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Article 5 of the UN Convention on the Rights of the Child: parental guidance and the evolving capacities of the child

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Article 5 of the UN Convention on the Rights of the Child

Article 5 of the UN Convention on the
Rights of the Child

Parental guidance and the evolving capacities of
the child

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Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they were meant to be – the unknown person inside each of them is our hope for the future.

Loving Every Child: Wisdom for Parents, Janusz Korczak

For Sam and Jude

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1 | Introduction

It's a funny thing about mothers and fathers. Even when their own child is the most disgusting little blister you could ever imagine, they still think that he or she is wonderful. Some parents go further. Well, there is nothing very wrong with all this. It's the way of the world ...

Occasionally one comes across parents who take the opposite line, who show no interest at all in their children, and these of course are far worse than the doting ones. Mr and Mrs Wormwood were two such parents ...¹

Matilda, Roald Dahl

Matilda Wormwood, the heroine in Roald Dahl's classic novel *Matilda*,² is an extraordinarily brilliant, sensitive and inquisitive child. But Mr and Mrs Wormwood are 'so gormless and so wrapped up in their own silly little lives' that they utterly fail to notice anything exceptional about their daughter. After teaching herself to read at the age of three, Matilda asks for a book, which irritates her father who would much prefer she watched television. When Matilda points out that lying is dishonest, she is told to keep her 'nasty mouth shut' and called an 'ignorant little squirt.' Matilda knows she is not ignorant or stupid, but she also knows that children are meant to be seen, not heard.

For the most part, history has treated children as the possession of their parents. The right to family was understood as an entitlement of parents over their children, rather than a relational right flowing in both directions between a child and her family. Parenting was viewed as a private matter, with little guidance or support from the State in the everyday care of a child. That children should be treated as individuals and respected as rights-holders was neither recognised, nor likely contemplated under international law, prior to the UN Convention on the Rights of the Child (CRC). This dissertation focuses on article 5 of the CRC

States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child,

1 Roald Dahl, 'Note to Reader', *Matilda* (London: Jonathan Cape, 1988).

2 Roald Dahl, *Matilda*, 1988.

to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

It undertakes a legal doctrinal analysis of the scope, content and function of article 5, contemplating its implications for children's enjoyment and exercise of rights under the CRC. In this introductory chapter, I begin with a brief overview of the children's rights movement and the drafting history of article 5 of the CRC. I then set out the problem statement and research questions that define the scope of this doctoral dissertation. A discussion on research methodology follows, with an explanation of the research methods employed to guide the analysis of article 5 of the CRC. Finally, an outline of each of the subsequent six chapters is given.

1 BACKGROUND: RIGHTS OF THE CHILD? OR RIGHTS OVER THE CHILD?

1.1 The child as 'property' – until 1900

Historically, the parent-child relationship was framed in proprietary terms. Children were seen as the 'chattel' of their parents, or more specifically their father.³ Under Roman law, the doctrine of *patria potestas* gave a father, as head of the family, absolute power over his children,⁴ including the right to determine the life or death of a child (*jus vitae necis*),⁵ and the right to sell his child into slavery.⁶ Though the doctrine of *patria potestas* eventually faded at the end of the nineteenth century,⁷ giving way to the 'Child-Saving'⁸ and 'Child Welfare'⁹ movements, the notion of children as 'quasi-property' con-

3 Jaap Doek, 'The Human Rights of Children: An Introduction' in U. Kil Kelly and T. Lief aard (eds) *International Human Rights of Children* (Singapore: Springer Nature Singapore, 2018); see also John Eekelaar, 'The Emergence of Children's Rights' (1986) 6 *Oxford Journal of Legal Studies* 161-182; David Archard, *Children: Rights and Childhood*, 2nd ed (Routledge Taylor and Francis, 2004); Michael D.A. Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter Publishers, 1983), 6-32, 13-17.

4 David Archard, 'Do parents own their children?' (1993) 1 *International Journal of Children's Rights* 293-301; Archard 2004 (n 3) 8.

5 Doek 2018 (n 3).

6 Archard 1993 (n 4) 294; Archard 2004 (n 3) 8.

7 Archard 2004 (n 3) 144; Freeman 1983 (n 3); Philip Alston and John Tobin with the assistance of Mac Darrow, *Laying the Foundations for Children's Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child*, (Florence: Innocenti UNICEF, 2005) 3.

8 Michael Freeman, *Magna Carta for Children? Rethinking Children's Rights*, Hamlyn Lectures (Cambridge: Cambridge University Press, 2020); Noam Peleg, *The Child's Right to Development* (Cambridge: Cambridge University Press, 2019).

9 Alston, Tobin and Darrow 2005 (n 7); Archard 2004 (n 3); see also Peleg 2019 (n 8) Chapter 1.

tinued to find favour in common law¹⁰ and continental European civil law¹¹ well into the twentieth century, casting a shadow on how children were viewed and treated within the family.¹²

1.2 The child as a ‘beneficiary of benevolence’ – 1901 to 1958

Early human rights instruments paid little attention to children’s status as individuals within society and the family, focusing instead on the moral and legal duties of adults around the child. The 1924 Declaration on the Rights of the Child (the Declaration of Geneva),¹³ the first international instrument to focus on the plight of children,¹⁴ and indeed coin the phrase ‘rights of the child’¹⁵ did not enumerate any specific rights for the child, nor did it even use the word ‘rights’ within its five substantive paragraphs.¹⁶ An initiative of Eglantyne Jebb (founder of Save the Children Fund UK),¹⁷ the 1924 Declaration embraced a welfarist or ‘child-saving’ approach, viewing children as beneficiaries of benevolence rather than subjects of rights. Though the 1924 Declaration still holds historical significance,¹⁸ marking the beginning of the

10 Eekelaar 1986 (n 3); Doek 2018 (n 3); see also John Tobin, ‘Chapter 4: Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC’ in M.D. Ruck, M. Peterson-Badali, and M. Freeman (eds), *Handbook of Children’s Rights: Global and Multidisciplinary Perspectives* (London: Routledge Taylor & Francis Group, 2017).

11 Doek 2018 (n 3) 2.

12 Archard 2004 (n 3) 144; Archard 1993 (n 4) 301; John Tobin, ‘Understanding Children’s Rights: A Vision beyond Vulnerability’ (2015) 28 *Nordic Journal of International Law* 155-182. DOI: 10.1163/15718107-08402002; Peleg 2019 (n 8); see also Ann Quennerstedt, ‘Balancing the Rights of the Child and the Parents in the Convention on the Rights of the Child’ (2009) 8 *Journal of Human Rights* 162-176.

13 The League of Nations adopted the 1924 Declaration during its fifth session on 26 September 1924, see Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood* (Leiden: Martinus Nijhoff, 1992) 156; see also Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Volume I and Volume II (Geneva: OHCHR, 2007) Vol. I, 3. When the League of Nations reaffirmed the 1924 Declaration in 1934, it renewed its commitment to the plight of children with Heads of State pledging to incorporate its principles into domestic law, see Geraldine Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Publishers, 1995), 5.

14 Van Bueren 1995 (n 13) 1-7; see also Alston, Tobin and Darrow 2005 (n 6).

15 Ibid, 1-7; Peleg 2019 (n 8) 32.

16 Geneva Declaration of the Rights of the Child, adopted 26 September 1924, League of Nations, O.J. Special Supplement 21 (1924) 43; Peleg, 2019 (n 8) 32; John Tobin, ‘Introduction’ in J. Tobin and P. Alston (eds), *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 4.

17 Veerman 1992 (n 13) 155-159.

18 Van Bueren 1995 (n 13) 8; see also Alston, Tobin and Darrow 2005 (n 7).

children's rights movement, at the time it did little to dispel the notion of a child as the property of her parents.¹⁹

The Universal Declaration of Human Rights,²⁰ adopted in 1948, was the first instrument to recognise the rights of 'all members of the human family'.²¹ However, again, it did not enumerate specific rights for the child, mentioning children just twice within its provisions, and in both instances, through rights entitlements of their parents.²² The European Convention on Human Rights, adopted just two years after the Universal Declaration did not mention children at all,²³ while the American Declaration of the Rights and Duties of Man focused on the duties of parents towards their children.²⁴ The Covenant on Civil and Political Rights,²⁵ and the Covenant on Economic Social and Cultural Rights²⁶ drafted simultaneously in the early 1950s amid the Cold War were more explicit in their references to children.²⁷ However, again, emphasis was placed on protecting parental rights and the family unit²⁸ rather than enumerating specific rights for the child.²⁹

19 Tobin 2015 (n 11) 171; Archard 1993 (n 5); see also Peleg 2019 (n 7), Chapters 1 and 2.

20 Universal Declaration of Human Rights, United Nations General Assembly resolution 217 A (III), adopted 10 December 1948 ('UDHR').

21 Article 16(3), UDHR.

22 Article 25 of the UDHR recognises 'motherhood and childhood' as 'entitled to special care and assistance', ensuring all children, whether born in or out of wedlock enjoy the same social protection. Article 26(1) of the UDHR recognises the right to education, while article 26(3) confers parents with 'a prior right to choose the kind of education that shall be given to their children'.

23 'The European Convention on Human Rights ("ECHR") was not drafted with children, still less children's rights, in mind. At the time of drafting, the child rights movement was in its infancy, with children predominantly seen as objects of benevolence, and recipients of special protection, rather than subjects holding individual legal rights,' Claire Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford University Press, 2021) pp 1-10, 1.

24 American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogotá Colombia, 1948, Inter-American Commission on Human Rights. See Article XXX. Duties towards children and parents: It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.

25 United Nations International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 ('ICCPR').

26 United Nations International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976 ('ICESCR').

27 See article 23(4), article 24(1), article 24(2), article 24(3), article 6(5), article 10(2)(b), ICCPR; see article 10(3) ICESCR; see also Peleg 2019 (n 7) 42-43.

28 See Article 13(3) and article 10(1), ICESCR; see article 18(4) ICCPR; see also Peleg 2019 (n 8) 42-43.

29 Alston, Tobin and Darrow 2005 (n 7) 5; see also Peleg 2019 (n 8) 41-43.

1.3 The emerging child rights movement – 1959 to 1978

The 1959 United Nations Declaration of Rights of the Child³⁰ was something of a breakthrough for children's rights.³¹ It was the first legal instrument to enumerate a set of substantive rights for children under international law.³² Amongst its ten principles, Principle 6 held particular significance for children's rights within the family:³³ 'The child ... shall, wherever possible, grow up in the care and under the responsibility of [their] parents ... in an atmosphere of affection' and to 'not, save in exceptional circumstances, be separated from [their] mother'.³⁴ It delineated the child's right to family from that of her parents, vesting an individual right in children to grow up in a family environment that provided love and affection. As Peleg suggests, Principle 6 with Principle 1 constituted 'an attempt to coin the duty to acknowledge and respect children's agency and identity as rights holders'.³⁵ However, the 1959 Declaration fell short of affirming children as independent rights-holders under international law. Its emphasis on protection over empowerment, and the absence of any civil and political rights reinforced the welfarist approach, affirming children once again as objects of solicitude rather than subject-holders of rights under international law.³⁶

It would take another two decades before children's rights would re-emerge on the international stage. Despite the influential work of early child rights pioneers,³⁷ such as Ellen Keys and Janusz Korczak,³⁸ the notion of 'rights for children' would only begin to take hold in the 1970s.³⁹ The social movements of the 1960s – women's rights, civil rights and anti-war – bolstered the profile of children's rights.⁴⁰ When Hillary Rodham famously quipped that "'children's rights' is a slogan in search of a definition",⁴¹ she brought into question how the law treated children, and the lack of meaningful respect for the child's voice and agency within society.⁴²

30 United Nations General Assembly Resolution 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 ('The 1959 Declaration of the Rights of the Child').

31 Alston, Tobin and Darrow 2005 (n 7) 5.

32 Doek 2018 (n 3).

33 Alston, Tobin and Darrow 2005 (n 7) 5.

34 Principle 6, The 1959 Declaration of the Rights of the Child.

35 Peleg 2019 (n 8) 37.

36 Peleg 2019 (n 8) 36-39; Alston, Tobin and Darrow 2005 (n 7) 5-6.

37 Veerman 1992 (n 13).

38 See Peleg 2019 (n 8); see Doek 2018 (n 3); see Freeman 2020 (n 8).

39 Freeman 2020 (n 8) 30-31.

40 C.R. Margolin, 'Salvation versus Liberation: The Movement for Children's Rights in a Historical Context' (1978) 25(4) *Social Problems* 441-452, 444.

41 Hillary Rodham, 'Children Under the Law' (1973) 43(4) *Harvard Educational Review* 487-514, 487.

42 Ibid, 488; see also Peleg 2019 (n 8) 40.

The 1970s ushered in the Child Liberation Movement, a short-lived but radical child rights' movement that advocated for children's self-determination and emancipation from the paternalistic control of parents and the State.⁴³ An important dimension of the Liberationist movement was its rejection of the prevailing paradigm of childhood as a period of vulnerability and helplessness, and its challenging of the unfettered authority of parents (and the State) over children. Neil proclaimed 'the two enemies of children are ignorance of parents and unhappiness of marriages ... The problem is parents, always parental. Children are ruined by the complexes of their parents.'⁴⁴ Liberationists sought to delink children's rights from parental rights. Holt went so far as to propose that 'the rights, privileges, duties and responsibilities of adult citizens [should] be made *available* to any young person, of whatever age',⁴⁵ including the right to elect guardians to replace parents.⁴⁶ A more extreme position, suggested by Farson, was to overhaul the entire social structure, reconstructing childhood as an autonomous space for the child, rather than a period of vulnerability and dependency.⁴⁷ Farson believed that the only way to release children from the domination of parents and the State was to view the child as an autonomous individual, with a right to self-determination and the right to alternative home environments.⁴⁸ Although the Liberationist Movement faded at the end of the 1970s, and eventually dis-

43 Margolin 1978 (n 40) 446; see also Freeman 2020 (n 8) 31-35; Peleg 2019 (n 8) 45.

44 A. S. Neill, 'Freedom Works' in Paul Adams *et al* (eds.) *Children's Rights* (Elek Books: London, 1971) as quoted in Peleg 2019 (n 8) 45.

45 '1. The Problem of Childhood', John Holt, *Escape from Childhood* (New York: Ballantine Books, 1974), 1.

46 'These [rights] would include, among others:

1. The right to equal treatment at the hands of the law i. e. the right, in any situation, to be treated no worse than an adult would be.
2. The right to vote and take full part in political affairs.
3. The right to be legally responsible for one's life and acts.
4. The right to work for money.
5. The right to privacy.
6. The right to financial independence and responsibility i.e. the right to own, buy and sell property, to borrow money, establish credit, sign contracts etc.
7. The right to direct and manage one's own education.
8. The right to travel, to live away from home, to choose or make one's own home.
9. The right to receive from the state whatever minimum income it may guarantee to adult citizens.
10. The right to make and enter into, on a basis of mutual consent, quasi familial relationships outside one's immediate family i.e. the right to seek and choose guardians other than one's own parents and to be legally dependent on them.
11. The right to do, in general, what any adult may legally do. See John Holt, *Escape from Childhood* (Middlesex: Penguin Books, 1974).

47 Peleg 2019 (n 8) 51-52.

48 Richard Evan Farson, *Birthrights* (New York: Penguin Books, 1978); Freeman 2020 (n 8) 32; Peleg 2019 (n 8) 52.

appeared as a scholarly movement,⁴⁹ its contribution to children's rights was not insignificant. It reframed the child as not merely a human 'becoming,' but a human 'being',⁵⁰ deserving of respect as an individual within her family, community and society.⁵¹

1.4 The drafting of the Convention on the Rights of the Child – 1978 to 1989

It was within this political and social milieu that the United Nations General Assembly adopted a resolution in December 1976, proclaiming 1979 the Year of the Child to mark the 20th anniversary of the 1959 Declaration.⁵² It was not long after that the Polish delegation presented a draft convention on children's rights to the UN Commission on Human Rights in February 1978.⁵³ For the Polish delegation, an 'internationally binding instrument' would serve to 'strengthen the comprehensive care and ... well-being of children all over the world.'⁵⁴ The ambition was to adopt such a convention during the International Year of the Child, and there was an expectation that such a goal was attainable, given the well-established principles of the 1959 Declaration of the Rights of the Child.⁵⁵ There was broad support for the initiative, and the Human Rights Commission established a Working Group, 'with a view to [realize] ... the adoption of this convention by the General Assembly, if possible during the International Year of the Child.'⁵⁶ In the end, however, the Working Group would take a full decade to complete the draft Convention on the Rights of the Child. During those years, the UN Commission on Human Rights would oversee the drafting process,⁵⁷ convening over 90 Working Group sessions,⁵⁸ with State delegates,⁶⁰ non-governmental organiza-

49 Freeman 2020 (n 8) 34; see also Peleg 2019 (n 8) 44.

50 Freeman 2020 (n 8) 35; Peleg 2019 (n 8).

51 Freeman 2020 (n 8) 31.

52 UN General Assembly, 'International Year of the Child', UNGA Resolution 31/169, adopted on 21 December 1976.

53 OHCHR 2007 (n 13) Vol I, 31, 43; see also UN Doc. E/1978.34; see Doek 2018 (n 3) 6.

54 OHCHR 2007 (n 13) Vol I, 31, 32.

55 OHCHR 2007 (n 13) Vol I, 36.

56 OHCHR 2007 (n 13) Vol I, 36, 44.

57 Professor Adam Lopatka, a member of the Polish delegation to the UN Commission on Human Rights served as Chairman-Rapporteur of the CRC Working Group, elected by acclamation every year during the decade-long drafting process, see OHCHR 2007 (n 13) Vol I, 68, 79, 82, 94, 107, 115, 124, 139, 153, 164.

58 The High Commission for Human Rights convened seven CRC Working Group sessions in 1979 (14, 20, 21, 22 and 26 February and 2 March), seven CRC Working Group sessions in 1980 (22, 25, 26, 27, 28 and 29 Feb and 7 March), nine CRC Working Group sessions in 1981 (26-30 January, 3, 25, 26 and 27 February), five CRC Working Group sessions in 1982 (2, 3, 4, 8, 9 February), five CRC Working Group sessions in 1983 (24-28 January), six CRC Working Group sessions in 1984 (30 January-3 February, 2 March), six CRC

tions⁶¹ and intergovernmental organizations⁶² to jointly discuss, negotiate and achieve consensus on each of the provisions in the Convention on the Rights of the Child.⁶³

1.5 Finding common ground: The role of parents and family under the CRC

That parents and family would hold a formative role in a child's enjoyment of rights was widely accepted, if not expected, when the first draft of the

Working Group sessions in 1985 (28 January-1 February, 8 March), six CRC Working Group sessions in 1986 (27-31 January, 11 March), six CRC Working Group sessions in 1987 (26-30 January, 6 March), sixteen CRC Working Group sessions in 1988 (25 January-5 February, 7-10 March) OHCHR 2007 (n 13) Vol I, 68, 79, 82, 94, 107, 115, 124, 139, 153, 164.

59 The UN General Assembly, under UNGA Resolution 42/101 requested the Secretary-General to authorize additional meetings for the CRC Working Group in 1988 and 1989, to enable the completion and adoption of the draft UN Convention in 1989. In 1988, the CRC Working Group held 22 meetings from 25 January to 5 February, see UN Commission on Human Rights, 'Report of the working group on a draft convention on the rights of the child', 6 April 1988, UN Doc. E/CN.4/1988/28, para 1.

The CRC Working Group convened 23 meetings from 28 November to 9 December 1988, and 21, 22 and 23 February 1989, for the purposes of completing the second reading and adopting the draft UN Convention, see UN Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child,' 2 March 1989, UN Doc. E/CN.4/1989/48, paras 1 and 2.

60 According to Doek, the 53 State delegations of the CRC Working Group were representatives from States members of the UN Commission on Human Rights. The membership of the UN Commission on Human Rights rotated over the decade-long CRC drafting process, and as such, it affected the continuity of States attending the CRC Working Group meeting, see Doek 2018 (n 3).

61 A coalition of 50 non-governmental organizations was formed in 1983, and became known as the *Ad Hoc NGO Working Group*. Led by Nigel Cantwell, the *Ad Hoc NGO Working Group* would come to play a pivotal role, not only in moving the CRC drafting process forward, but also in advancing new rights and protections specific to children, such as standards for school discipline, encouragement of breastfeeding, and specific measures for the recovery and rehabilitation of child victims of sexual and other exploitation, trafficking and torture. See Cynthia Price Cohen, 'The Role of Nongovernment Organizations in the Drafting of the Convention on the Rights of the Child' (1990) 12(1) *Human Rights Quarterly* 137-147, 142-144; Nigel Cantwell, 'Conventionally Theirs: An Overview of the Origins, Content and Significance of the Convention on the Rights of the Child' (1992) 56(4) *Social Education* 208-210; Nigel Cantwell, 'Words that Speak Volumes: A short history of the drafting of the CRC' in J. Connors, J. Zermatten, & A. Panayotidis (eds) 18 *Candles: The Convention on the Rights of the Child Reaches Majority* (Geneva: Institut international des droits de l'enfant (IDE), 2007) 21-29.

62 A number of international organizations were actively involved in the Working Group sessions, including the United Nations Children's Fund (UNICEF), the World Health Organization (WHO), the International Labour Organization (ILO), the United Nations Education, Scientific and Cultural Organization (UNESCO), the International Committee of the Red Cross (ICRC), see Doek 2018 (n 3); see also Tobin 2019 (n 16).

63 Doek 2018 (n 3); Alston, Tobin and Darrow 2005 (n 7); Van Bueren 1995 (n 13).

Convention was tabled in 1978. Commenting on the original Polish draft, Member States voiced concerns over the rights of parents in adoption,⁶⁴ the rights of working parents,⁶⁵ and the importance of supporting parents to ensure 'the interests and welfare of the child'.⁶⁶ The World Health Organization commented on the need for more 'detailed provisions on the obligations of parents, both as individuals and ... of the family' and the support that would be needed for 'the promotion of child growth and development'.⁶⁷ Finland suggested that States should provide financial support to parents,⁶⁸ while France,⁶⁹ Greece⁷⁰ and Sweden⁷¹ drew attention to the importance of recognising fathers in the care and upbringing of children.⁷²

At the request of the Polish Delegation, the International Commission of Jurists convened a conference in Warsaw⁷³ in 1979, issuing a 'Statement of Principles on the Legal Protection of the Rights of the Child'.⁷⁴ It affirmed the broad consensus that any international instrument on the rights of the child would need to recognise and support parents and family to further children's realization of rights. Principle 1 recognised that, '[T]he State has an important

64 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Submission of Barbados, para 2, 7.

65 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Sweden, para 6, 17.

66 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Zambia, para 3, 19.

67 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, World Health Organization, para 2, 21.

68 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Finland, 34.

69 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, France; see also OHCHR 2007 (n 13) Vol 1, 498.

70 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Greece; see also OHCHR 2007 (n 13) Vol 1, 499.

71 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Sweden; see also OHCHR 2007 (n 13) Vol 1, 500.

72 UN Commission on Human Rights, 'Question of a Convention on the Rights of the Child: Report of the Secretary-General' 27 December 1978, UN Doc. E/CN.4/1324, Sweden, Greece, Society for Comparative Legislation.

73 Fifty delegates representing 18 States from Eastern and Western Europe attended the ICJ Warsaw Conference: Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Romania, USSR and Yugoslavia, Austria, Belgium, France, German Federal Republic, Ireland, Italy, Netherlands, Norway, Sweden, Switzerland and the United Kingdom, see OHCHR 2007 (n 13) Vol 1, 50.

74 OHCHR 2007 (n 13) Vol I, 51-52.

responsibility to secure the Rights of the Child through support to the family in need⁷⁵ while Principle 2 called on the ‘State [to] set out clearly what is required of parents to ensure the welfare of the child in society, and also how the State and organizations and individuals in society propose to assist parents in the upbringing of their children.’⁷⁶

When the Polish delegation returned a revised draft in October 1979, in what would become the working framework for the CRC, there was a marked increase in the respect accorded to parents and families.⁷⁷ The thrust of these early discussions revealed not only a common interest, but a clear intention to recognise and support parents and other carers in order to further children’s realization and enjoyment of rights under the CRC. Over the decade-long drafting process, however, the CRC Working Group would grapple with how to accord respect to parents and other carers in a manner that not only secured children’s enjoyment of rights but also enabled their exercise of rights as independent rights-holders under the CRC. In the end, when the draft CRC was adopted in 1989, it referenced parents and other carers over 70 times within its preamble and provisions, consolidating their role as rights-holders and duty-bearers in children’s enjoyment and exercise of rights under the Convention.⁷⁸

1.6 Article 5: Attempting to ‘strike a delicate balance’

As early as 1981, the CRC Working Group took notice of a possible tension that could arise between a parent’s legitimate exercise of rights, and a child’s evolving autonomy in the exercise of rights under the CRC. The delegation from Denmark remarked, ‘it was not sufficient ... that the child has the right to express his opinion in matters concerning his own person ... the child should *as soon as possible have an influence in matters concerning his person*’ [emphasis added].⁷⁹ To this end, the Danish delegation proposed a separate provision

⁷⁵ OHCHR 2007 (n 13) Vol I, 51-52.

⁷⁶ OHCHR 2007 (n 13) Vol I, 51-52.

⁷⁷ For example, article 8(1), a new addition to the revised draft stated, ‘The duty of bringing up the child shall lie equally with both the parents ... guided by his best interests’. Article 15, also a new addition recognised the responsibilities of parents ‘within their financial possibilities and powers, [to] secure conditions of living necessary for a normal growth of the child.’ See Resolution on the ‘Question of a convention on the rights of the child’ 10 October 1979, UN Doc. E/CN.4/1349.

⁷⁸ Roberta Ruggiero, Diana Volonakis and Karl Hanson, ‘The inclusion of “third parties”’: the status of parenthood in the Convention on the Rights of the Child’ in E. Brems, E. Desmet and W. Vanderhole (eds) *Children’s Rights Law in the Global Human Rights Landscape* (London: Routledge, Taylor and Francis, 2017) 85. See Chapter 2, Table 1.

⁷⁹ UN Commission on Human Rights, ‘Report of the Working Group,’ (1981) E/CN.4/L.1575, para 75.

... Parents or other guardians have the right and duty to decide in matters concerning the person of the child. *But the child shall, as soon as possible, have an influence in such matters. As the child gets older, the parents or the guardians should give him more and more responsibility for personal matters with the aim of preparing the child for the life of a grown-up* [emphasis added].⁸⁰

Though the draft text was not seriously considered at the time, it likely sowed the seeds for a discussion that would emerge some three years later in 1984, when the CRC Working Group contemplated children's right to freedom of thought, conscience and religion.

As discussions unfolded, it became apparent that children's religious rights had historically been subsumed into the rights of their parents.⁸¹ Working Group members felt strongly that the draft convention should break from existing international law and recognise an independent right to freedom of religion for a child within the family.⁸² The delegation from Canada proposed a draft text for article 7*bis* (article 14(2)), which would incorporate the phrase 'evolving capacities of the child' as a basis to recognise a child's evolving autonomy in the exercise of freedom of religion under international law.⁸³ Though the meaning of 'evolving capacities' was never directly discussed, it is likely that the intention was to affirm children's status as primary rights-holders, whose voice and agency, even if not determinative, would be listened to and respected by those adults exercising authority over their everyday lives.⁸⁴

The issue of a child's evolving capacities resurfaced again in 1987, when the Working Group discussed but did not adopt article 7*ter* relating to the civil and political rights of the child – freedom of expression, freedom of association and peaceful assembly, and right to privacy. As delegates contemplated replicating sub-paragraph 14(2) within article 7*ter*, the delegation from Norway spoke of a 'need for a general provision dealing with the evolving capacities of the child'.⁸⁵ Canada supported Norway, expressing a 'wish that the principle [of evolving capacities] ... be dealt with in a comprehensive manner through a general article'.⁸⁶ The representatives of Argentina and Sweden

⁸⁰ Ibid, para 75.

⁸¹ OHCHR 2007 (n 13) Vol I, 455.

⁸² United Nations Commission on Human Rights, 'Report of the Working Group to the Commission on Human Rights' (1984) E/CN.4/1983/62, paras 15, 16; OHCHR 2007 (n 13) Vol I, 455.

⁸³ Ibid, 4; OHCHR 2007 (n 13) Vol I, 455

⁸⁴ John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford: Oxford University Press, 2019).

⁸⁵ United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child' (1987) E/CN.4/1987/25, para 115

⁸⁶ Working Group Report 1987, para 115

also voiced similar concerns, calling for a general provision to recognise the child's evolving capacities in the exercise of all rights under the draft convention.⁸⁷ However, representatives from the United States of America and Germany voiced concern that any recognition of a child's evolving capacities could undermine the role of parents and family.⁸⁸

In 1988, Australia, Austria, the Netherlands and the United States of America tabled a draft for a general provision on the evolving capacities of the child,⁸⁹ which the Australia delegation explained, would 'incorporate into the convention two important general concepts: (a) the evolving capacities of the child, and his or her rights as enumerated in the draft convention, and (b) the rights and duties of the parents who raised the child, who provided guidance to and took primary responsibility for the child.'⁹⁰ The feeling was that such a provision could strike a 'delicate balance between the rights of the child and the correlative rights of parents';⁹¹ and by placing emphasis on the *evolving* capacities of the child, parents would still have an important role to play.⁹²

When the text of article 5 was adopted during the second reading in 1989, it was labelled a 'general qualifying provision',⁹³ and placed among the first five provisions to signify its broader function in the interpretation and implementation of all other provisions under the CRC⁹⁴

Article 5. States parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.⁹⁵

87 Working Group Report 1987, para 115, 117.

88 Working Group Report 1987, para 101; United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1988) E/CN.4/1988/28, para 34.

89 Working Group Report, 1988, para 27

90 Working Group Report 1988, para 28

91 Working Group Report 1988, para 30.

92 Working Group Report 1988, para 30.

93 OHCHR 2007 (n 13) Vol 1, 189; Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin?' (2018) 25 International Journal of Children's Rights 285-306.

94 Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 1999).

95 Article 5, United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S. 3 ('CRC')

2 PROBLEM STATEMENT: THE ENIGMA OF ARTICLE 5 UNDER THE CRC

Article 5 is an innovation of the CRC.⁹⁶ It has no antecedent and has not been replicated in any subsequent regional or international child rights instruments.⁹⁷ Even the African Charter on the Rights and Welfare of the Child, which mirrors so many of the provisions in the Convention has no equivalent to article 5 of the CRC.⁹⁸

Broadly, article 5 is understood as a mediating provision,⁹⁹ navigating the triangular relationship between the State, the child and the child's carers. In practical terms, however, it consolidates the role of a wide range of carers (formal and informal) as rights-holders and duty-bearers, recognising that children will likely rely on persons beyond their parents (or legal guardians) for guidance and direction in their everyday lives.¹⁰⁰

Though the need for such a provision may appear obvious,¹⁰¹ the unorthodox nature of article 5 has posed a challenge for States seeking to incorporate and implement its legal framework within domestic law, jurisprudence and policy.¹⁰² At the crux of article 5 is the parent-child relationship. It challenges traditional models of parenting, which were historically framed in proprietary terms. In their place, it offers a conception of parenting that is based on mutual respect, collaboration, and trust, likening the role of a parent to that of a 'trustee' or 'fiduciary'. Parents are no longer seen as exclusive rights-holders over their child, but duty-bearers to their child, in the child's enjoyment and exercise of rights under the CRC.¹⁰³ Brems, Desmet and Vandenhoele suggest the inclusion of (formal and informal) carers as both rights-holders and duty-bearers is an innovation of the CRC: it may hold promise for other branches of human rights, such as disability rights or the rights of elderly persons, both of which also rely on caregiving relationships for the implementation of rights.¹⁰⁴ However, as Van Bueren points out, the framework of article 5 'is

96 Garton Kamchedzera, 'Article 5: The Child's Right to Appropriate Guidance and Direction' in André Alen, Johan Vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans, Mieke Verheyde, and Bruce Abramson (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2012).

97 Tobin and Varadan 2019 (n 84) 159.

98 Ibid, 159.

99 OHCHR 2007 (n 13) Vo. I, 360; See also Working Group Report 1988 (n 88) para 32.

100 Ruggiero, Volonakis and Hanson 2017 (n 78) 85.

101 Dominic McGoldrick, 'The United Nations Convention on the Rights of the Child', (1991) 5 *International Journal of Law and the Family* 132, 138; Van Bueren 1995 (n 13); see also Tobin and Varadan 2019 (n 84).

102 Van Bueren 1995 (n 13) 50; McGoldrick 1991 (n 101) 138.

103 Tobin and Varadan 2019 (n 84) 161.

104 Eva Brems, Ellen Desmet and Wouter Vanderhole, 'Children's rights law and human rights law: analysing present and possible future interactions' in E. Brems, E. Desmet and W. Vanderhole (eds) *Children's Rights Law in the Global Human Rights Landscape* (London: Routledge, Taylor and Francis, 2017) 2-5.

bound to be problematic in implementation¹⁰⁵; what right of action would a child have against parents who fail to provide ‘appropriate direction and guidance’?¹⁰⁶ McGoldrick warns that its ‘implementation is fraught with difficulty because those charged with providing “appropriate direction and guidance” to the child ... may well have an interest, personal or institutional in ensuring that the child does not exercise its rights.’¹⁰⁷ For Detrick and Alston, the challenge lies in articulating the scope and function of article 5: it does not constitute a comprehensive recognition of the rights and responsibilities of parents and other carers, nor does it ‘impose duties on parents and other persons mentioned, as an international convention cannot purport to impose, directly, any duties upon entities other than its States parties.’¹⁰⁸

It is likely for these reasons that article 5 has remained something of an ‘enigma’¹⁰⁹ in the 30 years since the CRC was adopted.¹¹⁰ It has been called ‘unique’,¹¹¹ ‘ground-breaking’,¹¹² ‘innovative’¹¹³ and ‘pivotal’,¹¹⁴ making a ‘vital contribution’¹¹⁵ to the realization of all rights within the CRC. The CRC Committee has described article 5 as holding ‘special relevance’ for the implementation of the right to be heard (article 12),¹¹⁶ and one of two provisions with ‘all-embracing relevance’ in the implementation of article 19.¹¹⁷ The CRC Committee has also recognised article 5 as a key element in a holistic

105 Van Bueren 1995 (n 13) 50.

106 Van Bueren 1995 (n 13) 50.

107 McGoldrick 1991 (n 101) 138; Van Bueren 1995 (n 13) 49-50.

108 Philip Alston, ‘The Legal Framework of the Convention on the Rights of the Child’ (1992) 91/2 *United Nations Bulletin of Human Rights: The Rights of the Child* 1-15, 13-14.

109 Elaine Sutherland, The Enigma of Article 5 of the United Nations Convention on the Rights of The Child’ (2020) 28(3) *International Journal of Children’s Rights* 447-470. DOI:10.1163/15718182-02803008

110 Brian Sloan and Claire Fenton-Glynn, ‘Editorial’ (2020) 28 *International Journal of Children’s Rights* 439; see also Claire Fenton-Glynn and Brian Sloane (eds) *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Leiden: Brill Nijhoff, 2021).

111 Kamchedzera (n 96) 6.

112 Aoife Daly, ‘Assessing Children’s Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child’ (2020) 28 *International Journal of Children’s Rights* 471-499. DOI:10.1163/1571818202803011

113 Kamchedzera (n 96) 6.

114 Ursula Kilkelly, ‘“Evolving Capacities” and “Parental Guidance” in The context of Youth Justice’ (2020) 28 *International Journal of Children’s Rights* 500-520. DOI:10.1163/15718182-02803004

115 Gerison Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti, 2005); see also Sutherland 2020 (n 109).

116 CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), 29 May 2013, CRC/C/GC/14, para 59.

117 CRC Committee, General comment No. 13 (2011): The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras 64, 66

child rights approach.¹¹⁸ Yet, despite all of this, and being labelled ‘a general qualification clause’¹¹⁹ that ‘serve[s] the function of providing an overall framework, or umbrella’¹²⁰ for the implementation of other substantive provisions, article 5 is not a general principle of the CRC.¹²¹ Nor has article 5 been given much priority by the CRC Committee in the Reporting Guidelines for monitoring the implementation of the CRC.¹²² Between 1993 and 2020, the CRC Committee referenced article 5 just eight times in its 568 Concluding Observations issued to States parties.¹²³

118 General comment No. 13, para 59; CRC Committee, General comment No. 21 (2017) on children in street situations, 21 June 2017, CRC/C/GC/21, para 11.

119 During the Technical Review of the UN Convention, UNICEF referred to Article 5 as a ‘general qualification clause,’ OHCHR 2007 (n 12) Vol I, 189; see Hanson and Lundy 2017 (n 93) 288.

120 Philip Alston, ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *International Journal of Law and the Family* 1; Detrick 1999 (n 94), 115-124; Van Bueren 1995 (n 13) 49-51.

121 Article 5 was not mentioned during the CRC Committee discussion on the general principles of the CRC in its first session, see D. Goodman, ‘Analysis of the First Session of the Committee on the Rights of the Child’ (1995) 1 *Netherlands Quarterly for Human Rights* 43; see also B. Abramson, ‘Article 2. The Right of Non-Discrimination’, in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2008).

122 See United Nations Committee on the Rights of the Child (1996), General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, paragraph 1(b), of the Convention, adopted by the Committee at its 343rd meeting (thirteenth session) on 11 October 1996, UN Doc. CRC/C/58 (Reporting Guidelines, 1996); United Nations Committee on the Rights of the Child (2005), Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child, UN Doc. CRC/C/58/Rev. 1; United Nations Committee on the Rights of the Child (2010), CRC Treaty Specific Reporting Guidelines, Harmonised According to the Common Core Document, UN Doc. CRC/C/58/Rev. 2; United Nations Committee on the Rights of the Child (2015), Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child, UN Doc. CRC/C/58/Rev. 3. See also Goodman 1995 (n 121) 49.

