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## The Equal Rights Trust

Parallel report submitted to the 51<sup>st</sup> session of the Committee on Economic,  
Social and Cultural Rights in relation to the second periodic report  
submitted by:

## Bosnia and Herzegovina

September 2013

### Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Committee on Economic, Social and Cultural Rights (the Committee) providing information in relation to the second periodic report by Bosnia and Herzegovina.
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. ERT has been actively involved in the promotion of improved protection from discrimination in Bosnia and Herzegovina since 2011. In the project *Developing civil society capacity to combat discrimination and inequality in Bosnia and Herzegovina*, ERT has worked in partnership with the Helsinki Committee for Human Rights in Bosnia and Herzegovina (HCRC) based in Sarajevo, and the Center for Informative and Legal Aid (CIPP) based in Zvornik, and trained and consulted with many other civil society organisations from across the country. In the course of this project, ERT has undertaken research on patterns of discrimination and inequality in Bosnia and Herzegovina and on the legal and policy framework in place to prevent discrimination and promote equality.

4. This submission focuses on the extent to which Bosnia and Herzegovina has met its obligations to respect, protect and fulfil the rights to equality and non-discrimination. In particular, the submission is concerned with Bosnia and Herzegovina's performance under Article 2(2) of the Covenant on Economic, Social and Cultural Rights (the Covenant). In assessing Bosnia and Herzegovina's adherence to its obligations under Article 2(2), the submission relies on the interpretation of the Article which has been provided by the Committee in its *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)* (General Comment No. 20).<sup>1</sup>
5. The submission also relies upon the Declaration of Principles on Equality (the Declaration),<sup>2</sup> a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".<sup>3</sup> It has also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>4</sup>
6. The submission is divided into two parts. The first part examines deficiencies and gaps within the existing legislative framework in Bosnia and Herzegovina such that it falls short of what is required under Article 2(2) of the Covenant. The second part highlights a number of areas where, despite the existence of legislation, there has been a failure effectively to implement certain provisions so as to ensure that the rights to equality and non-discrimination are realised in practice, and thus the state has failed to discharge its obligations arising under Article 2(2).

#### **Article 2(2): The Existing Legislative Framework**

7. Under Article 2(2) of the Covenant, States Parties undertake:

*(...) to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

8. Protection from discrimination in Bosnia is provided by both the Constitution and legislation, primarily. Article 4 of the Constitution of Bosnia and Herzegovina prohibits discrimination in "the

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<sup>1</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/20, 2009.

<sup>2</sup> *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

<sup>3</sup> *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

<sup>4</sup> Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: [http://assembly.coe.int/ASP/Doc/ATListingDetails\\_E.asp?ATID=11380](http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380).

enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution”<sup>5</sup> on “any ground”.

9. However, the primary means by which individuals in Bosnia and Herzegovina are able to enforce their right to non-discrimination is the Law on Prohibition of Discrimination, adopted in 2009.<sup>6</sup> While this Law provides a degree of protection from discrimination, it contains certain gaps and weakness which means that it falls short of the standard of protection required by the Covenant in a number of respects.

### ***Grounds of Discrimination***

10. Article 2 of the Law on Prohibition of Discrimination explicitly prohibits discrimination on a large number of grounds:

*(...) race, skin colour, language, religion, ethnic affiliation, national or social origin, connection to a national minority, political or any other persuasion, property, membership in trade union or any other association, education, social status and sex, sexual expression or sexual orientation and every other circumstance with a purpose or a consequence to disable or endanger recognition, enjoyment or realization, of rights and freedoms in all areas of public life.*

11. ERT is concerned that this list, while extensive, nevertheless omits a number of grounds which have been recognised under international law. Each of these omitted grounds is included in the list of explicitly protected grounds provided in Principle 5 of the Declaration of Principles on Equality and has been recognised either in the Covenant, in other international human rights instruments, by the Committee, or by other Treaty Bodies:

- (a) **Birth:** Birth is an explicitly prohibited ground under Article 2(2) of the Covenant;
- (b) **Disability:** The Committee has stated that disability is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>7</sup> Discrimination on grounds of disability is also expressly prohibited under Article 4 of the Convention on the Rights of Persons with Disabilities.
- (c) **Age:** The Committee has stated that age is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>8</sup>

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<sup>5</sup> The International Covenant on Economic, Social and Cultural Rights is included in Annex I to the Constitution.

