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Parallel report submitted to the 108th session of the Human Rights Committee in relation to the initial state report submitted by:

Indonesia

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Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Human Rights Committee (the Committee) commenting on the Initial Periodic report by Indonesia under Article 40 of the International Covenant on Civil and Political Rights (the Covenant).
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 promoting improved protection from religious discrimination in Indonesia since 2010. Since November 2010, ERT has been working in partnership with the Indonesian Legal Aid Foundation (YLBHI) and the Institute for Policy Research and Advocacy (ELSAM) on a project entitled "Empowering civil society to use non-discrimination law to combat religious discrimination and promote religious freedom". In the course of this project ERT has undertaken research on patterns of discrimination and inequality in Indonesia, with a particular focus on religious discrimination, and on the legal and policy framework in place to prevent discrimination and promote equality.

Introduction

4. This submission focuses on the extent to which Indonesia has met its obligations to respect, protect and fulfil the right to non-discrimination under the Covenant. Thus, the submission is concerned with Indonesia's performance under two articles of the Covenant: Article 2(1), which requires that states parties respect and ensure the enjoyment of the rights provided in the Covenant without distinction, and Article 26, which, as the Committee has stated, provides an "autonomous right"¹ to non-discrimination. The main focus of the recommendations made in this submission is on measures required to bring Indonesia's law, policy and practice in line with its obligations, arising under Article 26, to respect, protect and fulfil the right to non-discrimination as an autonomous right "not limited to those rights which are provided for in the Covenant".²
5. In considering Indonesia's adherence to its obligations under Articles 2(1) and 26, this submission relies, in part, on the interpretation of these provisions which has been provided by the Human Rights Committee in its General Comment No. 18. In particular, we hope that this submission will respond to the Committee's wish to be informed of the existence of discrimination in fact and about "legal provisions and administrative measures directed at diminishing or eliminating such discrimination".³ Parts two and three of the submission have a particular focus on the relationship between the right to freedom of religion and the right to non-discrimination, and the efficacy of measures to protect these two rights in Indonesia. As such, the submission relies upon the Committee's General Comment No. 22 in which the Committee confirmed *inter alia* that preferential measures in access to government services or economic privileges are contrary to the prohibition of discrimination on grounds of religion or belief under Article 26, and underlined the importance of Article 20(2) in providing additional protection from incitement to discrimination, hostility or violence for religious minority groups.⁴ The submission also makes references the Committee's recommendations in General Comment No. 23, in which the Committee emphasised the relationship between Articles 27 (the rights of minorities), and Articles 2(1) and 26.⁵
6. The submission also relies upon the Declaration of Principles on Equality (the Declaration), a document of international best practice on equality.⁶ The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described

¹ UN Human Rights Committee, *General Comment No. 18: Non-discrimination*, 1989, Para 12.

² *Ibid.*, Para 12.

³ *Ibid.*, Para 10.

⁴ UN Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Article 18)*, 1993, Para 9.

⁵ UN Human Rights Committee, *General Comment No. 23: The Rights of Minorities (Article 27)*, 1994, Para 4.

⁶ *Declaration of Principles on Equality*, The Equal Rights Trust, London, 2008.

as “the current international understanding of Principles on Equality”.⁷ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.⁸

7. This submission is divided into three parts. The first part addresses a specific request for information made by the Committee in its list of issues to be taken up in connection with the consideration of the initial periodic report of Indonesia, adopted by the Committee at its 107th session, namely the protection of the rights to equality and non-discrimination in the Constitutional and national law of Indonesia. The second examines constitutional and legislative provisions which discriminate directly or indirectly on the basis of religion or belief, against religious minorities and heterodox communities within mainstream religions. The third examines a number of cases of discrimination and discriminatory violence against religious minorities, highlighting serious problems with the ability of Indonesia to meet its obligations to protect these groups from discrimination and associated violence.

1. Prohibition of Discrimination within the Constitutional and National Law of Indonesia

8. In the List of Issues which it adopted at its 107th session, the Committee asked Indonesia to indicate:

*[A]ny legislative and administrative measures relating to protection against discrimination on all grounds, including race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.*⁹

9. The **Constitution of Indonesia** contains a number of provisions which provide protection from discrimination, or which provide guarantees of equal treatment. Article 27(1) states that all citizens are equal before the law. Article 28D(1) provides that all persons have the “right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law”. Most importantly, Article 28I(2) states that:

Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.

10. In addition to this general prohibition on discrimination, Article 28D(3) provides a right to equal opportunities in government, albeit only for citizens, while Article 28B(2) provides a specific right

⁷ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para 93.

⁸ 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.

⁹ UN Human Rights Committee, *List of issues in relation to the initial report of Indonesia (CCPR/C/IDN/1)*, adopted by the Committee at its 107th session (11–28 March 2013), 29 April 2013, UN Doc. CCPR/C/IDN/1, Para 5.

for all children to protection from violence and discrimination. Article 28H(2) provides a right for all persons “to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness”. It is unclear whether the imprecise words “facilitation and special treatment” refer to reasonable accommodation, positive action or some different form of special treatment.