123 Between 1993 and 2020, the CRC Committee referenced article 5 in 8 instances out of its 568 concluding observations: CRC Committee, Concluding Observations: Holy See, 27 November 1995, CRC/C/15/Add.46, para 13; CRC Committee, Concluding Observations: Luxembourg, 24 June 1998, CRC/C/15/Add.92, para 13; CRC Committee, Concluding Observations: Democratic People’s Republic of Korea, 24 June 1998, CRC/C/15/Add.88, para 18; CRC Committee, Concluding Observations: Sierra Leone, 24 February 2000, CRC/C/15/Add.116, para 49; CRC Committee, Concluding Observations: Cyprus, 2 July 2003, CRC/C/15/Add.205, para 37-38; CRC Committee, Concluding Observations: Saint Lucia, 21 September 2005, CRC/C/15/Add.258, para 36-37; CRC Committee, Concluding Observations: Oman, 29 September 2006, CRC/C/OMN/CO/2, para 37(e); CRC Committee, Concluding Observations: Malaysia, 25 June 2007, CRC/C/MYS/CO/1, para 51.

Increasingly, scholars have questioned the CRC Committee's treatment of article 5, suggesting its scope and function¹²⁴ warrant further consideration as a general principle,¹²⁵ an 'umbrella principle'¹²⁶ and a 'cross-cutting standard'.¹²⁷ That said, the CRC Committee's treatment of article 5 may simply be a function of the CRC reporting process itself,¹²⁸ and the relative infancy of the CRC Communications procedure.¹²⁹ As Sutherland puts it: 'Like the capacities of children themselves, our understanding of article 5 and the scope for its application are evolving.'¹³⁰

Whatever the reason, the unusual and somewhat taciturn response to article 5 has had implications for children's everyday enjoyment and exercise of rights, both in how parents and carers view their decision-making authority, and how children's voice and agency are valued in the everyday decisions affecting their lives. In the context of medical research, where a child's informed consent is generally obtained through a proxy, the parent-child relationship, and indeed, how a proxy exercises its decision-making authority will have a direct bearing on how a child's voice and agency is respected, valued and supported in the research setting.

3 RESEARCH QUESTION

This dissertation undertakes a legal doctrinal analysis of article 5 of the CRC. Drawing on medical research as our case study, I contemplate the scope of article 5 and its implications for children's enjoyment and exercise of rights in the informed consent process. This dissertation is guided by a central research question and five sub-research questions.

What is the scope, content and function of article 5 of the CRC? And, what role does it hold for children's enjoyment and exercise of rights under the CRC?

- 1) *What is the nature of the right created under article 5 of the CRC?*
- 2) *What is the nature of the legal obligation created under article 5 of the CRC?*

124 Jaap Doek, 'The CRC General Principles' in *18 Candles: The Convention on the Rights of the Child Reaches Majority* (Geneva: Institut International des Droits de l'Enfant, 2007) 31; Hanson and Lundy 2017 (n 93).

125 John Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundation and Strategic Considerations' in A. Invernizzi and J. William (eds), *Human Rights of Children: From Visions to Implementation* (London: Routledge Ashgate, 2011) 61, 71-72.

126 Van Bueren 1995 (n 13) 51.

127 Hanson and Lundy 2017 (n 93) 299-302.

128 Sutherland 2020 (n 109) 462.

129 Sutherland 2020 (n 109) 467.

130 Sutherland 2020 (n 109) 468.

- 3) How does article 5 function as a framework to identify a child's carers under the CRC?
 - a. Does article 5 provide a framework to recognise a broad range of carers and informal care arrangements under the CRC?
 - b. Does article 5 provide a framework to support, assist and protect diverse family structures and informal care arrangements under the CRC?
 - c. What implications does article 5 (and the CRC framework) hold for the role of 'proxy' in informed consent in paediatric clinical research, particularly in lower- and middle-income countries?
- 4) How does article 5 function as a framework to navigate the parent-child relationship under the CRC?
 - a. What is the meaning of 'appropriate guidance and direction' under article 5?
 - b. What is the meaning of guidance and direction provided 'in a manner consistent with the evolving capacities of the child'?
 - c. What implications does article 5 (and the CRC) hold for decision-making in the informed consent process in medical research involving children?
- 5) What is the function of the concept of 'evolving capacities of the child' under the CRC and what is its relationship to article 5?

4 RESEARCH METHODOLOGY AND METHODS

Human rights legal scholarship has been criticised for its lack of rigor in research methodology.¹³¹ This is no less true in the legal discourse on children's rights. As Tobin observes in the *Commentary on the UN Convention on the Rights of the Child*, '[t]oo often engagement with the Convention is unaccompanied by any explanation as to the methodology being employed to generate the meaning of its provisions.'¹³² The absence of any 'agreed constraints on the interpretative process' introduces a 'real risk of divergence and disagreement' over the scope, meaning and function of provisions within the CRC.¹³³

To counter these concerns, I have adopted a transparent interpretative methodology to guide the doctrinal analysis of article 5. For clarity, I distinguish between research methodology and research methods.¹³⁴ Research methodology explains the theoretical approach, or conceptual framework that drives the research inquiry, and the assumptions that underpin its analysis.

131 Fons Coomans, Fred Grünfeld and Menno Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32(1) *Human Rights Quarterly*, 179-186, 180; see also Bård A. Andreassen, Hans-Otto Sano and Siobhán McNerney-Lankford, 'Human rights research method' in B.A. Andreassen, H. Sano & S. McNerney-Lankford (eds) *Research Methods in Human Rights: A Handbook* (Cheltenham: Edward Elgar Publishing Ltd, 2017) 1-13, 2.

132 Tobin 2019 (n 16) 1-20, 9.

133 Ibid, 9-10.

134 Andreassen, Sano and McNerney-Lankford, 2017 (n 131) 1-13, 1, 2.

Research methods describe the specific tools and steps taken to operationalize the research methodology and generate the research output.¹³⁵

4.1 Research methodology

As a starting point, a legal doctrinal approach is used as the primary research methodology.¹³⁶ Traditional doctrinal scholarship has generally focused on the meaning and content of norms expressed in the law,¹³⁷ relying on rules, principles and standards derived from legal instruments or jurisprudence to interpret the meaning or possible meanings of a legal text. The emphasis is on coherence – maintaining fidelity to the rules, principles and standards that underpin a legal system, rather than critiquing the political content, value biases and other operating assumptions embedded in the norm itself.¹³⁸ In human rights law, legal doctrinal analysis continues to be ‘a cornerstone of human rights research methodology’,¹³⁹ with its focus on the process of ‘identifying the applicable human rights norms, their legal nature and scope of application and their correct interpretation.’¹⁴⁰ It is likely for this reason that human rights research methodology is often criticised for its overly ‘internal approach’ that fails to question the ‘validity, coherence, legitimacy and objectivity of the normative baselines’ that underlie human rights.¹⁴¹ There have also been concerns that a purely doctrinal approach risks treating law as a ‘closed system of logic’, which views non-legal sources as either unnecessary or undermining of the integrity of legal analysis.¹⁴² With these concerns in mind, I endeavour to apply an interpretative methodology that is both grounded in doctrinal analysis, yet also cognizant of the diversity of communities, perspectives and disciplines that will likely be relevant in mapping out a meaning for article 5 of the CRC.¹⁴³

¹³⁵ Ibid, 1-2.

¹³⁶ Siobhán McNerney-Lankford, ‘Legal methodologies and human rights research: challenges and opportunities’ in B.A. Andreassen, H. Sano & S. McNerney-Lankford (eds) *Research Methods in Human Rights: A Handbook* (Cheltenham: Edward Elgar Publishing Ltd, 2017) 39-67, 41; see also Christopher McCrudden ‘Legal research and the social sciences’ (2006) 122 *Law Quarterly Review* 632-650, 634-635.

¹³⁷ Martin Scheinin, ‘The art and science of interpretation in human rights law’ in B.A. Andreassen, H. Sano & S. McNerney-Lankford (eds) *Research Methods in Human Rights: A Handbook* (Cheltenham: Edward Elgar Publishing Ltd, 2017) 17-37, 20.

¹³⁸ McNerney-Lankford 2017 (n 136) 39-67, 43.

¹³⁹ Andreassen, Sano and McNerney-Lankford 2017 (n 131) 7.

¹⁴⁰ Scheinin 2017 (n 137) 20.

¹⁴¹ Ibid, 42.

¹⁴² Tobin 2019 (n 16) 14; see also John Tobin ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ (2010) 23 *Harvard Human Rights Journal* 1-50, 33.

¹⁴³ Ibid.

4.1.1 Rules and principles of treaty interpretation under international law

It bears reminding that the CRC is an international treaty, and as such falls within the four sources of international law enumerated under the Statute of the International Court of Justice.¹⁴⁴ This is important because any interpretative analysis of the CRC will need to be guided by principles and rules of interpretation applicable to all treaties under public international law.¹⁴⁵ To this end, the Vienna Convention on the Law of Treaties¹⁴⁶ (VCLT) serves as the starting point for our interpretative methodology of article 5 of the CRC.

(a) The Vienna Rules

Article 31 of the VCLT is identified as the ‘General Rule’: it requires that an ordinary meaning be applied to terms used in a treaty, in light of their context and the object and purpose of the treaty.¹⁴⁷ Article 31(2) elaborates on what is meant by context, clarifying that the whole text of the treaty (preamble as well as annexes) and any related or separate agreements adopted or accepted should be considered.¹⁴⁸ Scheinin explains that a treaty provision should be interpreted ‘according to its own linguistic expression but also taking into account that all other provisions in a treaty ... will affect how that linguistic expression is to be understood.’¹⁴⁹ Article 31(3) further provides that ‘subsequent practice’ related to the application of the treaty and which establishes agreement on the interpretation of the treaty should also be taken into consideration.¹⁵⁰ Article 32 allows for recourse to preparatory work (‘travaux’) and treaty conclusions (reservations, declarations) as a ‘supplementary means of interpretation.’¹⁵¹ But as Scheinin clarifies, ‘the additional means of interpretation mentioned in [article 32] are secondary in nature’ and should only be ‘resorted to when an effort under Article 31 has left the meaning of the treaty provision ... “ambiguous or obscure” or has led to a “manifestly absurd or unreasonable” result.’¹⁵²

Gardiner warns that the VCLT should not be treated as ‘a step-by-step formula for producing an irrebuttable interpretation in every case.’¹⁵³ It provides ‘key principles’ that must be supplemented by ‘interpreters’ own judg-

144 Article 38(1), Statute of the International Court of Justice, 26 June 1945, 993 U.S.T.S. 25.

145 Scheinin 2017 (n 137) 21; Tobin 2010 (n 142).

146 Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S. 331. (‘VCLT’)

147 R. Gardiner, ‘Part I: Overview, History, Materials and Dramatis Personae – Chapter 1 A Single Set of Rules of Interpretation’ in *Treaty Interpretation*, 2nd ed (Oxford: Oxford University Press, 2015), 5-57, 8; Scheinin 2017 (n 137) 23.

148 Gardiner 2015 (n 147) 8.

149 Scheinin 2017 (n 137) 23.

150 Article 31(3), VCLT.

151 Gardiner 2015 (n 147) 8.

152 Scheinin 2017 (n 137) 24.

153 Gardiner 2015 (n 147) 10.

ment, insight and ... experience of legal processes.¹⁵⁴ While there is 'a certain inherent logical sequence' in the rules, it is understood that the 'elasticity of the general rule makes it incapable of producing *the* determinate meaning of a treaty.'¹⁵⁵ The Vienna Rules should thus be viewed as a framework to guide the interpretative process¹⁵⁶ rather than 'a straightjacket that constrains the application and interpretation of a treaty according to its own rules and procedures.'¹⁵⁷

(b) *Special rules for human rights treaties*

It has been suggested that human rights treaties are a special category of treaties, warranting their own unique interpretative methodology.¹⁵⁸ As Tobin explains, human rights instruments often create obligations that extend well beyond States parties, requiring engagement with a broad range of non-State actors to achieve a workable and practicable meaning for the implementation and realization of a human right.¹⁵⁹ Moreover, unlike other areas of international law, there is no adjudicative body to enforce State compliance in human rights instruments.¹⁶⁰ For Scheinin, however, it is not so much that human rights treaties are unique, but that the purview of the VCLT is too narrow, written for a singular 'ideal type' of treaty – a reciprocal agreement between sovereign States who are both beneficiaries and duty-bearers, with no third parties affected and no international monitoring bodies involved.¹⁶¹

Scheinin suggests that it is possible to reconcile the VCLT framework with the unique characteristics of international human rights instruments, by giving more consideration to how States comply with human rights treaties. First, in the absence of an international monitoring mechanism, 'whenever a judicial or quasi-judicial body is created to monitor state compliance with a treaty', it should be seen as possessing '*inherent power* to interpret the treaty at the level of international law and ... with considerable authority in respect of individual states that are legally bound by the treaty.'¹⁶² Second, Scheinin further suggests '[t]here are many good reasons to accept' that the decisions and institutionalized practices of these judicial or quasi-judicial bodies constitute 'subsequent practice that establishes the correct interpretation of the provisions of the treaty in question'.¹⁶³ Such is the case with the European Convention of Human Rights where there is an established and ongoing

154 Gardiner 2015 (n 147) 452.

155 Tobin 2010 (n 142) 3.

156 Tobin 2010 (n 142) 3, 7.

157 Scheinin 2017 (n 137) 22; Tobin 2010 (n 142).

158 Gardiner 2015 (n 147) 105, 474-477; Tobin 2010 (n 142) 9-10.

159 Tobin 2010 (n 142) 9-10.

160 Tobin 2010 (n 142) 1.

161 Scheinin 2017 (n 137) 26.

162 Scheinin 2017 (n 137) 29.

163 Scheinin 2017 (n 137) 29-30.

agreement among State parties to accept the case-law generated by the European Court of Human Rights as both an authoritative statement and correct interpretation of the provisions of the Convention. This may explain how certain judgements have come to be viewed as 'special rules' developed by the European Court, (and adopted by the Inter-American Court) on the interpretation of human rights treaties. Specifically, three broad principles or 'special rules' of interpretation have been developed, which may be summarised as follows:

- (1) *Non-restrictive* – an interpretation that is most appropriate in order to realise the aim and achieve the objective of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties;
- (2) *Effectiveness* – an interpretation that will make its safeguards practical and effective;
- (3) *Dynamic* – an interpretation that is 'dynamic' and responds to evolving standards.

However, whether the role and function of a UN treaty monitoring body, such as the UN Committee on the Rights of the Child, should be likened to the European Court of Human Rights is questionable. Tobin suggests the presence of these 'special rules' – non-restrictive interpretation, effectiveness and dynamic interpretation – reflect a 'practical application and understanding of how the [VCLT] general rule' namely the good faith requirement and object and purpose test, are implemented in the specific domain of international human rights instruments.¹⁶⁴

That the UN treaty-monitoring bodies have relied on principles of non-restrictiveness, effectiveness and dynamic interpretation in their own interpretation of States' obligations under UN human rights treaties lends some support to the suggestion that the European Court of Human Rights, possesses inherent authority to interpret human rights treaties, and indeed holds weight as a legal authority on the interpretation of the European Convention of Human Rights.¹⁶⁵ But this does not resolve the question of whether a UN treaty-body,

¹⁶⁴ Tobin 2010 (n 142) 22.

¹⁶⁵ See UN Human Rights Committee, 'General Comment No. 6 (The right to life)', 30 April 1982, HRI/GEN/Rev.7, paras 4-5: States parties should take *specific and effective measures* to prevent the disappearance of individuals ... the right to life has too often been narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner ...'; see also UN Committee on the Elimination of Discrimination against Women, 'General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)', thirtieth session, 2004, paras 3, 4, 8: The Convention is a dynamic instrument ... a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men ... Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women'; see also Tobin 2010 (n 142) 22.

such as the CRC Committee, holds similar interpretative authority in its role monitoring States' implementation of legal obligations under the CRC.

4.1.2 *An interpretative framework for the CRC*

According to Scheinin then, it may be possible to derive a legal methodology for interpreting the CRC, that defers to the VCLT framework, yet also takes into account the unique characteristics of human rights treaties.

For Tobin, however, a more robust framework is needed, which relies on persuasion rather than a prescribed 'right way' to interpret international human rights instruments.¹⁶⁶ Because international human rights treaties lack a legally binding adjudicative mechanism, Tobin argues that other avenues are needed to secure compliance amongst States parties. Interpreting human rights treaties 'is ultimately an act of persuasion – an attempt to convince the relevant interpretative community that a particular meaning from a suite of potential meanings is the most appropriate interpretation to adopt.'¹⁶⁷ The interpretative process thus centres around an understanding that 'the accepted meaning of any term at a particular point in time will be that which attracts and achieves dominance over all other alternative understandings within the relevant interpretative community'¹⁶⁸ To this end, Tobin proposes three additional considerations in the interpretative process – practicality, coherence and context-sensitivity.

(a) *An interpretation that is clear and practical*

An interpretation must be clear and practical: 'the interpretative process must be directed toward achieving what might be described as descending levels of abstraction (or increasing levels of clarity) as to the context of a human rights.'¹⁶⁹ The aim is to provide guidance to States seeking 'to transform an abstract concept ... into reality', while encouraging 'a certain level of reflection in the interpretative process.'¹⁷⁰ The emphasis should be on identifying techniques that will achieve greater clarity and practicability: '[t]he interpretation offered must be "socially manageable" and "action guiding" rather than being so ambitious and demanding that implementation becomes impossible even with the best of intentions.'¹⁷¹

¹⁶⁶ Tobin 2010 (n 142) 14.

¹⁶⁷ Tobin 2010 (n 142) 7.

¹⁶⁸ Tobin 2010 (n 142) 7.

¹⁶⁹ Tobin 2010 (n 142) 25.

¹⁷⁰ Tobin 2010 (n 142) 26, 28.

¹⁷¹ Tobin 2019 (n 16) 13.

(b) *An interpretation that is coherent*

An interpretation needs to be coherent, both in its reasoning and its application within the broader international legal system. Assessing coherence requires some reflection on the underlying reasoning justifying the interpretation and its connectedness with the interpretative work of other relevant actors, who form part of the interpretative community.¹⁷²

By drawing attention to ‘coherence in reasoning’, the aim is to encourage the ‘netting’ of a wider range of sources outside of the legal framework that may be relevant and applicable to interpretation of the CRC.¹⁷³ Such an approach challenges the historical tendency to view law as a ‘closed system of logic’ that does not take into account non-legal sources for the interpretation of law.¹⁷⁴ The nature and scope of human rights provisions often requires States to engage with a wider range of actors (beyond government) to ensure individuals are able to secure the enjoyment of their rights. This is particularly true in the context of children’s rights where adults and communities play a key role in a child’s realization of rights under the CRC. The insights of other disciplines, such as psychology, education and health, are thus critical to constructing a meaning for rights and principles that are workable and practicable and importantly, coherent in their reasoning.¹⁷⁵ A proposed interpretation ‘that only satisfies the expectations of the legal community will be of little benefit and utility if it is unable to appeal to those disciplines that actually develop and deliver the policies that impact on the lives of children.’¹⁷⁶

System coherence is not dissimilar to the principles espoused under article 31(2) of the VCLT, which favour an interpretation that aligns with the treaty as a whole (internal system coherence) and is broadly consistent with the system of international law (external system coherence).¹⁷⁷

In practical terms, internal system coherence will require that any interpretation of article 5 take into account the scope and content of other provisions of the CRC, as well as the overall object and purpose of the treaty.

External system coherence encourages an interpretation that aligns with principles and standards under the broader international legal framework. However, given that article 5 is not directly replicated in any other international instrument, in practical terms, this will likely mean that any proposed interpretation should not be inconsistent with principles and standards espoused in international human rights law more generally.¹⁷⁸

172 Tobin 2010 (n 142) 29-33.

173 Tobin 2019 (n 16) 14.

174 Tobin 2010 (n 142) 33.

175 Tobin 2019 (n 16) 14.

176 Tobin 2019 (n 16) 14.

177 Tobin 2019 (n 16) 14-15.

178 Tobin 2019 (n 16) 15.

(c) *An interpretation that is sensitive to context*

The extent to which local context or culture should sway the persuasiveness of an interpretation remains somewhat controversial. Tobin suggests the ‘margin of appreciation doctrine’ under the European Convention on Human Rights could be used as a model framework to guide local context sensitivity. Tobin argues that its ability to ensure ‘[a] means to articulate and practice ... preferred values within a multicultural democracy’ makes it an important and necessary interpretative tool for the CRC, allowing for some sensitivity to socio-political context within the State.¹⁷⁹ At the same time, context sensitivity cannot be used as a basis to undermine the object and purpose of the right in question, and the role of local custom must always be tempered with the overarching object and purpose of the CRC – to secure children’s effective enjoyment of rights under international law.

A balance must be struck, which seeks to interpret the CRC in a manner that ensures its effectiveness while still remaining sensitive to the intentions and expectations of States parties.¹⁸⁰ This will be especially important in situations where terms or issues are either undefined or omitted from the CRC.¹⁸¹ Described as ‘blind spots’ or ‘burdens of inertia’, these gaps can undermine the principle of effectiveness in the interpretation and implementation of the CRC.¹⁸² Blind spots refer to issues which were ‘overlooked or unanticipated in the drafting process but that are essential to the effective operation of the relevant provisions.’¹⁸³ Burdens of inertia refer to issues that were discussed during the drafting process but were either not included or removed from the final text as a result of disagreements or time constraints.¹⁸⁴ Where an ‘effectiveness gap’ arises, it will be important to engage a ‘creative and active’ interpretative approach with a view to constructing a meaning that ensures effectiveness in implementation, while still acknowledging that States parties will need to be persuaded to adopt the proposed meaning.¹⁸⁵ Although it may be tempting to construct a meaning that weighs strongly in favour of children’s rights, Tobin warns that the interpretative process should not be viewed as an ‘unfettered licence for inflating the terms of a treaty in such a way that the intentions and expectations of States are ignored.’¹⁸⁶

179 Tobin 2019 (n 16) 17.

180 Tobin 2010 (n 142) 44; Tobin 2019 (n 16) 18.

181 Tobin 2019 (n 16) 18.

182 Tobin 2019 (n 16) 14-15.

183 Tobin 2010 (n 142) 44.

184 Tobin 2010 (n 142) 44.

185 Tobin 2019 (n 16) 14-15; see also Nigel Cantwell and Anna Holzscheiter, ‘Article 20: Children Deprived of Their Family Environment’ in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde and B. Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff, 2008).

186 Tobin 2019 (n 16) 19.

In summation, I adopt a research methodology that is both loyal to the principles of treaty interpretation (VCLT), yet also cognizant of a need for persuasiveness, taking into account the three additional qualities proposed by Tobin. The interpretative methodology guiding the doctrinal analysis of article 5 may be summarized as follows:

- (1) Principles of treaty interpretation
 - a. The 'General Rule' of the VCLT
 - b. 'Special rules' of interpretation – non-restrictive, effectiveness and dynamic – applied to human rights instruments
 - c. The jurisprudence of the CRC Committee as the authoritative body in the interpretation and implementation of the CRC
- (2) Practicality
 - a. Assessing whether the proposed interpretation of article 5 will lead to a practicable and implementable framework in a domestic legal setting
 - b. Assessing whether the proposed interpretation takes into account the relevant communities (States and non-States) who will need to be engaged for the implementation of article 5
- (3) Coherence
 - a. Assessing whether the proposed interpretation of article 5 aligns with the relevant actors in the children's right discourse under international law
 - b. Assessing whether the proposed interpretation of article 5 aligns with the object and purpose of the CRC
- (4) Context sensitivity
 - a. Assessing whether the proposed interpretation of article 5 accommodates the diversity of cultures and communities of States parties to the CRC
 - b. Assessing whether the proposed interpretation of article 5 aligns with the broad understanding of its scope and function amongst States parties of the CRC

4.2 Research methods

Two research methods are used to operationalize the research methodology: a literary review of materials related to article 5 and the CRC, and a case study on informed consent in medical research involving children.

4.2.1 *Literary review*

A literary review serves as the main research tool for operationalizing the doctrinal analysis of article 5. The literary review embodies three legal sources. First, and somewhat obvious, it relies on the text of article 5 and the CRC.

Where needed, consideration is given to the drafting process of the CRC,¹⁸⁷ and the discussions which took place during the CRC Working Group sessions between 1979 and 1989. Second, it relies on the work of the UN Committee on the Rights of the Child as an authoritative legal source on States' legal obligations under the CRC.¹⁸⁸ To this end, it reviews and considers all of the writings of the CRC Committee related to article 5 of the CRC. This includes the following materials: (1) twenty-five General Comments issued between 2001 and 2021;¹⁸⁹ (2) five hundred and sixty-eight Concluding Observations¹⁹⁰ issued to States parties between 1993 and 2020; (3) decisions in five individual complaints submitted under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure between 2018 and 2021;¹⁹¹ (4) reports and recommendations from 23 Days of General Discussion held between 1993 and 2018;¹⁹² (5) treaty reporting guidelines issued by the CRC Committee between 1996 and 2015;¹⁹³ (6) other written materials issued

187 The two volumes on the Legislative History of the CRC issued by the UN Office of the High Commissioner for Human Rights (2007) were consulted, as well as the original versions of CRC Working Group Reports issued by the Commission on Human Rights in 1979, 1980, 1981, 1983, 1984, 1985, 1986, 1987, 1988 and 1989.

188 See articles 43, 44, and 45; see also Rule 77, UN Committee on the Rights of the Child, 'Rule of Procedure', 18 March 2015, CRC/C/Rev.4.

189 General Twenty-five General Comments were reviewed, issued between 2001 and 2021. Accessed at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

190 A total of 568 Concluding Observations were reviewed, issued by the CRC Committee between 1993 and 2020. Accessed at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=5.

191 A total of 54 decisions were reviewed, issued by the CRC Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, between 2018 and 2021. Five decisions referenced a violation of article 5 in the complaint; however the CRC Committee has not issued a decision on the merits of a violation of article 5 of the CRC: *L.H.L. and A.H.L. v Spain*, Communication No. 13/2017, CRC/C/81/D/13/2017, 17 June 2019; *X, Y and Z v Finland*, Communication No 6/2016, CRC/C/81/D/2016, 15 May 2019; *J.J., O.L., A.J. and A.S. vs Finland*, Communication No 87/2019, CRC/C/85/D/87/2019, 11 November 2020; *Y.F., F.F., T.F. and E.F. vs Panama*, Communication No 48/2018, CRC/C/83/D/48/2018, 28 February 2020; *C.R. vs Paraguay*, Communication No 20/2017, CRC/C/83/D/30/2017, 12 March 2020. Accessed at: <https://juris.ohchr.org/en/search/results?Bodies=5&sortOrder=Date>

192 The reports, discussions and recommendations from 23 Days of General Discussion, held between 1992 and 2018, were reviewed and considered. Accessed at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx>

193 The Reporting Guidelines have been revised and reissued four times (1996, 2005, 2010 and 2015). See United Nations Committee on the Rights of the Child (1996), General guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, paragraph 1(b), of the Convention, adopted by the Committee at its 343rd meeting (thirteenth session) on 11 October 1996, CRC/C/58 (Reporting Guidelines, 1996); United Nations Committee on the Rights of the Child (2005), Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child, CRC/C/58/Rev. 1; United Nations Committee on the Rights of the child (2010), CRC Treaty Specific Reporting

during special events convened by the CRC Committee.¹⁹⁴ Third, it relies on scholarly literature on article 5,¹⁹⁵ children's rights, human rights and childhood studies. The culmination of these legal sources provides the basis for the doctrinal analysis of article 5 of the CRC.

4.2.2 Case study: informed consent in medical research involving children

A case study is used as a secondary research tool to enable a deeper contemplation of article 5, and more specifically the meaning of the right to guidance and direction in the exercise of rights in the real-world setting. The case study is presented in two parts, focusing on the ethical and legal dimensions of informed consent in medical research involving children. First, I contemplate how article 5 could be applied to navigate the parent-child decision-making process in informed consent in medical research. Historically,

Guidelines, Harmonised According to the Common Core Document, CRC/C/58/Rev. 2; United Nations Committee on the Rights of the Child (2015), Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child, CRC/C/58/Rev. 3, accessed at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/5&Lang=en and https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC/C/58/REV.3&Lang=en.

194 The reports, discussions and recommendations from three CRC events were reviewed and considered. The 20th Anniversary of Adoption of the Convention on the Rights of the Child, 8-9 October 2009, accessed at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/20thAnniversary.aspx>.

The 25th Anniversary of the Convention on the Rights of the Child, Statement by Kirsten Sandberg, Chairperson of the Committee on the Rights of the Child, 20 November 2014, accessed at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRC25thAnniversary.aspx>

The CRC 30 Conference: Celebrating 30 years of the Convention on the Rights of the Child, 18-19 November 2019, accessed at: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRC30.aspx>.

195 Garton Kamchedzera, 'Article 5: The Child's Right to Appropriate Guidance and Direction' in André Alen, Johan Vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans, Mieke Verheyde, and Bruce Abramson (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2012); Claire Fenton-Glynn and Brian Sloan, 'Editorial' (2020) 28 *International Journal of Children's Rights* 444; Elaine Sutherland, 'The Enigma of Article 5 of the United Nations Convention on the Rights of the Child: Central or Peripheral?' (2020) 28 *International Journal of Children's Rights* 447; Ursula Kilkelly, '"Evolving Capacities" and "Parental Guidance" in The context of Youth Justice' (2020) 28 *International Journal of Children's Rights* 500; Mark Henaghan, 'New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 United Nations Convention on the Rights of the Child' (2020) 28(3) *International Journal of Children's Rights* 588; Gerison Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti, 2005); John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in Tobin J. and Alston P. (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019). See also, Claire Fenton-Glynn and Brian Sloane (eds) *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Leiden: Brill Nijhoff, 2021).

children were framed as vulnerable and ‘non-autonomous’ beings in medical research, with little consideration afforded to their autonomy and agency in the informed consent process. While ethical concepts such as ‘assent’ have emerged to provide a more visible platform for children’s participation, there remains ethical uncertainty and trepidation over how children’s voice, agency and autonomy should be recognised and accorded weight in the informed consent process in medical research. I contemplate how article 5 could offer a different vantage point to researchers navigating the ethical dimensions of children’s informed consent in medical research.

Second, I consider the viability of using article 5 (and the CRC) as a framework to determine who should be act as ‘proxy’ in the informed consent process in paediatric clinical research. In many lower- and middle-income countries, there are no specific laws on human subject research, and more specifically no laws on informed consent in paediatric clinical research. This has led to legal uncertainty over the designating of a child’s ‘proxy’, which in turn, has led to categories of children being presumptively excluded from clinical research. Focusing on Thailand, where there is currently no law on informed consent in children, I consider how and whether article 5 (and the CRC) could be leveraged to navigate legal uncertainties surrounding the designation of proxy in paediatric clinical research. Specifically, I contemplate whether the right to guidance and direction (under article 5) amounts to a guarantee to all children as a class of persons, a right to receive support and assistance that enables their participation in the enrolment process in medical research. I further examine the appropriateness of relying on domestic laws unrelated to human subject research, as a basis to secure children’s right to receive appropriate guidance and direction in the informed consent process in paediatric clinical research.

5 OUTLINE

This doctoral dissertation is comprised of seven chapters: an introduction, four published academic manuscripts, a discussion chapter and a brief conclusion.

In Chapter 2, ‘There’s no place like home: The role of informal carers under the UN Convention on the Rights of the Child’¹⁹⁶ I examine how informal carers have come to be recognised and supported under the CRC. I posit that while article 5 may function as a framework to enable a broad and flexible reading of ‘parent’, ‘family’ and ‘family environment’, taking into account the role of wider family members and community involved in the everyday care of the child, it does not provide a legal basis to extend direct support, assist-

196 Sheila Varadan, ‘There’s No Place Like Home: the Role of Informal Carers under the UN Convention on the Rights of the Child’ (2021) 32(1) *International Journal of Law, Policy and the Family*. DOI: <https://doi.org/10.1093/lawfam/ebab049>

ance and protection to informal carers and informal care arrangements under the CRC. This leaves open the question of how and whether the CRC framework is able to accommodate the diversity of parenting and family care arrangements, which in most parts of the world, involves extended family members and community.

In Chapter 3, 'The principle of evolving capacities under the UN Convention on the Rights of the Child'¹⁹⁷ I examine the scope and function of the concept of 'evolving capacities' within the CRC. Interrogating the CRC Committee's General Comments, I suggest that the concept of evolving capacities holds three broad functions under the CRC: (1) an enabling principle that empowers children in the exercise of their rights under the CRC; (2) an interpretative principle that ensures CRC provisions are read in a manner that accords respect to children's progressive agency in the exercise of their rights; (3) a policy principle that informs programming on children's rights. I argue that the CRC Committee's treatment of 'evolving capacities' has stretched the principle well beyond the framework of parental guidance and the scope of article 5 of the CRC. I conclude that the CRC Committee should give more consideration to how it has come to view the concept of 'evolving capacities' as a broader principle of the CRC, delinked from article 5 and the framework of parental guidance.

In Chapter 4, 'The role of parents in the proxy informed consent process in medical research involving children',¹⁹⁸ I contemplate how article 5 could offer a different vantage point to researchers navigating the proxy decision-making process in informed consent in medical research. Specifically, I suggest that article 5 offers a framework to guide the informed consent process in three ways. First, it introduces boundaries around proxy decision-makers' authority in the informed consent process. Second, it promotes a model of parent-child decision-making that is collaborative, participatory, and based on mutual respect and trust. Third, it challenges traditional perceptions of children as a non-autonomous beings, offering a different narrative, in which the child is seen as an active agent, enabled and supported in the informed consent process in research. Finally, it fosters deeper respect for a child's autonomy in the medical research setting, recognising that children's capacities need to be considered in the decision-making process in informed consent.

197 Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27(2) *International Journal of Children's Rights* 306-338. DOI: <https://doi.org/10.1163/15718182-02702006>

198 Sheila Varadan, 'Article 5: The Role of Parents in the Proxy Informed Consent Process in Medical Research involving Children' (2020) 28(3) *International Journal of Children's Rights* 521-546. DOI: <https://doi.org/10.1163/15718182-02803009>; See also Sheila Varadan, 'Chapter 12: Article 5: The Role of Parents in the Proxy Informed Consent Process in Medical Research involving Children' in B. Sloan and C. Fenton-Glynn (eds) *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Leiden: Brill Nijhoff, 2021) 281-306.

In Chapter 5, 'The proxy dilemma: Informed consent in paediatric clinical research – a case study of Thailand',¹⁹⁹ I contemplate the viability of using article 5 (and the CRC) as a framework to identify a child's genuine carer as her proxy for the purposes of informed consent in paediatric clinical research. In many lower- and middle-income countries, the legislative and regulatory framework for paediatric clinical research is weak or non-existent. This poses a challenge for the recruitment and enrolment of children in paediatric clinical trials. In Thailand, where there is no specific law on human subject research and no regulatory framework for informed consent in paediatric clinical research, there remains considerable uncertainty surrounding the designation of 'proxy' in the informed consent process in paediatric clinical research. Adding to this uncertainty, it is not uncommon for children to grow up with multiple carers within the wider family and community. For the most part, these childcare arrangements are informal. This has led to an ethically and legally perplexing outcome, whereby a child's primary caregiver is not legally recognised in the informed consent process, while a child's legal representative is not available to provide informed consent. This has resulted in the presumptive exclusion of categories of children from clinical research – not out of ethical concern but due to the absence of a legal framework to recognise a proxy for the child. Presumptively excluding children from clinical research, particularly in low-resourced settings, carries implications not only for the individual child but for children's well-being and child-health policy. Clinical studies often serve as informal avenues to access health care, and can yield immediate improvements in the quality of life for children and communities. I suggest that article 5 and the CRC may offer an avenue to resolve legal uncertainty in paediatric informed consent, providing a framework that responds to the legal ambiguities surrounding the designation of 'proxy' and in so doing, guaranteeing to all children a right to receive guidance and direction that enables their participation in the informed consent process in clinical research.

In Chapter 6, 'The curious case of article 5', I bring together the four published manuscripts in a broader legal analysis on the scope, content and function of article 5 under the CRC. I posit that article 5 does not function as a standalone legal provision, but as a framework that informs the scope and content of all other legal obligations under the CRC: (1) it acts as a framework to identify a child's carers; (2) it navigates the parenting relationship between a child and her carers in a manner that accords respect to the child as an individual and rights-holder within the family. I further posit that it is both inevitable and necessary to recognise children's capacities as evolving in the realization of their rights under the CRC. So, while the phrase 'evolving capacities of the child' appears only twice in the CRC (under articles 5 and article

199 Sheila Varadan, Salin Sirinam, Kriengsak Limkittikul and Phaik Yeong Cheah, 'The Proxy Dilemma: Informed Consent in Paediatric Clinical Research – a Case Study of Thailand' (2022) 22(1) *Developing World Bioethics* 1-10. DOI: <https://doi.org/10.1111/dewb.12341>

14(2)), the concept of evolving capacities is likely embedded within the CRC itself. At the same time, in the absence of any explicit recognition of a principle of evolving capacities, and without more guidance from the CRC Committee on the meaning and scope of 'evolving capacities', imputing a broad principle of evolving capacities may be viewed as an overreach in the interpretation of article 5 and the CRC.

In Chapter 7, 'Article 5 – Innovation or enigma', I conclude with a research agenda on article 5, contemplating its implications not only for children's rights but for international human rights more generally. I identify three areas for further inquiry: (1) the relational dimension of rights under international human rights law; (2) the scope and meaning of 'evolving capacities'; (3) the challenges of recognising non-State 'third-parties' as rights-holders and duty-bearers under international human rights law.