<sup>6</sup> BiH Official Gazette No. 59/09, published on 28 July 2009.

<sup>7</sup> See above, note 1, Para 28.

<sup>8</sup> See above, note 1, Para 29.

- (d) **Nationality:** The Committee has stated that nationality is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>9</sup>
  - (e) **Marital and family status:** The Committee has stated that marital and family status is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>10</sup>
  - (f) **Health status:** The Committee has stated that health status is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>11</sup>
  - (g) **Place of residence:** The Committee has stated that place of residence is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>12</sup>
  - (h) **Economic and social situation:** The Committee has stated that economic and social situation is a prohibited ground falling within “other status” in Article 2(2) of the Covenant.<sup>13</sup>
  - (i) **Pregnancy:** Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must take steps to protect pregnant women from discrimination.
  - (j) **Maternity:** Under Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, States must also take steps to protect women from discrimination on grounds of maternity.
12. ERT welcomes the use of an “open-ended list” of grounds in the Law on Prohibition of Discrimination through use of the phrase “and every other circumstance” after the list of explicitly protected grounds provided in Article 2(2). An open-ended list such as this has the clear advantage that those exposed to discrimination on grounds which are not explicitly listed in the Law can claim protection. Given that each of the omitted grounds listed in paragraph 11 above enjoys protection from discrimination under international human rights law, the open-ended list of protected grounds in Article 2 must be read as including protection from discrimination on these grounds, if it is to be consistent with Bosnia and Herzegovina’s obligations under international law.
13. Nevertheless, ERT regrets the failure to include the listed grounds explicitly in Article 2 of the Law on Prohibition of Discrimination. ERT is concerned that without explicit recognition, victims of discrimination on those grounds may be required to undertake legal proceedings so as to establish that these grounds are recognised under Article 2(2), rather than being able to rely on the Law immediately. In addition, ERT is concerned that the Bosnian courts may fail to recognise some or all of these grounds when interpreting Article 2(2). As such, ERT believes that the explicit inclusion of

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<sup>9</sup> See above, note 1, Para 30.

<sup>10</sup> See above, note 1, Para 31.

<sup>11</sup> See above, note 1, Para 33.

<sup>12</sup> See above, note 1, Para 34.

<sup>13</sup> See above, note 1, Para 35.

these grounds in the Law on Prohibition of Discrimination is essential to avoid potential restrictive judicial interpretation.

14. In addition, ERT is concerned that the Law on Prohibition of Discrimination does not set down criteria by which further grounds are to be recognised as protected from discrimination. This further compounds the lack of certainty as to which further groups are likely to be recognised and protected by the courts among rights-holders, duty-bearers and those responsible for the Law's implementation and enforcement. The absence of qualifying criteria creates the risk of litigation being brought seeking protection on grounds not needing or meriting protection and, conversely, of groups or individuals being unclear of the Law's scope and whether they will enjoy protection. The drafters of the Declaration proposed a test to establish the admission of new grounds – as the best approach to determine whether a new ground should be incorporated:

*Discrimination based on any other ground must be prohibited where such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.<sup>14</sup>*

15. This approach has the advantage of flexibility for further groups to be recognised and protected in the future and minimises the risk of unnecessary litigation, unfettered judicial discretion and of confusion among the general public as to which grounds should qualify.

### ***Failure to Make Reasonable Accommodation***

16. Article 5 of the Law on Prohibition of Discrimination provides that making reasonable accommodation for persons with disabilities is not to be treated as a form of discrimination. Whilst ERT welcomes the recognition of the principle of reasonable accommodation, ERT is concerned that it is framed as an exception to the right to non-discrimination, rather than as a necessary condition for the realisation of the right to equality. It is an established principle of international human rights law that failure to make such reasonable accommodation is a form of discrimination.
17. The definition of “discrimination” in Article 2 of the Convention states that discrimination on the basis of disability “includes all forms of discrimination, including denial of reasonable accommodation”. Article 5 of the CRPD requires States Parties to “take all appropriate steps to ensure that reasonable accommodation is provided”. “Reasonable accommodation” is defined as:

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<sup>14</sup> The approach of the Declaration of Principles on Equality reflects that of the principal anti-discrimination legislation in South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) which provides both a list of explicitly prohibited grounds and a condition that further grounds are to be prohibited if one of the three criteria listed above is met. This provision draws inspiration from the decision of the South African Constitutional Court in *Hoffman v. South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000), where it was held that the prohibition on discrimination in Section 9 of the Constitution of South Africa extended to discrimination on grounds of HIV status, despite the fact that HIV status was not one of the explicitly listed prohibited grounds. See, in particular, Paras 28 and 29.