11. Article 28J(2) creates a general and broad exception to the human rights protected under Chapter 10A by permitting limitations of the rights where these are:

[E]stablished by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands based upon considerations of morality, religious values, security and public order in a democratic society.

12. The **Law concerning Human Rights** contains a number of general provisions on equality, primarily in Article 3, which supplement the rights provided in the Constitution.¹⁰ Article 3(1) provides that “[e]veryone is born equal in dignity and human rights, and is bestowed with the intellect and reason to live with others in a spirit of brotherhood”. Article 3(2) provides that “[e]veryone has the right to be recognised, guaranteed, protected, and treated fairly before the law and is entitled to equal legal certitude and treatment before the law”. Article 3(3) provides that “[e]veryone has the right without any discrimination, to protection of human rights and obligations”. “Discrimination” is defined in Article 1 as:

[A]ll limitations, affronts or ostracism, both direct and indirect, on grounds of differences in religion, ethnicity, race, group, faction, social status, economic status, sex, language, or political belief, that results in the degradation, aberration, or eradication of recognition, execution, or application of human rights and basic freedoms in political, economic, legal, social, cultural, or any other aspects of life.

13. The Law also provides for equality between men and women in a number of specific fields: pay and working conditions (Article 38(3)); access to schooling and education (Article 48); and marriage, contact with children, and assets, during and after marriage (Article 51). In addition, the Law provides that every citizen has equal rights to vote and stand for election (Article 43(1)). The Law also specifically prohibits discrimination in the field of justice (Article 17) and in the rights enjoyed as a citizen (Article 26(2)). The Law provides for a right to “special facilities and treatment” for persons with disabilities, the elderly, women, and children (Article 41(2)), though these terms are not defined.
14. In addition to the Constitution and the Law concerning Human Rights, the **Law concerning the Elimination of Racial and Ethnic Discrimination**¹¹ provides protection from discrimination on

¹⁰ Law No. 39 of 1999 concerning Human Rights, Laws of the Republic of Indonesia, adopted and entered into force 23 September 1999.

¹¹ Law No. 40 of 2008 concerning the Elimination of Racial and Ethnic Discrimination, Laws of the Republic of Indonesia, adopted and entered into force 10 November 2008.

grounds of race and ethnicity in all areas of life. Article 1(1) defines “racial and ethnic discrimination” as:

[A]ny form of distinction, exclusion, restriction, or preference, based on race and ethnicity, which causes the nullification or deprivation of recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social and cultural context.

15. ERT has a number of concerns with the scope of protection from discrimination which is provided in the Constitution and the Law concerning Human Rights.
16. In general, ERT welcomes the comprehensive approach taken in Article 28I(2) of the Constitution, which prohibits discrimination on “any grounds whatsoever”. However, ERT regrets the failure to also explicitly list grounds upon which discrimination is prohibited, in line with the practice in international human rights instruments to which Indonesia is a party. While the use of an open-ended prohibition, interpreted in line with international law and best practice, should mean that the personal scope of protection from discrimination is broad, the omission of any specified grounds presents a number of practical problems. Without explicit inclusion of particular grounds, rights-holders, duty-bearers and interested parties such as government agencies and the judiciary will be unclear as to the scope of protection from discrimination. This will in turn limit the extent to which preventive acts are taken and policies put in place. Moreover, victims will be required to undertake legal proceedings in order to establish that grounds protected under international law are indeed recognised under Article 28I(2), rather than being able to rely on the protection immediately. Further, ERT is concerned that the Indonesian courts may fail to recognise some grounds requiring protection under the Covenant and other international human rights instruments when interpreting Article 28(2), given the lack of jurisprudence on discrimination in Indonesia.
17. ERT notes that the approach taken to the protection of characteristics in the Law concerning Human Rights is at odds with that applied in the Constitution. Article 1 of this Law provides a closed list of protected grounds, prohibiting discrimination only on grounds of religion, ethnicity, race, group, faction, social status, economic status, sex, language, and political belief. This approach, while meeting the need for clarity and specificity which is lacking from the Constitutional provision, has a serious disadvantage, in that it excludes from protection a number of grounds protected under the Covenant and other international human rights instruments. Principle 5 of the Declaration of Principles on Equality requires states to prohibit discrimination on grounds of race,¹² colour,¹³ ethnicity,¹⁴ descent,¹⁵ sex,¹⁶ pregnancy,¹⁷ maternity,¹⁸ civil, family or carer status,¹⁹ language,²⁰

¹² Race is an explicitly prohibited ground under Articles 2(1) and 26 of the Covenant.

¹³ Colour is an explicitly prohibited ground under Articles 2(1) and 26 of the Covenant.

¹⁴ Ethnic origin is a prohibited ground under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁵ Descent is a prohibited ground under Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.

religion or belief,²¹ political or other opinion,²² birth,²³ national or social origin,²⁴ nationality,²⁵ economic status,²⁶ association with a national minority, sexual orientation,²⁷ gender identity,²⁸ age,²⁹

¹⁶ Sex is an explicitly prohibited ground under Articles 2(1) and 26 of the Covenant.