ABSTRACT

Children need guidance to navigate their everyday lives, and in most parts of the world, such guidance is likely to come from not just parents, but wider family and community. How we acknowledge informal carers and support their caregiving role has implications for a child's enjoyment and exercise of rights. Yet, the UN Convention on the Rights of the Child (CRC) does not recognise a concept of kinship care nor does it accord formal recognition to informal carers involved in the everyday care of a child. The role of extended family and community members is referenced just once in the CRC, within the framework of parental guidance and direction under article 5. Interrogating the work of the UN Committee on the Rights of the Child, this paper examines how informal carers have come to be recognised and supported under the CRC. It suggests that while article 5 may offer an avenue to identify informal carers, its scope and function are not open-ended, and the extent to which the CRC provides a legal framework to support and protect informal carers remains unclear. This paper concludes that more consideration needs to be given to how informal carers are supported in their caregiving role to further children's enjoyment and realization of rights under the CRC.

INTRODUCTION

Few things will have more significance in a child's life than family. Children need guidance and direction to navigate their everyday lives, and such guidance is likely to come from not just parents, but extended family and community.¹ How we recognise extended family members and support their informal caregiving role will have implications for a child's enjoyment and exercise

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1 G. Kamchedzera, 'Article 5: The Child's Right to Appropriate Direction and Guidance' in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde and B. Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 2012) 13-38, 20.

of rights.² Yet, historically the right to family was understood as an entitlement of parents over their child,³ rather than a relational right flowing between a child and her wider family.⁴ Parents were afforded wide and unfettered authority over their children, with little interference or intrusion from the State.⁵ That a child should hold an independent right to family and family relationships was neither contemplated nor recognised under international law, prior to the United Nations Convention on the Rights of the Child (CRC).⁶

When the CRC was adopted on 20 November 1989,⁷ it introduced a framework for the human rights of children, but also a novel conception of the child.⁸ Children were no longer viewed as objects of solicitude, but as independent holders of rights with personality, dignity and individuality.⁹ However, in seeing the child as an independent rights-holder, the CRC did not abandon children to their autonomy;¹⁰ rather it recognised that a child's exercise of rights would be deeply connected to and interdependent on the guidance and direction provided by parents, family and community.¹¹ In

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- 2 G. Van Bueren, *The International Law on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 1995) 67.
 - 3 M.D.A. Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter Publishers, 1983), 244, 245; D. Archard, *Children Rights and Childhood*, 2nd edition (Abingdon: Taylor and Francis Group, 2004).
 - 4 B. Bennett Woodhouse, 'The Child's Right to Family' in J. Todres and S. M. King (eds) *The Oxford Handbook of Children's Rights Law* (Oxford: Oxford University Press, 2020) 237-252, 238; P. Veerman, *The Rights of the Child and the Changing Image of Childhood* (Hague: Martinus Nijhoff Publishers, 1992); Noam Peleg, *The Child's Right to Development* (Cambridge: Cambridge Univkilkeppersity Press, 2019) 34; Archard 2004 (n 3) 159-164.
 - 5 Archard 2004 (n 3) 154; Freeman 1983 (n 3); see also M. Freeman, *A Magna Carta for Children? Rethinking Children's Rights* Hamlyn Lectures (Cambridge: Cambridge University Press, 2020).
 - 6 A. Lopatka, 'An Introduction to the United Nations Convention on the Rights of the Child' (1996) 6(2) *Transnat'l L. & Contemp. Probs.* 251 - 262, 254; J. Tobin, 'Justifying Children's Rights' (2013) 21(3) *International Journal of Children's Rights* 395-441; Peleg 2019 (n 4); Bennett Woodhouse 2020 (n 4); Archard, 2004 (n 3) 64.
 - 7 United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S. 3. (CRC).
 - 8 Lopatka 1996 (n 6) 254; Archard 2004 (n 3).
 - 9 Lopatka, 1996 (n 6) 254, 255; Tobin 2013 (n 6); Archard 2004 (n 3).
 - 10 B. C. Hafen and J. O. Hafen, 'Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37(2) *Harv. Int'l L. J.* 449-492, 486; Jaap Doek, 'What Does the Children's Convention Require' (2006) 20 *Emory International Review* 199-208.
 - 11 Lopatka, 1996 (n 6) 255; J. Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in M. D. Ruck, M. Peterson-Badali, and M. Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Abingdon: Taylor and Francis, 2017); J. Tobin, 'Parents and Children's Rights under the Convention on the Rights of the Child: Finding Reconciliation in a Misunderstood Relationship' (2005) 7(2) *Australian Journal of Professional and Applied Ethics* 31-46; Tobin, 2013 (n 6); J. Doek, 'The Human Rights of Children: An Introduction' in U. Kilkelly and T. Liefwaard (eds) *International Human Rights of Children* (Singapore: Springer Nature, 2018) 3-29.

its opening paragraphs, the CRC affirmed the family¹² as the 'natural environment' for the child's growth and well-being.¹³ The family would serve as the social backdrop in which rights are understood, mediated and realised.¹⁴ So, while the CRC offered more support and assistance to parents than any previous instrument under international law,¹⁵ it also did not tolerate a family environment in which children were disabused of their rights and dignity as individuals.¹⁶ Viewed this way, the CRC did not undermine parental rights,¹⁷ but rather promoted a particular conception of family, based on 'mutual love,'¹⁸ trust, and respect for the child as an individual within the family.¹⁹

But, the CRC does not specify who is a 'parent', or what constitutes 'family' within its provisions. It uses sixteen different terms to identify carers.²⁰ In some instances, it relies on a formal legal relationship, while in other instances, it invokes local custom to identify those responsible for a child. This lack of nomenclature for carers within the CRC, leaves open the question of how 'parent', 'family' and 'family environment' should be understood, and how far States' obligations should extend to recognise wider family and community members who may be involved in the everyday care of a child.

Article 5 is the only provision within the CRC to explicitly reference 'extended family' and 'community' amongst parents and other persons legally responsible for the child. It requires States parties to

'respect the responsibilities, rights and duties of parents or, where applicable, *the members of the extended family or community as provided for by local custom*, legal guardians or other persons legally responsible for the child, to provide ... appropriate direction and guidance' to children in the exercise of their rights under the CRC [emphasis added].²¹

12 CRC, preamble paras 4

13 CRC, preamble paras 5; Lopatka, 1996, 255.

14 Tobin, 2013 (n 6) 424.

15 Bennett Woodhouse 2020 (n 4), 243; See CRC, articles 2(1), 3(2), 5, 9, 10, 16, 18(1), 18(2), 18(3), 21(a), 22(2), 23(2), 23(3), 24(2), 27(3), 27(4) and 29(1)(c), 37(c), 40(2)(b)(ii), 40(2)(b)(iii) of the CRC.

16 J. Tobin and S. Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in J. Tobin and P. Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford: Oxford University Press, 2019) 159-185, 169.

17 Doek 2006 (n 10) 202; Tobin 2013 (n 6); Hafen and Hafen 1996 (n 10); see also S. Kilbourne, 'U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights' (1996) 6 *Transnat'l L. & Contemp. Probs.* 437 - 462, 455; M. Guggenheim, *What's Wrong With Children's Rights* (Boston: Harvard University Press, 2005).

18 Lopatka, 1996 (n 6) 255.

19 Tobin, 2013 (n 6) 424, 426.

20 This paper uses the term 'carers' broadly to capture all references within the CRC to persons holding a care-related function within the family structure: (1) persons with legal responsibility for the care of the child; (2) persons in an ongoing caregiving relationship to the child; (3) persons acting as customary caregivers within the family structure. This includes sixteen different terms, referenced in 36 sub-provisions of the CRC. See Table 1 in Part I.

21 Article 5, CRC.

Article 5 has been identified as a cross-cutting standard of the CRC, which intersects with and applies to all other articles.²² Broadly, it is understood as a mediating provision, striking ‘a delicate balance,’²³ that respects the rights and responsibilities of parents yet also recognises the child’s status as a rights-holder with evolving capacities in the exercise of rights under the CRC.²⁴ Practically, it brings together formal²⁵ and informal carers²⁶ under one provision, recognising that parenting arrangements and family structures will often be guided by socio-cultural realities rather than formal legal relationships.²⁷ Article 5 thus offers an avenue to identify informal carers, ensuring whoever is primarily responsible for the child, ‘whatever the nature of their exact legal relationship’ will be recognised.²⁸ Yet, its scope and function are not open-ended, and the extent to which article 5 provides a legal basis to support and assist informal carers involved in the everyday care of a child remains unclear.

This paper examines how informal carers are recognised and supported under the CRC. Part I reviews the decade-long drafting process, discussing how the CRC Working Group considered the role of informal carers during the drafting of the CRC. Part II interrogates the work of the UN Committee on the Rights of the Child (CRC Committee), suggesting that it has evolved a broad and flexible approach to ‘parent’, ‘family’ and family environment’, relying on article 5 as its basis to identify the role of informal carers under the CRC. Part III considers whether this broad recognition of informal carers has yielded protection, support and assistance for informal care arrangements, suggesting the CRC Committee draws a distinction in how it supports informal carers alongside parents and informal carers acting *in lieu* of parents. While the CRC

22 K. Hanson and L. Lundy, ‘Does Exactly What it Says on the Tin: A Critical Analysis and Alternative Conceptualisation of the So-called “General Principles” of the Convention on the Rights of the Child’ (2017) 25(2) *International Journal on the Rights of the Child*, 285-306, 302. DOI: 10.1163/15718182-02502011; see also S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 1999); P. Alston, ‘The Legal Framework of the Convention on the Rights of the Child’ (1992) 91/2 *United Nations Bulletin of Human Rights: The Rights of the Child* 1-15.

23 Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Volume I and Volume II (Geneva: OHCHR, 2007) 360; United Nations Commission on Human Rights, ‘Report of the Working Group on a draft convention on the rights of the child’ (1988), E/CN.4/1988/28, para 32.

24 Detrick, 1995 (n 22) 118; see also Tobin and Varadan, 2019 (n 19) 160.

25 This paper uses the term ‘formal carers’ to distinguish those persons – ‘parents’, ‘legal guardians’, or ‘others responsible for the child’ – identified as having ‘primary responsibility’ for the child as per articles 18(1) and 27(2) of the CRC.

26 This paper uses the term ‘informal carers’ to identify those persons exercising care-related roles within the family, who are not recognised as having ‘primary responsibility’ for the child under the CRC. To this end, it relies on the *UN Guidelines on Alternative Care* as its framework to guide its definition of informal care. See further below.

27 Tobin and Varadan, 2019 (n 19) 169.

28 Detrick 1999 (n 22) 121; see also Alston 1992 (n 22).

Committee has encouraged broad support for informal carers acting *in lieu* of parents, the legal basis for extending such assistance remains unclear, and as a result, there remains a somewhat precarious response to informal care arrangements within the CRC. This paper concludes that more guidance is needed from the CRC Committee on how informal carers and informal care arrangements should be supported, assisted and protected as part of States' legal obligations under the CRC.

For clarity, this paper uses the term 'informal carers' as it is understood within the *Guidelines for Alternative Care*,²⁹ to identify members of extended family or community caring for a child alongside parents³⁰ or *in lieu* of parents without legal recognition or as part of an order from an administrative or judicial authority.³¹

1 DRAFTING HISTORY – FINDING A COMMON GROUND FOR CARERS

The question of who is a 'parent' and what constitutes 'family' came up more than once during the decade-long drafting process for the CRC.³² As the CRC Working Group worked to finalize the draft, 'some speakers wished to have a list of definitions of terms used in the convention, which would be of great help for a correct understanding of the legal and practical effects'³³ of the provisions within the CRC. They pointed to a need for a definition of concepts such as 'parents' or 'legal guardians',³⁴ querying whether 'only biological parents' should be recognised or if 'other persons [were] also entitled to be considered parents for some purposes, with equal responsibilities in relation to the child or children concerned?'³⁵

In 1987, a non-governmental organization, the Four Directions Council, made a written submission to the CRC Working Group, proposing a definition for parents which centred around the child's relationship to her carers rather than the carers' legal status over the child: '...family members ... customarily

29 United Nations General Assembly, '64/142. Guidelines for the Alternative Care of Children', 24 February 2010, A/RES/64/142, para 29(b)(i), para 30(c).

30 Ibid.

31 Guidelines for Alternative Care, para 29(b)(i).

32 See OHCHR, 2007 (n 23) Vol I and Vol II. For a more detailed account of the drafting history for article 5 of the CRC, see E. Sutherland, 'The Enigma of Article 5 of the United Nations Convention on the Rights of The Child' (2020) 28(3) *International Journal of Children's Rights* 447-470, 450-454, DOI:10.1163/15718182-02803008; see also S. Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27(2) *International Journal of Children's Rights* 306-338, 310-316, DOI:10.1163/15718182-02702006.

33 CRC Working Group Report 1988, para 242

34 CRC Working Group Report 1988, para 242.

35 CRC Working Group Report 1988, para 242..

share responsibilities for the child's upbringing and guidance.³⁶ The Four Directions Council argued that,

[e]xtended-family members can be just as actively involved in the child's development as parents – often, as in the care of grandparents, even *more* involved' and as such, broader family members should be 'entitled to the same consideration, protection and assistance as the nuclear family'.³⁷

According wider recognition to extended family also provides greater protection for children in situations where parental care is unavailable:

If a child must be separated from its parents ... it need not also be removed from its extended family. Continued custody within the extended family may be far less disruptive or traumatic than substitute care or institutionalization.³⁸

Such protection for informal carers would, 'assure ... grandparents and older siblings of the child' who are

assuming or sharing parental responsibilities, the rights to retain custody of the child, to maintain contact with or be reunited with the child ... to provide direction to the child's education ... and to share in State assistance for the child.³⁹

These concerns mirrored earlier discussions. During the drafting of article 20 on deprivation of family environment, the CRC Working Group struggled to formulate terms that would reflect the diversity of family structures in which children grow up around the world. During the initial discussions in 1980 and 1982, the Working Group contemplated several formulations: 'parental care', 'natural family environment', 'biological family' and 'normal family environment'. However, these proposals were rejected either for 'conceptual difficulties' or for being unduly narrow.⁴⁰ The decision to settle on 'family environment' was a 'compromise text,' revealing 'both a wish to look further than simple parental care and the impossibility of trying to define more exactly the family.'⁴¹ Thus, while the CRC drafters appeared cognizant of a need to

36 United Nations High Commission on Human Rights, 'Written statement submitted by the Four Directions Council, a non-governmental organization in consultative status (category II)', 12 August 1987, E/CN.4/Sub.2/1987/NGO/5, para 6.

37 NGO Written statement, E/CN.4/Sub.2/1987/NGO/5, para 3, 4.

38 Ibid, para 4.

39 Ibid, para 6.

40 OHCHR 2007 (n 23) Vol 2, p 526-528, 530; see also Nigel Cantwell and Anna Holzscheiter, 'Article 20: Children Deprived of Their Family Environment' in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde and B. Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff, 2008) 32.

41 Cantwell and Holzscheiter 2008 (n 37) 32.

capture a broad range of carers within the family structure, they struggled to find clarity over who those carers should be, and how informal care arrangements would be recognised under the CRC.⁴²

It was not until the second (and final) reading of the draft CRC in 1989 that Working Group members contemplated a specific reference to 'extended family' and 'community' to capture informal care arrangements under the CRC. It bears mentioning that just prior to the second reading, delegations from Senegal, Egypt and Morocco expressed concern 'that the drafting exercise had failed to take account of the concerns of the developing countries', and 'urged the Working Group to be more responsive to those countries in the course of the second reading of the draft' to ensure 'there would be more chance of universal recognition of the future convention.'⁴³ It is also worth noting that the Bangladesh delegation had previously voiced concerns that more consideration needed to be given to 'Islamic Law [which] have their own conceptions of the nuclear family, the extended family and the rights of the child' and it was 'essential that the Draft Convention should be acceptable to the Islamic countries who constitute one of the largest groups of States in the international community.'⁴⁴

It was within this milieu that a suggestion was made during the second reading to include a reference to extended family and informal care arrangements⁴⁵

The draft Convention as a whole may not adequately recognize the role of the extended family and community when parental care is not available. Because cultures, traditions and customs in many countries and areas provide for such a role, the Working Group may wish to broaden Article [5] accordingly.⁴⁶

In a note from the Secretariat summarising the discussions, the CRC Working Group took notice of 'the wording of Article [20], both paragraphs 1 and 2, which mention "family environment"' and suggested that 'it would seem desirable to include in Article [5], as the relevant umbrella article, a reference' to the role of 'the extended family or community as provided for by local

42 Cantwell and Holtzscheiter 2008 (n 37); J. Tobin, 'Article 20: Special Protection for Children Deprived of Their Family Environment' in J. Tobin and P. Alston (eds) *The UN Convention on the Rights of the Child : A Commentary* (Oxford University Press: Oxford, 2019), 725-758, 733.

43 CRC Working Group Report, 1988, E/CN.4/1988/28, para 251.

44 United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1986), E/CN.4/1986/39, Annex IV, page 1.

45 Van Bueren 1995 (n 2) 71.

46 OHCHR 2007 (n 23) Vol I, 361-362; see United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1989), E/CN.4/1989/WG.1/CRP.1/Add.1, para 13.

custom.⁴⁷ On this basis, article 5 was revised, introducing the first explicit reference to the rights and responsibilities of members of the ‘extended family or community’

States Parties shall respect the responsibilities, rights and duties of *parents*, or where applicable, the *members of the extended family or community* as provided for by local custom, *legal guardians or other persons legally responsible for the child* ... [emphasis added]⁴⁸

In bringing together formal and informal carers under one provision, the implication was that children grow up in a diversity of parenting and family structures, often relying on carers beyond their biological or legal parents. As Detrick and Alston suggest, ‘the clear intent of Article 5 was to ensure that whoever is primarily responsible for the child, whatever the nature of their exact legal relationship, are covered by its terms.’⁴⁹

However, for non-governmental organizations (NGOs),⁵⁰ and some CRC Working Group delegates, the limited recognition ‘given to the actual or potential primary role of extended family members in caring for and bringing up children’ was both a disappointment and an affirmation of the Western liberal bias underpinning the CRC.⁵¹

At several points during the drafting process,⁵² NGOs speaking on behalf of indigenous communities ‘urged the Working Group to recognise the importance of strengthening families and communities’, drawing attention to the generations of indigenous children who had been forcibly removed from their families and communities.⁵³ Their concern was that the CRC offered ‘no clear recognition of extended families’ nor did it provide ‘any requirements that States should take into account the actual social and family structure prevailing in the communities in which children lived’.⁵⁴

47 OHCHR 2007 (n 23) Vol 1, 361-362; see also E/CN.4/1989/WG.1/CRP.1/Add.1, para 13; see also Detrick, 1999, 119.

48 Article 5, CRC.

49 Detrick, 1999 (n 22), 121-122; see also Alston 1992, (n 22) 13.

50 OHCHR 2007 (n 23) Vol 2007, 227; see also E/CN.4/1989/SR.55, para 88, 89.

51 OHCHR 2007 (n 23) Vol. 1, 229; see also E/CN.4/1989/SR.55, para 108; R. Lawrence Barsh, ‘The Draft Convention on the Rights of the Child: A Case of Eurocentricism in Standard-Setting’ (1989) 58(1) *Nordic Journal of International Law* 24-34, 28; see also NGO Written statement, E/CN.4/Sub.2/1987/NGO/5, para 1; A. Quennerstedt, C. Robinson and J. I’Anson, ‘The UNCRC: The Voice of Global Consensus on Children’s Rights?’ 36(1) *Nordic Journal of Human Rights* (2018) 38-54, 39; Van Bueren 1995 (n 2).

52 OHCHR 2007 (n 23) Vol 1, 227; see also E/CN.4/1989/SR.55, para 90 - 91.

53 OHCHR 2007 (n 23) Vol 1, 227; see also E/CN.4/1989/SR.55, para 89.

54 OHCHR 2007 (n 23) Vol 1, 227, see also E/CN.4/1989/SR.55, para 90, 91

Table 1: Terminology for Carers within the UN Convention on the Rights of the Child

Terminology	Frequency	Location
Parent or parent(s)	36	Arts. 2(1), 2(2), 3(2), 5, 7(1), 9(1), 9(3) 9(4), 10(1), 10(2), 14(2), 18(1), 18(2), 18(3), 19(1), 21(a), 22(1), 22(2), 23(2), 23(3), 24(2)(e), 24(2)(f), 27(2), 27(3), 27(4), 29(1)(c), 40(2)(b)(ii), 40(2)(b)(iii)
Legal guardian(s)	11	Arts. 2(1), 2(2), 3(2), 5, 14(2), 18(1), 18(2), 19(1), 21(a), 40(2)(b)(ii), 40(2)(b)(iii)
Family members / members of family	4	Preamble – paras. 1, 5 Arts. 2(2), 9(4), 10(1), 22(2)
...others/those responsible for the child...	4	Arts 22(1), 23(2), 27(2), 27(3)
...any other/those person(s) who has the care of the child...	2	Arts. 19(1), 19(2)
Other persons legally responsible	1	Art. 5
Individuals legally responsible for him/her	1	Art. 3(2)
Members of extended family	1	Art. 5
Relatives	1	Arts. 21(a)
Family relations	1	Arts. 8(1)
Family environment	3	Preamble – para. 6 Arts. 20(1), 22(2)
Members of community	1	Art. 5
...other persons having financial responsibility for the child...	1	Arts. 27(4)
...persons having responsibility for the maintenance of the child...	1	Art 26(2)
...others caring for the child...	1	Art. 23(3)
...all interested parties...	1	Art. 9(2)

These concerns were further underscored by the confusing nomenclature for carers within the CRC.⁵⁵ Sixteen different terms are used to identify carers within the CRC. In some cases, carers are recognised on the basis of a legal

55 Detrick 1999 (n 22), 121.

relationship to the child, while in other instances carers are identified on the basis of a customary (and informal) caregiver relationship. While the term 'parent' appears with more frequency than any other term, no one term or combination of terms is used consistently to identify carers or caregiving responsibilities throughout the CRC.⁵⁶

It is likely this culmination of factors that led to criticisms of the CRC as a Western liberal instrument, which did not reflect the lived realities of parenting and family structures in most parts of the world.⁵⁷ But, is the CRC framework nonetheless able to recognise informal carers, and provide assistance and support for their role in the everyday care of a child? The remainder of this paper contemplates this question, examining how the CRC Committee has come to view informal carers and informal care arrangements in its interpretation of legal obligations under the CRC.

2 EVOLVING A BROAD AND FLEXIBLE APPROACH TO 'PARENT' AND 'FAMILY'

As early as 1994, the CRC Committee acknowledged that 'it would seem hard to argue for a single notion of the family', given the 'influence of economic and social factors, and the prevailing political, cultural or religious traditions' which shape the family in a 'diversity of ways'.⁵⁸ The CRC Committee viewed the CRC as an instrument that 'reflects different family structures arising from various cultural patterns and emerging familial relationships',⁵⁹ affirming that provisions of the CRC should apply to a range of family care situations: 'nuclear famil[ies], separated parents, single-parent family, common-law family and adoptive family'.⁶⁰ In this respect, and as emphasised by UN agencies during the 1994 Day of General Discussion, the CRC Committee saw the 'essential value' of the CRC in its ability to function as an adaptive framework 'shaping and implementing ... programmes designed to improve the situation of the family and to promote the protection of the rights of its members'.⁶¹

Since then, the CRC Committee has consistently affirmed that

any reference to "family" (or to "parents") ... be understood within the local context and may mean not only the "nuclear" family, but also the extended family

56 Detrick 1999 (n 22) 121; Van Bueren 1995 (n 2); Barsh 1989 (n 48) 28-29; see also NGO Written statement, E/CN.4/Sub.2/1987/NGO/5, para 3.

57 Peleg 2019 (n 4) 103; Barsh 1989 (n 48); Van Bueren 1995 (n 2) 68-71; Tobin 2013 (n 6).

58 CRC Committee, 'General discussion on the role of the family in the promotion of the rights of the child', CRC/C/34, para 190.

59 CRC Committee, 'Role of the Family in the Promotion of the Rights of the Child', excerpt from Report of the Seventh Session, 10 October 1994, CRC/C/24, para 2.1.

60 Ibid, para 2.1

61 CRC Committee, 'General discussion on the role of the family in the promotion of the rights of the child' CRC/C/34, para 187.

or even broader communal definitions including grandparents, siblings, other relatives, guardians or care providers, neighbours ...⁶²

Reviewing the General Comments, there are at least 37 instances⁶³ in which the CRC Committee has adopted a wider reading of 'parent',⁶⁴ 'family'⁶⁵ or 'family environment'⁶⁶, relying in some measure on article 5 to account for the role of extended family and community as informal carers.

During its 2005 Day of General Discussion on Children without Parental Care, the CRC Committee again affirmed that 'the Convention reflects different family structures arising from various cultural patterns and emerging familial

62 CRC Committee, 'Day of General Discussion: Violence against children within the family and in school', 28 September 2001, CRC/C/111, paras 701, 702.

63 CRC Committee, General Comment No. 3 (2003) HIV/AIDS and the rights of the child, 17 March 2003, CRC/GC/2003/3, paras 33, 34; CRC Committee, General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, para 15; CRC Committee, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras 7, 8, 34, 40, 39; CRC Committee, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, paras 8, 15, 19, 20; CRC Committee, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19, 28, para 2; and 27 inter alia), 2 March 2007, CRC/C/GC/8*, paras 38, 47; CRC Committee, General Comment No. 9 (2006), The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, paras 41, 45, 49; CRC Committee, General Comment No. 11 (2009) Indigenous children and their rights under the Convention, 12 February 2009, CRC/C/GC/11, paras 46, 47; CRC Committee, General Comment No. 12 (2009) The right of the child to be heard, 20 July 2009, CRC/C/GC/12, paras 84, 90, 91, 92; CRC Committee, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras 5, 47(c)(i), 59, 66, 72(d); CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), 29 May 2013, CRC/C/GC/14, paras 59, 70, 60; CRC Committee, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, paras 61, 67, 78; CRC Committee, General Comment No. 21 (2017) on children in street situations, 21 June 2017, CRC/C/GC/21, paras 11(b), 35; CRC Committee and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on States obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*', 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 27; CRC Committee, General Comment No. 24 (2019) on children's rights in the child justice system, 18 September 2019, CRC/C/GC/24*, paras 9, 10, 57.

64 General Comment No. 6, para 8; General Comment No. 7, para 15, 19, 20; General Comment No. 14, para 60; General Comment No. 15, paras 61, 67, 78; General Comment No. 23, para 27; General Comment No. 24, para 57.

65 General Comment No. 7, para 15; General Comment No. 14, para 59.

66 General Comment No. 14, para 15.

relationships.⁶⁷ In its subsequent General Comment No. 7, the CRC Committee elaborated further

15... 'family'...refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements, provided these are consistent with children's rights and best interests.⁶⁸

In its General Comment No. 14, the CRC Committee emphasised that any assessment of the child's best interests should take into account the quality and nature of relationships between a child and her caregivers and the overall family environment.⁶⁹ The CRC Committee advocated for a broad reading of 'family', which explicitly acknowledged the role of informal caregiving relationships in the assessment of best interests of the child

59. ...The term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents, or where applicable, the members of extended family or community as provided for by local custom (art. 5).⁷⁰

The CRC Committee further embraced a broad and flexible approach to the concept of parents, emphasizing that "'parents" must be interpreted in a broad sense to include biological, adoptive or foster parents, or, where applicable, the members of the extended family or community as provided for by local custom'.⁷¹

In recent years, the CRC Committee has increasingly referred to informal carers either jointly or interchangeably with parents: 'parents or caregivers',⁷²

67 CRC Committee, Day of General Discussion: Children Without Parental Care, 17 March 2006, CRC/C/153, para 644.

68 CRC Committee, General Comment No. 7, para 15.

69 CRC Committee, General Comment No. 14, para 48

70 General Comment No. 14, para 59.

71 General Comment No. 23, para 27.

72 CRC Committee, General Comment No. 25 (2021) on children's rights in relation to the digital environment, 2 March 2021, CRC/C/GC/25, paras. 15, 43, 72, 77, 86, 103; General Comment No. 24, para 34; General Comment No. 21, para 15; CRC Committee, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20*, para 51; CRC Committee, General Comment No. 16 (2013) on States obligations regarding the impact of the business sector on children's rights*, 17 April 2013, CRC/C/GC/16, paras 35, 36, 13; General Comment No. 15, para 31; CRC Committee, Report of the 2016 Day of General Discussion: Children's Rights and the Environment, 2016, 23.

'parents or relatives',⁷³ 'parents and/or primary caregivers',⁷⁴ 'parents or other caregivers'⁷⁵ and 'parents and caregivers'.⁷⁶

What we can discern then is an emerging practice amongst CRC Committee members to acknowledge the role of informal carers within the CRC framework, through a wider reading of 'parents', 'family' and 'family environment'. For the most part, the CRC Committee has relied on article 5 as a framework to identify informal carers and to enable a broader reading of 'parent' and 'family' within the CRC. However, a plain reading of article 5 suggests that it does not capture any and all informal care arrangements: it is circumscribed to 'guidance and direction' for the purposes of children's exercise of rights; and its scope appears limited to only those informal care arrangements 'provided for by local custom.' Moreover, its formulation suggests a disjunctive approach towards informal care, deferring to parents in the first instance, and in the alternative 'or where applicable' to 'members of the extended family or community', 'legal guardians or other persons legally responsible for the child'. Also, depending on how broadly the concept of 'parent' is understood and what priority is accorded to a child's biological parents under the CRC,⁷⁷ wide

73 General Comment No. 23, para 4

74 CRC Committee and Committee on the Protection of the Rights of All Migrant Workers, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration**, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22*, para 9; General Comment No. 14, para 72; CRC Committee, Report and Recommendations of the Day of General Discussion on 'Children of Incarcerated Parents', 30 September 2011, paras 21, 30

75 General Comment No., 24, para 10; General Comment No. 10, para 9; CRC Committee, Report of the 2014 Day of General Discussion: Digital Media and Children's Rights, paras 80, 94 and 95.

76 General Comment No. 25, paras 15, 19, 21 (3 times), 32 (2 times), 36, 39, 55, 72, 76 (2 times), 84 (3 times), 85 (2 times), 86 (3 times), 88, 102, 108, 114; General Comment No. 14, paras 10, 12; General Comment No. 21, paras 48, 54, 51, 62; General Comment No. 20, paras 25, 50 (2 times), 51, 55; CRC Committee, General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)*, 17 April 2013, CRC/C/GC/17, paras 34, 48, 56(a); General Comment No. 16, para 54; General Comment No. 15, paras 6, 12, 18, 61, 64, 67, 78; General Comment No. 13, paras 5, 8, 44(c), 47(c)(i).

77 Within the academic discourse on children's rights, commentators have offered different perspectives on how the concept of 'parent' should be understood, and what priority, if any, should be accorded to biological parents within the CRC. Bainham argues that 'the expression ['parents'] should be interpreted in the conventional sense of genetic parents'. Bainham goes on to explain that while the concept of 'parents' appears 'wide enough to include not only genetic parents but also those performing the social role of parents', 'the history of Articles 7 and 8 reveals that the concern of the international community was with the rights of children from the moment of birth and in relation to their birth parents.' See A. Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in A. Bainham, S. Day Sclater and M. Richards (eds) *What is a Parent? A Socio-Legal Analysis* (Oxford: Hart Publishing, 1999) 25-46, 37. Sloan argues that articles 5

recognition of informal carers may potentially undermine or interfere with legal obligations under other provisions, notably States' obligations to protect the child's right to know and be cared for by parents (article 7(1)),⁷⁸ a child's right to her identity and 'family relations' (article 8(1))⁷⁹ and as discussed further below, a child's right to not be separated from parents (article 9(1))⁸⁰ or where such separation is necessary for the best interests of the child, to maintain relations with both parents (9(3)).⁸¹ Thus, on its face, article 5 and the CRC more generally, may not be as accommodating to informal carers, or the diversity of family and parenting structures as the CRC Committee envisages it to be.

The remainder of this paper argues that while the CRC Committee has been willing to acknowledge the role of informal carers through a broad reading of 'parent' and 'family', it has been less willing or able to extend direct support

and 7 provides at the very least, a presumptive entitlement of a biological parent to be viewed as a 'parent' within the CRC, and while article 8 recognises that a child's identity-rights 'should not be limited to biological/genetic manifestations of the concept', it nonetheless 'include[s] these elements,' see B. Sloan, 'Chapter 10: Article 5 of the Convention on the Rights of the Child and the Involvement of Fathers in Adoption Proceedings: A Comparative Analysis' in B. Sloan and C. Fenton-Glynn (eds) *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Leiden: Brill Nijhoff, 2021), 257-278, 266. For Tobin, there is nothing in the final text of the CRC or the jurisprudence of the CRC Committee which demands that the meaning of 'familial relations' be restricted to biological ties, nor the definition of 'parents' be restricted to a man and woman, see J. Tobin, 'Recognising Same-Sex Parents' (2008) 33(1) *Alternative Law Journal* 36-40, 36-37; see also J. Tobin and R. McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?' (2009) 23 *International Journal of Law, Policy and the Family* 110-131, 112-114, DOI:10.1093/lawfam/ebn020. For a general discussion on the concept of 'parent' within the CRC framework, see J. Tobin and F. Seow, 'Article 7: The Rights to Birth Registration, a Name, Nationality and to Know and Be Cared for by Parents' in J. Tobin and P. Alston (eds) *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 237-280, 258-260; see also Tobin and Varadan 2019 (n 19) 169-170.

78 Article 7(1) of the CRC: The Child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

79 Article 8(1) of the CRC: States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

80 Article 9(1) of the CRC: States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

81 Article 9(3) of the CRC: States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

and assistance to informal carers particularly where parents or legal carers remain primarily responsible for the child.

3 RECOGNISING INFORMAL CARERS ALONGSIDE PARENTS

3.1 Providing parental support and assistance to informal carers

Despite its detractors,⁸² when the CRC was adopted in 1989, it offered more support and assistance to parents than any previous instrument under international law.⁸³ Article 18(1) recognises that parents share a common responsibility for the upbringing and development of the child, with the best interests of the child as their basic concern.⁸⁴ Article 27(2) recognises 'parent(s) or others responsible for the child' as having 'the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.'⁸⁵ Articles 18(2) and 27(3) require States to provide appropriate measures to support and assist parents and other legal carers in their caregiving responsibilities towards the child.⁸⁶ In addition to articles 18 and 27, at least seven other provisions require States to provide direct support and assistance to parents in their caregiving role under the CRC.⁸⁷ The CRC introduces what Tobin describes as a '*collaborative or cooperative* conception of the relationship between state and family', in which 'parents have primary responsibility for children's upbringing' while the State plays 'a critical role in assisting parents.'⁸⁸ It challenges the liberalist conception of family, which traditionally placed parenting beyond the purview of the State, offering in its place, a framework that allows, if not expects, parents to make demands on the State to support and assist their caregiving role.⁸⁹ However, the extent to which this collaborative partnership extends to informal carers, such as grandparents, also involved in the everyday care of a child, remains unclear.

3.1.1 *Support and assistance in child-rearing responsibilities (Art. 18)*

The CRC Committee acknowledges the importance of supporting informal carers as part of States' legal obligations to assist to parents under article 18(2)

⁸² Guggenheim 2005 (n 15); Hafen and Hafen 1996 (n 10); see also Kilbourne 1996 (n 15) 455.

⁸³ See Articles 2(1), 3(2), 5, 9, 10, 16, 18(1), 18(2), 18(3), 21(a), 22(2), 23(2), 23(3), 24(2), 27(3), 27(4) and 29(1)(c), 37(c), 40(2)(b)(ii), 40(2)(b)(iii) of the CRC.

⁸⁴ See Article 18(1) of the CRC.

⁸⁵ Article 27(2) of the CRC.

⁸⁶ Articles 18(2) and 18(3) and Articles 27(3) and 27(4) of the CRC.

⁸⁷ See articles 19(2), 23(2), 23(3), 24(2)(e), 24(2)(f), 40(2)(b)(ii), 40(2)(b)(iii) of the CRC.

⁸⁸ Tobin, 2013 (n 6) 425.

⁸⁹ Ibid.

and 18(3), particularly in early childhood: ‘a young child’s parents play a crucial role in the achievement of their rights, along with other members of family, extended family or community, including legal guardians, as appropriate. This is fully recognised within the Convention (especially article 5), along with the obligation on States parties to provide assistance including quality childcare services (especially article 18)’.⁹⁰ To this end, the CRC Committee has called on States to ‘render appropriate assistance’ that includes the ‘provision of parenting education, parenting counselling and other quality services for mothers, fathers, siblings, grandparents and others who from time to time may be responsible for promoting the child’s best interests’.⁹¹

The CRC Committee has further recommended ‘child-centred family policies’⁹² which target wider family members to support parents in their child-rearing responsibilities at home. In its Concluding Observations to Guyana, the CRC Committee recommended that ‘the State party undertake measures with a view to strengthening the capacities of families, nuclear and extended, to take care of their children.’⁹³ In its Concluding observations to Niue, the CRC Committee took notice ‘of the existence of an extended family system that provides solidarity in care and that parents cannot fulfil their responsibilities.’⁹⁴ In Tuvalu, the CRC Committee noted ‘that the extended family system in the State party provides protection and care to children whose parents cannot take care of them’ recommending that the ‘State party give support to members of the extended family, including information on the best forms of child-rearing practices, social support and material resources.’⁹⁵ In its Concluding Observations to Sao Tome, the CRC Committee again called for ‘targeted measures to enhance the role of the family in the promotion of children’s rights, including developing family counselling services in both urban and rural areas.’⁹⁶

⁹⁰ General Comment No. 7, para 15.

