15. Article 5

Comment and Conclusions

The chapeau to Article 5 makes an explicit link with obligations under Article 2 of the Convention and goes on to repeat the undertaking to eliminate racial discrimination—an unnecessary repetition according to some views.[1] Commentators have observed that there is a lack of 'fit' between Article 5 and Article 1,[2] including the reference to 'civil rights' in Article 5 but not in Article 1, and, further, that as noted, the 'grounds' of prohibited discrimination in Article 5 omit 'descent'. The lack of limitation regarding non-citizens in Article 5 has proved serviceable in facilitating more generous interpretations of the scope of the Convention vis-à-vis Article 1(2). In *D.R. v Australia*, the Committee took into account General Recommendation (GR) 30 'and in particular the necessity to interpret Article 1, paragraph 2 of the Convention in the light of article 5', rejecting the State party's claim that the communication was inadmissible.[3]

On interpretation of Article 5, three interrelated issues in particular have generated discussion: (1) whether rights are 'established' by the Convention or merely acknowledged where they appear in the legal system of the State and require protection from discrimination; (2) the question of which rights does Article 5 protect from discrimination, bearing in mind that the list of rights is not closed; and (3) the requirements flowing from the chapeau statements on discrimination and equality. A preliminary excursus by the Committee in 1973 registered a variety of views but without a consensus on the interpretation of an article described therein as obscure on more than one point.[4] The views expressed were summarized by Partsch according to three perspectives,[5] the first of which, 'the extremely wide concept',[6] was that Article 5 established the listed rights as legal obligations so that failure to comply with them would violate the Convention; the second, 'the extremely narrow concept',[7] held that the list of rights established the field of application of the principle of non-discrimination; a third, 'the intermediate concept',[8] expressed the position that Article 5 prohibited discrimination and guaranteed the right to equality before the law.[9] Meron notes a wide acknowledgement that

[1] N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, 1980), p. 55.

[2] Schwelb, p. 1004.

[3] Para. 6.3.

[4] A/9018, Chapter V, paras 55 and 61.

[5] K.J. Partsch, Elimination of Racial Discrimination in the Enjoyment of Civil and Political Rights, *Texas International Law Journal* 14 (1979), 191–250.

[6] *Ibid.*, 215; according to Partsch, the concept 'was formulated by the rapporteur [Sayegh] in order to show it was unacceptable'.

[7] *Ibid.*, 216.

[8] *Ibid.*, 216.

[9] According to Committee member Haastrup, A/9018, para. 53, 'the essential element of article 5 was the right of everyone to equality before the law.' Aboul-Nasr on the other hand, argued, *ibid.*, para. 53, that the article was concerned only with discrimination in respect of the rights enumerated therein. See also the introduction to the debate by Sayegh, *ibid.*, paras 40–44, and comments in by Committee members Calovski, Macdonald, Ortiz-Martin, Partsch, Soler, and Tomko. Sayegh observed, *ibid.*, para. 42, that it should not be pretended that

The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary. Patrick Thornberry, Oxford University Press. © Patrick Thornberry 2016. DOI: 10.1093/law/9780199265336.003.0015

the catalogue of human rights in article 5 does not create those rights but merely obligates a State to prevent racial discrimination in the exercise of those which it has recognised. Article 5 could have been drafted in a manner that clearly defined this limitation. But a more explicit formulation would have emphasised the liberty of States to deny some of the rights listed, which would possibly have weakened the authority of... [the UDHR]... and undermined the status of some rights as customary law.[10]

The ambiguities adverted to by Meron were spotted in the drafting of the Convention: the remarks of the representative of Canada who read Article 5 as granting rights as well as guaranteeing non-discrimination in their exercise will be recalled.[11]

The interpretative issues were further addressed by the Committee in GR 20 of 1996 which commences with the statement that 'the rights and freedoms mentioned in Article 5 do not constitute an exhaustive list',[12] recalling the UN Charter and the Universal Declaration of Human Rights (UDHR) 'at the head of these rights and freedoms' as well as the elaboration of rights in the international covenants. The recommendation observes that States parties are 'obliged to acknowledge and protect the enjoyment of human rights', while 'the manner in which the obligations are translated into the legal order of States parties may differ'.[13] Paragraph 1 makes a general position statement:

> Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of such rights. The Convention obliges States to prohibit and eliminate discrimination in the enjoyment of such human rights.