¹⁷ 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.

¹⁸ 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.

¹⁹ The Committee has stated that marital status is a protected ground under “other status” in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (*Danning v. the Netherlands* (Communication No. 180/1984), U.N. Doc. CCPR/C/OP/2 at 205 (1990); and *Sprenger v. the Netherlands* (Communication No. 395/1990), U.N. Doc. CCPR/C/44/D/395/1990 (1992)).

²⁰ Language is an explicitly prohibited ground under Articles 2(1) and 26 of the Covenant.

²¹ Religion is an explicitly prohibited ground under Articles 2(1) and 26 of the Covenant.

²² Political or other opinion is an explicitly prohibited ground under Articles 2(1) and 26 of the Covenant.

²³ Birth is a prohibited ground under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights.

²⁴ National or social origin is a prohibited ground under Articles 2(1) and 26 of the International Covenant on Civil and Political Rights.

²⁵ The Committee has stated that nationality is a prohibited ground falling within “other status” in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (*Gueye v. France* (Application No. 1961/1983), U.N. Doc. CCPR/C/35/D/196/1985 (1989); *Adam v. Czech Republic* (Application No. 586/1994), U.N. Doc. CCPR/C/57/D/586/1994 (1996); and *Karakurt v. Austria* (Application No. 965/2000), U.N. Doc. CCPR/C/74/D/965/2000 (2002)).

²⁶ The Committee on Economic, Social and Cultural Rights has stated that the ground of economic situation falls under “other status” in Article 2(2) in the International Covenant on Economic, Social and Cultural Rights: Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Para 35.

²⁷ The Committee has stated that sexual orientation is a protected ground under “other status” in Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (*Young v. Australia* (Communication No. 941/2000), U.N. Doc. CCPR/C/78/D/941/2000 (2003)).

²⁸ The Committee on Economic, Social and Cultural Rights has stated that gender identity is a prohibited ground under “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. See above, note 26, Para 32.

disability,³⁰ health status,³¹ genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

18. ERT is concerned that the different approaches taken in the Constitution and the Law concerning Human Rights risks confusion and inconsistency in interpretation and application. In particular, we are concerned that those implementing these instruments, including the courts, will interpret the broad-based prohibition contained in the Constitution in light of the closed list provided in the Law.
19. **ERT therefore urges the Committee to recommend that all of the grounds listed in paragraph 17 of this submission be explicitly included in both Article 281(2) of the Constitution and Article 1 of the Law concerning Human Rights. ERT also urges the Committee to recommend that the words “upon any grounds whatsoever” are retained in Article 281(2) of the Constitution and added to the end of the listed grounds in the Law concerning Human Rights, thus bringing the provisions into line with international law and best practice.**
20. As noted above, Article 1 of the Law concerning Human Rights defines the scope of application of the right to non-discrimination by reference to “human rights and basic freedoms in political, economic, legal, social, cultural, or any other aspects of life.” ERT believes that the scope of the right as thus defined is restrictive and not in compliance with the scope of Articles 2(1) and 26.
21. While Article 2(1) prohibits discrimination in the enjoyment of the rights contained within the Covenant, Article 26 states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination (...)

22. The Committee has interpreted Article 26 as “prohibit[ing] discrimination in law or in fact in any field regulated and protected by public authorities”.³²

²⁹ The Committee on Economic, Social and Cultural Rights has stated that age is a prohibited ground under “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights See above, note 26, Para 29.

³⁰ Discrimination on grounds of disability is expressly prohibited under international law, specifically under Article 4 of the Convention on the Rights of Persons with Disabilities. The Committee on Economic, Social and Cultural Rights has also stated that disability is a prohibited ground which falls within “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights: See above, note 26, Para 28.

³¹ The Committee on Economic, Social and Cultural Rights has stated that health status is a prohibited ground under “other status” in Article 2(2) of the International Covenant on Economic, Social and Cultural Right. See above, note 26, Para 33.

³² See above, note 1, Para 12.

23. Drawing inspiration from this and other definitions of the scope of the rights to equality and non-discrimination in international human rights law, Principle 8 of the Declaration provides that “[t]he right to equality applies in all areas of activity regulated by law”.³³ Both definitions – that of the Human Rights Committee and that in the Declaration – extend far wider than the definition in Article 1 of the Law concerning Human Rights, which restricts protection from discrimination only to matters where the enjoyment of human rights and basic freedoms are at issue.
24. **ERT therefore urges the Committee to recommend that the scope of the right to non-discrimination in both the Constitution and the Law concerning Human Rights be amended such that it applies “in all areas of activity regulated by law”.**
25. In addition to the concerns expressed above regarding the personal and material scope of the right to non-discrimination as provided in the Constitution and the Law concerning Human Rights, ERT is concerned that the Law concerning Human Rights does not define and prohibit the forms of discrimination which are considered part of a modern equality guarantee. In particular, while the Law uses the phrase “both direct and indirect” in its definition of discrimination in Article 1, it does not define direct and indirect discrimination in line with the requirements of international human rights law.
26. Principle 5 of the Declaration of Principles on Equality provides a definition of discrimination which reflects international law and best practice. The relevant part of Principle 5 states:

Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.³⁴

³³ See above, note 6, Principle 8, p. 8.