⁹¹ General Comment No. 7, para 20(c); CRC Committee, Summary Record (Partial) of the 979th Meeting: Day of General Discussion, Implementing child rights in early childhood, 22 September 2004, CRC/C/SR.979, para 5; CRC Committee, Day of General Discussion: Implementing Child Rights in Early Childhood, 17 September 2004, para 13.

⁹² CRC Committee, Concluding Observations: Republic of Serbia: Initial Report, 20 June 2008, CRC/C/SRB/CO/1, para 39(a); CRC Committee, Concluding Observations: Albania: Initial Report, 31 March 2005, CRC/C/15/Add.249, para 45(a).

⁹³ CRC Committee, Concluding Observations: Guyana: Initial Report, 26 February 2004, CRC/C/15/Add.224, para 33.

⁹⁴ CRC Committee, Concluding Observations: Niue, Initial Report, 26 June 2013, CRC/C/NIU/CO/1, para 43.

⁹⁵ CRC Committee, Concluding Observations: Tuvalu, Initial Report, 30 October 2013, CRC/C/TUV/CO/1, para 42; CRC Committee, Concluding Observations: Tuvalu, 31 March 2020, CRC/C/TUV/CO/2-5, para 33.

⁹⁶ CRC Committee, Concluding Observations: Sao Tome and Principe’ Second to Fourth Periodic Report, 29 October 2013, CRC/C/STP/CO/204, para 39(d)

3.1.2 *Material assistance for an adequate standard of living (Art. 27)*

When discussing legal obligations under article 27(3), the CRC Committee has urged States parties to 'implement systematic strategies to reduce poverty in early childhood' by providing 'material assistance and support programmes for children and families (art. 27.3) ... to assure to young children a basic standard of living consistent with rights.'⁹⁷ The CRC Committee has repeatedly stressed that '[e]conomic reasons cannot be a justification for separating a child from his or her parents.'⁹⁸ To this end, the CRC Committee has called on States to provide specific measures that 'restore or enhance the family's capacity to take care of the child,'⁹⁹ including a 'comprehensive national policy on families' which not only focuses on 'States subsidies and material assistance' but also offers 'support in the form of so-called service plans, including access to social and health services, child-sensitive family counselling services, education and adequate housing.'¹⁰⁰

For the most part, however, these measures have tended to focus on strengthening the role of parents, only recognising informal carers in so far as it contributes to parents' ability to fulfil their child-rearing responsibilities.¹⁰¹ That informal carers should hold caregiving responsibilities independent of, yet alongside parents does not appear to be contemplated, let alone supported within articles 18 and 27 of the CRC.

3.2 *Supporting informal carers to respect children's unique identity and culture*

The CRC Committee has shown an interest in supporting informal carers where it furthers respect for a child's identity, culture and dignity. In its General Comment No. 11 on the rights of indigenous children, the CRC Committee emphasises the importance of respecting traditional extended family structures as part of States' legal obligations to provide support and assistance to indigenous communities.¹⁰² The CRC Committee reiterated this point in its Concluding Observations to New Zealand, recommending that assistance be provided to Maori and Pacific Island families in a manner that respects and acknowledges the role of informal carers within traditional extended family

⁹⁷ General Comment No. 7, para 26.

⁹⁸ General Comment No. 14, para 61.

⁹⁹ General Comment No. 14, para 61.

¹⁰⁰ CRC Committee, Day of General Discussion: Children without Parental Care, 17 March 2006, CRC/C/153, para 645

¹⁰¹ General Comment No. 13, para 5.

¹⁰² General Comment No. 11, para 46; CRC Committee, Day of General Discussion: the Rights of Indigenous Children, Recommendations, 3 October 2003, para 17.

structures.¹⁰³ However, as Henaghan points out, the CRC and article 5 acknowledge wider family only ‘where’ applicable – ‘not as of right’ – inviting a degree of subjectivity in how informal carers are recognised, and under what conditions traditional family structures will be protected, even when they form part of a child’s unique identity and sense of family.¹⁰⁴ In this regard, while article 5 may provide an avenue to identify informal carers, it does not offer a legal basis to guarantee the protection of informal care arrangements and traditional extended family structures.¹⁰⁵

3.3 Supporting informal carers to further children’s enjoyment of rights under the CRC

The CRC Committee supports the role of informal carers where it contributes to children’s enjoyment of specific rights under the CRC. The CRC Committee has acknowledged the role of informal carers in States’ implementation of children’s rights in four broad areas: (1) preventing violence against children; (2) promoting the right to health; (3) mitigating the risks of child-offending; (4) protecting children in the criminal justice system. However, again, the support and assistance provided to informal carers appears somewhat incidental, forming part of States’ broader legal obligations, rather than directly supporting (or protecting) informal carers in their role in the everyday care of the child.

3.3.1 *Preventing violence against children (Art. 19)*

The CRC Committee has relied on article 5 to encourage broad support to parents, extended families, and community members to prevent violence against children.¹⁰⁶ During the 2001 Day of General Discussion on Violence against Children in Families and Schools, the CRC Committee stressed ‘the fundamental importance of and great complexity involved in increasing support and assistance to families’ claiming that it ‘must play the key role in preventing family violence’.¹⁰⁷ The CRC Committee has since advocated for a ‘child rights approach’ to violence prevention, which focuses on ‘supporting the strengths and resources of the child ... and all social systems of which

103 CRC Committee, Concluding Observations: New Zealand, 27 October 2003, CRC/C/15/Add.216, para 42.

104 M. Henaghan, ‘New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 United Nations Convention on the Rights of the Child’ (2020) 28(3) *International Journal of Children’s Rights* 588–612, 593, 594, 602, 608.

105 Henaghan 2020 (n 94) 609.

106 General Comment No. 13, paras 64, 66.

107 CRC Committee, Day of General Discussion: Violence against Children, Within the Family and in Schools, 28 September 2001, 28th Session, CRC/C/111, para 694.

the child is a part: family, school, community, institutions, religious and cultural systems.¹⁰⁸ In its General Comment No. 13, the CRC Committee emphasised, 'the primary position of families, including extended families, in child caregiving and protection and in the prevention of violence' urging States to actively support parents as well as 'other caregivers to secure, within their abilities and financial capacities and with respect for the evolving capacities of the child, the living conditions necessary for the child's optimal development (arts. 18 and 27).'¹⁰⁹

3.3.2 Promoting children's right to health (Art. 24)

In the context of the right to health under article 24, the CRC Committee has acknowledged that '[a] wide range of different duty bearers need to be involved if children's right to health is to be fully realized.'¹¹⁰ The CRC Committee has added that while '[p]arents are the most important source of early diagnosis and primary care for small children' and 'play a central role in promoting healthy child development,' a child's 'socialization processes, which are crucial for understanding and adjusting to the world in which they grow up, are strongly influenced by their parents, extended family and other caregivers.'¹¹¹ To this end, the CRC Committee has recommended that information and support be provided not just to parents but 'extended family and other caregivers.'¹¹² It has further clarified that '[a]lthough not explicit in article 24, paragraph 2(f) ... any reference to parents also include[s] other caregivers.'¹¹³

3.3.3 Addressing risks of child-offending

In its 1995 Day of General Discussion on Juvenile Justice, the CRC Committee characterised the 'role of the family' as 'fundamental' to reducing risks of child-offending, stressing the importance of 'increasing involvement of families in children's programmes'; facilitating 'the release of children for home visits'; and encouraging closer and more frequent contact with children, as well as 'a say in children's treatment'.¹¹⁴ In its subsequent General Comment on Juvenile Justice, the Committee explained that 'measures of assistance should not only focus on the prevention of negative situations, but also and even more on the promotion of the social potential of parents', by extending support

108 General Comment No. 13, para 59.

109 General Comment No. 13, paras 3(h), 5.

110 General Comment No. 15, para 6.

111 General Comment No. 15, para 67.

112 General Comment No. 15, para 61.

113 General Comment No. 15, para 78.

114 CRC Committee, Day of General Discussion: Juvenile Justice, 1995, CRC/C/46, para 230.

beyond the immediate family of the child.¹¹⁵ In its more recent General Comment No. 24 on children's rights in child justice proceedings, the CRC Committee reiterated that '[p]revention and early intervention programmes should be focused on support for families, in particular those in vulnerable situations or where violence occurs.'¹¹⁶ The CRC Committee has underscored the interlinkage between support for parents and broader family under article 18 stating that, '[i]nvestment in early childhood care and education correlates with lower rates of future violence and crime.'¹¹⁷ The CRC Committee has further recognised that it is 'an absolute priority [that] children should be supported within their families and communities' in early intervention measures, particularly where the child is below the minimum age of criminal responsibility.¹¹⁸ As Kilkelly explains, in recommending 'investment to support family capacity and parenting, including programmes that expressly strengthen the family environment'¹¹⁹ and referencing 'Article 5 in this context', the CRC Committee 'makes clear that securing these rights to the child is both a parental responsibility and a measure essential to prevent the child's involvement with criminal activity.'¹²⁰

3.3.4 *Protecting children's rights in criminal justice proceedings (Art. 40)*

Where a child is under investigation or involved in criminal proceedings, the CRC Committee has urged the importance of involving a child's primary carers, calling on States to 'explicitly legislate for the maximum possible involvement of parents or legal guardians in the proceedings because they can provide general psychological and emotional assistance to the child and contribute to effective outcomes.'¹²¹ At the same time, recognising that 'many children are informally living with relatives who are neither parents nor legal guardians', the CRC Committee has recommended that 'laws ... be adapted to allow genuine caregivers to assist children in proceedings, if parents are unavailable.'¹²² Similarly, when a child is deprived of her liberty, the CRC Committee has encouraged a broader interpretation of 'family' under article 37(c) to enable the child to maintain contact with not just parents but 'wider

115 CRC Committee, General Comment No. 10 (2007) Children's right in juvenile justice, 25 April 2007, CRC/C/GC/10, para 19.

116 General Comment No. 24, para 9.

117 General Comment No. 24, para 10.

118 General Comment No. 24, para 11.

119 U. Kilkelly, "Evolving Capacities" and "Parental Guidance" in The context of Youth Justice' (2020) 28(3) *International Journal of Children's Rights* 500-520, 508.

120 Ibid.

121 General Comment No. 24, para 57.

122 General Comment No. 24, para 57.

community, including communications with his or her family, friends and other persons ... and the opportunity to visit his or her home and family'.¹²³

What we discern then is a willingness to extend support and assistance to informal carers alongside parents and other legal carers in three broad respects. First, in the context of parental support and assistance under articles 18(2) and 27(3), the CRC Committee appears willing to acknowledge the role of informal carers where it directly supports and contributes to parents' child-rearing responsibilities under the CRC. The CRC Committee has further emphasised the importance of child-centred family policies that ensure financial assistance to wider family members to prevent family separation. Yet, for the most part, these measures have tended to focus on parents, extending support to informal carers only in so far as it contributes to parents' ability to fulfil their child-rearing responsibilities towards the child.

Second, the CRC Committee has shown a willingness to support informal carers where doing so fosters respect for a child's identity and culture. To this end, the CRC Committee has encouraged greater support for informal carers and traditional extended family structures where it fosters respect for children's rights in indigenous communities (article 30). However, whether the CRC provides a framework that guarantees protection, assistance and support for traditional extended family structures, particularly in indigenous communities, remains unclear.¹²⁴

Finally, the CRC Committee has shown a willingness to support informal carers where doing so contributes to the effective implementation of specific rights under the CRC, such as the right to health (article 25), the right to freedom from violence (article 19), and children's rights and protection within the justice system (article 40).

4 RECOGNISING INFORMAL CARERS FOR CHILDREN WITHOUT PARENTAL CARE

Where a child is deprived of parental care, the CRC Committee has taken a more active approach to informal care arrangements and the role of informal carers. This can be explained in two ways. First, the CRC affirms that 'family, as the fundamental group of society' is 'the natural environment for the survival, protection and development of the child'.¹²⁵ For its part, the CRC Committee has taken the view that a 'State's primary responsibility [is] to *prevent* family disruption, family poverty and the potentially resulting breakdown of family structures'.¹²⁶ Extending support, assistance and protection to informal carers, particularly where parental care is unavailable thus forms

123 General Comment No. 24, para 95(e).

124 Henaghan 2020 (n 94) 593, 594, 602.

125 CRC Committee, DGD, Children without Parental Care, para 644.

126 Cantwell and Holtzscheiter 2008 (n 37) 8.

part of States' primary obligation to prevent family separation and preserve the family environment for the child.

Second, as Cantwell and Holzscheiter point out, there is a 'legal no-man's land'¹²⁷ between article 9 and article 20, which necessitates some recognition of informal care arrangements under the CRC. Article 9 protects a child's right to not be separated from her *parents*, whereas article 20 ensures a child's protection when deprived of her *family environment*.¹²⁸ Because article 9 and 20 use different terminology to characterise a child's separation from carers, it becomes difficult to establish the precise linkage in States' legal obligations for a child who is separated or deprived of parental care, and a child who is deprived of her family environment.¹²⁹ This 'legal no-man's land' can lead to an 'effectiveness gap'¹³⁰ and unintended outcome – children being placed in institutional care when they are separated from parents, but could otherwise be cared for by informal carers (extended family or wider community) within their family environment.

Cantwell and Holtzscheiter attribute this 'effectiveness gap' to the absence of a provision for 'kinship' care under the CRC.¹³¹ To this end, Cantwell and Holtzscheiter argue that 'it is reasonable to contend that the spirit in which Article 5 was phrased and adopted – one of cultural sensitivity and inclusiveness – should somehow find appropriate reflection in the interpretation of 'family' in Article 20.'¹³² Using article 5 in this way, however, means that informal carers will need to be accorded the same respect, support and assistance afforded to parents or legal guardians when they are acting *in lieu* of parents, with an understanding that 'the State has no obligation under Article 20 to ensure alternative care for a child who, for whatever reason, is not in the care of his or her parents but is being looked after by a member of the extended family'.¹³³

The CRC Committee has broadly endorsed this reading of article 5, recommending 'that the notion of "extended family" as enshrined in Article 5 of the CRC ... be more systematically taken into account in all actions aimed at ensuring the continuity of a child's upbringing in cases where care by the child's biological parents is not available.'¹³⁴ In its 2005 Day of General Discussion on Children without Parental Care, the CRC Committee underscored the need to find alternatives to institutional care, which include supporting extended family members, so as to avoid displacing children from their family

127 Cantwell and Holzscheiter 2008 (n 37) 36.

128 Tobin 2019 (n 39) 734.

129 Cantwell and Holzscheiter 2008 (n 37) 36 - 37; see also Tobin 2019 (n 42) 734.

130 John Tobin, 'Introduction' in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 18.

131 Cantwell and Holzscheiter, 2008 (n 37) 36.

132 Cantwell and Holtzscheiter 2008 (n 37) 35.

133 Tobin 2019 (n 39) 734; Cantwell and Holtzscheiter 2008 (n 37) 37.

134 Cantwell and Holtzscheiter 2008 (n 37) 8.

environment.¹³⁵ The CRC Committee reiterated this point in its General Comment No. 3, emphasising the importance of extended family when parental care is unavailable

34. ...The extended family, with the support of the surrounding community, may be the least traumatic and therefore the best way to care for orphans when there are no other feasible alternatives. Assistance must be provided so that, to the maximum extent possible, children can remain within existing family structures.¹³⁶

However, relying on article 5 as a framework to identify informal carers, and to inform the scope and content of family environment for the purposes of article 20, has implications for other legal obligations under the CRC. It imputes a broader legal obligation under article 9(1), requiring that a child's right to not be separated include not only parents but also informal carers forming part of the child's family environment.¹³⁷ Indeed, the CRC Committee has affirmed that 9(1) includes 'any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has strong a personal relationship.'¹³⁸ A broader reading of article 9(1) has implications for obligations under article 9(3), requiring States to take measures that preserve not only the child's relationship with parents but also with informal carers forming part of her family environment. To this end, the CRC Committee has said that, '[p]reservation of the family environment encompasses the preservation of the ties of the child in a wider sense' which include 'the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment.'¹³⁹

The legal basis to impute a broad reading of States' legal obligations towards informal carers and informal care arrangements, particularly where parents or legal carers are unavailable, remains unclear. Detrick and Alston suggest 'there would seem to be strong policy reasons, based on the approach adopted in Article 5, as well as in keeping with the spirit of the CRC as a whole, for encouraging a broad and generous interpretation [to family environment] whenever that appears to be in keeping with the best interests of the child'.¹⁴⁰ However, as already noted above, depending on how broadly the concept of 'parents' is understood within the CRC and what priority is given to biological parents, extending wide recognition and support to informal carers may potentially lead to a tension between a child's rights to know, be cared for and maintain a relationship with parents, and a child's rights in respect

135 CRC Committee, DGD, Children without Parental Care, para 665.

136 General Comment No. 3, para 34.

137 General Comment No. 3, paras 33, 34; General Comment No. 6, paras 7, 8, 34; General Comment No. 14, paras 60, 70; General Comment No. 23, para 27.

138 General Comment No. 14, para 60.

139 General Comment No. 14, para 70.

140 Detrick 1999 (n 22) 122-123; see also Alston 1992 (n 22) 13, 14, 15.

of family environment.¹⁴¹ In the absence of a provision expressly recognising informal care arrangements, or indeed any recognition of ‘kinship’ care within the CRC, it remains precarious, if not colourable to claim that article 5 provides a legal basis to recognise informal carers and manage informal care arrangements.

The CRC Committee has encouraged broad support and assistance to informal carers in its concluding observations,¹⁴² recommending that all necessary resources, and social welfare services¹⁴³ be provided to extended family members¹⁴⁴ when one or both parents are unavailable due to death or illness,¹⁴⁵ or imprisonment.¹⁴⁶ However, the CRC Committee has also voiced concern that informal care arrangements, such as ‘grandparenting’,¹⁴⁷ ‘customary or informal adoption’,¹⁴⁸ ‘informal foster care’,¹⁴⁹ ‘kinship foster-

141 See Bainham 1999, Sloan 2021 (n 77).

142 CRC Committee, Concluding Observation: Cook Islands, 2 April 2020, CRC/C/COK/CO/2-5, paras 33 and 34; CRC Committee, Concluding Observations: Micronesia (Federated States of), 3 April 2020, CRC/C/FSM/CO/2, paras 44–46.

143 CRC Committee, Concluding Observations: Micronesia (Federated States of), 3 April 2020, CRC/C/FSM/CO/2, paras 44–46; CRC Committee, Concluding Observations: Côte d’Ivoire, 31 May 2019, CRC/C/CIV/CO/2, para 40(b); CRC Committee, Concluding Observations: Vanuatu 29 September 2017, CRC/C/VUT/CO/2, para 31(c).

144 CRC Committee, Concluding Observations: Sudan, 9 October 2002, CRC/C/15/Add.190, paras 41, 42(a); CRC Committee, Concluding Observations: Eritrea, 2 July 2003, CRC/C/15/Add.204, para 36; CRC Committee, Concluding Observations: Zambia, 2 July 2003, CRC/C/15/Add.206, para 37; CRC Committee, Concluding Observations: Honduras, 3 May 2007, CRC/C/HND/CO/3, para 48(b); CRC Committee, Concluding Observations: Mali, 3 May 2007, CRC/C/MLI/CO/2, para 42(b); CRC Committee, Concluding Observations: Bhutan, 8 October 2008, CRC/C/BTN/CO.2, para 44; CRC Committee, Concluding Observations: Guinea-Bissau, 8 July 2013, CRC/C/GNB/CO/2-4, para 49(b); CRC Committee, Concluding Observations: Cook Islands, CRC/C/COK/CO/2-5, para 34; CRC Committee, Concluding Observations: Micronesia, 3 April 2020, CRC/C/FSM/CO/2, paras 44, 45(c).

145 CRC Committee, Concluding Observations, Ethiopia, CRC/C/ETH/CO/3, paras 37, 38(b); CRC Committee, Concluding Observations: Uganda, 23 November 2005, CRC/C/UGA/CO/2, para 42(b); CRC Committee, Concluding Observations: Congo, 20 October 2006, CRC/C/COG/CO/1, para 47(a); CRC Committee, Concluding Observations: Swaziland, 16 October 2006, CRC/C/SWZ/CO/1, paras 40, 41(b); CRC Committee, Concluding Observations: Eritrea, 23 June 2008, CRC/C/ERI/CO/3, para 45(a); CRC Committee, Concluding Observations: Malawi, 27 March 2009, CRC/C/MWI/CO/2, paras 41, 42(b); CRC Committee, Concluding Observations: Mauritania, 17 June 2009, CRC/C/MRT/CO/2, para 47(a);

146 CRC Committee, Concluding Observations: Nepal, 21 September 2005, CRC/C/15/Add.261, para 52; CRC Committee, Concluding Observations: Mexico, 8 June 2006, CRC/C/MEX/CO/3, paras 38, 39, 40.

147 CRC Committee, Concluding Observations: Madagascar, 27 October 2003, CRC/C/15/Add.218, para 43(b); CRC Committee, Concluding Observations: Tanzania, 3 March 2015, CRC/C/TZA/CO/3-5, paras 48(a), 49.

148 CRC Committee, Concluding Observations: Marshall Islands, 26 October 2000, CRC/C/15/Add.139, para 41; CRC Committee, Concluding Observations: Kiribati, 29 September 2006, CRC/C/KIR/CO/129; CRC Committee, Concluding Observation: Samoa, 16 October 2006, CRC/C/WSM/CO/1, paras 39, 40; Committee, Concluding Observations: Lesotho, 21 February 2001, CRC/C/15/Add.147, para 39.

ing¹⁵⁰ or other informal care,¹⁵¹ and extended family care¹⁵² are not vetted, monitored or subject to any assessment of the best interests of the child. In a number of cases, the CRC Committee has expressed deep concern over informal care arrangements, such as 'kweekjes',¹⁵³ confiage,¹⁵⁴ which have been associated with rights-abuses, such forced labor¹⁵⁵ or exploitation. Indeed, the CRC Committee has called for legislation to improve the oversight of informal care arrangements and ensure the protection of children, whether it is extended family care,¹⁵⁶ informal adoption¹⁵⁷ or kinship adoption.¹⁵⁸ These concerns reflect not only the precarity of relying on article 5 as a legal basis to recognise and support informal carers, but also the inadequacies of the CRC framework more generally, in respecting, protecting and fulfilling children's rights in diverse informal care settings. What is needed from the CRC Committee is clearer guidance specifically on how informal carers should

149 CRC Committee, Concluding Observations: Kenya, 7 November 2001, CRC/C/15/Add.160 paras 39, 40; CRC Committee, Concluding Observations: Ghana, 9 June 2015, CRC/C/GHA/CO/3-5, para 43(c).

150 CRC Committee, Concluding Observations: Georgia, 27 October 2003, CRC/C/15/Add.222, para 37(e).

151 CRC Committee, Concluding Observations: Guinea, 13 June 2002, CRC/C/15/Add.177, paras 32(c), 33(b); CRC Committee, Concluding Observations: Timor-Leste, 14 February 2008, CRC/C/TLC/SO/1, para 50.

152 CRC Committee, Concluding Observation: Pakistan, 27 October 2003, CRC/C/15/Add.217, paras 46, 47(a); CRC Committee, Concluding Observations: Argentina, 21 June 2010, CRC/C/ARG/CO/3-4, para 52(c); CRC Committee, Concluding Observations: Niue, 26 June 2013, CRC/C/NIU/CO/1, para 46; CRC Committee, Concluding Observations: Cook Islands, CRC/C/COK/CO/2-5, paras 33, 34.

153 CRC Committee, Concluding Observations: Suriname, 28 June 2000, CRC/C/15/Add.130, paras 37, 38.

154 CRC Committee, Concluding Observations: Cote D'Ivoire, CRC/C/CIV/CO/2, para 39(b).

155 CRC Committee, Concluding Observations: Burundi, 16 October 2000, CRC/C/15/Add.133, para 50; CRC Committee: Solomon Islands, 2 July 2003, CRC/C/15/Add.208, paras 34, 35(a); CRC Committee, Concluding Observations: Comoros, 23 October 2000, CRC/C/15/Add.141, paras 29, 30.

156 CRC Committee, Concluding Observations: Islamic Republic of Iran, 31 March 2005, CRC/C/15/Add.254, para 50; CRC Committee, Concluding Observations: Timor Leste, 14 February 2008, CRC/C/TLS/CO/1, para 51; CRC Committee, Concluding Observations: Sri Lanka, 19 October 2010, CRC/C/LKA/CO/3-4, paras 44, 45; CRC Committee, Concluding Observations: Uzbekistan, 10 July 2013, CRC/C/UZB/CO/3-4, para 48(c); CRC Committee, Concluding Observations: Tuvalu, 31 March 2020, CRC/C/TUV/CO/2-5, paras 34-35.

157 CRC Committee, Concluding Observations: Togo, 31 March, 2005, CRC/C/15, Add.255, para 43; CRC Committee, Concluding Observations: Benin, 20 October 2006, CRC/C/BEN/CO/2, paras 44, 45(a); CRC Committee, Concluding Observations: Benin, 25 February 2016, CRC/C/BEN/CO/3-5, para 49; CRC Committee, Concluding Observation: Senegal, 20 October 2006, CRC/C/SEN/CO/2, para 35(a); CRC Committee, Concluding Observations: Argentina, 21 June 2010, CRC/C/ARG/CO/3-4, para 53(a).

158 CRC Committee, 'Concluding Observations: Tuvalu', 31 March 2020, CRC/C/TUV/CO/2-5, para 35; CRC Committee, 'Concluding Observations: Vanuatu', 29 September 2017, CRC/C/VUT/CO.

be recognised and supported, and what protections should be accorded to informal care arrangements under the CRC.

CONCLUSION

In almost every part of the world, informal carers play some role in the everyday lives of children.¹⁵⁹ Whether it is casual babysitting from a grandparent, intergenerational family care,¹⁶⁰ or grandparental care *in lieu* of parents working overseas,¹⁶¹ how we recognise and accord respect to informal care has direct implications for children's enjoyment and exercise of rights under the CRC. Yet, historically, informal carers were seen as having 'a roleless role' with a social status seldom recognised or accorded any clear expectations.¹⁶² The CRC does not explicitly acknowledge a concept of 'kinship' care¹⁶³ nor does it accord formal recognition to informal carers involved in the everyday care of a child. That the CRC references members of the extended family or community under article 5 offers some avenue to identify informal carers. But whether this provides enough of a legal basis to accord recognition, support and protection to informal carers and informal care arrangements remains unclear.

This paper examined how informal carers and informal care arrangements have come to be recognised within the CRC. It suggested that while the CRC Committee has adopted a flexible framework to interpret concepts such as 'parent', 'family' and 'family environment', relying in some measure on article 5 to identify informal carers, it remains uneven in how it accords respect and support to informal carers. This can be explained in two ways. First, the limited recognition of extended family as primary carers for children, and the lack of a clear nomenclature for carers has left open the question of how informal carers should be recognised and how far States' obligations should extend to support informal carers alongside parents or others legally responsible for the child. Second, while article 5 may provide an avenue to identify informal carers, its framework is not open-ended. Its scope is limited to provid-

159 Family for Every Child, *The paradox of kinship care: The most valued but least resourced care option – a global study*, November 2019. Accessed at: <https://bettercarenetwork.org/sites/default/files/2020-02/Kinship-Care-Global-Review-Final.pdf>

160 V. Timonen, 'Introduction: widening the lens on grandparenting' in V. Timonen, (ed) *Grandparenting Practices around the World* (Bristol: Policy Press Scholarship, 2018) 1-20.

161 UNICEF Thailand, *The Impact of Internal Migration on Early Childhood Well-Being and Development* (2016), 54, available at: <https://www.unicef.org/thailand/reports/impact-internal-migration-early-childhood-well-being-and-development>; see also B. Ingersoll-Dayton, S. Pungpung, K. Tangchonlatip and L. Yakas, 'Pathways to grandparents' provision of care in skipped-generation households in Thailand' (2018) 33 *Ageing and Society* 1429-1452.

162 K. Herlofson and G.O. Hagestad, 'Transformations in the role of grandparents across welfare states' in S. Arber and V. Timonen (eds) *Contemporary grandparenting: Changing family relationships in global contexts* (Bristol: Policy Press Scholarship, 2012) 27-49, 27.

163 Cantwell and Holzscheiter, 2008 (n 37) 36; see also Sutherland 2020 (n 32).

ing direction and guidance to a child; and its formulation suggests a disjunctive approach to informal care, deferring in the first instance to parents and only 'where applicable' and 'provided for by local custom', to members of extended family or community. What are we left with is a precarious and uneven response to informal carers that potentially denies children their right to family and family relationships under international law.

3 | The principle of evolving capacities under the UN Convention on the Rights of the Child*

ABSTRACT

The phrase ‘evolving capacities of the child’ appears twice in the CRC, under articles 5 and 14(2) in the framework of parental guidance. Yet the term ‘evolving capacities’ appears over 80 times in the General Comments of the CRC Committee. This paper examines the Committee’s use of ‘evolving capacities’ in its General Comments, suggesting that the term has been treated as an enabling principle, an interpretative principle, and a policy principle within the framework of the CRC. A broad principle of evolving capacities has thus emerged under the CRC that informs not only the framework of parental guidance, but the whole of the Convention. However, the CRC Committee does not recognise ‘evolving capacities’ as a general principle or otherwise under the CRC. This paper examines why this might be, and concludes that more consideration needs to be given to the role of ‘evolving capacities’ as a principle under the CRC.

INTRODUCTION

The idea that a child could exercise, claim and secure the enjoyment of her rights independently is still not entirely accepted under international law. Historically, children have been defined by their vulnerability and afforded special treatment and protection on the basis of their relative physical and mental immaturity.¹ Concepts such as capacity and competency did not find

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1 United Nations Convention on the Rights of the Child, preamble para. 9; J. Tobin ‘Understanding Children’s Rights: A Vision beyond Vulnerability’ (2015) 28 *Nordic Journal of International Law* 155-182. DOI: 10.1163/15718107-08402002.

expression in early child rights instruments² and were notably absent from the first drafts of the UN Convention on the Rights of the Child³ ('CRC', 'the Convention').⁴ Parents were designated as the primary rights-holders in the care and upbringing of their children, and conferred with wide and unfettered authority under international law.⁵ The family unit enjoyed a special status and protection under international law,⁶ and the State generally did not interfere in the day-to-day parenting of children.⁷ Childhood was viewed as a singular, fixed and universal stage of life,⁸ for which 'the child's only remedy was to grow up';⁹ and, a child's lack of capacity was, at times, used as a basis to bring into question whether children could have rights at all.¹⁰

So, when the phrase 'evolving capacities of the child' appeared in the text of the CRC, it represented a distinct break from previously held conceptions of childhood and children under international law. It challenged the entrenched perception of the child as an object of protection, and introduced the prospect of the child as a rights-holder under international law. It created a direct relationship between the State and the child, rendering the child visible under international law.¹¹ Importantly, it recognised that as children grow and develop, their capacities evolve, and parents must adjust their direction and guidance to enable their children to exercise increasing agency over their lives.

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- 2 See Geneva Declaration of the Rights of the Child, adopted 26 September 1924, League of Nations; see also Declaration of the Rights of the Child, UNGA Resolution 1386 (XIV) of 20 November 1959.
 - 3 UN Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S. 3 ('UNCRC').
 - 4 Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child, Volumes I and II* (New York/Geneva: United Nations, 2007), Vol. I.
 - 5 See article 18(4), United Nations International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 ('ICCPR'); see article 13(3), United Nations International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976 ('ICESCR'); see article 26(3), United Nations Universal Declaration of Human Rights, 10 December 1948, UNGA Resolution 217A ('UDHR').
 - 6 See articles 12 and 16(3) UDHR; article 10(1) ICESCR; articles 23(1) and 17, ICCPR.
 - 7 M. Freeman, *The Rights and Wrongs of Children* (Dover, New Hampshire: Frances Pinter, 1983).
 - 8 G. Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti, 2005); G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martin Nijhoff Publishers, 1995).
 - 9 O. O'Neill, 'Children's Rights and Children's Lives', (1992) 6(1) *International Journal of Law and the Family* 24-42, 32, 39.
 - 10 H. Brighouse, 'What Rights (If Any) Do Children Have?' in D. Archard and C.M. Macleod (eds) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2003) 45-46; J. Griffin, 'Do Children Have Rights?' in D. Archard and C.M. Macleod (eds.), *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2003) 27; O'Neill 1992 (n 9) 39.
 - 11 Lansdown, 2005 (n 8) 6.

This was a somewhat radical departure from the traditional relationship between the child and her parents, in which parents were primary rights holders and the child was a passive recipient of protection and care. It is likely for this reason that article 5 has been described as an ‘innovation’ ‘unique in international law’.¹² with ‘evolving capacities’ characterised as ‘a new principle of interpretation’ with ‘profound implications for the human rights of the child.’¹³

However, the significance of ‘evolving capacities’ within the framework of the CRC remains unclear. It appears twice in the Convention, under articles 5 and 14(2), in the context of parental direction and guidance. Article 5 recognises the right of the child to receive appropriate direction and guidance from parents, legal guardians, extended family and community, in a manner consistent with her evolving capacities in the exercise of rights under the UN Convention.¹⁴ Article 14(2), while mirroring the language of article 5, focuses on the child’s right to freedom of thought, conscience and religion.¹⁵ In both contexts, the reference to ‘evolving capacities’ does not so much create a right of the child to exercise rights in accordance with her evolving capacities as it recognises the right of children to receive appropriate guidance and direction from parents and guardians to secure the enjoyment of their rights in a manner consistent with their evolving capacities.¹⁶

Yet, since the Convention’s adoption in 1989, the term ‘evolving capacities’ appears to have taken on a broader role. The UN Committee on the Rights of the Child (‘Committee’) references the term ‘evolving capacities’ more than 80 times in 19 of its 23 General Comments.¹⁷ The issue of a child’s evolving

12 G. Kamchedzera, ‘Article 5. The child’s right to appropriate direction and guidance’ in A. Alen, J. Vande Lotte, E. Verhellen, F. Ang, E. Berghmans, and M. Verheyde (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2012) 6, 13.

13 Van Bueren 1995 (n 8) 51, 137; Lansdown 2005 (n 8) 3.

14 Article 5: ‘States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention’, UNCRC (n 3).

15 Article 14(2): ‘States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child’, UNCRC (n 3).

16 J. Tobin and S. Varadan, ‘Article 5: The Right to Parental Direction and Guidance and Consistent with a Child’s Evolving Capacities’ in J. Tobin, and P. Alston, (eds) *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 159-185.

17 CRC Committee, General Comment No. 1 (2001) Article 29(1): The Aims of Education, 17 April 2001, CRC/GC/2001/1, paras 1, 9, 12; CRC Committee on, General Comment No. 3 (2003) HIV/AIDS and the rights of the child, 17 March 2003, CRC/GC/2993/3, paras 12, 20, 22, 23, 29, 40(f); CRC Committee, General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003,

capacities has come up in at least 5 of the 22 Days of General Discussion, notably in the discussions on the Rights of Children and HIV/AIDS (1998), General Measures of Implementation (1999), Child Rights in Early Childhood (2004), the Right of the Child to be Heard (2006), and Digital Media and the Rights of the Child (2014). During the 20th Anniversary of the CRC in 2009, the CRC Committee convened a panel discussion on ‘evolving capacities’ as an emerging issue in the implementation of the CRC, encouraging its wider use in education programming, children’s participation, protection frameworks and age-appropriate policies.¹⁸ In almost all these instances, the Committee has engaged ‘evolving capacities’ outside of the framework of article 5 and article 14(2).

CRC/GC/2003/4, paras 1, 7, 9, 12, 16, 33; CRC Committee, General Comment No. 5 (2003), General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para 69; CRC Committee, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, paras 3, 13, 17, 33; CRC Committee, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19, 28, para 2; and 27 inter alia), 2 March 2007, CRC/C/GC/8*, paras 13, 28, 47; CRC Committee, General Comment No. 9 (2006), The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, paras 32, 68; CRC Committee, General Comment No. 10 (2007) Children’s rights in juvenile justice, 25 April 2007, CRC/C/GC/10, para 16; CRC Committee, General Comment No. 11 (2009) Indigenous children and their rights under the Convention, 12 February 2009, CRC/C/GC/11, para 46; CRC Committee, General Comment No. 12, the right of the child to be heard (2009), 20 July 2009, CRC/C/GC/12, paras 31, 69, 79, 80, 84, 91, 94, 100, 134(e), 134(g); CRC Committee, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras 5, 33, 59, 66, 72(a); CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), 29 May 2013, CRC/C/GC/14, paras 44, 55, 84 and 93; CRC Committee, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, I. Introduction, paras 21, 22, 31 and 78; CRC Committee, General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, 17 April 2013, CRC/C/GC/16, paras 23 and 31; CRC Committee, General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31), 17 April 2013, CRCC/GC/17, paras 14(a), 18, 32, 34 and 57(b); CRC Committee/CEDAW Committee, Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices, 14 November 2014, CEDAW/C/GC/31 – CRC/C/GC/18, para 20; CRC Committee, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20, paras 1, 7(c), 18, 20, 22, 37(e), 39, 40, 42, 43, 46, 50; CRC Committee, General Comment No. 21 (2017) on children in street situations, 21 June 2017, CRC/C/GC/21, paras 11(b), 15, 33, 35; Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22*, para 34.

18 CRC Committee, Twentieth anniversary of the Convention on the Rights of the Child: Dignity, Development and Dialogue, Outline of 20th Anniversary Event, 1 September 2009, paras 7, 23, 24(d), 43).