*(...) necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*

18. The interpretation of Article 2(2) of the Covenant in the Committee's General Comment No. 20 also reflects this understanding. The Committee has stated that:

*The denial of reasonable accommodation should be included in national legislation as a prohibited form of discrimination on the basis of disability. States parties should address discrimination, such as (...) denial of reasonable accommodation in public places such as public health facilities and the workplace, as well as in private places, e.g. as long as spaces are designed and built in ways that make them inaccessible to wheelchairs, such users will be effectively denied their right to work.<sup>15</sup>*

19. ERT therefore believes that the failure of the Law on Prohibition of Discrimination to recognise failure to make reasonable accommodation as a form of discrimination on grounds of disability is incompatible with Article 2(2) of the Covenant. Indeed, the Declaration of Principles on Equality recognises that reasonable accommodation is required to give effect to the right to equality, and expands the obligation to make reasonable accommodation to other grounds of discrimination, in addition to disability. Principle 13 of the Declaration of Principles on Equality recognises that:

*To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.*

*Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.<sup>16</sup>*

20. Thus, the definition of reasonable accommodation in the Declaration departs from the traditional understanding of reasonable accommodation, in that it applies to all grounds of discrimination, rather than solely on grounds of disability. ERT is of the view that this reflects an emerging international consensus arising from the need to ensure consistent standards of legal protection

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<sup>15</sup> See above, note 1, Para 28, repeating, in part, Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with disabilities*, U.N. Doc E/1995/22 at 19, 1995, Para 15.

<sup>16</sup> See above, note 2, Principle 13, p. 10.

between discrimination occurring on different grounds. In her legal commentary to the Declaration, Dr. Dimitrina Petrova has explained the relationship between Principle 13 and these other sources:

*The concept of reasonable accommodation is well established in equality law, particularly in legislation related to disability rights. The definition of accommodation in Principle 13 [Accommodating Difference] is based on the definition contained in the UN Convention on the Rights of Persons with Disabilities, but it is extrapolated to cover other forms of disadvantage beyond disability, as well as, more generally, differences which hamper the ability of individuals to participate in any area of economic, social, political, cultural or civil life.<sup>17</sup>*

21. There are a number of grounds of discrimination, in addition to disability, where failure to make reasonable accommodation will result in denial of the right to equality. For example, reasonable accommodation is particularly important in ensuring equality for persons who have a different religion or belief from the majority, which might require modification to working practices or conditions to enable observance of religious doctrines. Given the well-established patterns of discrimination and disadvantage in Bosnia and Herzegovina on grounds of religion and belief, the extension of the obligation to make reasonable accommodation to religion – and other grounds – appears particularly relevant.
22. ERT therefore urges the Committee to take a progressive interpretation of the right to equality in Article 2(2) of the Covenant, in line with Principle 13 of the Declaration of Principles of Equality, and interpret the Article as both prohibiting a failure to make reasonable accommodation as a form of discrimination, and extending its application to all recognised grounds of discrimination.

### ***Discrimination by Association***

23. The Law on Prohibition of Discrimination does not prohibit discrimination by association. The Declaration of Principles on Equality includes this as a form of discrimination in its definition of discrimination in Principle 5.<sup>18</sup> While the Covenant does not explicitly prohibit discrimination by association, the Committee has stated in General Comment No. 20 that:

*In determining whether a person is distinguished by one or more of the prohibited grounds, identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. Membership also includes association with a group characterized by one of the prohibited grounds (e.g. the parent of a child with a disability) (...)<sup>19</sup>*

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<sup>17</sup> Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, above note 2, pp. 30–31.