³⁴ See above, note 6, Principle 5, p. 6.

27. The Covenant does not use the terms “direct” and “indirect” in its prohibition on discrimination in Articles 2(1) and 26. However, the Committee, in interpreting Articles 2(1) and 26 has stated in General Comment No. 18 that:

[T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground (...) and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³⁵

28. The terms “purpose” and “effect”, can, in practice, be understood as being equivalent to direct and indirect discrimination respectively. Moreover, definitions of direct and indirect discrimination have been provided by the Committee on Economic, Social and Cultural Rights in its General Comment No. 20. The definitions of direct and indirect discrimination used by the Committee on Economic, Social and Cultural Rights are as follows:

Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.³⁶

29. ERT believes that the similar nature and purpose of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 2(1) of the International Covenant on Civil and Political Rights indicates that the interpretations of the articles by the relevant Treaty Bodies should be consistent as far as possible. As such, ERT would urge the Committee to adopt the same interpretation of discrimination, and the same definitions of both direct and indirect discrimination, as the Committee on Economic, Social and Cultural Rights has done.
30. **ERT therefore urges the Committee to recommend that the Law concerning Human Rights be amended to prohibit direct and indirect discrimination and to define direct discrimination**

³⁵ See above, note 1, Para 7.

³⁶ See above, note 26, Para 10.

and indirect discrimination in line with the definitions recognised in the Declaration of Principles on Equality and international human rights law.

31. The Law concerning Human Rights does not prohibit harassment as a form of discrimination. Principle 5 of the Declaration of Principles on Equality prohibits harassment as a form of discrimination and defines harassment as follows:

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.³⁷

32. Harassment has been recognised as a form of discrimination within the scope of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights in General Comment No. 20.³⁸ As stated above, ERT believes that the parallel nature and purpose of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights and Article 2(1) of the International Covenant on Civil and Political Rights indicates that the two articles should be construed consistently with each other, and that therefore the interpretations of the articles by the relevant Treaty Bodies should be similarly consistent. ERT therefore believes that harassment should be prohibited as a form of discrimination under Article 2(1) of the Covenant.

33. **ERT therefore urges the Committee to recommend that both the Constitution and the Law concerning Human Rights be amended to prohibit harassment. ERT further urges the Committee to recommend that the Law concerning Human Rights be amended to define harassment in line with the definitions provided in the Declaration of Principles on Equality.**

34. The Law concerning Human Rights does not prohibit failure to make reasonable accommodation as a form of discrimination. 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.³⁹

³⁷ See above, note 6, Principle 5, p. 6.

³⁸ See above, note 26, Para 7.

³⁹ See above, note 6, Principle 13, p. 10.

35. This principle draws inspiration from a number of sources, particularly the Convention on the Rights of Persons with Disabilities (CRPD). For example, 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 requires States Parties to “take all appropriate steps to ensure that reasonable accommodation is provided”. “Reasonable accommodation” is defined as:

(...) 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.

36. The interpretation of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights in its General Comment No. 20 also reflects the current international consensus. 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.⁴⁰

37. As with other concepts discussed above, ERT believes that the interpretation of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights by the Committee on Economic, Social and Cultural Rights gives rise to an assumption that Article 2(1) of the Covenant should, given its common content and purpose, be interpreted in the same way. As such, ERT believes that it should be assumed that failure to make reasonable accommodation should also be considered a form of prohibited conduct under the Covenant.
38. ERT therefore believes that the omission in Indonesian legislation of any provision defining reasonable accommodation as a form of discrimination on grounds of disability is incompatible with Article 2(1) of the Covenant, and the Convention on the Rights of Persons with Disabilities (CRPD).
39. **ERT therefore urges the Committee to recommend that the Law concerning Human Rights be amended so as to prohibit a failure to make reasonable accommodation as a form of discrimination on grounds of disability.**

⁴⁰ See above, note 26, 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.

40. The definition of reasonable accommodation in the Declaration departs from the current understanding of reasonable accommodation in the Convention on the Rights of Persons with Disabilities, and other international instruments, in one important way, in that it applies to all grounds of discrimination rather than solely on grounds of disability. ERT believes that this reflects an emerging international consensus arising from the need to ensure consistent standards of legal protection 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.⁴¹

Reasonable accommodation is particularly important in ensuring equality for persons of a different religion or belief, for example in modifying work times to enable observance of religious holidays. Given the evidence of widespread religiously-based discrimination in Indonesia, the introduction of the notion of reasonable accommodation, and the definition of the denial of reasonable accommodation as a form of discrimination regardless of the protected ground, are recommended.