The statement that Article 5 'assumes' the existence and recognition of rights is not unambiguous in that such an 'assumption' may carry a certain normative force, facilitating Article 5 critiques of the absence of certain rights in the constitutions or laws of States parties. Vandenhole recalls a more extensive interpretation by the Committee in concluding observations on Malawi: the State party was reminded that Article 5 implied the existence of civil, political, economic, social, and cultural rights, and that 'full respect for human rights is the necessary framework for the efficiency of measures adopted to combat racial discrimination'.[14] While the explicit recommendations by the Committee for States parties to broaden their range of human rights commitments suggest that Article 5 does not 'establish' such commitments, the rights listed in Article 5, together with rights that may be implicit in or derived from them, increasingly appear to be treated as standard, canonical requirements. The Committee does not restrict the range of its examination of reports on being informed that this or that human right is not guaranteed in the domestic or international portfolio of the State party concerned; on the contrary, the State party will be invited to remedy its absence as well as securing its enjoyment without discrimination.

article 5 amounted to a convention on civil, political, economic, social, cultural and other rights... the only human right given obligatory force by article 5 was the right of everyone to be protected from racial discrimination and to benefit from equality before the law in the enjoyment of fundamental human rights'.

[10] T. Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination', *American Journal of International Law* 79 (1985), 283–318, 294.

[11] Ch. 12.

[12] Para. 1.

[13] Para. 1.

[14] CERD/C/63/CO/13, para. 7, cited in W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005), p. 10.

Arguments on 'granting' or 'recognition' of rights intersect with interpretations of the range of protected rights. The final paragraph of GR 20 asserts, in light of 'notably' in the chapeau to Article 5, that the rights and freedoms referred to in 'and any similar rights' shall be protected. With regard to the *travaux* of Article 5, Lerner comments that '"notably" was used in order to avoid a restrictive interpretation of the rights enumerated... some delegations would have preferred a more general and less detailed wording, with a view to preventing such an interpretation'.[15] The recommendation's reference to 'similar rights' opens out to unlisted human rights displaying similar characteristics to those listed. Commentators go further. O'Flaherty suggests that the Convention addresses all rights regardless of source,[16] while Diaconu argues that Article 5 'extends to all rights', and if 'a certain right is granted, whether in an international [instrument] or through internal legislation, no discrimination is allowed with regard to its exercise'; he makes an analogy between Article 5 and Protocol 12 to the European Convention on Human Rights (ECHR), which forbids discrimination in relation to rights 'established by law'.[17] The Inter-American Convention on Racism, etc, with the advantage of much later adoption (2013) than the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), defines racial discrimination in its Article 1 as nullifying or curtailing the enjoyment of the 'human rights and fundamental freedoms enshrined in the international instruments applicable to the States parties', while Article 3 extends the anti-discrimination portfolio to 'all human rights and fundamental freedoms enshrined in... domestic law and in international law applicable to the States parties'.

If the range of protected rights subject to the equality/discrimination critique is understood expansively, the analytical point on whether Article 5 'establishes' or 'assumes' the rights becomes less important, though not without practical consequences in States that specifically recognize only a limited portfolio of rights. The bulk of commentary on ICERD aligns itself with wider views on the range of rights subject to undertakings under Article 5, which may thereby be described as setting out a floor of rights, not a ceiling, a description that resonates with the promise of the Convention to address all forms of racial discrimination. CERD practice suggests that the relevant international law applicable to States parties and treated as furnishing background standards of rights to be protected from discrimination extends beyond treaty law into rights presumptively generated through the operation of customary international law. Hence, for example, the regular endorsements by the Committee of the UNDRIP, treated as representing the best contemporary standard of indigenous rights, and particularly of its concept of indigenous self-determination.