<sup>18</sup> See above, note 2, Principle 5, p. 6.

<sup>19</sup> See above, note 1, Para 16.

24. The fact that the Law on Prohibition of Discrimination does not explicitly include discrimination by association therefore represents a failure of the state party to ensure that it effectively prohibits all forms of discrimination.

### ***Multiple Discrimination***

25. The impact of the lack of protection from discrimination on a broader list of grounds, and of the omission of discrimination by association, is exacerbated by the lack of provision for multiple, including intersectional, discrimination in the Law on Prohibition of Discrimination. In its General Recommendation No. 20, the Committee explicitly stated that:

*Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds, for example women belonging to an ethnic or religious minority. Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying.<sup>20</sup>*

26. The Committee has also indicated that multiple discrimination may amount to discrimination falling within “other status” in Article 2(2):

*Other possible prohibited grounds could include (...) intersection of two prohibited grounds of discrimination, e.g. where access to a social service is denied on the basis of sex and disability.<sup>21</sup>*

27. Principle 5 of the Declaration of Principles of Equality prohibits multiple discrimination through the use of the term “or a combination of any of these grounds” after listing the protected grounds. This is further reinforced in Principle 12, which states that “[l]aws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground”.
28. The fact that the Law on Prohibition of Discrimination does not prohibit multiple discrimination represents a failure of the state party to effectively prohibit all forms of discrimination. It is also, as demonstrated, inconsistent with the Committee’s interpretation of the right to non-discrimination in the Covenant, and with the best practice approach set out in the Declaration.

### ***Mobbing***

29. Article 4 of the Law on Prohibition of Discrimination provides that “mobbing” is a form of discrimination. “Mobbing” is defined as:

*(...) every form of non-physical harassment at working place with repetitive actions that have humiliating effect on a victim and aim for or has degradation of employee’s working conditions or professional status as a consequence.*

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<sup>20</sup> See above, note 1, Para 17.

<sup>21</sup> See above, note 1, Para 27.

30. Mobbing is therefore defined as a form of discrimination despite the fact that there is no reference in the definition to a ground of discrimination. ERT acknowledges that mobbing may well be a form of treatment or harm sufficiently serious to require legislative prohibition. However, ERT is concerned that the lack of any connection with a protected characteristic of the victim risks creating confusion, by unnecessarily blurring the lines between discrimination and other forms of workplace bullying. ERT believes that its presence in anti-discrimination legislation risks confusion by mixing concepts and objectives, and that it should be removed from the Law on Prohibition of Discrimination and, if necessary, provided for elsewhere in legislation, so as to ensure that the law is clear, easily-understood, and consistent both with international law on discrimination, and with the principles espoused in the Law on Prohibition of Discrimination itself.

### ***Exceptions***

31. In addition to the concerns noted above, ERT is concerned that the Law on Prohibition of Discrimination provides for a number of exceptions which permit discrimination in ways which are inconsistent with Article 2(2) of the Covenant.
32. In line with the current international consensus, the Declaration of Principles of Equality sets out rules to assess the validity of limitations or exceptions to the protection from different forms of discrimination. Under Principle 5 of the Declaration, *direct discrimination* “may be permitted only very exceptionally, when it can be justified against strictly defined criteria”, while *indirect discrimination* may be permitted only where it can be “objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.<sup>22</sup>
33. ERT notes that similar language to the test of justification for indirect discrimination was used by the Committee in its General Comment No. 20, albeit in the form of a single test for all forms of discrimination, whether direct or indirect:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*<sup>23</sup>

34. The Law on Prohibition of Discrimination contains a number of exceptions to the prohibition on discrimination which are of concern. In particular, Article 5 provides that the following measures shall not be considered discrimination:

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<sup>22</sup> See above, note 2, Principle 5, p. 6.

<sup>23</sup> See above, note 1, Para 13.