What then is the role and function of ‘evolving capacities’ within the framework of the CRC? To answer this question, I interrogate the Committee’s use of ‘evolving capacities’ in its commentary on the interpretation and implementation of the CRC. While it is acknowledged that the issue of children’s capacity has been considered in the broader discourse on child studies, my ambition in this paper remains modest – to ascertain the role and function of the term ‘evolving capacities’ as it is used and understood within the framework of the CRC. To do this, I place emphasis on the work of the CRC Committee, specifically its General Comments. As the treaty-monitoring body of the CRC, the general comments of the CRC Committee act as authoritative statements on the implementation, interpretation and meaning of provisions under the CRC.¹⁹

Part I examines the drafting history of the term ‘evolving capacities’ within the CRC. Reviewing the reports of the CRC Working Group, I posit that it is unlikely that drafters intended to create a broad principle of ‘evolving capacities’ under the CRC, when they first coined the phrase in their discussions on the right to freedom of religion. The reports of the Working Group suggest that CRC drafters sought to forge a delicate balance within the CRC, acknowledging the role of a child’s evolving capacities, while still affirming the important role played by parents and other carers in providing direction and guidance to their children.

Part II dissects the General Comments of the CRC Committee with a view to understanding how ‘evolving capacities’ has come to be used by the Committee in its commentary. It is suggested that the CRC Committee has derived a role and function for ‘evolving capacities’ that can be distilled into three broad categories: (1) ‘evolving capacities’ as an enabling principle, in which the term is used to empower children’s agency in the exercise of their rights under the CRC; (2) ‘evolving capacities’ as an interpretative principle, in which the term is used to interpret specific provisions of the Convention in a manner that recognises children’s capacities in the exercise of their rights; (3) ‘evolving capacities’ as a policy principle, in which the term is used to guide States in policy-making and programming on child rights. It is further suggested that the Committee’s use of ‘evolving capacities’ has introduced a role and function to the term that go well beyond the scope of article 5 of the CRC. In so doing, it has recognised a broader principle of ‘evolving capacities’ under the CRC that informs not only the framework of parental direction and guidance, but the interpretation and implementation of the whole of the Convention.

19 CRC Committee, Rules of Procedure, 18 March 2015, CRC/C/Rev.4, Rule 77; see also K. Hanson, and L. Lundy, ‘Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called “General Principles” of the Convention on the Rights of the Child’ (2017) 25(2) *The International Journal of Children’s Rights* 285-306. DOI:10.1163/15718182-02502011

Part III contemplates how such a principle of ‘evolving capacities’ could be recognised within the framework of the CRC. It has been suggested that article 5 should be recognised as a general principle of the CRC to reflect the cross-cutting nature of ‘evolving capacities’ under the CRC.²⁰ However, I argue that recognising article 5 as a general principle would not necessarily result in ‘evolving capacities’ being recognised as a broader principle or cross-cutting standard under the CRC. Article 5 recognises the child’s right to receive appropriate direction and guidance from parents, legal guardians and other adult carers. It does not, on its face, enshrine a broader principle of evolving capacities under the CRC. On the contrary, it would appear from the discussions of the CRC Working Group that the intention was to delimit the scope of ‘evolving capacities’ under article 5, carefully balancing it with the rights of parents and other carers.²¹ Thus, the principle of ‘evolving capacities’ as it is used by the Committee today is broader than the scope of the term as it appears under article 5.

A principle of ‘evolving capacities’ potentially holds foundational value in the interpretation of the CRC. As Lansdown writes, it is ‘central to the balance embodied in the Convention between recognising children as active agents in their own lives, while also being entitled to protection in accordance with their relative immaturity and youth.’²² Yet, this broad principle does not find expression in any single provision of the Convention, nor has it been explicitly recognised by the Committee in its interpretation of the CRC. Recognising that every child is a subject of rights and as such, entitled to increasing agency over the exercise of their rights as they evolve, has profound implications in how children are viewed, enabled and empowered within their families, communities, schools and society in general. I conclude that more consideration needs to be given to the role of ‘evolving capacities’ as an overarching principle in the realisation of children’s rights under the Convention.

1 DRAFTING HISTORY OF THE ‘EVOLVING CAPACITIES OF THE CHILD’

The coinage of the phrase ‘evolving capacities of the child’ only came about half-way into the decade-long drafting process, during the 1984 Working Group session.²³ Until that point, the term had not emerged in the discussions of the CRC Working Group, and was notably absent from the text of the early

20 Hanson and Lundy 2017 (n 19); see also J. Doek, ‘The CRC General Principles’ in *18 Candles: The Convention on the Rights of the Child Reaches Majority* (Geneva: Institut international des droits de l’enfant, 2007) 31-42.

21 OHCHR 2007 (n 4).

22 Lansdown 2005 (n8) 3.

23 UN Commission on Human Rights, ‘Report of the Working Group to the Commission on Human Rights’ (1984) E/CN.4/1983/62, para 4.

drafts presented to the United Nations Office in Geneva by the Permanent Representative of Poland.²⁴

1.1 Evolving capacities and the drafting of article 14(2)

The question of a child's evolving capacities first arose in the Working Group's discussions on freedom of thought, conscience and religion. Delegates raised concerns that children were not afforded enough consideration as rights-holders in the exercise of their right to freedom of religion, while parents and guardians continued to exercise almost unfettered authority over their children in their religious upbringing and education.²⁵ To address these concerns, the delegation from Canada proposed a draft text for article 7*bis* (article 14), introducing the phrase 'evolving capacities of the child.'²⁶ Previous instruments under international law, such as the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration)²⁷ and the International Covenant on Civil and Political Rights (ICCPR), had not recognised the child's capacities in the exercise of their right to freedom of religion. In the ICCPR, States parties were only required 'to have respect for the liberty of parents ... to ensure the religious and moral education of their children in conformity with their own convictions.'²⁸ There was no mention of the child's rights or interests. Under the 1981 Declaration, the guiding principle was the best interests of the child with parents retaining wide authority to choose the moral education for their children.

That a child's capacities can and should be recognised in the exercise of freedom of religion was a relatively new idea within the Working Group, and as such prompted some member to raise concerns that empowering a child in the exercise of their freedom of religion could undermine parental rights.²⁹ After a lengthy discussion on the proposed sub-paragraph, the delegations from the Netherlands and the Ukraine SSR suggested that a compromise text be drafted and the delegation from the United Kingdom put forward a revised version.³⁰ Following some amendments, the draft text was agreed:

24 OHCHR 2007, Vol I (n 4).

25 OHCHR 2007, Vol I (n 4) 455.

26 CRC Working Group Report 1984 (n 23) para 4; OHCHR 2007, Vol I (n 4) 455.

27 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, adopted by the UN General Assembly, 25 November 1981, UNGA Resolution 36/55, A/36/684.

28 Article 18(4) ICCPR (n 5).

29 Van Bueren 1995 (n 8).

30 CRC Working Group Report 1984 (n 23) para 17.

The States Parties shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his right in a manner consistent with the evolving capacities of the child.³¹

This revised text was then adopted in the first reading of the Working Group in 1984.³² However, the debate re-ignited during the second reading. A new drafting group was established (composed of Bangladesh, China, the Holy See, Italy, Mexico Morocco, the Netherlands and Poland, and later joined by the United States of America, the Union of Soviet Socialist Republics, Argentina, Algeria, Egypt, Tunisia and two NGOs)³³ to reconsider the reference to the 'evolving capacities of the child'. The new drafting group sought to introduce two new sub-paragraphs into the provision, one of which replicated article 18(4) of the ICCPR. The proposed text read as follows:

2. The States Parties shall equally respect the liberty of parents and when applicable, legal guardians, to ensure the religious and moral education of the child in conformity with their own conviction [of their choice].
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.³⁴

This drafting group reiterated concerns that any reference to a child's capacities would limit the scope of parental rights already established elsewhere under international law (article 18(4), ICCPR)³⁵ Delegations from Islamic states were not willing to accept any provision which potentially empowered children to change their religion or have choice over their religion.³⁶ Other groups believed that it was in the best interests of the child that she adopt the religion of her father.³⁷ In the end, in an attempt to reach consensus, the Chairman of the Working Group removed the proposed new sub-paragraphs, claiming that this text was already replicated elsewhere in international law.³⁸

The issue, however, was far from resolved. Following the adoption of the CRC, the delegation of the Holy See made a declaration that 'the right of parents to give their child a religious and moral education in conformity with their personal beliefs formed part of the right to manifest one's religion as

31 OHCHR 2007, Vol. I (n 4) 117.

32 Ibid.

33 UN Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1989), E/CN.4/1989/48, para 280, 281.

34 OHCHR 2007, Vol. I (n 4) 463; see also CRC Working Group Report 1989 (n 33) para 280.

35 OHCHR 2007, Vol. I (n 4) 463; CRC Working Group Report 1989 (n 33) para 288; Van Bueren 1995 (n 8) 156-7.

36 Van Bueren 1995 (n 8) 157.

37 Ibid.

38 OHCHR 2007, Vol. I (n 4), 463-464; CRC Working Group Report, 1989 (n 33) para 288-289).

per article 18(3) of the ICCPR'.³⁹ Italy joined Holy See in its declaration (OHCHR, 2007, para 291). When the CRC entered into force in 1990, 21 States parties reserved on article 14 of the CRC.⁴⁰ This constituted the largest reservation on any single provision under the CRC.

1.2 Evolving capacities and the drafting of article 15 (Art. 28)

The issue of the child's evolving capacities re-surfaced in 1985 when the Working Group discussed article 15 (article 28) on the right of the child to education. The delegation from the Netherlands suggested that a sub-paragraph similar to article 14(2) be included under article 15 (article 28).⁴¹ According to the Netherlands, referencing 'evolving capacities' was necessary to delimit the authority of parents under article 13(3) of the ICESCR, which allowed parents to 'choose for their children schools ...to ensure the religious and moral education of their children in conformity with their own convictions'.⁴² The proposal by the Netherlands was dropped from the final version of article 15 (article 28), however, the discussions on 'evolving capacities' precipitated further conversations on the need for a general provision recognising the 'evolving capacities of the child' within the text of the CRC.

1.3 Evolving capacities and the drafting of article 5

The pivotal discussion on 'evolving capacities' came during the Working Group session in 1987, when delegates discussed but did not adopt article 7^{ter} relating to the civil and political rights of the child – freedom of expression, freedom of association and peaceful assembly, and right to privacy.

The delegation from Norway spoke of the 'need for a general provision dealing with the evolving capacities of the child'.⁴³ Canada supported Norway and expressed a 'wish that the principle [of evolving capacities] ... be dealt with in a comprehensive manner through a general article'.⁴⁴ The representat-

39 OHCHR 2007, Vol. I (n 4) 464; CRC Working Group Report 1989 (n 33) para 290.

40 Afghanistan, Algeria, Bangladesh, Brunei, Djibouti (withdrawn in 2009), Holy See, Indonesia, Iran, Iraq, Jordan, Kuwait, Malaysia, Maldives, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Syria, and United Arab Emirates. Accessed at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en> (28 October 2021).

41 OHCHR 2007, Vol. 2 (n 4) 642.

42 See article 13(3), ICESCR (n 5).

43 UN Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1987), E/CN.4/1987/25, para 115.

44 Ibid, para 115.

ives of Argentina and Sweden also voiced similar concerns, calling for a general provision recognising the evolving capacities of the child.⁴⁵

During the 1987 Working Group session, a draft text was received from the delegations of United States and Australia for article 5*bis*. In that draft text, however, parents were identified as the primary rights holders (rather than the child) with 'due regard for the importance of allowing the child to develop the skills and knowledge required for an independent adulthood.'⁴⁶ The delegation from Canada was critical of the American draft text, stating that it would only support such a provision if there was 'due regard for the evolving capacities of the child and the child's need to mature into an independent adulthood.'⁴⁷ Canada explained that the priority should be protecting the child as a rights-holder, rather than reiterating parental rights:

... the family must not be given arbitrary control over the child. Any protection from the State given to the family must be equally balanced with the protection of the child within the family.⁴⁸

The Chairman of the Working Group requested that a new proposal for article 5*bis* be presented at the 1988 Working Group session.⁴⁹ Australia, Austria, the Netherlands and the United States of America submitted the proposal for the draft text:

The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his or her rights enumerated in the present Convention in a manner consistent with the evolving capacities of the child, having due regard for the importance of promoting the development of the skills and knowledge required for an independent adulthood.⁵⁰

The representatives of the Federal Republic of Germany expressed concern over the new draft text, arguing that parental rights would not be sufficiently safeguarded. The Germany delegation put forward its own draft text for a sub-paragraph under article 21 (article 41 of the CRC) of the draft Convention, which stated that: 'Nothing in this Convention shall affect the right and the duty of parents and, where applicable, legal guardians to take measures as are required for the upbringing and well-being of the child.'⁵¹

45 CRC Working Group Report 1987 (n 43) paras 115, 117.

46 CRC Working Group Report 1987 (n 43) para 100.

47 CRC Working Group Report 1987 (n 43) para 104.

48 CRC Working Group Report 1987 (n 43) para 106.

49 CRC Working Group Report 1987 (n 43) para 110.

50 UN Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1988), E/CN.4/1988/28, para 27.

51 CRC Working Group Report 1988 (n 50) para 29.

The Working Group members responded to the proposal from Germany by highlighting that the Convention already recognised the critical role of parents in the upbringing of the child

... If the emphasis was placed on the evolving capacities of the child in accordance with his age, the parents also had a role to play. Attention should be given to the growing child, and to his evolving capacities in a positive environment. The parents' rights in respect of bringing up the child were already well protected in article 8.⁵²

The observer for Australia further noted that the role and function of a proposed article 5*bis* was to interlink two important and general concepts:

[T]he proposed article would incorporate into the convention *two important general concepts: (a) the evolving capacities of the child, and his or her rights as enumerated in the draft convention, and (b) the rights and duties of the parents who raised the child, who provided guidance to and took primary responsibility for the child* [emphasis added]⁵³

While the representative from Germany eventually joined the consensus for the text of article 5*bis*, he continued to suggest that an interpretational clause be attached to the CRC, which stated 'clearly that the draft convention was under no circumstances to be interpreted in a way that would affect the rights of parents or legal guardians.'⁵⁴ No such clause was ever attached to the CRC.

The final version of article 5*bis* was adopted following the second reading and now constitutes the text of article 5 of the CRC:

States Parties shall respect the responsibilities, rights, and duties of parents, or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.⁵⁵

The Working Group session reports, though not exhaustive, do offer some insight into the motivations and concerns that CRC drafters may have harboured when the phrase 'evolving capacities of the child' was being discussed and penned into the texts of articles 5 and 14(2) of the CRC. The foremost concern amongst Working Group members was that any explicit recognition of a child's capacities (evolving or otherwise) in the exercise of their rights would undermine the rights of parents and the sanctity of family. This was especially pronounced in discussions on freedom of religion, where many

52 CRC Working Group 1988 (n 50) para 30.

53 CRC Working Group Report 1988 (n 50) para 28.

54 CRC Working Group Report 1988 (n 50) para 34.

55 CRC Working Group Report 1987 (n 43) para 185.

Working Group members viewed a child's exercise of freedom of religion as a direct threat to parental rights, and as potentially undermining the best interests of the child. That 21 States parties entered a reservation on article 14 – the highest number of reservations entered against any provision under the CRC – is a testament to these concerns.

At the same time, the fact that the issue of children's capacities would continue to re-emerge in the discussions of the Working Group, notably in the context of civil and political rights and the right to education, was not insignificant. It was during these discussions that a number of Working Group members identified the need for a 'general provision' that would address the role of children's evolving capacities in the exercise of their rights under the CRC. To respond to these calls while respecting the views of those Working Groups members who remained concerned about parental rights, the Committee sought to strike a delicate balance within article 5. The wording of the provision would acknowledge the role of the evolving capacities of the child, while recognising the importance of parents, guardians, extended family and community in the upbringing of the child.⁵⁶ As such, the intended scope and function of article 5 was not to create a broad principle of 'evolving capacities' under the Convention but to bring together two important general concepts under the CRC: (a) the child as a rights holder under the CRC; and (b) the rights, responsibilities and duties of parents and other carers (legal guardians, community and extended family) in the upbringing of their children under international law.⁵⁷

2 THE CRC COMMITTEE'S USE OF 'EVOLVING CAPACITIES' IN ITS GENERAL COMMENTS

In the three decades following the adoption of the CRC, the term 'evolving capacities' appears to have taken on a broader role and function outside the framework of parental guidance and direction. The term appears more than 80 times in 19 of the 23 General Comments.⁵⁸ The issue of a child's evolving capacities arose during 5 of the 22 Days of General Discussion, notably on

56 OHCHR 2007, Vol I (n 4) 360; CRC Working Group Report 1988 (n 50) para 32; Tobin and Varadan 2019 (n 16).

57 CRC Working Group Report 1988 (n 50) para 28.

58 General Comment No. 1; General Comment No. 3; General Comment No. 4; General Comment No. 5; General Comment No. 7; General Comment No. 8; General Comment No. 9; General Comment No. 10; General Comment No. 11; General Comment No. 12; General Comment No. 13; General Comment No. 14; General Comment No. 15; General Comment No. 16; General Comment No. 17; Joint Recommendation No. 31 of the CEDAW Committee/General Comment No. 18, General Comment No. 20; General Comment No. 21; General Comment No. 22 (n 17).

the Rights of Children and HIV/AIDS (1998),⁵⁹ General Measures of Implementation (1999),⁶⁰ Child Rights in Early Childhood (2004),⁶¹ the Right of the Child to be Heard (2006),⁶² and Digital Media and the Rights of the Child (2014).⁶³ During the 20th anniversary of the Convention on the Rights of the Child in 2009, the CRC Committee convened a panel on ‘evolving capacities of the child as an enabling principle’ in which it encouraged the wider application of the principle in education programming, children’s participation, protection frameworks and age-appropriate policies.⁶⁴

It is suggested that the Committee has derived a role and function or ‘evolving capacities’ that can be distilled into three broad categories: (1) ‘evolving capacities’ as an enabling principle, in which the term is used to empower children in the exercise of their rights under the CRC; (2) ‘evolving capacities’ as an interpretative principle, in which the term is used to interpret specific provisions of the Convention in a manner that recognises children’s capacities in the exercise of their rights; (3) ‘evolving capacities’ as a policy principle, in which the term is used to guide States in policy-making and programming on children’s rights.

2.1 Evolving capacities as an enabling principle

As an enabling principle, ‘evolving capacities’ serves four functions: (1) it affirms the child as a rights-holder under international law, recognising that as children grow, develop and mature, they acquire capacities to exercise increasing levels of agency over their rights; (2) it supports and recognises children’s agency in decision-making; (3) it recognises that all children, even very young children, should be engaged as agents in the promotion and protection of their own rights; (4) it crystalizes the role of parents and other carers as duty-bearers to their children, providing guidance and direction to support the child’s exercise and enjoyment of rights under the CRC.

The CRC Committee first recognised ‘evolving capacities’ as an enabling principle in its General Comment No. 7, where it explained the role of a child’s evolving capacities in the framework of parental guidance and direction:

59 CRC Committee, ‘Day of General Discussion on children living in a world with HIV/AIDS’, CRC/C/80, paras 210-243, para 230.

60 CRC Committee, ‘10th Anniversary Commemorative Meeting,’ excerpt from Annex IV, 22nd Session, 30 September-1 October 1999, CRC/C/87, para 291(k).

61 CRC Committee, ‘Day of General Discussion: Implementing child rights in early childhood’, 22 September 2004, CRC/C/SR.979, paras 4, 10.

62 CRC Committee, ‘Day of General Discussion on the Right of the Child to be Heard’, 29 September 2006, 43rd Session, 11-29 September 2006, preamble para 1, para 11.

63 CRC Committee, ‘Report of the 2014 Day of General Discussion – “Digital media and children’s rights”’, 12 September 2014, paras 107, 109.

64 CRC Committee, 20th Anniversary Event (n 18) paras 7, 23, 24(d), 43.

Evolving capacities as an enabling principle. Article 5 draws on the concept of “evolving capacities” to refer to processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized.⁶⁵

The CRC Committee went on to elaborate the importance of a principle of evolving capacities in the realisation of children’s rights:

Respecting young children’s evolving capacities is crucial for the realization of their rights, and especially significant during early childhood, because of the rapid transformation in children’s physical, cognitive, social and emotional functioning from earliest infancy to the beginnings of schooling.⁶⁶

In its General Comment No. 20, the CRC Committee again invoked ‘evolving capacities’ as an enabling principle, however this time, delinking it from the framework of parental guidance and direction:

The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.⁶⁷

In this first function, the Committee uses the principle of evolving capacities as a basis to recognise children’s entitlement to exercise increasing agency over their rights as they grow and mature. It affirmed that all children, even very young children, are rights-holders under the CRC, with an entitlement to exercise progressive agency over their rights as they grow, mature and develop. In other words, while a younger child requires more guidance in the exercise of her rights, as she grows and develops, there is a corresponding obligation to grant her increasing levels of agency to take responsibility over the exercise of her rights.

In its second function, the Committee’s use of ‘evolving capacities’ as an enabling principle recognises the role of children’s agency in decision-making. In General Comment No. 15, the Committee confirmed that ‘children’s evolving capacities have a bearing on their independent decision-making in their health issues’⁶⁸; and in the context of young children, the Committee recognised that ‘[c]hildren, including young children, should be included in decision-making processes, in a manner consistent with their evolving capacities.’⁶⁹

65 General Comment No. 7 (n 17) para 17.

66 General Comment No. 7 (n 17) para 17.

67 General Comment No. 20 (n 17) para 18.

68 General Comment No. 15 (n 17) para 21.

69 General Comment No. 12 (n 17) para 100.

At the same time, the Committee warned that enabling a child's 'evolving capacities' should not 'obviate States' obligations to guarantee protection':⁷⁰

In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.⁷¹

So, while children continue to need appropriate levels of protection, there remains an obligation to enable children's agency in so far as their evolving capacities allow: 'By being guaranteed the right to be heard, to challenge rights violations and to seek redress, adolescents are enabled to exercise agency progressively in their own protection.'⁷² The Committee reaffirmed this point in the context of adolescents' right to health in General Comment No. 4: 'States parties have to take into account the evolving capacities of adolescents and involve them in an appropriate manner in developing measures, including programmes, designed to protect them.'⁷³

In General Comment No. 3, the Committee further discussed this link between children's participatory rights and their agency in the exercise of rights: '[c]hildren are rights holders and have a right to participate in accordance with their evolving capacities in raising awareness by speaking out about the impact of HIV/AIDS on their lives and in the development of HIV/AIDS policies and programmes.'⁷⁴ This point was reiterated in the General Comment No. 5, where the Committee noted that '[c]hildren, including adolescents have the right to participate in raising awareness about their rights to the maximum extent of their evolving capacities.'⁷⁵ In General Comment No. 12, the Committee emphasised that measures should be introduced to enable 'children to contribute their views and experiences to the planning and programming of services for their health and development' with the aim of promoting 'children's capacities to take increasing levels of responsibility for their own health and development.'⁷⁶ And, again in General Comment No. 15, the Committee highlighted the link between children's right to be heard on 'all aspects of health provisions' and strengthening 'children's capacities to take increasing

70 General Comment No. 20 (n 17) para 19.

71 General Comment No. 20 (n 17) para 20.

72 General Comment No. 20 (n 17) para 19.

73 General Comment No. 4 (n 17) para 12.

74 General Comment No. 3 (n 17) para 12.

75 General Comment No. 5 (n 17) para 69.

76 General Comment No.12 (n 17) para 104.

levels of responsibility for their own health and development.⁷⁷ Thus, in its third function, the principle of ‘evolving capacities’ enables and strengthens children’s participatory role in the promotion and protection of their own rights.

In its fourth function, ‘evolving capacities’ as an enabling principle informs how parents and guardians should provide guidance and direction to their children under article 5:

The Convention recognises the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children ... *but underlines that this is to enable the child to exercise his or her rights and requires that direction and guidance are undertaken in a manner consistent with the evolving capacities of the child* [emphasis added].⁷⁸

The Committee explains that:

Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children’s autonomy and self-expression ... Parents (and others) should be encouraged to offer ‘direction and guidance’ in a child-centred way through dialogue and example, in ways that enhance young children’s capacities to exercise their rights ...⁷⁹

The Committee expounded on this point further in its General Comment No. 12:

The more the child himself or herself knows, has experience and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child’s development, but will steadily increase as the child is encouraged to contribute her or his views.⁸⁰

In this fourth function, the Committee makes clear that parents no longer carry a *carte blanche* in how they provide guidance and direction to their children: parental guidance and direction must be provided in a manner that reflects a child’s unique needs and evolving capacities, and such guidance needs to be adjusted continually to enable the child to exercise progressive levels of agency and responsibility in the exercise of her rights. Viewed in this way, ‘evolving capacities’ as an enabling principle has ‘profound significance for

⁷⁷ General Comment No. 15 (n 17) para 19.

⁷⁸ General Comment No. 12 (n 17) para 91.

⁷⁹ General Comment No. 7 (n 17) para 17.

⁸⁰ General Comment No. 12 (n 17) para 84.

the triangular relationship between the child, the family and the State.⁸¹ It transforms the role of the parent from primary rights-holder over their child, to duty-bearer to their child in the child's exercise of her rights under the CRC.

2.2 Evolving capacities as an interpretative principle

The Committee has invoked 'evolving capacities' in its interpretation of at least 14 provisions under the CRC. This section examines the role and function of 'evolving capacities' as an interpretative principle in respect of the following provisions under the CRC: (1) General Principles – article 2 (Non-discrimination), article 3 (Best interests of the child), article 6 (Survival and development) through the framework of article 29 (Education rights) and article 31 (Right to play), and article 12 (Right to be heard); (2) Civil and Political Rights – article 13 (Freedom of expression), article 14 (Freedom of thought, conscience and religion), and article 17 (Access to information); (3) Reading-in of 'evolving capacities' – article 8 (Preservation of identity), article 16 (Right to privacy), article 18 (Parental responsibilities), article 27 (Adequate standard of living), and article 24 (Right to health).

2.2.1 *Evolving capacities and the General Principles of the CRC*

i) *Article 2 – The Child's Evolving Capacities as a Basis for Discrimination*
Although the Committee does not specifically reference 'evolving capacities' in its interpretation of article 2, it does recognise that a child's capacities, or perceived lack thereof, can be a basis for discrimination when children are denied or restricted access to rights under the CRC. In its General Comment No. 20, the Committee observed that '[a]dolescence itself can be a source of discrimination,⁸² explaining that adolescents are 'often treated as incompetent and incapable of making decisions about their lives.'⁸³ In its General Comment No. 4, the Committee called on States to ensure that minimum ages were '...the same for boys and girls (article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity...'⁸⁴ The Committee emphasised that unequal access to information, commodities and services related to sexual and reproductive health 'amounts to discrimination.'⁸⁵ Thus, while 'evolving capacities' is not directly cited in the interpretation of non-discrimination under article 2, the principle nonetheless plays a

81 Lansdown 2005 (n 8) ix.

82 General Comment No. 20 (n 17) para 21.

83 General Comment No. 20 (n 17) para 21.

84 General Comment No. 4 (n 17) para 9.

85 General Comment No. 20 (n 17) para 59.

role in the interpretation of non-discrimination, ensuring a child's capacities, or perceived lack thereof is not used as a basis to deny or restrict access to rights under the CRC.

ii) *Article 3 – The role of evolving capacities in the determination of the best interests of the child*

The Committee drew an important link between the evolving capacities of the child and the best interest of the child in its General Comment on article 3(1). It recognised that as a child's capacities evolve, increasing weight should be accorded to his or her views in the determination of best interests. The Committee emphasised that '[t]he evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake,'⁸⁶ explaining that '... as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests.'⁸⁷ The Committee reiterated this point in its General Comment No. 20: 'when determining best interests, the child's views should be taken into account, consistent with their evolving capacities...' ⁸⁸ So, the best interests of the child remains a primary consideration (article 3(1)), while the right to be heard 'provides the methodology for hearing the views of the child,'⁸⁹ and the principle of evolving capacities provides the framework to recognise and attribute weight to the child's voice and agency in the best interests' determination. Thus, as an interpretative principle 'evolving capacities' plays an important role in maintaining the balance embodied in the Convention between 'recognising children as active agents in their own lives, entitled to be listened to, respected and granted increasing autonomy in the exercise of rights' while still affording each child the unique protection they need, in accordance with their relative immaturity and youth.⁹⁰

iii) *Article 6 – Evolving capacities in the interpretation of the child's right to survival and development*

The CRC Committee has not engaged in an extension discussion on the role of 'evolving capacities' in the interpretation of the right to survival and development. However, the Committee does link 'evolving capacities' with the child's development in its General Comments on articles 12, 29 and 31. The Committee recognised that enabling a child to engage her rights (such as the right to be heard) stimulates development, and thus contributes to the realisation of the right to development under article 6. In its General Comment No. 12, the Committee explained that:

⁸⁶ General Comment No. 14 (n 17) para 44.

⁸⁷ General Comment No. 14 (n 17) para 44; General Comment No. 20 (n 17) para 22.

⁸⁸ General Comment No. 20 (n 17) para 22.

⁸⁹ General Comment No. 14 (n 17) para 43.

⁹⁰ Lansdown 2005 (n 8) 3.

[C]hild participation is a tool to stimulate the full development of the personality and the *evolving capacities of the child consistent with article 6* and with aims of education embodied in article 29 [emphasis added].⁹¹

The Committee drew a similar link in the context of education, identifying the key goal of education as the ‘development of the individual child’s personality, talents and abilities’, and calling for educational curricula to be ‘of direct relevance to the child’s social, cultural, environmental and economic context and to ... take full account of the child’s evolving capacities.’⁹²

In the framework of the right to play, the CRC Committee referenced children’s development alongside their evolving capacities in its interpretation of article 31:

States parties must ensure, to the maximum extent possible, the life, survival and development of the child. In this regard, the Committee draws attention to the need to recognise the positive value of each dimension of article 31 in promoting the development *and evolving capacities of the children ...* [emphasis added].⁹³

Interestingly, in its General Comment No. 20, the Committee referenced ‘[r]espect for evolving capacities’ as part of the ‘Right to development’ in its section on the ‘General principles of the Convention.’⁹⁴ While article 6 was not explicitly addressed in General Comment No. 20, it would appear that the Committee drew an implicit link between ‘evolving capacities’ and development, noting that the ‘implementation of rights should take account of children’s development and their evolving capacities.’⁹⁵

iv) Article 12 – Evolving capacities in the interpretation of the right to be heard
The Committee’s most extensive discussion on the interpretative role of ‘evolving capacities’ comes in its commentary on article 12 (right to be heard). The Committee ascribes three functions to ‘evolving capacities’ in its interpretation of article 12: (1) interpreting ‘capable of forming his or her own views’ in a manner that enables all children to engage their rights under article 12; (2) providing a framework for assessing and attributing ‘due weight’ to the views of the child; (3) recognising the right to be heard as a condition precedent in the child’s right to receive appropriate direction and guidance from parents, legal guardians and other carers under article 5.

In its first function, the CRC Committee invokes the concept of evolving capacities to dispel the notion that a child must meet a threshold of competency to be ‘capable of forming his or her own views’ under article 12 of the

⁹¹ General Comment No. 12 (n 17) para 79.

⁹² General Comment No. 1 (n 17) para 9.

⁹³ General Comment No. 17 (n 17) para 18.

⁹⁴ General Comment No. 20 (n 17) paras 14, 18, 19, 20.

⁹⁵ General Comment No. 20 (n 17) para 1.

CRC. The Committee explains that the reference to ‘capable of forming his or her own views’ ‘should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible’⁹⁶ and to create an environment to enable the child to express her views. The Committee explains that States ‘cannot begin with the assumption that a child is incapable of expressing his or her own views’ but instead must ‘presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them.’⁹⁷ The Committee stresses that ‘article 12 imposes no age limit on the right of the child to express her or his views and discourages States parties from introducing age limits either in law or in practice which would restrict the child’s right to be heard in all matters affecting her or him.’⁹⁸ In other words, ‘it is not up to the child to first prove her or his capacity.’⁹⁹ In its Day of General Discussion on child rights in early childhood, the Committee ‘underlined the concept of the child as rights holder’ who ‘is able to form views from the youngest age, even when she or he may be unable to express them verbally.’¹⁰⁰

Thus, the obligation falls on the State party to enable children to express their views, and ‘[c]onsideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities.’¹⁰¹

In its second function, the CRC Committee introduces the prospect of using ‘evolving capacities’ as a framework to accord ‘due weight’ to the views of the child under article 12 of the CRC. The Committee has stated that ‘[c]onsideration needs to be given to the notion of the evolving capacities of the child’¹⁰² explaining that ‘article 12 makes it clear that age alone cannot determine the significance of a child’s view. Children’s level of understanding is not uniformly linked to their biological age.’¹⁰³ In at least two instances, the Committee uses ‘evolving capacities’ as a basis to assess ‘due weight’. In the context of children with disabilities, the CRC Committee notes that, ‘their views be respected in accordance with their evolving capacities,’¹⁰⁴ while in the context of migration, the CRC Committee places ‘evolving capacities’ alongside ‘age and maturity’.¹⁰⁵

96 General Comment No. 12 (n 17) para 20.

97 General Comment No. 12 (n 17) para 20.

98 General Comment No. 12 (n 17) para 21.

99 General Comment No. 12 (n 17) para 20.

100 General Comment No. 12 (n 17) para 21.

101 General Comment No. 12 (n 17) para 134(e).

102 General Comment No. 12 (n 17) para 31.

103 General Comment No. 12 (n 17) para 29.

104 General Comment No. 9 (n 17) para 32.

105 General Comment No. 22 (n 17) para 34.

While there remains considerable scope for the Committee to elaborate on the role of ‘evolving capacities’ in the assessment of ‘due weight’, it is nonetheless important to note that the Committee has looked to ‘evolving capacities’ as a framework in its interpretation of article 12.

In its third function, the Committee embeds article 12 within article 5, introducing something akin to a condition precedent on parents and other carers providing direction and guidance to their children:

... the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities ...¹⁰⁶

This requirement is stimulated by article 12 of the Convention, which stipulates that the child’s views must be given due weight, whenever the child is capable of forming her or his own views ... as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them.¹⁰⁷

In other words, for parents to provide appropriate direction and guidance to children in line with article 5, they must take into account the views of children, and as a child’s capacities evolve, greater weight must be ascribed to the views of the child, with parents and other carers adjusting their guidance and direction to reflect the child’s evolving capacities in the exercise of her or his rights.

2.2.2 Evolving capacities and civil and political rights under the CRC

The use of ‘evolving capacities’ in the interpretation of civil and political rights serves two functions: (1) it affirms the child’s status as the primary rights-holder and agent in the exercise of civil and political right; (2) it recognises States’ obligation to create environments that enable and empower children to exercise their civil and political rights, in accordance with their evolving capacities. In its commentary on article 14, the Committee confirmed that, ‘it is the child who exercises the right to freedom of religion, not the parent, and the parental role necessarily diminishes as the child acquires an increasingly active role in exercising choice throughout adolescence.’¹⁰⁸ The Committee reiterated this point in the same General Comment with respect to article 13: ‘the obligation of parents and caregivers to provide appropriate guidance in accordance with the evolving capacities of adolescents should not interfere with adolescents’ right to freedom of expression.’¹⁰⁹

106 General Comment No. 12 (n 17) para 84.

107 General Comment No. 12 (n 17) para 85.

108 General Comment No. 20 (n 17) para 43.

109 General Comment No. 20 (n 17) para 42.

In its second function, the Committee recognises an obligation on States to create environments that enable and empower children in the exercise of their civil and political rights, taking into account the principle of evolving capacities. In respect of article 14, the Committee called on States to ensure that a child's freedom of religion is 'respected in schools and other institutions, including with regard to choice over attendance in religious instruction classes'¹¹⁰; and in respect of article 17 (Freedom of association), the Committee noted that it fell on the State to 'guarantee that adolescents' right to freedom of association and peaceful assembly in all its forms is fully respected ... including through the provision of safe spaces for both girls and boys.'¹¹¹ It is in this latter function that one sees 'evolving capacities' stretched beyond the framework of parental guidance and direction.

2.2.3 *Reading-in of evolving capacities under the CRC*

In a number of other instances, the CRC Committee simply reads-in 'evolving capacities' without further explanation. For instance, in its interpretation of article 8 (Right to identity), the Committee states that '[a]lthough children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities.'¹¹² In its interpretation of article 16 (Right to privacy), the Committee specifies that 'States should ... take all appropriate measures to strengthen and ensure respect for the confidentiality of data and the privacy of adolescents, consistent with their evolving capacities.'¹¹³ In interpreting articles 18 (Parental responsibilities) and 27 (Adequate standard of living), the Committee notes that:

States parties have a positive and active obligation to support and assist parents and other caregivers to secure, within their abilities and financial capacities and with respect for the evolving capacities of the child, the living conditions necessary for the child's optimal development.¹¹⁴

Reading-in 'evolving capacities', without any further explanation or reference to article 5, reveals a seemingly settled practice by the Committee of treating 'evolving capacities' as a broader principle within the framework of the CRC.

¹¹⁰ General Comment No. 20 (n 17) para 43.

¹¹¹ General Comment No. 20 (n 17) para 45.

¹¹² General Comment No. 14 (n 17) para 55.

¹¹³ General Comment No. 20 (n 17) para 46.

¹¹⁴ General Comment No. 13 (n 17) para 5; General Comment No. 21 (n 17) para 15.

2.3 Evolving capacities as a policy principle

The Committee has repeatedly relied on ‘evolving capacities’ as a policy principle across a range of issues, such as children’s education, HIV/AIDS, adolescent health, early childhood development, corporal punishment, violence against children, harmful practices, children’s health, rest and play, indigenous children’s rights and adolescents’ rights. As a policy principle, ‘evolving capacities’ serves two functions: (1) it improves children’s access to rights and their role as decision-makers in the exercise of their rights; (2) it guides minimum age laws. In both functions, ‘evolving capacities’ is delinked from the framework of parental guidance and direction.