41. **ERT therefore urges the Committee to take a progressive interpretation of the right to equality in Articles 2(1) and 26 of the Covenant, in line with Principle 13 of the Declaration of Principles of Equality, and interpret those articles as prohibiting a failure to make reasonable accommodation as a form of discrimination on all grounds, and to call on Indonesia to make similar provision in the Law concerning human rights.**

2. Legal Provisions which Discriminate on Grounds of Religion

42. As a party to the Covenant, Indonesia has obligations both to provide protection from discrimination on grounds of religion and belief and to ensure the enjoyment of religious freedom. As noted above, under Article 2(1), Indonesia is required to ensure the enjoyment of Covenant rights without distinction on grounds which include religion and belief, while under Article 26, Indonesia is required to respect, protect and fulfil the right to non-discrimination in all areas of life, on grounds which include religion and belief. Under Article 18, Indonesia has an obligation to protect the right to freedom of conscience, thought and religion. This includes the right to manifest one's religion and to protection from coercion which would impair an individual's freedom of religion.⁴² Article 20 of the Covenant requires that states prohibit "advocacy of national, racial or

⁴¹ Petrova, D., "The Declaration of Principles on Equality: A Contribution to International Human Rights", in *Declaration of Principles on Equality*, above note 6, pp. 30-31.

⁴² Article 18 (1) and (2).

religious hatred that constitutes incitement to discrimination, hostility or violence”.⁴³ Article 27 requires that states take measures to protect religious minorities, providing that these groups “shall not be denied the right (...) to profess and practice their own religion (...)”.

43. ERT is concerned that, despite its clear obligations to protect both the right to religious freedom and the right to non-discrimination on grounds of religion and belief, there remain a number of constitutional, legislative and administrative provisions in Indonesia which discriminate on grounds of religion and which restrict the enjoyment of freedom of conscience, thought and religion for certain groups.

The Constitution of Indonesia and the Law concerning Human Rights

44. Article 29 of the **Constitution of Indonesia** provides a general guarantee of the right to religious freedom. It states:

1. *The state is based on belief in the One and Only God;*
2. *The state guarantees each and every citizen the freedom of religion and of worship in accordance with his religion and belief.*

45. However, amendments passed in August 2000 have had the effect of limiting the protection of religious freedom and non-discrimination on grounds of religion and belief.⁴⁴ Thus, while Article 28E(2) broadly guarantees the right of each person to be “free to worship and practice the religion of his choice”, Article 28J(2) imposes a duty on all persons, in exercising their rights and freedoms, to:

(...) accept the limitations determined by the law for the sole purposes of guaranteeing the recognition and respect of the rights and liberties of other people and of satisfying a democratic society’s just demands based on considerations of morality, religious values, security and public order.

46. Evidence collected by ERT in its joint research with Indonesian civil society organisations indicates that this provision has been used to justify limitations on the rights of religious minorities in the form of statutes, regulations, decrees, and by-laws that restrict religious freedom for religious minorities and groups within mainstream religions who hold heterodox beliefs.
47. The **Law concerning Human Rights** deals with religion and religious belief in a number of respects. The definition of discrimination in Article 1 includes religion as a protected ground. In addition, Article 22 protects the right of everyone “to choose his religion and to worship according to the teachings of his religion and beliefs”, and requires the state to guarantee everyone “the

⁴³ Article 20(2).

⁴⁴ The People’s Consultative Assembly, *The Second Amendment of the Indonesia Constitution*, passed 18 August 2000, and signed by MPR Speaker Amien Rais and seven MPR deputies.

freedom to choose and practice his religion and to worship according to his religion and beliefs”.

48. The Law also, however, uses religion as a justification for limiting the right to disseminate political beliefs. Article 23(2) which provides for a right to “hold, impart and widely disseminate (...) [political] beliefs” includes a limitation that the right shall be exercised “taking into consideration (...) religious values [and] morals”. Limitations are only permissible if made “by law” and “solely for the purposes of guaranteeing recognition and respect for the basic rights and freedoms of another person, fulfilling moral requirements, or in the public interest”. Neither “moral requirements” nor “public interest” is defined.
49. **ERT would therefore urge the Committee to recommend that the Law concerning Human Rights be amended to remove religious values and morals as justification for limiting the right to disseminate political beliefs.**

Law No. 1/PNPS/1965 Concerning the Prevention of Religious Abuse and/or Defamation (the “Blasphemy Act”)

50. In its List of Issues for consideration by the state party, the Committee specifically referred to Law No. 1 of 1965 (hereinafter the “Blasphemy Act”) and requested that Indonesia provide information on instances when a religion can be defamed under this law.⁴⁵
51. The Blasphemy Act is a criminal law provision within Indonesian law, based upon a presidential decree issued by President Sukarno, Law No. 1 of 1965. The Law states that, “the religions embraced by the people of Indonesia”, encompass “Islam, Christianity, Catholicism, Hinduism, Buddhism and Confucianism” and any other religions, such as “Judaism, Zoroastrianism, Shintoism and Taoism, shall be left alone providing that provisions found in this ruling and any other laws are not violated”.
52. Article 1 of the Blasphemy Act prohibits:

[E]very individual (...) in public from intentionally conveying, endorsing or attempting to gain public support in the interpretation of a certain religion embraced by the people of Indonesia or undertaking religious based activities that resemble the religious activities of the religion in question, where such interpretation and activities are in deviation of the basic teachings of the religion.