- i. Measures based on a distinction, exclusion or providing an advantage in relation to employment as a staff member of an institution if it is done in compliance with the doctrines, basic presumptions, dogmas, beliefs or teachings of the confession or religion, bearing in mind that every distinction, exclusion or providing an advantage is done consciously in order not to offend religious feelings of members of that confession or religion;
  - ii. Measures which define maximum age as the most appropriate for terminating working relation and determine age as a condition for retirement;
  - iii. Measures which put an individual in a less favourable position, in defining the rights and obligations within family relations, provided it is defined within the Law, and especially in order to protect the rights and interests of children, which has to be justified with legitimate purpose, the protection of public morals, along with favouring marriage in accordance with provisions of the family laws;
  - iv. Measures involving establishing employment relations, membership, and actions that are in compliance with preaching and operations of registered churches and religious communities in Bosnia and Herzegovina, and other public or private organisations working in accordance with the Constitution and laws, if demanded by religious doctrines, beliefs or goals.
35. ERT believes that the first and fourth of these, which provide exceptions for religious organisations, are over-broad and should be limited. In relation to the first exception, ERT believes that the exception should be explicitly restricted to the appointment of religious ministers, as opposed to all members of staff working in or for a religious institution. This latter group could include administrative staff, cleaners, and other positions where a particular religious affiliation (or indeed any other characteristic) should not to be a pre-condition for employment. Moreover, restricting the exception's application to the former group – religious ministers – meets the express legitimate aim of the exception, the protection of religious freedom, in a way which meet's the Committee's test of proportionality.
36. The fourth exception, which would permit any registered church, religious organisation, or other public or private organisation to discriminate if such action is, in their view, demanded by their religious doctrines, beliefs or goals, does not, in the view of ERT, meet the test of proportionality set out by the Committee, and should be removed. The exception could, for example, permit hotels managed by individuals with a particular religious conviction to refuse to provide rooms for LGBT persons.
37. The second of the exceptions listed above would allow employers to terminate the employment of an employee for no other reason than their age, regardless of their ability to undertake the tasks required of them. ERT believes that this exception – and the direct age discrimination which it would permit – cannot be considered legitimate or compatible with the nature of Covenant rights, and so should be removed.
38. The third cited exception is problematic in a number of ways. First, the exception is both excessively broad and vaguely-worded apparently applying to the area of "family relations, provided it is

defined within the law". Thus, the provision may be interpreted as providing an absolute exception for all family law. The Declaration of Principles on Equality states clearly that the right to equality, and therefore the right to non-discrimination which is subsumed within the right to equality, "applies in all areas of activity regulated by law".<sup>24</sup> A law which states, as the Bosnian Law does, that the protection from discrimination does not apply in areas of family law is contrary to this principle of universal application. Further, by making specific reference to "favouring marriage in accordance with provisions of the family laws", the Law on the Prohibition of Discrimination implicitly denies the possibility of legal recognition of same-sex couples under Bosnian law and perpetuates the disadvantage faced by same-sex couples based on their sexual orientation, in denying the possibility to challenge existing family law insofar as it does not recognise same-sex relationships. For these reasons, ERT believes that this exception should also be removed.

39. ERT believes that any exceptions to the right to non-discrimination based on such aims should be scrutinised closely. Indeed, any such exceptions should be explicitly stated in legislation, rather than left to judicial interpretation.

### ***Positive Action***

40. Although Article 5 of the Law provides that "temporary special measures" are not to be considered discrimination, it merely permits such measures, rather than obliges that they be taken where this is necessary in order to achieve substantive equality. This contrasts with the international consensus that positive action is a necessary element of the right to equality, rather than an exception to it. Principle 3 of the Declaration states:

*To be effective, the right to equality requires positive action.*

*Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.*<sup>25</sup>

41. As Dr. Dimitrina Petrova has noted in her commentary on the Declaration, this principle goes beyond established understanding of temporary special measures, in line with an emerging consensus about the role and importance of positive action:

*Positive action measures are not defined as an exception to the principle of equal treatment but as part of its implementation. The concept of positive action in Principle 3 goes further towards substantive equality than the concepts of special measures related to specific categories of persons found in international and regional human rights instruments. But it should be noted that the Declaration captures the growing tendency of interpreting "special measures" as part of, rather than an exception to equal treatment. For example, the Committee on the*

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<sup>24</sup> See above, note 2, Principle 8, p. 8.

<sup>25</sup> See above, note 2, Principle 3, p. 5.