In its first function, the Committee has used ‘evolving capacities’ to encourage States to improve adolescents’ access to health services: due attention must be given to the evolving capacities of the child to ensure the accessibility of voluntary, confidential HIV counselling and testing services.¹¹⁵ In the context of HIV-related research, the Committee has relied on ‘evolving capacities’ to foster children’s agency and decision-making: ‘[i]n line with the child’s evolving capacities, consent of the child should be sought’ in HIV/AIDS biomedical research, HIV/AIDS operations, and social, cultural and behavioural research.¹¹⁶

In the context of education, the Committee has relied on ‘evolving capacities’ to guide education policies to ‘create [s]chools [that] foster a humane atmosphere and allow children to develop according to their evolving capacities.’¹¹⁷

In its second function, the Committee relies on ‘evolving capacities’ to inform minimum age laws in sexual consent, marriage and the possibility of medical treatment without parental consent.¹¹⁸ The Committee has said that ‘minimum ages should ... closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity (arts. 5 and 12 to 17).’¹¹⁹ In at least one instance, the Committee has referenced ‘evolving capacities’ as a basis for setting a minimum age, ‘... [s]uch laws or regulations should stipulate an age for this process, or refer to the evolving capacity of the child ...’¹²⁰ In its General Comment No. 18 on harmful practices, the CRC Committee has further relied on ‘evolving capacities’ as a basis to justify marriages of children below 18 years of age: ‘[a]s a matter of respecting the child’s evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a

¹¹⁵ General Comment No. 3 (n 17) para 22.

¹¹⁶ General Comment No. 3 (n 17) para 29.

¹¹⁷ General Comment No. 1 (n 17) para 12.

¹¹⁸ General Comment No. 4 (n 17) para 9.

¹¹⁹ General Comment No. 4 (n 17) para 9.

¹²⁰ General Comment No. 4 (n 17) para 33.

mature, capable child below 18 years of age may be allowed in exceptional circumstances ...¹²¹

In other instances, the Committee has invoked ‘evolving capacities’ as an enabling principle to guide policy more generally. As already noted above, the CRC Committee held an event on the 20th anniversary of the CRC, during which it convened a panel on ‘evolving capacities’ as an enabling principle in practice. In its recommendations, the Committee appeared to recognise the increasing significance of the principle of evolving capacities under the Convention

States parties should elaborate on the consequences of the recognition of the child as a person with evolving capacities to exercise her or his own rights and consider the establishment of appropriate ages for the independent exercise of some rights, allowing for flexible application. This would recognize the capacities of the child while providing necessary protection to the child and clear standards for those who have to implement and respect the rights of the child.¹²²

The Committee has further shown a willingness to recognise ‘evolving capacities’ as part of a broader policy framework under General Comments No. 13 and No. 21. In General Comment No. 13, the Committee discussed a ‘child rights approach’ as a policy framework:

Definition of a child rights approach. Respect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights-bearing person should be established and championed as the pre-eminent goal of States parties’ policies concerning children ... It requires a paradigm shift away from child protection approaches in which children are perceived and treated as “objects” in need of assistance rather than as rights holders entitled to non-negotiable rights to protection. A child rights approach is one which furthers the realization of the rights of all children as set out in the Convention by developing the capacity of duty-bearers to meet their obligations to respect, protect and fulfil rights (art. 4) and the capacity of rights holders to claim their rights ...¹²³

The Committee went on to explain that:

This approach is based on the declaration of the child as a rights holder and not a beneficiary of benevolent activities of adults. It includes respecting and encouraging consultation and cooperation with, and the agency of, children in the design, implementation, monitoring and evaluation of the coordinating framework and specific measures therein, taking account of the age and *evolving capacities of the child or children* [emphasis added].¹²⁴

121 General Comment No. 18 (n 17) para 2.

122 CRC Committee, 20th Anniversary (n 18) recommendation 5.

123 General Comment No. 13 (n 17) para 59.

124 General Comment No. 13 (n 17) para 72(a).

The Committee expounds on the child rights approach in its General Comment No. 21, stating that ‘the process of realising children’s rights is as important as the end result. A child rights approach ensures respect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights holder’;¹²⁵ it draws on ‘child rights standards and principles from the Convention and other international human rights instruments to guide behaviour, actions, policies and programmes’ with the aim of building ‘the capacity of children as rights holders to claim their rights and the capacity of duty bearers to fulfil their obligations to children’.¹²⁶

Thus, the Committee’s use of ‘evolving capacities’ in the policy context suggests a role and function for the term that extends beyond the scope of parental guidance and direction under article 5 and article 14(2), introducing a framework to guide States in their programming on children’s rights.

2.4 A principle of evolving capacities under the CRC

Studying the CRC General Comments, it would appear that the Committee’s use of ‘evolving capacities’ has stretched the term well beyond the framework of parental guidance where it was first conceived under articles 5 and 14(2). In so doing, it would appear that the Committee has introduced a broader principle of ‘evolving capacities’ under the CRC that not only informs the framework of parental direction and guidance but the interpretation and implementation of the Convention as a whole.

As an enabling principle, ‘evolving capacities’ acknowledges the processes of maturation and learning that all children undergo, recognising that as a child grows, develops and matures, he or she becomes entitled to increasing levels of agency and responsibility over the exercise of rights.¹²⁷ The Committee’s use of ‘evolving capacities as an enabling principle’ serves four functions: (1) it affirms that all children, even very young children are rights holders under the CRC; (2) it recognises the role of children’s agency in decision-making; (3) it introduces an obligation on States to engage children in the promotion and protection of their rights, in so far as their evolving capacities permit; (4) it crystalizes the role of parents and other carers as duty-bearers to their children in the child’s exercise of their rights under the CRC. In short, it changes how children are perceived, enabled and empowered in the exercise and enjoyment of their rights under international law.

As an interpretative principle, ‘evolving capacities’ introduces a framework in which provisions of the Convention are interpreted in a manner that sup-

¹²⁵ General Comment No. 21 (n 17) para 10.

¹²⁶ General Comment No. 21 (n 17) paras 11(b), 11(c).

¹²⁷ General Comment No. 7 (n 17) para 17; General Comment No. 20 (n 17).

ports the child's exercise of rights in line with their evolving capacities. It also introduces an obligation on States, alongside parents and other carers, to take measures to support children in the exercise of their rights as their capacities develop, creating environments adapted to their evolving capacities, and ensuring they are provided with the resources and information needed to exercise their rights in institutional settings.

As a policy principle, 'evolving capacities' unshackles States from traditional policy-making frameworks, in which children are presumed to lack capacity until they cross a specific age-barrier or reach a prescribed legal age of adulthood. It debunks the notion that children must reach a requisite threshold of capacity to be able to exercise their rights, and it recognises that as children grow and develop, they need to be progressively enabled and empowered in the exercise of their rights. It challenges perceptions of capacity as a binary concept, replacing it with a framework that views it as dynamic and fluid process, recognising the 'wide range of qualities – moral, social, cognitive, physical and emotional' – that encompass capacity.¹²⁸ It further recognises that 'children, like adults, will not acquire a consistent and overall level of capacity across all fields' according to a fixed and uniform process and 'expressions of competence will vary according to the nature of the tasks involved, their personal experiences, expectations placed on them, social context and individual abilities.'¹²⁹

Taken together, the Committee's use of 'evolving capacities' introduces a role and function for the term that has a far-reaching and transformative impact on how children are viewed, enabled and empowered within families, schools, communities and society generally. The Committee's use of 'evolving capacities' is thus much wider and more radical than what was likely envisaged by the CRC Working Group when it first penned the phrase into the texts of articles 5 and 14(2) of the Convention.

3 EVOLVING A PLACE FOR THE PRINCIPLE OF EVOLVING CAPACITIES UNDER THE CRC

Interestingly, the Committee does not recognise 'evolving capacities' as a general principle under the CRC. Indeed, when the Committee met for the first time in 1991 and identified the four general principles of the Convention – non-discrimination (article 2), best interests of the child (article 3(1)), the right to

¹²⁸ Lansdown 2005 (n 8) 23.

¹²⁹ Ibid.

development (article 6), and the right to be heard (article 12) – the evolving capacities of the child did not feature in the discussions.¹³⁰

However, there have been consistent calls over the years to recognise article 5 as a general principle under the Convention. Even in the final stages of the CRC drafting, it was suggested by UNICEF that article 5 be recognised as a general provision of the Convention on the basis that it featured amongst the first provisions.¹³¹ Doek¹³² and Detrick¹³³ have separately suggested that article 4 and article 5 be included as general principles of the CRC on the basis that both provisions introduce general obligations applicable to the whole of the CRC. In their recent analysis, Hanson and Lundy called for a re-evaluation of the composition and nomenclature of the general principles, proposing that article 6 be replaced with article 5, and the label ‘general principles’ be discarded in favour of two categories – ‘overall implementing obligations’ and ‘cross-cutting standards’ of the CRC.¹³⁴ Hanson and Lundy suggested that article 5 be recognised as a cross-cutting standard under the CRC, given that ‘evolving capacities’ has become a concept ‘widely used by many child rights actors in a cross-cutting role.’¹³⁵

Elevating article 5 to the status of a general principle (or cross-cutting standard) would not necessarily recognise ‘evolving capacities’ in the manner that it has come to be understood by the Committee in its General Comments. A plain reading of article 5 does not appear to support an interpretation of ‘evolving capacities’ as a broader principle of the CRC. The reference to ‘evolving capacities’ under article 5 appears to be directed to the manner in which children receive guidance and direction – not to enshrine a broader principle under the CRC. This reading of article 5 is corroborated in the discussions of the CRC Working Group, many of whom saw article 5 as reflecting a ‘delicate balance between the evolving capacities of children as rights-holder and the correlative rights of parents’¹³⁶ and the interlinking of two important general concepts under the Convention.¹³⁷

This is further corroborated in the Committee’s own treatment of ‘evolving capacities’ in its General Comments. For the most part, the Committee delinks its references to ‘evolving capacities’ from article 5 and parental guidance and direction. In the over 80 references to ‘evolving capacities’, article 5 is refer-

130 D. Goodman, ‘Analysis of the First Session of the Committee on the Rights of the Child’ (1995) 1 *Netherlands Quarterly for Human Rights* 43-62; see also Hanson and Lundy 2017 (n 19).

131 Hanson and Lundy 2017 (n 19) 288; OHCHR 2007, Vol. I (n 4) 6.

132 Doek 2007 (n 20).

133 S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1999) 115-124, 115-116.

134 Hanson and Lundy 2017 (n 19).

135 Hanson and Lundy 2017 (n 19) 301, 302.

136 OHCHR 2007, Vol. I (n 4) 358.

137 OHCHR 2007, Vol. I (n 4) 359.

enced in only 14 instances across 7 General Comments.¹³⁸ In other words, in the vast majority of instances, the Committee invokes the principle of ‘evolving capacities’ delinked from article 5 and the framework of parental guidance under the CRC. A few notable examples are provided below to demonstrate this point.

In its commentary on HIV/AIDS and the rights of children in General Comment No. 3, the Committee refers to ‘evolving capacities’ eight times as an enabling principle, an interpretative principle and a policy principle, yet it never refers to article 5 or the framework of parental guidance and direction.¹³⁹ In General Comment No. 1, on the aims of education, the Committee references ‘evolving capacities’ three times, again with no reference to article 5 or parental guidance and direction.¹⁴⁰ In General Comment No. 15, on the child’s right to health, the Committee invokes ‘evolving capacities’ six times as an enabling principle and a policy principle, and again with no reference to article 5 or parental guidance and direction.¹⁴¹ In its General Comment No. 5, on the implementation of the Convention, the Committee cites ‘evolving capacities’ in its reference to States’ obligations under article 42, again delinking it from article 5 and the framework of parental guidance and direction.¹⁴² In its General Comment No. 18, on harmful practices, the Committee relies on ‘evolving capacities’ to recognise exceptional circumstances in which a child can marry under 18 years of age,¹⁴³ and again there is no reference to parental guidance or article 5.

To recognise article 5 as a general principle of the CRC, without giving due consideration to the manner in which ‘evolving capacities’ has come to be used and understood by the Committee would likely obfuscate the scope and function of article 5, while not actually resolving the need to recognise the principle of ‘evolving capacities’ more broadly under the CRC. How then should a principle of ‘evolving capacities’ be recognised and understood under the Convention? This paper suggests that a different avenue, outside of the framework of article 5 will likely need to be found, in order to recognise the overarching principle of ‘evolving capacities’ under the Convention. The Committee has already shown its willingness to treat ‘evolving capacities’ as a broader principle within the framework of the CRC. What is needed now is a formal recognition of this principle in a manner that aligns with the Committee’s use and understanding of the term in its General Comments. Whether labelled

138 See General Comment No. 4 (n 17) para 7; General Comment No. 11 (n 17) para 46; General Comment No. 12 (n 17) paras 69, 84, 91, 94; General Comment No. 13 (n 17) para 59; General Comment No. 14 (n 17) para 44; General Comment No. 20 (n 17) paras 18 (twice), 42, 43, 50; General Comment No. 21 (n 17) para 11(b).

139 General Comment No. 3 (n 17) paras 12, 20, 22, 23, 29, 40(f).

140 General Comment No. 1 (n 17) paras 1, 9, 12.

141 General Comment No. 15 (n 17) paras 21, 22, 31, 78.

142 General Comment No. 5 (n 17) para 69.

143 General Comment No. 18 (n 17) para 20.

as a 'guiding principle', 'umbrella principle' or 'cross-cutting standard', the nomenclature applied to 'evolving capacities' must reflect its stature as a broader principle, delinked from articles 5 and 14(2), and its overarching role in the interpretation and implementation of the whole of the Convention.

CONCLUSION

A child's capacity, or perceived lack thereof, will undoubtedly play a role in how she is able to secure the enjoyment of rights under international law. Children have historically been defined by their vulnerability, and generally presumed to be incompetent under the law. However, the work of Alderson amongst others, has convincingly shown that even at a very young age, children are able to express agency and autonomy over their lives, and are often capable of decision-making much earlier than the legally prescribed age of competency.¹⁴⁴ Yet the capacity of children continues to be undervalued and overlooked in all areas of life.¹⁴⁵

When the delegates of the CRC Working Group first coined the phrase 'evolving capacities of the child' in 1984, it is unlikely they intended for it to be interpreted beyond the immediate concern of establishing a counter-balance to the wide liberties afforded to parents under international law in respect of their child's right to freedom of religion. However, when the notion of children's evolving capacities continued to re-emerge in the CRC drafting process, a different discussion ensued – was there need for a general principle of evolving capacities under the CRC?

The Working Group was unable to definitively resolve this issue at the time of the CRC drafting. But, in the almost three decades since the CRC entered into force, the CRC Committee appears to have answered this question by introducing a broad principle of 'evolving capacities' under the CRC. The Committee has invoked 'evolving capacities' over 80 times in 19 of its 23 General Comments, and referenced it across a variety of contexts elsewhere. The term 'evolving capacities' has taken on a broad role and function as an enabling principle, an interpretative principle, and a policy principle within the CRC. What is needed now is an explicit acknowledgment from the Committee of a principle of 'evolving capacities' within the framework of the CRC. Without such a recognition, the principle of 'evolving capacities' with its

144 P. Alderson, *Choosing for Children: Parents' Consent to Surgery* (Oxford: Oxford University Press, 1990); P. Alderson, *Children's Consent to Surgery* (London: Open University Press, 1993); P. Alderson and J. Montgomery, *Health Care Choice: Making Decisions with Children (Participation & consent)* (London: Institute of Public Policy, 1996).

145 M. Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15(1) *International Journal of Children's Rights* 5-23, 13; Tobin, J., 'Justifying Children's Rights,' *International Journal of Children's Rights* 2013 (21(3)), 395-441. DOI: 10.1163/15718182-02103004

potential to transform how we view, enable and empower children's agency in the realisation of their rights will continue to go unnoticed, and the promise of a paradigm shift in which the child is no longer viewed as an 'object of protection', but rather as a subject of rights under international law will remain largely theoretical.

To borrow from an analogy suggested by UNICEF: the process of realising a child's rights can be likened to a table.¹⁴⁶ The four legs of the table represent the key provisions needed to realise children's rights under the CRC: non-discrimination (article 2), best interests of the child (article 3(1)), parental guidance and direction (article 5), and the right to be heard (article 12). The table top represents the child's survival and development (article 6), and the rug on which the table stands represents the implementation of children's rights (article 4). What is missing from this image is a chair that would enable the child to sit on her own at the table. The principle of evolving capacities represents that missing chair – it secures for every child the prospect of claiming, exercising and enjoying their rights independently under international law.

146 UNICEF, *Child Rights Education Toolkit: Rooting Child Rights in Early Childhood Education, Primary and Secondary Schools*, First ed., (Geneva: UNICEF, 2014), 24-25.

4 | The role of parents in the proxy informed consent process in medical research involving children

ABSTRACT

Medical research involving child subjects has led to advances in medicine that have dramatically improved the lives, health and well-being of children. Yet, determining when and under what conditions a child should be enrolled in medical research remains an ethically vexing question in research ethics. At the crux of the issue is the free and informed consent of the child participant. A child, who is presumed legally incompetent, or lacks sufficient understanding to exercise autonomous decision-making, will not be able to express free and informed consent in the research setting. Rather than exclude all such children from medical research, a parent (or legal guardian) is designated as a proxy to consent on the child's behalf. However, the concept of proxy informed consent and the framework for its implementation present practical and ethical challenges for researchers, particularly in navigating the relationship between proxy decision-makers and child subjects in the medical research setting. Article 5 of the CRC may offer guidance on this point: (1) it places boundaries around how parental authority should be exercised; (2) it offers a model for parent-child decision-making that is participatory, collaborative and linked to the child's enjoyment of rights under the CRC; (3) it respects and supports the autonomy of child participants by recognising their evolving capacities to give informed consent. This paper concludes that greater consideration should be given to article 5 as a complementary framework for researchers engaged in medical research involving children.

INTRODUCTION

Children have been called the ‘little medical heroes’ of science.¹ James Phipps, an eight-year old boy, was among the first human subjects to test the smallpox vaccine.² James Greenlees, an eleven-year old boy, was the first human subject to undergo a carbolic acid treatment to prevent wound infection, after suffering a compound leg fracture.³ Joseph Meister, a ten-year old boy, was the first human subject to receive a rabies vaccination, after being bitten fourteen times by a rabid dog.⁴ But, for all of these scientific breakthroughs, there are countless other instances, in which a child was subjected to undignified treatment and unnecessary suffering for the purposes of advancing medical knowledge for the benefit of others.⁵

At the crux of human subject research is the tension it poses between the pursuit of knowledge for the benefit of human progress, and the need to preserve the inviolability and dignity of all persons. Informed consent represents an attempt to negotiate that tension through a process that seeks to respect, as widely as possible, the autonomy of persons, expressed in the voluntary, uncoerced and fully informed consent of the human subject in research. It is likely for this reason that informed consent remains the most important ethical requirement in medical research and the *sine qua non* of all research involving human subjects.⁶ However, it is also for this reason that

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1 J. Lentz, ‘Little Medical Heroes’ (1940) 18 *Hygeia* 888; S. Lederer, and A. Grodin, ‘Historic Overview: Pediatric Experimentation’ in M. Grodin and L. Glantz (eds.) *Children as Research Subjects: Science, Ethics & Law* (Oxford: Oxford University Press, 1994) 3-28; S. Lederer, ‘Children as Guinea Pigs: Historical Perspectives’ (2003) 10 *Accountability in Research* 1-16, 2-4.

2 Ibid.

3 Lentz 1940 (n 1); Lederer and Grodin 1994 (n 1); Lederer 2003 (n 1) 2-4.

4 Ibid.

5 Lederer and Grodin 1994 (n 1); A. Jonsen, *A Short History of Medical Ethics* (Oxford: Oxford University Press, 1999); P. Weindling, A. von Villiez, A. Loeweneau and N. Farron, ‘The victims of unethical human experiments and coerced research under National Socialism’ (2016) 40(1) *Endeavour* 1-6.

6 S. Perley, S. Fluss, Z. Bankowski, and F. Simon, ‘The Nuremberg Code: An International Overview’ in G. Annas and M. Grodin (eds.) *The Nazi Doctors and the Nuremberg Code* (New York: Oxford University Press, 1992), 149-171; E. Emanuel, D. Wendler, and C. Grady, ‘What Makes Clinical Research Ethical?’ (2000) 283(30) *JAMA* 2701-2711; E. Emanuel, D. Wendler, J. Killen, and C. Grady, ‘What Makes Clinical Research in Developing Countries Ethical? The Benchmarks of Ethical Research’ (2004) 189 *Journal of Infectious Diseases* 930-937.

medical research involving a child, who may be unable to give informed consent, presents an ethical dilemma for researchers seeking to further knowledge of child-related illness and disease.⁷

Children stand to benefit significantly from advances made through medical research and experimentation. The exclusion of children from medical research has led to the therapeutic orphaning⁸ of paediatric drugs, denying children as a class of persons the collective benefits of medical progress.⁹ In practical terms, this means that paediatricians are often forced to rely on data derived from adult clinical trials for the treatment of a child, prescribing untested ('off-label') medications which potentially place an individual child at risk, given the differences in children's pharmacokinetic and pharmacodynamic profiles.¹⁰

To overcome the ethical impasse, children have been categorised as 'vulnerable' subjects in research with additional ethical protections imposed on research involving them.¹¹ Amongst these protections, consent by proxy provides the ethical and legal basis to obtain consent for a child in medical research.¹² Because children below 18 years of age are generally presumed incompetent under the law, and a young child may lack sufficient understand-

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- 7 H. Beecher, 'Experimentation in Man' (1959) 159 *JAMA* 461-478; R. McCormick, 'Proxy consent in the experimentation situation' (1974) 18(12) *Perspectives in Biology and Medicine* 2-20; J. Katz, 'The Consent Principle of the Nuremberg Code: Its Significance Then and Now' in G. Annas and M. Grodin (eds) *The Nazi Doctors and the Nuremberg Code* (New York: Oxford University Press, 1992) 227-239; Perley et al. 1992 (n 6).
 - 8 H. Shirkey, 'Editorial: Therapeutic Orphans – Everybody's Business' (1968) 68(2) *Drug Intelligence* 323; H. Shirkey, 'Therapeutic Orphans' (1970) 121(3) *The Journal of Infectious Diseases* 348-350.
 - 9 Nuffield Council of Bioethics, *Children and clinical research: ethical issues*, London: Nuffield Council, 2015, xvi. Accessed at: <https://www.nuffieldbioethics.org/publications/children-and-clinical-research>
 - 10 M. Spriggs, and P. Caldwell, 'The ethics of paediatric research' (2011) 47 *Journal of Paediatrics and Child Health* 664-667; Nuffield Council 2015 (n 9), xvi.
 - 11 National Commission for the Protection of Human Subjects and Biomedical And Behavioural Research, *Belmont Report*, Office of the Secretary, Department of Health, Education and Welfare (Baltimore: United States of America, 1979); World Medical Association, *Declaration of Helsinki* (2000), revised by the 52nd WMA General Assembly, Edinburgh, Scotland; World Medical Association, *Declaration of Helsinki* (2004), revised by the 55th WMA General Assembly, Tokyo, Japan; World Medical Association, *Declaration of Helsinki* (2008), revised by the 59th WMA General Assembly, Seoul, Korea; World Medical Association, *Declaration of Helsinki* (2013), revised by the 64th WMA General Assembly, Fortaleza, Brazil.
 - 12 World Medical Association, *Draft Code of Ethics on Human Experimentation* (1962) 2(5312) *British Medical Journal* 1119; World Medical Association, *Declaration of Helsinki* (1964), adopted by the 18th World Medical Assembly, Helsinki, Finland; World Medical Association, *Declaration of Helsinki* (1975), revised by the 29th World Medical Assembly, Tokyo, Japan; World Medical Association, *Declaration of Helsinki* (1983) revised by the 35th World Medical Assembly, Venice, Italy; World Medical Association, *Declaration of Helsinki* (1989), revised by the 41st World Medical Assembly, Hong Kong; World Medical Association, *Declaration of Helsinki* (1996), revised by the 48th General Assembly, Somerset West, Republic of South Africa; World Medical Association, *Declaration of Helsinki* 2000 (n 11); Declaration of Helsinki 2004 (n 11); Declaration of Helsinki 2008 (n 11); Declaration of Helsinki 2013 (n 11).

ing and independence to say ‘no’ to adult researchers, consent by a parent or legal guardian (‘proxy’) provides an added layer of protection for the vulnerable child participant, while also serving as the legal basis to authorize the child’s enrolment in a study.¹³

However, the concept of proxy consent and the framework for its implementation present significant practical and ethical challenges for researchers. What are the parameters of proxy decision-making authority? What is the role of the child in the informed consent process? To what extent should a child’s autonomy be recognised and enabled in the proxy informed consent process? The absence of any standardised regulatory framework for proxy informed consent and the resultant variations that have emerged within ethical guidelines has led to uneven approaches in how children are recognised, supported and enabled in the proxy informed consent process.

There are no straightforward answers to these issues, and this chapter does not attempt to resolve them. What it considers is the extent to which the United Nations Convention on the Rights of the Child (CRC) and more specifically article 5, could offer a different vantage point for researchers navigating the ethical dimensions of proxy informed consent in medical research.

For clarity, and to avoid the use of contested terms such as ‘therapeutic’ and ‘non-therapeutic’ research, this chapter defines medical research as follows: a subset of health research that deals specifically with human subject experimentation, undertaken for the primary purpose of acquiring generalizable scientific or medical knowledge to further understanding of the causes, development and effects of human disease and improve preventive, diagnostic and therapeutic interventions.¹⁴

This chapter does not focus on informed consent in medical treatment or experimental therapeutic interventions for the clinical care of a child. Its aim is to consider the complexities surrounding the proxy decision-making process in informed consent in medical research that does not envisage a direct medical benefit to the child. It contemplates the relevance of the CRC, and article 5, as a complementary framework to navigate the decision-making relationship between a child and her carers in the proxy informed consent process.

What follows is a three-part analysis which expounds upon article 5 and its potential relevance in informed consent in medical research involving children. Part I provides a brief history of informed consent and an overview of proxy informed consent provisions in existing international ethical guidelines and instruments. Part II considers the relevance of the CRC in medical research and the unique vantage point that article 5 may provide in respect of the

13 Belmont Report, 1979 (n 11); Spriggs and Caldwell 2011 (n 10) 665.

14 Declaration of Helsinki 2013 (n 11), principle 6; Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO), *International Ethical Guidelines for Health-related Research Involving Humans* (2016), Geneva: Switzerland, Preamble. (‘CIOMS 2016’)

parent-child relationship in proxy informed consent. Part III examines how article 5 could be used to guide researchers navigating the proxy informed consent process. This paper posits that article 5 and the CRC framework may be useful in three respects. First, it introduces boundaries around how proxy authority should be exercised in the informed consent process. Second, it promotes a model for parent-child decision-making that is participatory, collaborative and linked with the child's enjoyment of rights under the CRC. Third, it fosters respect for children's autonomy by recognising the child's evolving capacities to provide informed consent in medical research. The paper concludes that more consideration should be given to article 5 and the CRC as a complementary framework to navigate the ethical dimensions of proxy informed consent in medical research involving children.

1 OVERVIEW OF INFORMED CONSENT IN MEDICAL RESEARCH ETHICS

1.1 History of informed consent in human subject medical research

That a human subject should voluntarily consent to participation in medical research was not a widely accepted practice when it was codified under Principle One of the Nuremberg Code.¹⁵ At the time, medical experimentation tended to take place in the context of medical treatment, and as such, the rights and protection of human subjects were viewed through the prism of the physician-patient relationship, as part of the physician's duty to act in the patient's best interest.¹⁶ A participant's consent was seen as more of a practical consideration, to facilitate cooperation, rather than an ethical duty to respect the autonomy of the participant.¹⁷

The gravity and magnitude of atrocities committed during the Nazi era under the guise of medical experimentation¹⁸ was a reckoning for the medical profession.¹⁹ As the Nazi Doctors' Trial (*United States v Karl Brandt*²⁰) unfolded, the ethical practices of the international medical community came under scrutiny: the defendants drew attention to the use of prisoners, institu-

15 R. Faden and T. Beauchamp, with N. King, *A History and Theory of Informed Consent* (Oxford: Oxford University Press, 1986) 152; Katz, 1992 (n 7) 229; Jonsen 1999 (n 5); Lederer 2003 (n 1).

16 Faden and Beauchamp 1986 (n 15) 152.

17 H. Beecher, 'Ethics and Clinical Research' (1966) 274(2) *The New England Journal of Medicine* 1354-1360; S. Lederer, 'Chapter 49: The Ethics of Experimenting on Human Subjects' in R. B. Baker and L. B. McCullough (eds), *The Cambridge World History of Medical Ethics* (Cambridge: Cambridge University Press, 2009); Katz 1992 (n 7); Lederer, 2003 (n 1).

18 Wiending et al., 2016 (n 5).

19 Perley et al., 1992 (n 6); Faden and Beauchamp, 1986 (n 15); Lederer, 2009 (n 17).

20 *United States of America v Karl Brandt et al.*, 21 November 1946-20 August 1947, judgement reprinted in G. Annas and M. Grodin (eds) *The Nazi Doctors and the Nuremberg Code* (New York: Oxford University Press, 1992) 61 - 144.

tionalized children and the mentally-ill in human experimentation, and challenged the assertion that voluntary participation was a common practice that 'generally occurred' in human subject research.²¹ In rejecting these claims, the Tribunal pronounced a set of ten 'basic principles' to 'satisfy moral, ethical and legal aspects' of research, which placed central importance on the voluntary participation of the human subject in research.²² That the Nuremberg Code focused on experimentation with prisoners (unrelated to medical treatment) did not diminish the universality of its principles or the stature of the Code.²³ The Nuremberg Code represented a watershed moment for the autonomy and dignity of human participants in medical experimentation, and to this day, remains the most influential statement on the rights of human subjects in research.²⁴

By the late 1950s, however, concerns began to emerge over the practicability and enforceability of the Code, particularly in a rapidly expanding field of drug development and clinical research.²⁵ There were fears that strict adherence to the informed consent requirements under the Nuremberg Code would 'effectively cripple' research in mental illness and 'render experimentation on children impossible.'²⁶ There were also doubts over practicability and enforceability of an absolute requirement of informed consent, after it was found that physician-researchers were not consistently implementing the Code's informed consent requirements in clinical research settings.²⁷

In the early 1960s, the World Medical Association (WMA) began a process to develop a code of professional ethics (drafted by physicians for physicians) to provide guidance to physician-researchers across a wider range of clinical research settings.²⁸ Led by the British Medical Research Council, Harvard Medical School, and the British Medical Association, a draft code was drawn up in 1961. In its first iteration, the draft replicated the structure and aims of the Nuremberg Code.²⁹ However, the WMA delegates could not agree and a protracted period of revisions ensued between 1962 and 1964.³⁰ When the draft code was finally adopted at the 18th WMA Assembly in Helsinki, Finland in 1964, its provisions on informed consent had significantly changed.³¹

The Declaration of Helsinki departed from the Nuremberg Code in a number of important respects. It introduced the possibility of conducting

21 Faden and Beauchamp 1986 (n 15) 155; Katz 1992 (n 7).

22 Lederer 2009 (n 17); Faden and Beauchamp 1986 (n 15) 155.

23 Faden and Beauchamp 1986 (n 15) 156; Katz 1992 (n 7).

24 Katz, 1992 (n 7).

25 Beecher 1959 (n 7); Perley et al. 1992 (n 6) 157; Faden and Beauchamp 1986 (n 15) 156; Lederer 2003 (n 1).

26 Beecher 1959 (n 7); Lederer 2003 (n 1) 10.

27 Beecher, 1966 (n 17).

28 Lederer 2003 (n 1) 10.

29 Katz 1992 (n 7) 233; Perley et al., 1992 (n 6).

30 Beauchamp and Faden 1986 (n 15); Lederer 2003 (n 1).

31 Katz 1992 (n 7) 232; *Ethics of Human Experimentation* 1962 (n 14).

research on persons incapable of providing voluntary, free and informed consent, breaking from the absolute requirement under Principle One of the Nuremberg Code.³² It proposed a concept of 'consent by proxy' for persons incapable of providing informed consent to enable their participation in research.³³ It introduced a distinction between medical research combined with clinical care (therapeutic research), for which informed consent was not strictly required,³⁴ and medical research undertaken for the purpose of accruing scientific knowledge for the benefit of others (non-therapeutic research) for which free and fully informed consent was required.³⁵ The upshot of these changes was to introduce a concept of informed consent (by proxy) that departed from the autonomy-based model of consent envisaged under Principle One of the Nuremberg Code.

The Declaration of Helsinki has since been revised eight times – 1975, 1983, 1989, 1996, 2000, 2004, 2008, 2013 – and continues to be recognised as the foundational instrument in medical research ethics, from which all other international guidelines and national regulatory frameworks are based.

1.2 INTERNATIONAL ETHICAL GUIDELINES ON INFORMED CONSENT IN MEDICAL RESEARCH

1.2.1 *The ethical dilemma of involving children in medical research*

When the Declaration of Helsinki introduced the notion of proxy consent into medical research, it did so without explicating how such an informed consent process would be implemented in the research setting. Who would hold the moral legitimacy to act as the proxy? On what basis did a proxy have moral authority to volunteer a child in research? What were the parameters of proxy decision-making authority? What was the child's role in the proxy informed consent process? To what extent should a child's preferences and views be elicited and prioritised in the proxy informed consent process? The uncertainty surrounding these questions led ethicists to debate the morality of involving children in medical research, particularly where the research did not overlap with the clinical care of the child.³⁶ Many of these questions remain unanswered, and the concept of proxy informed consent continues to stir unease

32 Declaration of Helsinki 1964 (n 12), part II, principle 1, part III, principle 3a.

33 Declaration of Helsinki 1964 (n 12), part II, principle 1, part III, principle 3a.

34 Declaration of Helsinki 1964 (n 12), part II, principle 1.

35 Declaration of Helsinki 1964 (n 12), part III, principle 3a; Katz 1992 (n 7).

36 A. Jonsen, 'Non-therapeutic research with children: the Ramsey versus McCormick Debate' (2006) *JAMA* S12-S14; McCormick 1974 (n 7); P. Ramsey, 'The enforcement of morals: non-therapeutic research on children' (1976) 6(4) *Hastings Centre Report* 21-30; See also P. Ramsey, *The Patient as person* (New Haven: Yale University Press, 1970).

among ethicists, who characterise it as an ‘insoluble dilemma’ of human subject research.³⁷

1.2.2 International ethical guidelines on proxy informed consent in medical research

In the meantime, international ethical guidelines and instruments evolved myriad frameworks for proxy informed consent, conferring wide authority to parents (or legal guardians) to act as decision-makers on behalf of their children in medical research. A brief survey of international ethical guidelines and instruments reveals some notable differences in how children are recognised, supported and enabled in the proxy informed consent process

Table 1: Informed consent under international medical research ethical codes and guidelines

<i>Instrument</i>	<i>Recognition of the child</i>	<i>Disclosure and participation in decision-making</i>	<i>Respect for child's agreement ('assent')</i>	<i>Respect for child's refusal ('dissent')</i>	<i>Weight given to child's preferences / authority of proxy</i>
<i>Declaration of Helsinki (2013)</i> ³⁸ World Medical Association Principles 28, 29	Children identified as persons 'incapable of giving informed consent'	No. There is no explicit requirement for engaging or involving children in decision-making	Yes. If a child is able to agree to participate, physicians must obtain assent alongside consent	Yes. A child's dissent or refusal must be respected	The child's refusal is <u>determinative</u> Assent is required alongside informed consent from a legally authorised representative
<i>CIOMS Guidelines (2016)</i> ³⁹ International Organizations of Medical Sciences Guidelines 9, 15 and 17	Children and adolescents recognised as having 'evolving capacities to give informed consent'	Yes. Age-appropriate information must be provided to children, and they must be involved in discussions in accordance with their evolving capacities	Yes. Agreement must be obtained in keeping with the child's evolving capacities	Yes. Refusal must be respected over parents/guardian permission, unless participation in research is the best medical option for the child	The child's refusal is <u>determinative</u> if it does not interfere with his or her best interests in clinical care Assent is required alongside permission from a parent or legally authorised representative

37 R. Moser, 'An Anti-Intellectual Movement in Medicine?' (1974) 227(4) *JAMA* 432-434, 433; McCormick 1974 (n 7)19; S. McLean, 'Medical Experimentation with Children' in P. Alston, S. Parker and J. Seymour, *Children, Rights and the Law* (Oxford: Clarendon Paperback, 1992) 173-191; Spriggs and Caldwell 2011 (n 10).

38 Declaration of Helsinki 2013 (n 11).

39 CIOMS 2016 (n 14).

<i>Instrument</i>	<i>Recognition of the child</i>	<i>Disclosure and participation in decision-making</i>	<i>Respect for child's agreement ('assent')</i>	<i>Respect for child's refusal ('dissent')</i>	<i>Weight given to child's preferences / authority of proxy</i>
Good Clinical Practice: Consolidated Guidance (1995, 2006, 2016)⁴⁰ Paras. 4.8.12	Children identified as 'vulnerable subjects'	Yes. Children should be informed about the nature of the research to the extent of their understanding	Yes. If the child is deemed capable of assenting, he or she may sign the informed consent form	No. Only parent or guardian may withdraw a child, and only if she or he appears unduly distressed.	The child's refusal is <u>not</u> recognised and <u>not</u> determinative Informed consent is required from a legally acceptable representative Assent may be obtained if the child is capable.
UNESCO Declaration on Bioethics and Human Rights (2005)⁴¹ Art. 7	Children identified as 'persons without capacity to consent'	Yes. The child should be involved to the greatest extent possible in decision-making	Not required	Yes. If research does not envisage a direct benefit, a child's refusal must be respected	The child's refusal is <u>determinative</u> Authorisation is required from a parent or legal guardian

40 International Council for Harmonisation (ICH), formerly known as the International Conference on Harmonisation (ICH) established technical guidelines for good clinical practice to harmonise guidelines for global pharmaceutical development. The ICH has issued four sets of guidelines – Quality Guidelines, Safety Guidelines, Efficacy Guidelines and Multidisciplinary Guidelines. Its Efficacy Guidelines (E6) address clinical trials and medical research, see International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH), 'Integrated Addendum to ICH E6(R1): Guidelines for Good Clinical Practice E6(R2), Current Step 4 Version, 9 November 2016. Accessed at: https://database.ich.org/sites/default/files/E6_R2_Addendum.pdf (27 October 2021).