53. The Constitutional Court has held this provision to mean that Indonesia only recognises six religions, holding that although “Indonesia recognizes whatever religions its citizens believe in”, it “only protects six religions from blasphemy”.⁴⁶

⁴⁵ See above, note 9, Para 26.

⁴⁶ Constitutional Court, Decision No/140/PUU-VII/2009, available at: http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_Putusan%20PUU%20140_Senin%2019%20April%202010.pdf.

54. Thus, Article 1 does not prohibit the actions of those believing in religions such as Judaism which are clearly distinct from the protected faiths. Rather, it impacts against those – including most prominently the Ahmadiyya sect of Islam – who practice heterodox forms of the specified protected religions. Article 2 requires that those violating Article 1 will initially be instructed to cease their activities. Article 3 states that failure to cease will result in the banning or dissolution of the group and may result in a maximum imprisonment of 5 years. Article 4 prohibits the expression of views or commission of acts which have the intent of discouraging others from adhering to any monotheistic religion, in effect criminalising the actions of those adhering to traditional belief systems (*penghayat*). Article 156 of the Criminal Code defines an offence in line with the requirements of Article 3 of the Blasphemy Act, for those whose words or actions “incite hostilities (...) considered as abuse or defamation of a religion embraced in Indonesia”.⁴⁷
55. ERT is concerned that this law – in addition to clearly restricting religious freedom – directly discriminates against members of religious minorities and those with heterodox beliefs from within the recognised faiths, on the basis of their religion or belief. The official recognition of six state-sanctioned religions in Indonesia privileges persons holding certain beliefs over others. It is also significantly restrictive for those faiths which are not so recognised,⁴⁸ exposing their adherents to unfavourable treatment on the basis of their religion or belief and thus directly discriminating against persons of any religions other than the six recognised under the Act. In addition, the Blasphemy Act discriminates against all those with heterodox beliefs within the recognised faiths, including notably the Ahmadiyya, but also members of minority Christian groups and others.
56. Despite the fact that the Act clearly contravenes the rights to freedom of religion and to non-discrimination on grounds of religion and belief, in a judicial review of the Blasphemy Act in 2010, the Indonesian Constitutional Court rejected arguments made by human rights groups that the law was unconstitutional.⁴⁹ The Court ruled that the Act was still “very necessary to prevent any misleading practice of worship” and was vital for religious harmony and the maintenance of public order.⁵⁰
57. In the List of Issues prepared for the session, the Committee specifically requested an explanation as to how the Blasphemy Act is compatible with the provisions of article 19 and 20 of the Covenant, in particular in light of General Comment No. 34 on article 19 of the Covenant relating to freedoms of opinion and expression.⁵¹ Article 20 requires that “any advocacy of national, racial or religious

⁴⁷ Criminal Code of Indonesia, Article 156(a).

⁴⁸ For example, the adherents of traditional beliefs are not under the auspices of the Ministry of Religious Affairs but still under the remit of the Ministry of Culture and Tourism since Indonesia has yet to recognise them as one of the official religions.

⁴⁹ See above, note 46.

⁵⁰ Ibid.

⁵¹ See above, note 9, Para 26.

hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Article 19 states that "everyone shall have the right to freedom of expression" and that "this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers (...)". General Comment No. 34 states that any restrictions on the application of freedom of expression "must not violate the non-discrimination provisions of the Covenant."⁵² The Committee's view on the application of Article 19 to blasphemy laws is made clear in the General Comment:

*Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.*⁵³

58. As detailed above, the provisions of the Blasphemy Act directly discriminate on grounds of religion and belief against all persons who do not adhere to one of the state-recognised religions protected by the Act. Thus, Law No. 1 of 1965 clearly violated Articles 2(1) and 26, of the Covenant, together with Articles 18 and 19.
59. **ERT would therefore urge the Committee to call for the immediate repeal of Law No. 1 of 1965 (the "Blasphemy Act") and any other legislation which prohibits blasphemy against certain religions.**

2005 Edict and Joint Decree on the Ahmadiyya

60. Persistent discrimination towards the Ahmadiyya religious community in Indonesia is well-evidenced, and has been legitimated by the state both through an edict by the Indonesian Ulama Council, originally issued in 1980 and reissued in 2005, and more recently by a decree by a number of government ministers. The edict states that the Ahmadiyya community deviates from Quranic teaching, through their claim that "Mirza Ghulam Ahmad was a prophet."⁵⁴ The *Joint Decree by the Minister of Religious Affairs, Attorney General and Minister of Internal Affairs of the Republic of Indonesia on the Warning and Instruction to Followers, Members and/or Leaders of the Jemaat Ahmadiyya Indonesia (JAI) and Members of the Community* (the Joint Decree on the Ahmadiyya) was

⁵² UN Human Rights Committee, *General Comment No. 34 on Article 19*, 2011, Para 26.