*Elimination of Discrimination against Women (CEDAW) in its General Recommendation No. 25 states that under the Convention, temporary special measures “should target discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights and fundamental freedoms. They should aim at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.”<sup>26</sup>*

42. ERT believes that the Law on Prohibition of Discrimination should provide for compulsory positive action measures in order to ensure realisation of the right to equality, rather than simply permit positive action as an exception to the prohibition on discrimination.
43. In conclusion, ERT is concerned that the Law on Prohibition of Discrimination is inconsistent with the obligations placed on states by Article 2(2) of the Covenant, as elaborated by the Committee in its General Comment No. 20. ERT therefore calls on the Committee to recommend that the government of Bosnia and Herzegovina amend the law, in particular by ensuring that it:
- (a) Explicitly prohibit discrimination on the grounds of birth, disability, age, nationality, marital and family status, health status, place of residence, economic and social situation, pregnancy and maternity, in addition to those grounds already included in the Law;
  - (b) Contains a test for the incorporation of new grounds of discrimination in line with that recommended in the Declaration of Principles on Equality;
  - (c) Explicitly prohibits failure to make reasonable accommodation as a form of discrimination on all grounds or, at the very least, on grounds of disability;
  - (d) Explicitly prohibits discrimination by association;
  - (e) Explicitly prohibits multiple discrimination;
  - (f) Does not contain other forms of prohibited conduct which do not amount to discrimination, such as “mobbing”;
  - (g) Provides only for strictly limited exceptions to the right to non-discrimination, in accordance with the Declaration of Principles on Equality;
  - (h) Provides for compulsory positive action measures as a necessary element of the right to equality, rather than an exception to the right to non-discrimination.

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<sup>26</sup> Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights”, in *Declaration of Principles on Equality*, above note 2, p. 32.

## Article 2: Implementation of Legislation

44. As noted in the statement of interest, ERT has been working in partnership with the Helsinki Committee for Human Rights in Bosnia and Herzegovina (HCRC) based in Sarajevo, and the Center for Informative and Legal Aid (CIPP) based in Zvornik, since 2011. In the course of this partnership, and in consultation with other civil society organisations engaged through this project, ERT has been repeatedly made aware of concerns about delays in the full implementation of the Law on Prohibition of Discrimination, and in particular about the failure of the Ministry of Human Rights and Refugees (the Ministry) to discharge a number of obligations created by Article 8 of the Law. We highlight three such concerns below.
45. First, the Ministry has failed to report, through the Council of Ministers, to the Parliamentary Assembly on cases and other manifestations of discrimination or to propose concrete legislative or other measures with regards to such discrimination, despite its obligation to do so under Article 8 of the Law. Second, the Ministry had failed to produce any annual reports (or special ad hoc reports) for the Council of Ministers containing proposals for measures for the prevention and suppression of discrimination in Bosnia and Herzegovina. Third, the Ministry has failed to establish a central database of cases of discrimination.
46. In addition, ERT notes that in April 2013, the Ministry issued a Rulebook on methods for data collection on cases of discrimination over three years after the deadline set down in the Law for the publication of such a document. While the eventual publication of this Rulebook is welcome, we share the concerns of our partners in Bosnia and Herzegovina about the delay in producing such a Rulebook, and the impact which this has had on the efficacy of efforts of state and non-state actors to combat discrimination.
47. ERT believes that the failure to implement the provisions set out in Article 8 of the Law in a timely manner weakens the ability of Bosnia and Herzegovina to tackle discrimination. Aside from their value to the Parliament and Council of Ministers, the reports, legislative proposals and database which the Ministry was required to develop are important tools for the public and non-governmental organisation. ERT is concerned that the failure of the government to implement these provisions and the lengthy delay in their implementation indicates that the Ministry is either disinclined, or otherwise unable to fulfil its obligations under the Law.
48. In conclusion, ERT is concerned that the failure of the government to discharge the obligations created by Article 8 of the Law on Prohibition of Discrimination weakens the ability of both state and non-state actors to effectively tackle discrimination and undermines the effectiveness of the Law as a whole. ERT therefore calls on the Committee to urge the government of Bosnia and Herzegovina to ensure full and effective implementation of Article 8 and all other outstanding provisions of the Law on Prohibition of Discrimination as soon as possible.