41 Declaration on Bioethics and Human Rights, *UNESCO*, adopted by acclamation at the 33rd session of the General Conference of UNESCO, 19 October 2005. Accessed at: <https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights> (27 October 2021).

<i>Instrument</i>	<i>Recognition of the child</i>	<i>Disclosure and participation in decision-making</i>	<i>Respect for child's agreement ('assent')</i>	<i>Respect for child's refusal ('dissent')</i>	<i>Weight given to child's preferences / authority of proxy</i>
Regulation (EU) No 536/2014 on clinical trials on medicinal products (2014) ⁴² European Parliament Art. 32	Children identified as 'minors' incapable of providing informed consent	Yes. The child must be engaged in a way adapted to their age and mental maturity	Not explicit. However, deference is given to national laws to determine where and when a child may give 'assent'	Yes. If a child refuses to participate or wishes to withdraw, his or her views must be respected	The child's refusal is <u>determinative</u> Informed consent is required from a legally designated representative
Convention on Human Rights and Biomedicine (Oviedo Convention) (1997) ⁴³ Council of Europe Arts. 5, 6, 17	Children identified as 'minors'	Yes. The child must be engaged in discussions and informed of his or her rights as prescribed by law	Not explicit. However, the child's views will be afforded increasing weight subject to age and maturity	Yes. If the child refuses, her or his wishes must be respected	The child's refusal is <u>determinative</u> Informed consent is required from a parent or legal representative
Add'l Protocol on Biomedical Research (2005) ⁴⁴ Council of Europe Arts. 14, 15	Children identified as 'minors'	Yes. The child must be engaged in discussions and informed of his or her rights as prescribed by law	Not explicit. However, the child's views will be afforded increasing weight subject to age and maturity	Yes. If the child refuses, her or his wishes must be respected	The child's refusal is <u>determinative</u> Informed consent is required from a parent or legal representative

42 European Parliament, Regulation (EU) No 536/2014 on clinical trials on medicinal products for human use, *European Parliament and of the Council*, 16 April 2014. Accessed at: https://ec.europa.eu/health/sites/default/files/files/eudralex/vol-1/reg_2014_536/reg_2014_536_en.pdf (27 October 2021).

43 Council of Europe, Convention on Human Rights and Biomedicine (Oviedo Convention), entered into force on 1 December 2009. Accessed at: <https://www.coe.int/en/web/bioethics/oviedo-convention> (27 October 2021).

44 Council of Europe, Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research (ETS No. 195), adopted 25 January 2005, entered into force on 1 September 2007. Accessed at: <https://rm.coe.int/168008371a#:~:text=Parties%20to%20this%20Protocol%20shall,in%20the%20field%20of%20biomedicine.> (27 October 2021).

These differences are further magnified at the national level where an estimated 1,100 laws and regulations inform human subject research across 131 countries.⁴⁵ A recent survey of informed consent provisions in 27 European countries revealed significant differences in age requirements, legal definitions for consent and assent, and proxy requirements.⁴⁶ What we are left with then, is an uneven ethical and regulatory framework for proxy informed consent that provides little assurance to the child that her rights and autonomy will be respected and supported in the informed consent process in medical research.

2 THE CRC AND INFORMED CONSENT IN MEDICAL RESEARCH

2.1 The role of the CRC in medical research with children

Despite its adoption over 30 years ago, the CRC seldom appears in international ethical guidelines and instruments. The Declaration of Helsinki – revised five times since 1989 – makes no reference to the CRC or the rights of children in its preamble or principles.⁴⁷ The technical guidelines for good clinical practice issued by the International Council for Harmonisation (ICH-GCP) also make no reference to the CRC.⁴⁸ The Guidelines for the Council of International Organizations of Medical Sciences (CIOMS) developed in collaboration with the WHO in 1982 and subsequently revised in 1993, 2002 and 2016 also make no reference to the CRC, despite mentioning the ‘evolving capacities of the child’ in its provisions on informed consent.⁴⁹

The Convention on Human Rights and Biomedicine⁵⁰ mentions the CRC in its preamble, but the rights of the child are not explicitly referenced in its provisions. The Convention has been criticised for failing to recognise ‘children’s evolving capacities’ and ‘right to be heard and participate in decision-making’ in the informed consent process.⁵¹

For its part, the Committee on the Rights of the Child has said the CRC applies in medical research, and ‘... academics, private companies and others,

45 Office for Human Research Protections, U.S. Department of Health and Human Services, *International Compilation of Human Research Standards*, 2019. Accessed at: <https://www.hhs.gov/ohrp/sites/default/files/2019-International-Compilation-of-Human-Research-Standards.pdf> (15 October 2019).

46 P. Lepola, A. Needham, J. Mendum, P. Sallabank, D. Neubauer, and S. de Wildt, ‘Informed consent for pediatric trials in Europe’ (2016) 101 *Arch Dis Child* 1017-1025.

47 Declaration of Helsinki 1996 (n 12); Declaration of Helsinki 2000, 2004, 2008, 2013 (n 11).

48 ICH-GCP 2016 (n 40).

49 CIOMS 2016 (n 14), Guideline 17.

50 Oviedo Convention (n 43).

51 T. Liefwaard, A. Hendriks, and D. Zlotnik, *From Law to Practice: Towards a Roadmap to Strengthen Children’s Rights in the Era of Biomedicine*, Leiden University (The Committee on Bioethics of the Council of Europe: Strasbourg, 2017), 4, 5, 27, 28.

undertaking research involving children [must] *respect the principles and provisions of the Convention* alongside ethical guidelines and codes (emphasis added).⁵²

The CRC Committee has further emphasised the importance of respecting children's rights in the research setting

Children have been subjected to unnecessary or inappropriately designed research with little or no voice to either refuse or consent to participation. In line with the child's evolving capacities, consent of the child should be sought and consent may be sought from parents or guardians if necessary, but in all cases consent must be based on full disclosure of the risks and benefits of research to the child.⁵³

Yet, the CRC does not explicitly address children's right to consent in medical treatment or research. The CRC Working Group considered the issue late in the drafting process during its 1989 Working Group Session.⁵⁴ A draft paragraph was tabled during discussions on the right to health (article 24), which stated 'that a child shall not be subject to any medical or scientific experimentation or treatment unless it is with the free and informed consent of the child or where appropriate that of the child's parents'.⁵⁵ A number of delegates strongly supported the inclusion of the paragraph. However, as discussions ensued, complex issues emerged, raising concerns about adopting such a provision without further consultation with experts.⁵⁶ Given the late stage in the drafting process, it was decided that the proposed paragraph should be rejected.⁵⁷

That the CRC did not address children's consent in medical research has been lamented as a missed opportunity to address the issue of proxy informed consent.⁵⁸ In the absence of a specific provision, this chapter contemplates whether article 5 could offer guidance to researchers navigating the ethical dimensions of proxy informed consent in medical research involving children.

52 CRC Committee, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, para 85.

53 UN Committee on the Rights of the Child, General Comment No. 3 (2003), HIV / AIDS and the rights of the child, 17 March 2003, CRC/GC/2993/3, para 29.

54 Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Volume I and Volume II (Geneva: OHCHR, 2007), Vol. II, 601.

55 OHCHR 2007 (n 54) Vol. II, 601.

56 G. Van Bueren, *The International Law on the Rights of the Child*, (London: Martinus Nijhoff Publishers, 1995) 310-312.

57 OHCHR 2007 (n 54) Vol. II, 601.

58 McLean 1992 (n 37) 189.

2.2 Article 5 – a unique and necessary provision of the CRC

Article 5 is unique to the CRC, having no antecedent and no subsequent equivalent in any other international and regional instrument on the rights of the child.⁵⁹ When the Working Group began discussing article 5, they were motivated by two equally important concepts: the child as a rights holder with evolving capacities, and the duties, responsibilities and rights of parents, legal guardians, members of extended family and community.⁶⁰ The ambition of article 5 was to bring together these two important general concepts under one provision, striking a delicate balance between empowering the child in the exercise of her rights, while also respecting the role of parents and guardians in the upbringing of their children.⁶¹

An important aspect of article 5 was its recognition of autonomy and rights as relational concepts under the CRC. As Tobin explains

Rights for children under the CRC are not to be enjoyed in isolation from their parents and family ... the realization of children's rights will be deeply connected to, and interdependent with, the exercise of parental rights and responsibilities.⁶²

Because children are born in a state of dependency, there will be a period in a child's life, in which she will need to rely on parents and others to provide direction and guidance to enable her realization and enjoyment of rights under the Convention.⁶³ Respecting a child's autonomy as a rights-holder will thus require giving consideration to the involvement of parents in the child's life, not only to ensure the child's protection, but also to support and enable her exercise of rights under the Convention. Viewed in this way, the CRC introduces a conception of rights that does not abandon children to their autonomy but rather recognises the important role that relationships will play in support-

59 G. Kamchedzera, 'Article 5: The Child's Right to Appropriate Direction and Guidance' in A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans, M. Verheyde and B. Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2012); John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019), 159-185.

60 UN Commission on Human Rights, Report of the Working Group on a draft convention on the rights of the child, 1988, E/CN.4/1988/28, para 28; see also UN Commission on Human Rights, Report of the Working Group on a draft convention on the rights of the child, 1987, E/CN.4/1987/25.

61 Working Report 1988 (n 60), paras 28, 30; Tobin and Varadan 2019 (n 59) 160.

62 J. Tobin, 'Chapter 4: Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in M.D. Ruck, M. Peterson-Badali, and M. Freeman (eds), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (London: Routledge Taylor & Francis Group, 2017) 21.

63 Tobin and Varadan 2019 (n 59) 161.

ing and enabling children's autonomy as rights-holders.⁶⁴ That said, article 5 does not envisage a role for parents and family that is indeterminate or indefinite. The reference to the 'evolving capacities of the child' recognises that as a child grows, respect for her autonomy should concurrently increase, and a time will come when parental guidance and direction will no longer be needed.⁶⁵ In this respect, article 5 should be understood as

an enabling or scaffolding provision that is designed to protect the rights of the child, *not parents*, by demanding that parents and carers provide the direction and guidance necessary for children to enjoy their rights.⁶⁶

For this reason, article 5 is also somewhat radical. It promotes a model of the parent-child relationship that departs from historical conceptions of the parent-child relationship, which were framed in terms of ownership over the child.⁶⁷ It introduces a conception of parenthood, which should be understood as 'a form of stewardship ... or trusteeship' that

perceives [the] child not as an object subject to the control and subjugation of an adult but rather an independent subject with discreet entitlements, the realisation of which is dependent on the assistance of adults.⁶⁸

It promotes a parent-child decision-making relationship that is 'co-operative and interdependent', with emphasis on 'a dialogue of participation and mutual respect'.⁶⁹ From the child's perspective, it reframes the role of parents as 'first and foremost duty-bearers expected to fulfil their obligation in the upbringing of the child', rather than 'rights-holders vis-à-vis the child'.⁷⁰ Article 5 thus introduces a model for parent-child decision-making that places the child at the centre of the process, with a right to receive appropriate guidance and direction from his or her parents, rather than a right of parents to have their authority respected by the State.⁷¹

This paper suggests that article 5 could offer guidance to researchers, where ethical guidelines and instruments have been unable. It provides a framework

⁶⁴ A. Daly, *Autonomy and the Court: Beyond the Right to Be Heard* (Stockholm: Brill, 2017), 190.

⁶⁵ J. Tobin, 'Justifying Children's Rights' (2013) 21(3) *International Journal of Children's Rights* 395-441. DOI: 10.1163/15718182-02013004; N. Peleg, 'International Children's Rights Law: General Principles' in T. Liefwaard and U. Kilkelly (eds.) *International Human Rights of Children* (Singapore: Springer Nature, 2018), 2-19, 18.

⁶⁶ Tobin and Varadan 2019 (n 59), 177.

⁶⁷ G. Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF, 2005); Tobin 2017 (n 54).

⁶⁸ J. Tobin, 'Parents and Children's Rights under the Convention on the Rights of the Child: Finding Reconciliation in a Misunderstood Relationship' (2005) 7(2) *Australian Journal of Professional and Applied Ethics* 31-46.

⁶⁹ *Ibid.*, 41.

⁷⁰ Peleg 2018 (n 65) 18.

⁷¹ Tobin and Varadan 2019 (n 59) 161; Peleg 2018 (n 65) 18.

that encourages a child's involvement at all stages of decision-making,⁷² recognising that as children develop and grow, respect for their autonomy should concurrently increase.⁷³

3 ARTICLE 5 AND PROXY INFORMED CONSENT IN MEDICAL RESEARCH

This section examines how article 5 could be applied in the research setting to support researchers navigating the relationship between parents (or legal guardians) child subjects in the proxy informed consent process. It suggests that article 5 may be useful in three respects: (1) it introduces boundaries around how proxy decision-making authority is exercised; (2) it promotes a model for parent-child decision-making that fosters participation, dialogue and collaborative decision-making in the proxy informed consent process; (3) it places an obligation on parents and legal guardians to support and enable a child's autonomy by recognising her evolving capacities for decision-making in the research setting. Each of these aspects of article 5 is considered below.

3.1 Boundaries around proxy decision-making authority

For the most part, research ethical guidelines and instruments do not explicate the boundaries of proxy decision-making authority in informed consent. This was likely a deliberate decision to ensure respect for the authority of parents (or legal guardians) acting on behalf of their child in the research setting. However, situations can arise when a proxy's exercise of decision-making authority is not consistent with a child's enjoyment and exercise of rights in the research setting. For example, Spriggs and Gillam observed a practice, in which parents withheld information from their children in the informed consent process.⁷⁴ In some cases, parents misrepresented the purpose of the research to the child. Spriggs and Gillam found that while '[t]hese kinds of situations were ... troubling for researchers', '[r]esearch ethics guidelines and regulations in the UK, Australia and the USA [had] nothing specific to say about the deception of children' by their parents.⁷⁵

Article 5 may offer guidance to researchers on this point. While it accords respects to the role of parents and other carers in providing guidance and direction to their children, their authority is not unbounded. The nature of the 'responsibilities, rights and duties of parents' is informed by the other provisions of the CRC, specifically those relating to the responsibilities of

72 Tobin 2017 (n 62).

73 Peleg 2018 (n 65) 18.

74 M. Spriggs and L. Gillam, 'Deception of children in research' (2015) 41 *J Med Ethics* 179-182.

75 Ibid, 179, 180.

parents (articles 18, 27, 14 and 5). Any direction and guidance provided to children must also be 'appropriate', which in the context of the CRC framework, will be understood as consistent with the child's enjoyment of other rights under the Convention.⁷⁶ Finally, guidance and direction provided by parents must take into account 'the evolving capacities of the child', recognising that as children grow, the role of a proxy will need to be adjusted to enable more respect for the autonomy and agency of the child subject in the research setting.

3.2 The parent-child relationship in proxy informed consent

Remarkably, ethical guidelines and instruments have struggled to formulate an ethical basis to justify children's participation in the proxy informed consent process that is not linked with the determinative outcome of informed consent. This is due, in part, to individualistic conceptions of autonomy that continue to dominate the discourse on informed consent.⁷⁷ However, it is also due to traditional understandings of parent-child relationships, in which parents are accorded wide and unfettered authority to determine how and to what extent their child should be involved in decision-making in informed consent.⁷⁸

The advent of concepts such as 'assent' and 'dissent' which appear in some ethical guidelines and instruments⁷⁹ and not others⁸⁰ offer a more visible platform for children's participation. Yet the concept of 'assent' has been criticised for introducing more confusion rather than clarity over the question of how to recognise and attribute value to a child's participation in the proxy informed consent process.

The concept of 'assent' and its use in the research setting are problematic for a number of reasons. First, there is no agreed definition for 'assent' in medical research ethics.⁸¹ This has resulted in an uneven understanding of what assent means, and how it should be obtained, which in some cases has

76 Tobin and Varadan 2019 (n 59) 171, 172.

77 P. Ramsey, 'The enforcement of morals: non-therapeutic research on children' (1976) 6(4) *Hastings Centre Report* 21-30; McCormick 1974 (n 7); Faden and Beauchamp 1986 (n 15); Emanuel et al., 2000 (n 6).

78 A. Sibley, A. Pollard, R. Fitzpatrick, and M. Sheehan 'Developing a new justification for assent' (2016) 17(2) *BMC Medical Ethics*, 1-9. DOI: 10.1186/s12910-015-0085-x; W. Gaylin and R. Macklin (eds, *Who Speaks for the Child: The Problems of Proxy Consent* (New York: Hastings Center, 1982).

79 Declaration of Helsinki, 2000, 2004, 2008, 2013 (n 11); CIOMS 2016 (n 14); ICH-GCP 2016 (n 40).

80 UNESCO 2005 (n 41); EU Regulations 2014 (n 42); Oviedo 1997 (n 43); Additional Protocol 2005 (n 44).

81 Nuffield Council 2015 (n 9) 60.

led to age restrictions or other barriers on children's participation.⁸² Second, variations in the assent process have resulted in disagreements over its role and function, prompting some to question the value of children's participation in the informed consent process.⁸³ Third, the binary framework of 'assent' and 'dissent' has reduced children's participation to either 'agreement' or 'refusal', overlooking the wide range of perspectives in between, and undermining children's rights to freedom of expression in the proxy decision-making process.

These practical challenges have fed broader debates around the value and weight that should be accorded to children's participation in the proxy informed consent process. These perspectives have yielded a number of ethical approaches, which may be summarised as follows: (1) attributing value to a child's views to support and foster her developing autonomy in decision-making in informed consent;⁸⁴ (2) attributing value to a child's views as a pedagogical exercise to nurture moral growth and development;⁸⁵ (3) attributing value to a child's views as a show of respect for the individual child and her moral worth in the research setting;⁸⁶ (4) attributing value to a child's views as a reflection of the fluidity in the parent-child decision-making process, and the gradual devolvement of decision-making authority from the proxy to the child.⁸⁷

The Nuffield Council on Bioethics, in its 2015 report recognised the importance of involving children in the informed consent process, as a show of respect for the individual child 'regardless of their age or capacity'.⁸⁸ Navin

82 D. Wendler, and S. Shah, 'Should Children Decide Whether They are Enrolled in Non-beneficial Research?' (2003) 3(4) *American Journal of Bioethics* 1-7; D. Ungar, S. Joffe, and E. Kodish 'Children are not small adults: Documentation of assent for research involving children' *Journal of Pediatrics* (2006) S31-S33. DOI: 10.1016/j.peds.2006.04.048

83 P. Baines, 'Assent for children's participation in research is incoherent and wrong' (2011) 96 *Arch Dis Child*, 960-962. DOI: 10.1136/adc.2011.211342

84 A. Bartholome, 'Parents, Children, and the Moral Benefits of Research' (1976) *Hastings Center Report* 44-45; V. Miller, and R. Nelson, 'A Developmental Approach to Child Assent for Nontherapeutic Research' (2006) *Journal of Pediatrics* S25-30. DOI:10.1016/j.peds.2006.04.047; C. Navin, and J. Wasserman, 'Capacity for Preferences and Pediatric Assent' (2019) 49(1) *Hastings Center Report* 43-51. DOI: 10.1002/hast.980; Nuffield Council 2015 (n 9); S. Joffe, 'Rethink "Affirmative Agreement", but Abandon "Assent"' (2003) 3(4) *American Journal of Bioethics* 9-11; R. Nelson, 'We Should Reject Passive Resignation in Favor of Requiring the Assent of Younger Children for Participation in Nonbeneficial Research' (2003) 3(4) *American Journal of Bioethics* 11-13; D. Diekema, 'Taking Children Seriously: What's so Important about Assent?' (2003) 3(4) *American Journal of Bioethics* 25-26; A. Sibley, M. Sheehan, and A. Pollard, 'Assent is not consent' (2012) 38(1) *Journal of Medical Ethics* 3.

85 Sibley et al., 2016 (n 78); Miller and Nelson 2006 (n 84); Joffe 2003 (n 84).

86 Sibley et al., 2016 (n 78) 6; Nuffield Council 2015 (n 9); Navin and Wasserman 2019 (n 84).

87 C. Fisher, 'A Goodness-of-Fit Ethic for Child Assent to Nonbeneficial Research' (2003) 3(4) *American Journal of Bioethics* 27-28; W. Rossi, W. Reynolds and R. Nelson 'Child Assent and Parental Permission in Pediatric Research' (2003) 24 *Theoretical Medicine* 131-148; Joffe 2003 (n 84); Diekema 2003 (n 84).

88 Nuffield Council 2015 (n 9) 102.

and Wasserman agree with this approach, recognising that there is ‘moral value’ in involving a child that is ‘not reducible to considerations of either autonomy or best interests’.⁸⁹ Sibley et al., have put forward an ethical justification for children’s participation that is based on the ‘moral worth’ of the child, recognising the inherent value of involving a child even if she is ‘not considered to have the necessary and cognitive capacities to give fully informed consent’.⁹⁰

Article 5 and the CRC framework could offer additional guidance to researchers on these issues. First, the CRC reinforces the notion that the child has moral worth and her participation has inherent value, through its rights-based framework. Articles 5 and 12 together affirm that all children are holders of rights, with voice and agency, which, even if not determinative, must be listened to and respected by those adults, exercising influence over the child.⁹¹

Second, article 5 introduces a model for parent-child decision-making, which demands that ‘parents concede that they are not always the sole arbiters of a child’s best interests’.⁹² It requires that parents work with their children to create decision-making systems that allow the child’s views to be heard, taken into account and treated seriously in decision-making processes.⁹³ This collaborative decision-making model promotes a relationship that is based on dialogue and participation, in which parents must not only involve the child in decision-making, but also explain to her why certain decisions are made.⁹⁴ The article 5 framework thus challenges the traditional proxy-child relationship in research ethics, in which the child is designated as ‘vulnerable’ and the proxy (parent or guardian) empowered as ‘protector’. It replaces it with a framework that recognises the evolving capacities of the child, and importantly, demands that parents (or guardians) support the child to develop her decision-making capacities’.⁹⁵

Third, article 5, article 12 and article 18 provide a framework to guide researchers in how they attribute weight to the child’s views in the proxy informed consent process. Article 18 requires that parents make the child’s best interests their basic concern, while article 5 requires parents to provide guidance and direction that is appropriate and in a manner consistent with the child’s evolving capacities. However, articles 5 and 18 together recognise the importance of respect for the views and preferences of a child in the assessment of her best interests. As the CRC Committee explains,

89 Navin and Wasserman 2019 (n 84) 44.

90 Sibley et al., 2012 (n 84); Sibley et al., 2016 (n 78); Navin and Wasserman 2019 (n 84).

91 D. Archard, *Children, Rights and Childhood*, 2nd edition (London: Routledge, 2004) 54; Tobin 2013 (n 65) 407; Tobin and Varadan 2019 (n 59) 173.

92 Tobin 2017 (n 62) 24.

93 Tobin 2017 (n 62) 24.

94 Tobin 2017 (n 62) 24.

95 J. Tobin, ‘Understanding Children’s Rights: A Vision Beyond Vulnerability’ (2015) 84 *Nordic Journal of International Law* 155-182, 177. DOI: 10.1163/15718107-08402002

Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child ... The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child ... in all matters affecting the child, including the assessment of his or her best interests.⁹⁶

The CRC Committee further adds

The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake ... as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests.⁹⁷

Thus, as a child grows and her capacities evolve, greater weight must be attributed to her views and preferences in proxy decision-making setting. In this respect, articles 5, 12 and 18 offer guidance to researchers faced with situations, in which a parent's use of proxy authority does not respect the views and preferences of the child subject in the research setting. Applying articles 5, 12 and 18, if a child has sufficient understanding, capacity and maturity to express free and voluntary consent to participate in medical research, her views should be determinative in an assessment of her best interests.⁹⁸ This position aligns with the recommendations of the Nuffield Council which state, that 'where [children] are capable of understanding what is involved in taking part in a particular piece of research ... professionals have an ethical obligation to actively seek their consent ... regardless of any additional requirements of national legislation.'⁹⁹ Thus, while the CRC does not directly resolve the question of whether children hold a right to consent in medical research, articles 5, 12 and 18 provide a framework that, at the very least, assures that the views and preferences of a child will not be overlooked or disregarded in the informed consent process.

3.3 The evolving capacities principle and the autonomy of the child

For the most part, ethical guidelines and instruments have generally presumed that all children under 18 years of age lack capacity to provide informed

⁹⁶ CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para 43.

⁹⁷ CRC General Comment No. 14, para 44.

⁹⁸ J. Tobin 'Article 36: Protection against All Other Forms of Exploitation' in J. Tobin and P. Alston (eds) *The UN Convention on the Rights of the Child: A Commentary*, (Oxford: Oxford University Press, 2019) 1402-1419, 1417.

⁹⁹ Nuffield Council 2015 (n 9) 150-151.

consent, deferring to national laws and regulations to determine when and under what conditions a child may provide informed consent in medical research.¹⁰⁰ However, because a young child may also lack sufficient understanding and independence to engage in autonomous decision-making, children, as a group, are designated as ‘vulnerable subjects’ in medical research.¹⁰¹ This combination of presumed incompetence and vulnerability has essentialised children as ‘non-autonomous’ beings, in need of protection rather than empowerment in the informed consent process.¹⁰²

Yet, there is an emerging body of qualitative research and empirical data that challenges the notion of children as non-autonomous, incapable and vulnerable in the research setting. Hein et al., suggest that a child may be capable of autonomous decision-making through ‘shared’ or ‘co-consent’ as early as 12 years of age.¹⁰³ Alderson and others have shown that children are able to engage in various levels of decision making at all ages¹⁰⁴ and are often able to express free and informed consent well before the age of legal competency.¹⁰⁵ Although these perspectives are finding more support in the discourse on research ethics,¹⁰⁶ researchers continue to grapple with how to balance respect for parental authority with recognition of children’s autonomy in the informed consent process.

Article 5 may provide guidance on this point. As Peleg observes, ‘[a]rticle 5 and the evolving-capacities principle is, essentially, a mechanism to achieve balance between autonomy and protection’¹⁰⁷ As the CRC Committee further elaborates, ‘parents (and others) have a responsibility to continually adjust the levels of support and guidance they offer to a child’ to ‘take account of

100 Declaration of Helsinki 2013 (n 11) Principles 28, 29; CIOMS 2016 (n 14), Guideline 15, 17; ICH-GCP 2016 (n 40) para 4.8; UNESCO 2005 (n 41) Article 7; EU Regulations 2014 (n 42) article 32; Oviedo Convention 1997 (n 43) Article 5; Additional Protocol 2005 (n 44) Article 14.

101 Belmont Report 1979 (n 11); Declaration of Helsinki 2000, 2004, 2008, 2013 (n 11); CIOMS 2016 (n 14) Guideline 15.

102 Emanuel et al., 2000 (n 6); Ramsey 1970 (n 36); Ramsey 1976 (n 36); McCormick 1974 (n 7).

103 I. Hein, M. De Vries, P. Troost, G. Meynen, J.B. Van Goudoever and R. Lindauer ‘Informed consent instead of assent is appropriate in children from the age of twelve: Policy implications of new findings on children’s competence to consent to clinical research’ (2015) 16(76) *BMC Medical Ethics*, 1-7. DOI: 10.1186/s12910-015-0067-z

104 P. Alderson, J. Hawthorne, M. Killen ‘The Participation Rights of Premature Babies’ (2005) 13 *International Journal of Children’s Rights* 31-50; P. Alderson, K. Sutcliffe, and K. Curtis ‘Children’s Competence to Consent to Medical Treatment’ (2006) 36(6) *Hastings Center Report* 25-34; P. Alderson, *Choosing for Children: Parents’ Consent to Surgery* (Oxford: Oxford University Press, 1990); P. Alderson, *Children’s Consent to Surgery* (Buckingham: Open University Press, 1993).

105 Alderson 1993 (n 104); P. Alderson, and J. Montgomery, *Health Care Choices: Making decisions with children* (London: Institute for Public Policy Research, 1996).

106 Nuffield Council 2015 (n 9); Navin and Wasserman 2019 (n 84); Miller and Nelson 2006 (n 84).

107 N. Peleg, *The Child’s Right to Development*, (Cambridge: Cambridge University Press, 2019) 207.

a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests.¹⁰⁸ In other words, as a 'child grows and develops, respect for her autonomy should concurrently increase' and a time will come when the child has sufficient capacity that she will no longer need to rely on her right to parental guidance and direction to secure the enjoyment of her rights under the Convention.¹⁰⁹

In this respect, article 5 and the evolving-capacities principle are not dissimilar to the often cited judgment of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*,¹¹⁰ in which reference was made to parental rights as a 'dwindling right' which terminates once a child has achieved sufficient understanding, intelligence and discretion to enable her to make a wise choice in her own interests. Though *Gillick* predated the CRC, it embodied a vision of children's rights that aligns with the CRC, and article 5.¹¹¹ It is likely for this reason that it has been cited as a basis to recognise children's right to consent in medical research.¹¹² However, the decision in *Gillick* focuses on children's consent in medical treatment, and is at best a jurisprudential authority confined to common law jurisdictions; whereas article 5 offers a framework to navigate the proxy-child decision-making relationship that is relevant across all of the 196 State Parties to the CRC.

It is important to emphasise that article 5 does not 'render the involvement of ... parents mute or displace their authority'.¹¹³ It requires, and indeed expects parents to provide 'appropriate levels of protection' to prevent the child from being forced to make decisions in circumstances when they themselves do not feel competent or comfortable doing so.¹¹⁴ In this respect, article 5 adopts a conception of autonomy that is relational. It challenges individualistic notions of autonomy in the discourse on informed consent, which have historically characterised children as incompetent and 'non-autonomous', and in its place, offers a concept of 'supported autonomy' which Daly explains as '[c]hildren [being able] to have their autonomy respected

108 CRC Committee, General Comment No. 7 (2005), Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, para 17.

109 Tobin 2013 (n 65); Peleg 2018 (n 65) 18; Tobin and Varadan 2019 (n 59) 177.

110 *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 2 WLR 480.

111 J. Tobin 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 *Melbourne University Law Review* 579-625, 600.

112 P. Alderson 'Children's Consent and "Assent" to Healthcare Research' in M. Freeman (ed) *Law and Childhood Studies* (Oxford: Oxford University Press 2012), 175-189; P. Alderson, 'Giving Children's Views "Due Weight" in Medical Law' (2018) 26(3) *International Journal of Children's Rights* 16-37. DOI:10.1163/15718182-02601001; Alderson 2006 (n 104); Nuffield Council 2015 (n 9).

113 Tobin 2005 (n 68) 32.

114 Tobin and Varadan 2019 (n 59) 174.

without being given the same status as adults and without being abandoned to harmful fates unaided'.¹¹⁵

At the same time, the evolving capacities principle is not without concerns for the proxy informed consent process. The question of how a child's 'evolving capacities' will be assessed, and the process by which decision-making authority will devolve from the parent to the child are not addressed within article 5 or practically considered by the CRC Committee. Making a child's exercise of autonomy conditional on her evolving capacities potentially 'opens up adults' discretion to decide who is capable',¹¹⁶ enabling paternalism through the rhetoric of rights.¹¹⁷ While there will be legitimate situations where a child's autonomy in decision-making will need to be constrained¹¹⁸ without further elaboration on how a child's 'evolving' capacities will be recognised and practically enabled, there remains a risk that article 5 could be used to undermine rather than support the autonomy of child subjects in the medical research setting.

Notwithstanding these concerns, article 5 and the evolving-capacities principle may nonetheless offer guidance to researchers, providing a framework that fosters respect for a child's autonomy as she grows and develops,¹¹⁹ and places responsibility on parents (or legal guardians), to exercise their authority in a manner that supports and enables the child's capacities to engage in autonomous decision-making in the informed consent process.

CONCLUSION

In the mid-1970s, two leading bioethicists – Paul Ramsey and Richard McCormick – were invited to discuss the morality of involving children in medical research, in what would become the pivotal debate on the ethics and regulation of proxy informed consent. As McCormick and Ramsey laid out their arguments, a remarkably blunt conception of the child was revealed. For Ramsey, the child was not a moral agent.¹²⁰ For McCormick, the child was neither legally competent nor factually capable of consent.¹²¹ In essentializing the child as 'vulnerable', 'non-autonomous' and 'incapable', Ramsey and McCormick effectively robbed children of voice and agency in the informed

115 Daly 2017 (n 64) 132.

116 Alderson 2018 (n 112).

117 Tobin, 2009 (n 111); see also M. Freeman 'Rethinking Gillick,' (2005) 13(1-2) *International Journal of Children's Rights* 201-218.

118 Daly 2017 (n 64); Tobin, 2009 (n 111); see also W. Gaylin 'Competence: No Longer All or None' in W. Gaylin and R. Macklin (eds), *Who Speaks for the Child: The Problems of Proxy Consent*, (New York: Hastings Center 1982), 27-56.

119 Peleg 2018 (n 65) 18.

120 Ramsey 1976 (n 36) 25.

121 McCormick 1974 (n 7) 2.

consent process, laying the foundation for a proxy consent process that would prioritize protection over empowerment in the research setting.

In the 45 years since Ramsey and McCormick, research with children has challenged this narrow understanding of informed consent. Alderson and others offer evidence that children, from a very young age, are able to engage in various forms of decision-making at varying levels.¹²² Increasingly, it is recognised that child acquire capacities over a dynamic and evolving process that encompasses multiple dimensions – psychological, cognitive, emotional, social, cultural and spiritual.

Yet, the ethical framework for proxy informed consent remains unchanged, and the image of the child as vulnerable and non-autonomous continues to influence how children are viewed, recognised and supported in the proxy informed consent process in the medical research.

This paper contemplated how article 5 and the CRC framework could be applied to medical research to recognise, support and enable children's voice and agency in the proxy informed consent process. It is suggested that article 5 may offer guidance to researchers in three broad respects. First, it introduces boundaries around how proxy authority is exercised, ensuring parental decision-making is undertaken in a manner that respects and supports the child's enjoyment of rights in the research setting. More practically, it provides a set of guiding principles to evaluate when and under what circumstances the exercise of proxy decision-making authority should not be deemed appropriate in the proxy informed consent setting. Second, it promotes a model for parent-child decision-making that values participation, dialogue and collaborative decision-making in the proxy informed consent process, ensuring that a child's views and preferences are respected and taken seriously at each stage of the decision-making process. Third, it places an obligation on parents to respect and support children's autonomy by recognising their evolving capacities in the decision-making process in informed consent.

It is undeniable that medical research has yielded advances in medicine that have dramatically improved the health, well-being and life expectancy of all human beings. This is particularly true for children, whose lives have been transformed over the past century as a result of medical progress in the prevention, diagnosis and treatment of child-related illness and disease. Inclusion of children in research has been and will remain essential if further gains are to be made in children's health and well-being. Yet, ethical guidelines and instruments continue to grapple with how to involve children in research, in a manner that respects and supports their autonomy. This chapter did not set out to resolve the ethical dilemmas surrounding children's consent in medical research. What it sought to do is introduce a conception of the child as a rights holder, whose voice and agency, even if not determinative, must

122 Alderson 1993 (n 104); Alderson and Montgomery 1996 (n 105); Alderson, Sutcliffe and Curtis 2006 (n 104); Alderson, Hawthorne and Killen 2005 (n 104).

be listened to and respected by parents and researchers in the proxy informed consent process.

ABSTRACT

Informed consent is an essential requirement for the ethical conduct of research. It is also necessary requirement for the lawful conduct of research. In clinical research, voluntary and informed consent provides the legal basis to enrol human subjects. In paediatric clinical research, where children do not generally enjoy a presumption of competence, a legal representative must authorise a child's enrolment. Determining who should act on behalf of the child is a matter of law, rather than ethical principle. But, if national laws are lacking or do not address socio-cultural realities, legal uncertainty arises, which can have implications for children's enrolment in clinical research. Using Thailand as its case study, this chapter contemplates how international legal frameworks, such as the UN Convention on the Rights of the Child, could be leveraged to address legal uncertainty in informed consent to enable more children to access and participate in paediatric clinical research.

INTRODUCTION

In 1964, the World Medical Association adopted a set of guidelines for human subject research, in what would become the foundational framework for the ethical oversight of medical research. The Declaration of Helsinki¹ superseded the Nuremberg Code in scope and content.² It introduced a concept of proxy informed consent,³ breaking from the absolute requirement of voluntary and

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1 World Medical Association, *Declaration of Helsinki* (1964), adopted by the 18th World Medical Assembly, Helsinki, Finland, June 1964.

2 J. Katz, 'The Consent Principle of Nuremberg: Its Significance Then and Now' in G. Annas and M. Grodin (eds) *The Nazi Doctors and the Nuremberg Code: Human Rights in Human Experimentation* (New York: Oxford University Press, 1992) 227-239.

3 Declaration of Helsinki, 1964 (n 1). Part II, principle 1 and Part III, principle 3a.

informed consent⁴ in human subject research, and paving the way for ethical medical research in all categories of persons, including children.