⁵³ *Ibid.*, Para 48.

⁵⁴ The Indonesian Ulama Council, MUI fatwa No.11/Munas VII/MUI/15/2005, signed 29 July 2005 by fatwa commission members as well as by plenary conference members.

issued in 2008, pursuant to Article 2 of the Blasphemy Act,⁵⁵ The Decree:

[W]arn[s] and instruct[s] the followers, members and/or leaders of the [...] Jemaat Ahmadiyya Indonesia, provided that they profess to being believers of Islam, to cease the propagation of interpretations and activities in deviation of the teachings of Islam, that involves the propagation of an ideology that believes in the presence of a prophet along with his teachings after the Prophet Muhammad".⁵⁶

61. The Joint Decree directly discriminates against the Ahmadiyya, imposing restrictions and penalties on them solely because of their religion. Violations of the Decree are punishable under the Criminal Code.
62. Moreover, there is consistent evidence that the 2005 Edict and the Joint Decree prohibiting the religious activities of the Ahmadiyya have encouraged the persecution of Ahmadiyya; the documents are consistently referred to by both vigilante groups and state agents when committing acts of persecution against Ahmadiyya.⁵⁷ Further evidence of the state's implicit sanction of religious discrimination towards this group is evidenced through media coverage of proposals to dissolve the community,⁵⁸ or to relocate the community based in Lombok to another island.⁵⁹ Moreover, the government has failed to overturn several decrees that discriminate against the Ahmadiyya and foster intolerance. At least 17 provinces and regencies in Indonesia have issued local decrees banning the Ahmadiyya propagating activities in Indonesia such as having a billboard outside their mosques.⁶⁰
63. **ERT therefore urges the Committee to encourage Indonesia to repeal the 2005 edict and the Joint Decree on the Ahmadiyya, with immediate effect.**
64. In addition to the Blasphemy Act and the Joint Decree, a number of laws exist to regulate the practice of religion, some of which impose conditions which will be difficult for members of

⁵⁵ Joint Decree KEP-033/A/JA/6/2008.

⁵⁶ Ibid., Article 3.

⁵⁷ Human Rights Watch, *Indonesia: Reverse Ban on Ahmadiyya Sect*, 11 June 2008, available at: <http://www.hrw.org/news/2008/06/09/indonesia-reverse-ban-Ahmadiyya-sect>.

⁵⁸ Tempo.co, *Menteri Agama: Ahmadiyya Harus Dibubarkan*, 30 August 2010, available at: <http://www.tempo.co/read/news/2010/08/30/173275156/Menteri-Agama-Ahmadiyya-Harus-Dibubarkan> (in Indonesian).

⁵⁹ The Jakarta Globe, *Officials Announce Plan to Relocate Ahmadiyya Families to a Deserted Island*, 11 October 2010, available at: <http://www.thejakartaglobe.com/archive/officials-announce-plan-to-relocate-Ahmadiyya-families-to-a-deserted-island/>.

⁶⁰ Human Rights Watch, *Pre-Sessional Review of Indonesia*, 15 February 2013.

minority religions to adhere to. Among these are the Regulation on Building Houses of Worship;⁶¹ the Guidelines for the Propagation of Religion;⁶² Overseas Aid to Religious Institutions in Indonesia;⁶³ and Proselytizing Guidelines.⁶⁴

65. ERT is concerned that these laws may discriminate against members of religious minorities, on the basis of their religion or belief. Laws such as the Regulation on Building Houses of Worship, which requires faith groups to collect a specified number of signatures before establishing a place of worship, have a disproportionate impact on minority religious groups, and their application may therefore constitute discrimination.

3. Discrimination and Violence against Religious Minorities

66. ERT is concerned that the continued existence of the discriminatory laws cited above contributes to a climate where discrimination, harassment and, in some cases, serious violence against religious minorities is tolerated. Three cases documented by ERT in the course of our work in Indonesia exemplify the climate of severe discrimination and violence against religious minorities.

67. In February 2011, ERT interviewed members of the Board of the Ahmadiyya Indonesia, shortly after an attack on a group of Ahmadiyya persons which resulted in three deaths. The Board members informed ERT that on the 6 February 2011, a mob of around 1500 people attacked a house in Umbulan Village, Cikuesik in which 20 Ahmadiyya had gathered. The mob burned down the house and cars surrounding the building. Three Ahmadiyya men were forced to strip naked and beaten to death with sticks and machetes. Horrifying footage of the attack was subsequently posted on the internet. This footage shows that police were in the vicinity of the house when the attack occurred but failed to prevent the violence, most simply looking on. A number of persons were arrested in relation to this incident, and on 28 July 2011, a court in Serang District, Banten, sentenced 13 people to short three and six month sentences, despite the severity of the crime and the tragic outcome.