Rights unspecified in Article 5 but alluded to in the practice outlined in Chapters 13 and 14 of this work include language rights; the right to a name and identity rights writ large; participation rights widened beyond the 'political' sphere; reproductive rights; the right to family life; the right to food; a battery of rights associated with refugees and asylum-seekers including non-refoulement, the right to asylum, and the right to appeal against denials of refugee status; economic, social, and cultural rights including the right

[15] N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff and Noordhoff, 1980), p. 56.

[16] M. O'Flaherty, 'Substantive Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination', in S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (Zed Books and the Federation Press, 1998), pp. 162–83, p. 179.

[17] I. Diaconu, *Racial Discrimination* (Eleven International Publishing, 2011), pp. 217–19, at p. 218.

to an adequate standard of living, the right to water, and the right to register the births of children. The rights are derived from contemporary international practice as developed in universal (undifferentiated by category) and group-specific instruments, as well as customary law. Processes of discrimination can affect a number of rights simultaneously. The internal categories—civil rights, economic, social, and cultural rights—are interrelated and indivisible, so that violations of one right almost inevitably violate others. Racial discrimination characteristically targets or affects individuals and communities not in respect of rights punctiliously marked out but across the span of personal and communal rights and interests swept up in its wake.

As noted in Chapter 12, the rights in Article 5 are not 'fleshed out' through inclusion in a complex of a core rights statement subject to permissible limitations and derogations. In practice, Article 5 is treated as covering the various unstated facets of the expression of rights and limitations thereon. With regard to restrictions on the enjoyment of rights, GR 20 states that:

> [w]henever a State imposes a restriction upon one of the rights listed in Article 5 of the Convention which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose or effect is the restriction incompatible with Article 1 of the Convention as an integral part of international human rights standards. To ascertain whether this is the case, the Committee is obliged to inquire further to make sure that any such restriction does not entail racial discrimination.[18]

The admonition in *L.R. v Slovakia* regarding the inadmissibility of shielding stages in the implementation of a human right from scrutiny for racial discrimination may also be borne in mind.[19] The approximate, cursory statements of rights in Article 5, coupled with endorsement of rights from multiple sources have, nonetheless, the potential to generate indeterminacy in subjecting the rights protected by Article 5 to a standard discrimination analysis. Statements of rights subjected to discrimination analysis by the Committee are derived from their content as expressed in international law glimpsed through CERD lenses. CERD displays a tendency to optimize both the range and the standard of the rights to be protected from discrimination, in effect developing its own vision of them as a holistic construct emerging from a synthesis of multiple sources that includes their elaboration in the Convention.

Pertinent to the rights to be protected under Article 5 of ICERD, some general comments of the CESCR follow the '4A scheme', which translates rights into discrete but interconnected elements in order to clarify obligations deriving from them, facilitate their analysis, and measure the extent of their implementation. One such '4A' articulation appears in General Comment (GC) 13 on the *Right to Education*,[20] which measures the right in terms of its availability, accessibility, acceptability, and adaptability.[21] For education, *availability* refers to the existence of functioning educational institutions in the State party including the right of private parties to establish schools; *accessibility* focuses on discriminatory barriers to enjoyment of the rights; *acceptability* requires the

[18] Para. 2.

[19] *L.R. v Slovakia*, CERD/C/66/D/31/2003 (2005), para. 10.7. See further discussion in Chapter 8.

[20] E/C.12/1999/10.

