Submission of Prof. Gerald L. Neuman regarding draft General Comment on article 5, Equality and non-discrimination

This submission is respectfully offered to the Committee on the Rights of Persons with Disabilities by Gerald L. Neuman, a former member of the Human Rights Committee (2011-2014), and currently the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School, and Co-Director of its Human Rights Program*.* It relates to paragraph 1 (“Principle of equality and non-discrimination in international law”), paragraphs 5 and 6 (the normative content of article 5(1)), and paragraph 7.a (forms of discrimination, in particular direct discrimination), in the posted outline of the draft General Comment on article 5. It also addresses an issue that is not explicitly mentioned in the outline, the standard of justification for differential treatment that is alleged to constitute discrimination or a denial of equality.

As the Committee explained in its General comment No. 3, the term “discrimination” includes direct discrimination, indirect discrimination, denial of reasonable accommodation, and other forms (which may be related to those three categories). General comment No. 3 (2016), Article 6: Women and girls with disabilities, UN Doc. CRPD/C/GC/3 (2016), para. 17. This submission addresses the subject of direct discrimination, which involves action “for a reason related to a prohibited ground.” Id.

It would be useful for the Committee to clarify that the prohibition of discrimination on the basis of disability does not mean that differential treatment on the basis of disability is always a violation of the Convention per se, without any consideration of the explanation that is put forward to justify the differential treatment. Referring to disability as a “prohibited ground” does not mean that it is a ground that can never provide the basis of a lawful difference in treatment, but rather that differential treatment requires a high level of justification. The distinction between differential treatment (irrespective of justification) and “discrimination” (in the absence of sufficient justification) is fundamental in international human rights law, and should also inform the Committee’s interpretation of the Convention.[[1]](#footnote-1)

For example, a vision test for a driver’s license may be justified under current technological circumstances. Future developments in vehicle technology may remove the justification, but at present vision tests serve important purposes – for the protection of drivers themselves, for the protection of other persons with disabilities, and for the protection of persons without disabilities -- and if properly designed they do not violate the Convention.

This understanding of discrimination can be copiously documented at both the international level and the regional level. For example, under the two Covenants, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights both employ this definition:

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Human Rights Committee, General comment No. 18, Non-discrimination, para. 13 (1989), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (2008), at 198.

### Permissible scope of differential treatment

13. 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. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority.

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), para. 13, UN Doc. E/C.12/GC/20 (2009).

The Committee on the Elimination of Racial Discrimination has written:

On the core notion of discrimination, in its general recommendation No. 30 (2004) on discrimination against non-citizens, the Committee observed that differential treatment will “constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim”. As a logical corollary of this principle, in its general recommendation No. 14 (1993) on article 1, paragraph 1, of the Convention, the Committee observes that “differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate”. The term “non-discrimination” does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same**.** The Committee has also observed that the application of the principle of non-discrimination requires that the characteristics of groups be taken into consideration.

Committee on the Elimination of Racial Discrimination, General recommendation No. 32, The meaning and scope of special measures in the International Covenant on the Elimination of All Forms [of] Racial Discrimination, para. 8, UN Doc. CERD/C/GC/32 (2009) (footnotes omitted).

At the regional level, the Inter-American Court of Human Rights has explained:

83. Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights. The element of equality is difficult to separate from non-discrimination. Indeed, when referring to equality before the law, the instruments cited above (*supra* para. 71) indicate that this principle must be guaranteed with no discrimination. This Court has indicated that “[r]ecognizing equality before the law, […] prohibits all discriminatory treatment.”

84. This Advisory Opinion will differentiate by using the terms distinction and discrimination. The term distinction will be sued to indicate what is admissible, because it is reasonable, proportionate and objective. Discrimination will be used to refer to what is inadmissible, because it violates human rights. Therefore, the term “discrimination” will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.

Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, paras. 83-84, 18 Inter-Am. Ct. H.R. (ser. A) (2003) (footnotes omitted); see also id. paras. 85-94.

The European Court of Human Rights has described its longstanding jurisprudence as follows:

90. A difference in treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Abdulaziz, Cabales and Balkandali*, cited above, § 82).

91. A general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even when it is not specifically aimed at that group and there is no discriminatory intent. This is only the case, however, if such policy or measure has no “objective and reasonable” justification (see, among other authorities, *S.A.S. v. France* [GC], no. 43835/11, § 161, ECHR 2014 (extracts), and *D.H. and Others*, cited above, §§ 175 and 184-185).

*Biao v. Denmark* [GC], No. 38590/10, §§ 90-91 (ECHR 2016) (discussing both direct and indirect discrimination).

As these and numerous other examples demonstrate, the prevailing understanding of “discrimination” in human rights law involves the absence of a sufficient justification for differential treatment, not the simple absence of identical treatment. (Similarly, the converse requirement of “equality” does not mandate identical treatment regardless of the justification for any differentiation.)

A refusal to consider whether differential treatment may be justified as reasonable, objective and proportional would not serve the goal of human rights. In some cases, differential treatment is necessary to serve the needs of the very person with disabilities who is allegedly the victim of discrimination. In other cases, differential treatment may be required for the purpose of protecting the human rights of other persons -- with disabilities, or without -- whose interests conflict with those of the presumed victim. The Committee may be rightly skeptical of such justifications when they are offered, and should examine them closely, but the Committee should not interpret the concept of discrimination under the Convention as foreclosing from the outset any possibility of justification. If the Committee insists upon such a rigid definition of discrimination, it will be giving up opportunities to persuade both states and other human rights bodies with less specialized mandates to agree with its recommendations.

It is therefore submitted that the Committee should align its definition of “discrimination” with the standard definition in international human rights law, and employ its expertise in evaluating the justifications offered for differential treatment.

Respectfully submitted,

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1. This distinction is also relevant to the definition of indirect discrimination. A neutrally phrased rule that produces a difference in treatment that has a *statistically* disproportionate impact on the basis of a prohibited ground does not amount per se to indirect discrimination, but rather a finding of indirect discrimination depends on whether the impact is also disproportionate to the purpose that the rule serves. This submission, however, focuses on the subject of direct discrimination. [↑](#footnote-ref-1)