68. In February 2011, ERT met with a representative of the Huria Kristen Batak Protestan (Batak Christian Protestant Church - HKBP) church. The group has been repeatedly forced to relocate their place of worship by local administrations in different areas as public opinion has turned against their presence. In mid-2010, the community moved their place of worship to Ciketing, near Jakarta. Despite difficulties, the group succeeded in securing the number of signatures required under the Regulation on Building Houses of Worship. On 8 August 2010, after repeated protests by the local community, a number of members of the HKBP were beaten. On 12 September, the army was forced to step in as the community was surrounded by an estimated 3,000 protestors. The community is now under government protection.

69. In July 2011, ERT spoke with lawyers acting on behalf of two men of the Baha'i faith who are

⁶¹ Joint Ministerial Decree No. 1/1969.

⁶² Ministerial Decision No. 70/1978.

⁶³ Ministerial Decision No. 20/1978.

⁶⁴ Ministerial Decision No. 77/1978.

currently imprisoned following prosecution on charges of attempting to convert minors to another faith. The two men were prosecuted under the Law of Child Protection 23-2002 which provides a criminal penalty for anyone who “converts or attempts to convert children to other religion” and section 156 of the Criminal Code. According to their lawyers, the charges related to classes in “morals and ethics” which the two men were providing at one man’s home for his son and the son's friends. Their arrest followed statements by some of the children that the men had been defaming prophets Abraham, Moses, Jesus and Muhammad. The men denied both accusations. The men's lawyers stated that they were threatened with physical violence at the hands of the local community in an attempt to force their renunciation of their chosen religion and their conversion to Islam, and that this incident was not properly investigated by the police. They further stated that charges were laid against them following a refusal to recant their religion at the invitation of the police.

70. Reports published in 2012 and 2013 suggests that these three cases are indicative of a general pattern of discrimination, harassment and violence directed against religious minorities and that the number of such incidents may in fact be increasing. According to a recent study by the Wahid Institute, there were 274 listed cases of religious intolerance in 2012, based on media reports and field observations. The number represents a continuation of the trend of increasing intolerance documented by the Wahid Institute, which documented 121 cases in 2009, 184 cases in 2010 and 276 cases in 2011.⁶⁵ Amnesty International recently reported on the continuing religious discrimination in East Java, highlighting a case involving an estimated 165 Shi'a Muslims, including 48 children, who have been living in inadequate conditions at a sports complex in Sampang district on Madura Island since August 2012 when they were displaced after their village was attacked by a mob.⁶⁶ Credible local sources have stated that the authorities gave the villagers until March to convert to Sunni Islam if they wished to return to their homes.⁶⁷
71. Christian human rights organisations recently reported on acts of religious discrimination against Christian groups in West Java and South Sulawesi.⁶⁸ On 27 January 2013, members of the Islamic Defenders Front (FPI), a radical Islamic political group, scaled the gates of a Protestant church in Sumedang, West Java and attacked the pastor mid-service. CCTV footage revealed members of the radical group at one point strangling the pastor with his own necktie. Two days later, the pastor, Reverend Bernhard Maukur, was arrested by local authorities and sentenced to three months in

⁶⁵ Tisnadibrata, I.L., Oktofani, E., “Religious intolerance still at red-alert level, group says”, *Khabar Southeast Asia*, 13 February 2013, available at http://khabarsoutheastasia.com/en_GB/articles/apwi/articles/features/2013/02/13/feature-03.

⁶⁶ Amnesty International, “Indonesia: Religious freedom under attack as Shi'a villagers face eviction”, Amnesty International, 15 January 2013, available at <http://www.amnesty.org/en/news/indonesia-religious-freedom-under-attack-shia-villagers-face- eviction-2013-01-15>.

⁶⁷ Amnesty International UK, “Indonesia: Shi'a villagers told they must convert if they wish to return home”, Amnesty International, 16 January 2013, available at http://www.amnesty.org.uk/news_details.asp?NewsID=20568.

⁶⁸ International Christian Concern, “Rising Intolerance in Indonesia Leads to Violent Attacks against Christians”, Religion Today Online, 10 March 2013, available at <http://www.religiontoday.com/blog/rising-intolerance-indonesia-violent-attacks-christians.html>.

prison for holding services without a legal permit. No arrests of any of the pastor's attackers were reported.⁶⁹ Reports from the organization International Christian Concern also provide evidence of discrimination in the application of the Joint Ministerial Decree on the Construction of Houses of Worship. Christian pastors in the outskirts of Jakarta told the organization that in 2012, one church had spent over \$100,000 before finally obtaining a permit after several years.⁷⁰

72. **ERT therefore urges the Committee to recommend that Indonesia takes all necessary steps to eliminate discrimination and harassment against religious minorities, including through providing effective, proportionate and dissuasive remedies.**
73. **Further, ERT urges the Committee to recommend that where acts of violence or incitements to acts of violence are motivated by the religion of the victim, such motivation be treated as an aggravating factor and that Indonesia take all appropriate action to penalise, prevent and deter such acts.**

⁶⁹ Ibid.

⁷⁰ Ibid.