[21] Footnote 2 of the GC states that the approach 'corresponds with the Committee's analytical framework adopted in relation to the rights to adequate housing and food, as well as the work of the United Nations Special Rapporteur on the right to education'; the note also refers to GC No. 4 (right to adequate housing) and GC 12 (right to adequate food).

provision of curricula that are relevant, culturally appropriate and of good quality, including a safe and healthy school environment; *adaptability* signifies flexibility and responsiveness to the needs of students in diverse cultural settings. With nuances of difference, the '4A' formula has been repeated in later general comments, and is represented as '5A' in the later General Comment on *The Right to Take Part in Cultural Life* with the addition of *appropriateness*,[22] which ratchets up the cultural dimension of rights in referring to 'the realization of a specific human right in a way that is pertinent and suitable to a given modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and individuals'.[23]

While, as noted in Chapter 8, CERD has not explicitly adopted the '4A' or '5A' formulae of the CESCR, practice under Article 5 largely follows these contours. The principal focal points of practice are those of the provision of rights, linked to the argument as to the 'establishment' of rights by Article 5, or their 'availability' in the 4A formula, access to rights, and cultural appropriateness.[24] The listed rights, those derived from them, and background international law standards, are expected to be 'available', following the GR 20 vocabulary of 'assuming' the existence of rights. In terms of access to the enjoyment of rights, examples of racial, ethnic, and caste barriers to such enjoyment run through practice under Article 5, the need to address racial 'barriers' links with the statement in the preamble of their repugnancy to the ideals of any human society. 'Cultural' elements go beyond the category of economic, social, and cultural rights, and invest the understanding of rights in general.[25] The application of civil and political rights to, for example, justice and security areas is as likely to be as culturally influenced as rights to education or housing or the concept of participation in cultural activities itself. The stress on the limits of 'culture' from a human rights perspective, discussed elsewhere in the present work,[26] does not detract from its pervasiveness in providing templates for the interpretation and application of rights in a multiplicity of local contexts.

In particular, Committee practice has endorsed notions of culturally influenced collective rights associated with particular communities, notably indigenous peoples but also including Afro-descendant communities and others,[27] that present communal visions of human rights. Including but not confined to indigenous rights, international—and domestic—human rights standards have also embraced collective as well as individual rights.[28] While the collective rights addressed in practice move beyond the list in Article 5, the Committee treats their recognition as governed by principles of equality and non-discrimination. The work of other human rights bodies has been drawn upon in this area, notably the Inter-American Commission and Court of Human Rights, which has developed an understanding of the corpus of collective rights from constituent instruments on the rights of persons, applying their limited textual standards to the realities of communal

[22] E/C.12/GC/21 (2009).

[23] Paragraph 16 (e), which adds: The Committee wishes to stress... the need to take into account... cultural values attached to, inter alia, food and food consumption, the use of water, the way health and education services are provided and the way housing is designed and constructed'.

[24] On 'availability' and necessary infrastructures of rights, see Chapters 8 and 16 in particular.

[25] See further Chapter 20.

[26] In particular Chapters 6, 14, and 20.

[27] See among other judgments cited in Chapter 13, *Saramaka People v Suriname*, IACtHR Ser. C No. 172 (2007); also CERD GR 34; see further Chapter 20.

[28] G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law* (Martinus Nijhoff Publishers, 2009).

particularities and cultural diversity.[29] Article 5 of ICERD protects the rights of 'everyone'. In its interpretation of the right of 'everyone', CERD practice is in line with the position on cultural rights in GC 21 of the Committee on Economic, Social and Cultural Rights, which states that the word may denote 'the individual or the collective . . . In other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) in a community or group, as such'.[30] This flexibility, shared by CERD, contributes to the understanding that human rights, if they are to pursue a 'universal' vocation, cannot be inexorably tied to fundamentalist Liberal conceptions of rights as applying only paradigmatically or uniquely to 'individuals'.

The emphasis on the effect on CERD practice of developments in collective human rights under general international law should not detract from collective elements intrinsic to the Convention which, according to a member of the Committee in 1982,[31] represented 'a unique case in the international instruments on human rights'. The judgement of uniqueness is longer accurate but the comment on the intrinsic quality of the Convention retains its validity. Whatever the original drafting intentions behind the Convention, the reference to General Assembly resolution 1514 (XV) (the Colonial Declaration) in the preamble to the Convention serves to undermine any argument that ICERD is unfamiliar with collective rights, even in the 'hard' sense of rights inhering in a community as such. The outreach to collective concepts of rights has functional instrumentality in light of paradigmatic discriminatory practices that target groups, or target individuals on account of real or imagined appurtenance to racial/ethnic groups, of their actual or perceived membership thereof. The text of the Convention as a whole is not relentlessly 'individualistic' in its descriptions,[32] and should not be treated as a culturally assimilationist instrument, though it has been understood as such in (some) past practice.[33] Appraisals of discrimination against groups, taken holistically, and not simply of discrimination against individuals are an outstanding feature of the CERD repertoire. The raised profile of identity standards, particularly since the 1980s and 1990s, has further contoured the applications of equality and non-discrimination principles, directing attention towards gross collective harms.[34]

The practice generated by Article 5 presents a complex profile of racial discrimination, illustrating multiple forms and contexts of discrimination and denials of equality, their

[29] Concluding observations on Nicaragua, CERD/C/NIC/CO/14, para. 21, refer to the judgement of the Inter-American Court of Human Rights in the *Awas Tingni case*, IACtHR Ser. C No. 79 (2001); observations on Paraguay, CERD/C/PRY/CO/11-3, para. 17, refer to the judgments of the Inter-American Court of Human Rights in *Yakye Axa v Paraguay*, IACtHR Ser C No. 125 (2005); *Sawhoyamaxa v Paraguay*, IACtHR Ser. C No. 146 (2006); and *Xákmok Kásek v Paraguay*, IACtHR (2010). Decision 1 (68) on the Western Shoshone, A/61/18, Chapter II, applied aspects of the case of *Mary and Carrie Dann v United States* before the Inter-American Commission on Human Rights: Case 11.140, 27 December 2002. Note also the Committee's support for the decisions of the African Commission on Human and Peoples' Rights in the Endorois, Comm. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group international on behalf of the Endorois Welfare Council v Kenya* (2010); and *Ogiek* cases, now a judgement of the African Court of Human Rights, App. No. 006/2012, 15.03.2013, CERD/C/KEN/CO/1-4, para. 17.

[30] Para. 9.

[31] Devetak, A/37/18, para. 468.

[32] *Inter alia*, the right in 5(d)(v), referring to owning property 'alone as well as in association with others', may be recalled.

[33] P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, 1991), Chapter 30, especially with reference to then situation of Turkish communities in Bulgaria.

[34] Discussed in Chapter 20.

institutional settings, and contemporary targets. The abstract grounds of discrimination on Article 1, in practice undiminished in scope under Article 5 despite the omission of 'descent', metamorphose into human form in the complex, interlocking narratives that characterize global practice in the vindication and denial of rights. Ethnic minorities—notably including Roma in many States and not simply in Europe—indigenous peoples, Afro-descendants, caste groups, multiple categories of non-citizens, groups and persons identified through intersectionalities, particularly women and religious groups, bear the brunt of discrimination, as shown in the melancholy record of 'concerns' over rights and their violations that populate the archives of Article 5.

Large-scale human vulnerabilities are also exposed to view, whether the result of historical exclusion and dispossession, the operation of prejudices and antipathies, residues of hierarchical classification including the racial (perhaps transmuted into denigration of cultures),[35] or choice or compulsion to leave countries of nationality. The identification of potential victims of discrimination in the universalist framework of the Convention has resolved itself into micro-identifications of categories of persons under threat, a process facilitated and constructed through utilizing legal classifications and statements of rights from the human rights canon writ large, including the categories of minorities and non-citizens that were largely put aside in the drafting process. While the utilization of such categories by CERD tends to be approximate, and their descriptions overlapping, they serve the purposes of pinpointing where discrimination operates and of facilitating judgements of compatibility with legal standards. The enjoyment and exercise of civil, political, economic, social, and cultural rights in their various aspects are all potentially subject to diminution by racially discriminatory practices on the part of States, individuals, communities, and corporations.

[35] See Chapter 6.