At the crux of informed consent in children is the role played by the proxy – the legally competent person who holds an ethical duty to safeguard the interests of the child participant and a responsibility to authorise their lawful enrolment in clinical research.

Yet the role of proxy is not explicated under international and regional ethical guidelines. The Declaration of Helsinki does not elaborate on the proxy decision-making role nor does it provide a framework to determine who should act as proxy. Over the course of its eight revisions, the Declaration has employed diverse terminology and ascribed different levels of decision-making authority to the proxy. In earlier versions, it called on a ‘responsible relative’⁵ to give permission replacing ‘that of the [child] subject’,⁶ while in later versions it permitted only the ‘legally authorized representative’⁷ to provide informed consent, with an understanding that a child’s dissent should be respected,⁸ and where possible her assent obtained.⁹

Comparing current international and regional guidelines, there remain notable differences in the terminology used and levels of decision-making authority ascribed to the proxy (see Table 1). Determining who should act as proxy is only vaguely discussed, with wide deference given to the ‘applicable laws’ in the jurisdiction of the clinical study.

4 Nuremberg Code, *United States of America v Karl Brandt et al.*, 21 November 1946–20 August 1947, judgement reprinted in G. Annas and M. Grodin (eds) *The Nazi Doctors and the Nuremberg Code* (New York: Oxford University Press, 1992) 61–144.

5 World Medical Association, *Declaration of Helsinki* (1975), revised by the 29th World Medical Assembly, Tokyo, Japan, October 1975 (Principle 11); World Medical Association, *Declaration of Helsinki* (1983) revised by the 35th World Medical Assembly, Venice, Italy, October 1983 (Principle 11); World Medical Association, *Declaration of Helsinki* (1989), revised by the 41st World Medical Assembly, Hong Kong, September 1989 (Principle 11); World Medical Association, *Declaration of Helsinki* (1996), revised by the 48th General Assembly, Somerset West, Republic of South Africa, October 1996 (Principle 11).

6 See Declaration of Helsinki, 1974 (Principle 11); Declaration of Helsinki, 1983 (Principle 11); Declaration of Helsinki, 1989 (Principle 11); Declaration of Helsinki (1996) (Principle 11).

7 World Medical Association, *Declaration of Helsinki* (2000), revised by the 52nd WMA General Assembly, Edinburgh, Scotland, October 2000 (Principle 24); World Medical Association, *Declaration of Helsinki* (2004), revised by the 55th WMA General Assembly, Tokyo, Japan, October 2004 (Principle 15); World Medical Association, *Declaration of Helsinki* (2008), revised by the 59th WMA General Assembly, Seoul, Korea, October 2008 (Principle 27); World Medical Association, *Declaration of Helsinki* (2013), revised by the 64th WMA General Assembly, Fortaleza, Brazil, October 2013 (Principle 28).

8 Declaration of Helsinki, 2008 (Principle 28); Declaration of Helsinki, 2013 (Principle 29).

9 Declaration of Helsinki, 2000 (Principle 25); Declaration of Helsinki, 2004 (Principle 16); Declaration of Helsinki, 2008 (Principle 28); Declaration of Helsinki, 2013 (Principle 29).

Table 1: The role of 'proxy' in paediatric informed consent in international and regional guidelines

Instrument	Terminology for 'proxy'	Authority of 'proxy'	Definition for 'proxy'
Declaration of Helsinki, 2013 ¹⁰ World Medical Association Principles 28 and 29	Legally authorized representative (LAR)	Provide informed consent and where possible, the child's dissent must be respected and assent from the child obtained.	No definition provided
CIOMS, 2016 ¹¹ Council of International Organisations of Medicine Guideline 17	Parent or legally authorized representative (LAR)	Provides permission and where possible the agreement (assent) of the child should be obtained	Parent, legal guardian or legally authorised representative , consistent with applicable laws and regulations
Good Clinical Practice: Consolidated Guidance E6(R2) (1995, 2006, 2016) ¹² International Council of Harmonisation of Technical Requirements for Pharmaceuticals for Human Use Section 1: Glossary, para 1.37	Legally acceptable representative (LAR)	Provides informed consent and where appropriate, child provides written assent	An individual or juridical or other body authorised under applicable law to consent on behalf of a prospective subject, to the subject's participation in the clinical trial

10 Declaration of Helsinki, 2013 (Principles 28 and 29).

11 Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO), *International Ethical Guidelines for Health-related Research Involving Humans* (2016), (Geneva: CIOMS, 2016). ('CIOMS 2016') (Guideline 17: Research involving Children and Adolescents).

12 International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH), 'Integrated Addendum to ICH E6(R1): Guidelines for Good Clinical Practice E6(R2)', Current Step 4 Version, 9 November 2016. (ICH-GCP E6(R2)). Accessed at: https://database.ich.org/sites/default/files/E6_R2_Addendum.pdf (27 October 2021) (Section 1: Glossary, para 1.37).

<i>Instrument</i>	<i>Terminology for 'proxy'</i>	<i>Authority of 'proxy'</i>	<i>Definition for 'proxy'</i>
ICH Harmonised Guideline: Clinical Investigation of Medicinal Products in the Pediatric Population E11(R1) ¹³ International Council of Harmonisation of Technical Requirements for Pharmaceuticals for Human Use Section 2: Guidance, para 2.6.3.	Parent(s) or Legal Guardian	Provides fully informed consent in accordance with regional laws or regulations. Where appropriate, child provides assent (consistent with local legal requirements)	No definition provided.
WHO Guidelines on Good Clinical Practice ¹⁴ World Health Organization Principle 7	Legally authorised representative (LAR)	Provides permission in accordance with applicable law	No definition provided.
EU Regulations on clinical trials on medicinal products for human use No 536/2014 ¹⁵ European Parliament Article 2, Para 20	Legally designated representative (LDR)	Provides informed consent	A natural or legal person, authority or body which, according to the law of the Member State concerned, is empowered to give informed consent on behalf of a subject who is an incapacitated subject or a minor.
Convention on Human Rights and Biomedicine (1997) ¹⁶ Council of Europe Article 6	Representative or an authority or a person or body	Provides authorization with opinion of minor taken into consideration	Representative or an authority or a person or body provided for by law

13 International Council for Harmonisation of Technical Requirements for Pharmaceuticals for Human Use (ICH), 'Guidelines for Clinical Investigation of Medicinal Products in the Pediatric Population E11(R1)', 1 August 2017 (ICH-GCP E11(R1)). Accessed at: https://data.base.ich.org/sites/default/files/E11_R1_Addendum.pdf (27 October 2021) (Section 2: Guidance, para 2.6.3).

14 World Health Organization, *Handbook for Good Clinical Research Practice (GCP) Guidance for Implementation* (Geneva: World Health Organization, 2002)(Principle 7).

15 European Parliament, Regulation (EU) No 536/2014 on clinical trials on medicinal products for human use, *European Parliament and of the Council*, 16 April 2014. Accessed at: https://ec.europa.eu/health/sites/default/files/files/eudralex/vol-1/reg_2014_536/reg_2014_536_en.pdf (27 October 2021) (Article 29; Article 2, para 20).

16 Council of Europe, Convention on Human Rights and Biomedicine (ETS No. 164) (Oviedo Convention), adopted 4 April 1997, entered into force on 1 December 2009. Accessed at: <https://www.coe.int/en/web/bioethics/oviedo-convention> (27 October 2021) (Article 6).

Instrument	Terminology for 'proxy'	Authority of 'proxy'	Definition for 'proxy'
Additional Protocol on Biomedical Research (2005) ¹⁷ Council of Europe	Legal Representative or an authority or body provided for by law	Provides authorization with opinion of minor taken into consideration	A legal representative or an authority or a person or body provided for by law

This legal ambiguity can have practical implications for children's enrolment in paediatric research,¹⁸ particularly in lower- and middle-income countries¹⁹ where national laws may be lacking;²⁰ regulatory oversight remains weak; and socio-cultural realities of family and parenting do not reflect international guidelines.²¹ As Cheah and Parker explain, '[r]egulations for research in children in developing countries are often rigid, confusing or non-existent.'²² Moreover, research ethics committees 'rarely offer clear guidelines for research in children', and those that 'adopt international guidelines, with the noble intention of protecting children', often do so with 'little reflection on their relevance to the local setting, resulting in practical problems for the conduct of the research.'²³ In these settings, the legal uncertainty, coupled with vague international guidelines become barriers, preventing children from accessing research rather than protecting them through research.²⁴ Bwakura-Dangaremba

17 Council of Europe, Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research (ETS No. 195), adopted 25 January 2005, entered into force on 1 September 2007. Accessed at: <https://rm.coe.int/168008371a#:~:text=Parties%20to%20this%20Protocol%20shall,in%20the%20field%20of%20biomedicine.> (27 October 2021).

18 M. Colom, and P. Rohloff, 'Cultural considerations for informed consent in paediatric research in low/middle-income countries: a scoping review' (2018) 2 *BMJ Paediatrics Open* 1-14.

19 This chapter adopts a definition of 'lower- and middle-income countries' used by the World Bank. Accessed at: <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519> (27 October 2021)

20 M. Kalabuanga, R. Ravinetto, V. Maketa, H.M. Mavoko, B. Fungula, R.I. Da Luz, J. Van Geertruyden, and P. Lutumba, 'The Challenges of Research Informed Consent in Socio-Economically Vulnerable Populations: A Viewpoint from the Democratic Republic of Congo' (2016) 16(2) *Developing World Bioethics* 64-69.

21 Council for International Organizations of Medical Sciences, *Clinical research in resource-limited settings: A consensus by a CIOMS Working Group* (Geneva: CIOMS, 2021). Appendix 1, Special Populations, 84-85.

22 P.Y. Cheah and M. Parker, 'Consent and assent in paediatric research in low-income settings' (2014) 15(22) *BMC Medical Ethics* 1-10, 6.

23 Ibid, 6.

24 P.D. Joseph, J.C. Craig, A. Tong, and P. Caldwell, 'Researchers', Regulators', and Sponsors' Views on Pediatric Clinical Trials: A Multinational Study' (2016) 138(4) *Pediatrics* 1-13. DOI:10.1542/peds.2016-1171; N. Vischer, C. Pfeiffer, A. Joller, I. Klingmann, A. Ka, S.K. Kpomegbe, and C. Burri, 'The Good Clinical Practice guideline and its interpretation –

bizi et al., recount similar experiences in Zimbabwe, where there are no specific laws on paediatric clinical research: ‘a substantial number of potential research participants were orphans ... whose relatives wanted them to be involved in the study but could not because of the requirement ... for consent from a parent or legal guardian.’²⁵

Focusing on Thailand, where there is currently no law on human subject research and no specific regulations on informed consent in children, this chapter examines two areas of legal uncertainty, which commonly arise in the enrolment of children in clinical research: (1) who should act as the ‘legally acceptable representative’ for the child; and (2) how informed consent should be obtained in children without a legally recognised representative – children of minor parents,²⁶ children of parents without legal status, and children living without parental care. It suggests that international legal instruments, such as the UN Convention on the Rights of the Child (CRC), could be leveraged to navigate legal uncertainty in informed consent, providing a framework that not only considers socio-cultural environment, but also the child’s right to guidance in the informed consent process in paediatric clinical research.

1 BACKGROUND – THE LEGAL AND REGULATORY FRAMEWORK FOR INFORMED CONSENT IN PAEDIATRIC CLINICAL RESEARCH IN THAILAND

In Thailand, as in many lower- and middle-income countries (LMICs),²⁷ there is no specific law on human subject research and no regulations directly addressing informed consent in paediatric clinical research. Instead, legal codes, statutes and regulatory notifications are pieced together to create an ethico-legal framework for the informed consent process in paediatric clinical research. However, because it falls on individual ethics committees to lead this process on a case-by-case basis, there is considerable uncertainty and inconsistency in how legal requirements are interpreted and applied across the informed consent process in paediatric clinical research in Thailand.

Advisory guidelines have been developed to support ethics committees in their oversight of clinical research. The Forum for Ethics Review Committees in Thailand (FERCIT) – a coordinating body for ethics committees established

perceptions of clinical trial teams in sub-Saharan Africa’ (2016) 21(8) *Tropical Medicine and International Health* 1040-1048, 1043. DOI:10.1111/tmi.12734

25 M. Bwakura-Dangarembizi, R. Musesengwa, K.J. Nathoo, P. Takaldza, T. Mhute, and T. Vhembo, ‘Ethical and legal constraints to children’s participation in research in Zimbabwe: experiences from the multicenter pediatric HIV ARROW trial’ (2012) 13(17) *BMC Medical Ethics* 1-5, 3.

26 The term ‘minor parents’ is used to refer to parents who are not ‘sui juris’ or ‘legally competent’, see *Thailand Civil and Commercial Code 2468 B.E.*, Book I: General Principles, Title II: Persons, Chapter I: Natural Persons, Part II: Capacity, sections 19, 20.

27 CIOMS 2021 (n 21).

in 2000²⁸ – developed *Ethical Guidelines for Research* in 2007. The National Research Council of Thailand (NRCT), the main institutional body overseeing all research in Thailand, issued *National Policy and Guidelines for Human Subject Research* in 2015 aimed at addressing the legislative gap on human subject research.²⁹ While both of these guidelines are useful in the ethical oversight of clinical research generally, neither of them provides specific guidance on the legal requirements for informed consent in paediatric clinical research. In 2012, the Forum for Ethics Review Committees began a process to develop specific guidelines for paediatric research, issuing *Ethical Guidance for Research involving Children* in 2015. The 2015 FERCIT guidelines go further in their guidance on informed consent than any previous guidelines.³⁰ However, in the absence of a direct law on human subject research, there remain conflicting approaches on how Thai law should be interpreted and applied in the paediatric clinical research setting, which has resulted in uncertainty over the legal requirements for informed consent in children in Thailand.

2 DISCERNING WHO IS A LEGALLY ACCEPTABLE REPRESENTATIVE – ‘LAR’

As a starting point, both the *National Health Act B.E. 2550 (2007)* and the *Mental Health Act B.E. 2551 (2008)* require written informed consent for medical treatment. This legal requirement is extended to medical research, requiring a prospective research participant to provide voluntary and informed written consent as a condition for their lawful enrolment in clinical research. The *Mental Health Act B.E. 2551 (2008)* further adds, ‘where the patient is less than eighteen years of age ... [a] protector, curator, guardian or a person who takes care of that person, as the case may be, shall give consent ... on his behalf’.³¹ The *Mental Health Act B.E. 2551 (2008)*, however, does not provide a legal definition for the persons designated as ‘protector, curator, guardian’ nor does it reference a statute or legal code as its basis to define who may act as the proxy.

Apart from the *Mental Health Act B.E. 2551 (2008)* there is no other legal code or statute that directly addresses the legal requirements of informed consent in clinical research for adults or children in Thailand. The Food and Drug Administration (FDA), embedded within the Ministry of Public Health, has regulatory oversight of clinical trials involving the use of drugs in Thai-

28 Forum for Ethical Review Committees in Thailand, ‘Background’ (unofficial translation). Accessed at: <http://www.fercit.org/about.php> (27 October 2021)

29 National Research Council of Thailand, *National Policy and Guidelines for Human Research 2015* (Bangkok: National Library of Thailand, 2015) 1-112, vii.

30 Forum for Ethics Review Committees in Thailand, *Ethical Guidelines for Pediatric Research* (Bangkok: FERCIT, 2015). Accessed at: <http://www.fercit.org/index.php> (27 October 2021)

31 *Thailand Mental Health Act B.E. 2551 (2008)*, Section 20 and 21.

land. The FDA has not issued specific regulations for paediatric clinical research.³² However, in its 2013 *Clinical Trial Notification*, it specified that all clinical trials must comply with the good clinical practice guidelines issued by the International Conference of Harmonisation (ICH-GCP).³³ To this end, the FDA has designated ethics review committees to monitor and ensure compliance with the ICH-GCP guidelines as a condition for regulatory approval for a clinical study.

The ICH-GCP have issued at least two sets of good clinical practice guidelines relevant to informed consent in paediatric clinical trials. Under the ICH-GCP(E6), the general guidelines on good clinical practice in clinical trials, a legally acceptable representative must provide written consent on behalf of a child (a legally incompetent research participant) to authorise that child's enrolment in a clinical study. Deference is given to the 'applicable laws' in the jurisdiction of the clinical trial to define the scope and meaning of 'LAR'.³⁴ Under the ICH-GCP(E11), the guidelines for the use of medicinal products in children, a legal guardian must provide 'fully informed consent ... in accordance with laws or regulations'.³⁵ Notwithstanding the discrepancy in terminology, the ICH-GCP(E6) and ICH-GCP(E11) guidelines impose similar requirements for the role of proxy: (1) the individual must be authorised under the law to act as the legal representative for the child; (2) the individual must be legally competent and capable of providing informed consent on behalf of the child.

Under Thai law, however, there are conflicting legal frameworks to discern who is responsible for the child, and who is legally authorised to represent the child. Using a series of case studies, we consider the practical implications of this legal ambiguity on children's enrolment and participation in paediatric clinical research in Thailand.

2.1 Who is a parent for the purposes of informed consent in children

There are conflicting legal definitions for 'parent' under Thai law, which can directly affect a father's ability to act as a legal representative for his child in paediatric clinical research. Under Thai family law, the biological mother

32 There are no specific guidelines for reviewing drugs for children and infants in Thailand, and currently no regulations on the oversight of clinical trials in children (unofficial translation). Original version accessed: <https://he01.tci-thaijo.org/index.php/TJPP/article/view/169678/122040> (27 October 2021)

33 Thai Ministry of Public Health, FDA Regulations for the import of drugs for the purposes of clinical research, current as of January 2021. Original version accessed at: <https://www.fda.moph.go.th/sites/drug/Shared%20Documents/Law05-Bureau-Drug-announced/A20210205-i.pdf> (27 October 2021)

34 ICH-GCP E6(R2) (n 12) Section 1: Glossary, para 1.37.

35 ICH-GCP E11 (n 13) Section 2.6.3.

is the presumptive legitimate parent of the child.³⁶ A father does not enjoy presumptive parental status based on parentage, but rather on the basis of marriage. In other words, if the mother is married to the father at the time of the child's birth or the child is born within 310 days after the termination of the legal marriage, the father is presumed as the legal parent of the child.³⁷ If the father subsequently marries the mother after the child's birth, he becomes the legal parent of the child on the basis of that marriage.³⁸ If, however, the mother and father are unmarried at the time of the child's birth and do not subsequently marry, the father must make a formal application to register his status as the legal parent of the child.³⁹ Whether a father has cared for, or lived with his child since birth, will not be determinative of his legal status as a parent under Thai law. Even when a father's biological link to the child is not contested, in the absence of marriage a father will need to register his legal status as the child's parent. Moreover, if the mother contests the application, a formal hearing will ensue to determine where the father has a biological link or other legal claim to parent the child.

In contrast, section 4 of the *Child Protection Act B.E. 2546 (2003)* recognises both the 'father and mother of a child, regardless of whether they are married or not'.⁴⁰ The *Child Protection Act B.E. 2546 (2003)* also recognises parental status on the basis of an ongoing caregiving relationship, acknowledging a range of informal carers not biologically linked to the child, yet acting as the primary caregiver for her.

For its part, the FERCIT *Ethical Guidelines on Paediatric Research* suggests a definition for 'parent' that aligns with the *Child Protection Act B.E. 2546 (2003)* recognising both the father and mother as the child's legal representatives, irrespective of their marital status or formal registration. In the absence of a specific law or regulations on paediatric clinical research, however, there is no legal basis to favour the FERCIT guidelines or the *Child Protection Act B.E. 2546 (2003)* over the provisions under Thai family law.

Given the uncertainty of a father's legal status as 'parent', it is not uncommon for research sponsors, particularly foreign commercial sponsors, to require informed consent from a mother (irrespective of a father's eligibility to consent), to ensure the legality of informed consent. This can result in a

36 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter I: Parentage, Section 1546.

37 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter I: Parentage, Section 1536.

38 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter I: Parentage, Section 1547.

39 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter I: Parentage, Section 1548.

40 *Thailand Child Protection Act B.E. 2546 (2003)* (Unofficial Translation). Accessed at: http://web.krisdika.go.th/data/outsitedata/outside21/file/CHILD_PROTECTION_ACT_B.E._2546.pdf.

child's exclusion from research, even if the father is the biological parent and primary carer for the child. Consider the following scenario.

Scenario #1: The legal status of fathers

The biological mother provides written informed consent (in the presence of the father) for her son to be enrolled in a clinical trial. The boy is enrolled and the study commences. Mid-way through the trial, changes in the protocol require a re-consent process for the child. However, only the child's father is available to provide re-consent. When the trial staff ask for legal documentation, they discover the father is not married to the child's mother. Unsure if the father is the legal parent of the child, the trial staff attempt to contact the mother, but are unable to locate her. The trial staff then tell the father that he cannot consent for the child unless he is legally registered as the child's parent. The trial staff remove the child from the study.

2.2 Who is a guardian for the purposes of informed consent in children

There are conflicting legal definitions and frameworks for determining who is a legal guardian for the purposes of informed consent. Under Thai family law, a legally competent adult may be appointed as legal guardian⁴¹ through the will of the last surviving parent,⁴² or by application to the Court from a relative or the Public Prosecutor.⁴³ A legal guardian is generally appointed when a child is without parental care either because both parents have died or one or both parents have been deprived of parental rights and responsibilities – partially or fully – through a legal order.⁴⁴ The guardian becomes the legal representative for the child until he or she becomes '*sui juris*'⁴⁵ (either by age or legal marriage).⁴⁶ The role of a guardian is thus envisaged to replace a parent, extinguishing their rights and responsibilities, including their authority to act as the legal representative for the child.

In contrast, the *Child Protection Act B.E. 2546 (2003)* offers a broad definition for 'guardian', which includes adoptive parents, step parents, employers, and

41 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter III: Guardianship, Section 1587.

42 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter III: Guardianship, Section 1585-1586.

43 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter III: Guardianship, Section 1586.

44 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter II: Rights and Duties of Parent and Child, Section 1582.

45 The term '*sui juris*' is used to denote 'legal competence', see *Thailand Civil and Commercial Code 2468 B.E.*, Book I: General Principles, Title II: Persons, Chapter I: Natural Persons, Part II: Capacity, sections 19, 20.

46 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter III: Guardianship, Section 1585.

any other persons providing care or shelter to the child.⁴⁷ The *Child Protection Act B.E. 2546 (2003)* does not enumerate a formal legal process to establish guardianship over a child; and a person acting as 'guardian' for a child under the *Child Protection Act B.E. 2546 (2003)* does not appear to extinguish the rights and responsibilities of the child's legitimate parent.

The *FERCIT Ethical Guidelines on Paediatric Research* propose a definition for 'guardian' that encompasses both formally appointed legal guardians under Thai family law, and persons designated as guardians under the *Child Protection Act B.E. 2546 (2003)*. However, in bringing together formally appointed legal guardians, and guardians informally caring for a child, the *FERCIT* guidelines introduces more confusion than clarity over who is authorised to represent the child for the purposes of informed consent.

To confuse matters further, it is common for children to grow up in inter-generational or skip-generation households in Thailand. Consider the following scenario.

Scenario #2: Intergenerational households – grandparents caring for the child

In northeast Thailand, a grandparent brings his sick grandchild to a community health clinic. When the child tests positive for a parasite, clinical trial staff explain to the grandfather that the child is eligible to participate in a clinical trial. The grandfather is keen to enrol his granddaughter. But, when he is asked to produce legal documentation, the trial staff discover he is not formally recognised as the legal guardian of the child. The grandfather explains that he takes care of his grandchild while his son and daughter-in-law work to support the family. The researchers tell the grandfather that given the nature of the study (and the risks), written informed consent must be obtained from at least one parent, preferably the mother. The researchers try to contact the child's mother by phone. She provides verbal consent, but is unable to travel to the study site to provide written consent. The child is not enrolled in the study.

In Thailand, as in much of Southeast Asia, it is not uncommon for children to grow up in the care of grandparents.⁴⁸ Childcare and elderly care are intertwined in a broader system of intergenerational reciprocal family care.⁴⁹ Adult children assume social and financial responsibility for their ageing parents,⁵⁰ and in exchange grandparents contribute to the care and upbringing

47 Section 4, *Thailand Child Protection Act B.E. 2546 (2003)* (Unofficial Translation). Accessed at: http://web.krisdika.go.th/data/outsitedata/outside21/file/CHILD_PROTECTION_ACT_B.E._2546.pdf.

48 J. Knodel and M.D. Nguyen, 'Grandparents and grandchildren: care and support in Myanmar, Thailand and Vietnam' (2015) 35 *Ageing & Society* 1960-1988, 1963; J. Knodel and W. Pothisiri, 'Intergenerational Living Arrangements in Myanmar and Thailand: A Comparative Analysis' (2015) 30(1) *J Cross Cult Gerontol* 1-20, 17.

49 Ibid.

50 Ibid.

of grandchildren.⁵¹ As part of this arrangement, parents often leave children in the care of grandparents, while pursuing work outside the home for the financial benefit of the entire family.⁵² According to Knodel et al., the majority of elderly Thais receive some form of material or financial assistance from their adult children, and at least half contribute to some form of childcare.⁵³ Because intergenerational family care is a widely accepted socio-cultural norm in Thailand, grandparents seldom seek formal recognition for their role as primary caregivers for their grandchildren. Moreover, in the vast majority of cases, parents are still actively involved in the care and upbringing of their children, albeit remotely, whilst working for the benefit of the whole family. If grandparents were to formalize their status as legal guardians, it could potentially extinguish the rights and responsibility of parents, while not capture the intergenerational dimension of childcare. But, in the absence of a legally recognised caregiving relationship, the status of grandparents remains unclear for the purposes of informed consent in paediatric clinical research. The FERCIT ethical guidelines appear to acknowledge this quandary: 'in Thailand, it is not common to go to court to seek an order for guardianship, so it is a problem with whom to get consent.'⁵⁴

Kalabuanga et al., observed similar challenges in the Democratic Republic of Congo, noting that a requirement for a legally authorised representative 'fails to take into due account informal social mechanisms' which often rely on relatives and community to care for a child in *lieu* of biological parents.⁵⁵ So, 'when a child is brought to a clinic and is eligible for a trial, a question arises whether the caregiver is legally entitled to consent'.⁵⁶ Vischer et al., in their study on perceptions of the Good Clinical Practice Guidelines (ICH-GCP) in sub-Saharan Africa observed that it was common for relatives to care for a child in place of biological parents, making it difficult for trial staff to include such children.⁵⁷ Strode et al., have highlighted an ethico-legal tension in South Africa, whereby the *National Health Act* (section 71) recognises only parents

51 J. Knodel and N. Chayovan, 'Intergenerational Relationships and Family Care and Support for Thai Elderly' (2009) 33 *Ageing International* 15-27.

52 J. Knodel, B. Teerawichitchainan, V. Prachuabmoh and W. Pothisiri, *The Situation of Thailand's Older Population: An Update based on the 2014 Survey of Older Persons in Thailand*, (HelpAge International: November 2015). Available at: <https://www.helpage.org/where-we-work/east-asia/thailand/> (27 October 2021) Knodel and Nguyen 2015 (n 48) 17.

53 J. Knodel and B. Teerawichitchainan, 'Grandparenting in developing South East Asia: comparative perspectives from Myanmar, Thailand and Vietnam' in V. Timonen (ed), *Grandparenting Practices around the World* (Bristol: Policy Press Scholarship, 2018) 65-88; see also B. Ingersoll-Dayton, S. Punpuing, K. Tangchonlatip and L. Yakas, 'Pathways to grandparents' provision of care in skipped-generation households in Thailand' (2018) 33 *Ageing and Society* 1429-1452; Knodel and Nguyen 2015 (n 48) 10.

54 FERCIT Ethical Guidelines for Pediatric Research 2015 (n 31#0) Section 2.3.

55 Kalabuanga et al., 2016 (n 20) 66.

56 Ibid, 66.

57 Vischer et al., 2016 (n 24) 1043.

and legal guardians as legal representatives for the purposes of consent, while national ethical guidelines allow parental substitutes if certain conditions are met.⁵⁸

This gap between formal legal requirements and socio-culturally realities can lead to an ethically perplexing outcome, whereby a primary carer holds no legal authority in the informed consent process, while the legal representative holds little or no role in the everyday care of the child.

3 DISCERNING THE LEGAL REQUIREMENTS FOR CHILDREN WITHOUT A LEGAL REPRESENTATIVE

There are certain categories of children whose particular circumstances pose unique legal challenges to the informed consent process. For instance, children of minor parents, children of parents without legal status, and children without parental care do not readily have legally recognised representatives to act on their behalf. The lack of ethical guidance to navigate the legal requirements of informed consent in these children has tended to result in their presumptive exclusion from paediatric clinical research.

3.1 Children of minor parents

International and regional ethical guidelines do not address the informed consent process in children of minor parents. Domestic laws also tend to obscure the distinction between who is the legitimate parent for a child and who is the legal representative of a child. This has implications for the child of a minor parent, whose legitimate parent may not be legally competent to act as a legal representative. In this regard, determining who should provide informed consent for a child of minor parents can become an ethico-legal quandary, both in deciding who is best placed to hold the ethical duty to safeguard the interests and welfare of the child, and who holds legal authority to act on behalf of the child for the purposes of informed consent.

Under Thai family law, a child is a 'minor', and subject to the authority of a legal representative until he or she becomes *sui juris* (legally independent).⁵⁹ A child becomes *sui juris* when he or she turns 20 years of age, or enters into a legal marriage prior to the age of 20 years.⁶⁰ The age of

58 A.E. Strode, P.P. Singh, C.M. Slack, and D.R. Wassenaar, 'Research ethics committees in a tight spot: Approving consent strategies for child research that are *prima facie* illegal but are ethical in terms of national guidelines' (2018) 108(1) *SAMJ* 828-832, 829.

59 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter II: Rights and Duties of Parent and Child, Section 1566.

60 *Thailand Civil and Commercial Code 2468 B.E.*, Book I: General Principles, Title II: Persons, Chapter I: Natural Persons, Part II: Capacity, sections 19, 20.

marriage is 17 years (or the completion of the eighteenth year). However, it is legally possible for a child as young as 13 years old to enter into a legal marriage with Court approval.⁶¹

This raises the question of who is the legal representative for a child of an unmarried minor. According to Thai family law, a child born of a woman who is not married is the legitimate child of that woman.⁶² However, a legitimate parent can only be the legal representative for a child if the parent is also *sui juris*. In other words, an unmarried minor could not be the legal representative of her child, even if she is the legitimate parent of the child. That marital status should be the sole basis to determine the suitability of a minor parent to provide informed consent for a child raises obvious concerns as to the ethical validity of informed consent, but it also raises concerns for the protection and fair treatment of children of minor parents in clinical research. For instance, a child of a married 14 year-old mother could be enrolled in a clinical trial on the basis that her mother is presumptively competent as a result of her marriage, whereas a child of an unmarried 19-year old mother would not be eligible to enrol in a trial, even if her mother demonstrated sufficient maturity, understanding and capacity to consent on behalf of her child. Consider the following scenario.

Scenario #3: Children of minor parents

A toddler (3 years old) arrives at a village health clinic with his 17 year-old unmarried mother and grandmother. The young mother is soothing her son who has a high fever and is crying. The clinic trial staff tell the mother that her son is eligible to participate in a clinical trial on febrile illness, which will help diagnose and treat the cause of his fever. The mother, who is studying to be a nurse, listens intently and is keen to enrol her son in the study. The grandmother, however, is suspicious of the clinical trial staff and does not want her grandson enrolled. The trial staff are unsure whether to accept the consent of the mother who appears to be the primary carer for her son and better informed on her son's care needs, or to respect the refusal of the grandmother, given the mother's young age. In the end, the child is not enrolled in the study.

De Pretto-Lazarova et al., conducted a systematic review of informed consent in children of minor parents, citing an apparent lack of an 'ethically acceptable

61 *Thailand Criminal Code B.E. 2499 (1956)*, Book II: Specific Offences, Title IX: Offences Relating to Sexuality, Section 277.

62 *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter I: Parentage, Sections 1546; *Thailand Civil and Commercial Code 2468 B.E.*, Book V: Family, Title II: Parent and Child, Chapter II: Rights and Duties of Parent and Child, Sections 1564, 1566.

approach to the IC [informed consent] process' in paediatric research.⁶³ It may be possible to resolve the ethico-legal gap in some instances through a modification of informed consent requirements, particularly in research that envisages a risk that is negligible or well below the *de minimis* range. However, in the absence of any ethical guidance on this point, it is likely that children of minor parents will be presumptively excluded from clinical research, not out of an ethical concern but due to the absence of a legal framework to recognise the role of minor parents the informed consent process.

3.2 Children of parents without legal status

There appears to be no ethical guidance on how to navigate informed consent in children of parents without legal status. In some cases, a child may be an illegal migrant, or undocumented refugee, living with parents who do not have legal status or standing in the jurisdiction of the clinical research study. In other instances, a child may be part of an ethnic minority or religious group that is persecuted or discriminated and, as such, denied legal standing in the jurisdiction of the clinical research study. In both situations, the parent is not legally recognised to act on behalf of the child in the informed consent process. In the absence of specific laws or ethical guidance on this point, there remains a degree of legal precarity as to whether the parent will be allowed to give informed consent, which can affect the fair treatment of children of parents without legal status. Consider the following two scenarios.

Scenario #4A: Children of refugee parents

A child, born in a Thai refugee camp, is eligible to enrol in a malaria study. The malaria clinical trial is run out of a health centre that has been providing health care services to undocumented migrants and refugees living in the area for over forty years. The research clinic has built strong ties with local government authorities, which has allowed them to establish an ethically and socio-culturally appropriate process for recruiting and enrolling children of parents without legal status. The mother is keen to for her son to join the study and the child is enrolled.

Scenario#4B: Children of persecuted or discriminated ethnic minorities

A child, born in an ethnic hilltribe in North eastern Thailand, is eligible to enrol in a vaccine trial. The clinical trial is being conducted by a foreign commercial sponsor through a Thai university-hospital. The mother is keen for her son to join the study. However, when the trial staff ask for legal documentation, they learn

63 A. De Pretto-Lazarova, D.O. Brancati-Badarau, and C. Burri, 'Informed consent approaches for clinical trial participation of infants with minor parents in sub-Saharan Africa: A systemic review' (2020) 15(8) *PLOS One* 1-23. DOI: 10.1371/journal.pone.0237088.

the mother does not have legal status in Thailand. The child is not enrolled in the study.

A child of parents without legal status is likely to be viewed in the same way as a child living in the informal care of grandparents or relatives. It would fall on the ethics committee to determine when and under what conditions the legal requirements of informed consent could be modified to recognise carers not legally authorised to provide informed consent. Such a decision would likely turn on the nature of the research study – the benefit-risk ratio, the age of the child participants, and the research sponsor's willingness to deviate from international guidelines. It is important to underscore that a child's exclusion would not necessarily be out of ethical concern, but due to a lack of legal guidance on how to navigate the informed consent process in children without legal representatives. Moreover, any modification to the informed consent process, while enabling a child's enrolment, would not address the broader question of whether children, as a class of persons, are entitled to the guidance and support of a proxy in the informed consent process to enable their participation in clinical research, particularly where the research holds a prospective medical benefit for the child.

3.3 Children living without parental care

Beyond the question of who should act as proxy for a child, is the broader question of when a child should be ethically and legally entitled to provide informed consent in clinical research. For the most part, ethical guidelines have deferred to domestic law to determine when and under what conditions a child will be legally permitted to provide informed consent in medical research. However, in the absence of specific laws on human subject research, there may be differing age-barriers for adulthood, which can introduce confusion around when a child will be deemed legally capable of providing informed consent in research. As Colom and Rohloff observe, 'regulations vary significantly from country to country regarding when adolescents can provide legal consent' and 'even when legal frameworks allow adolescents to seek contraception services without parental permission', they may still require a legal representative to consent on their behalf to medical research.⁶⁴ Consider the following scenario.

Scenario #5: Children living without parental care

An 18 year-old boy is living on the streets in Bangkok. An NGO worker notices the boy is unwell and takes him to a public university-hospital. The boy is diagnosed with cancer, and is placed on a waiting list for treatment. The oncologist

⁶⁴ Colom and Rohloff 2018 (n 18) 12.

tells the boy that he may be eligible for treatment through a clinical drug trial. However, because he is under 20 years of age, written consent is required from both parents or a legal guardian. The boy tells the oncologist that he was kicked out of his home when he was 13 year-old and has been living on his own since. After consulting with the ethics committee and the research sponsors, the oncologist regretfully tells the boy he cannot enrol him in the trial.

Under Thai law, there are conflicting definitions for a child, and differing age barriers for adulthood. Under the *Child Protection Act B.E. 2546 (2003)* a child is defined as a person under the age of 18 years but does not include persons legally married before the age of 18 years. Under the *Civil and Commercial Code B.E. 2468 (1925)*, a child ‘ceases to be a minor and becomes *sui juris*⁶⁵ when they reach the age of 20 years, or become legally married prior to 20 years of age. Under the *Mental Health Act B.E. 2551 (2008)*, a patient who is 18 years or older and legally competent can provide written informed consent to medical treatment. However, children are not recognised as legally competent until they become ‘*sui juris*’, leaving open the question of whether a child who is 18 years old but unmarried is legally competent for the purposes of providing informed consent in medical research.

In the absence of specific legislation establishing a minimum age for informed consent in medical research or a clear framework to assess children’s capacity to provide informed consent in medical research, there is no clarity on when and under what conditions a child will be able to provide informed consent in a research study. This uncertainty has direct implications for children living without parental care, who may be presumptively excluded from a study – not out of ethical concern, but due to an absence of a legally authorised representative and a legal mechanism to assess their capacity to consent. While it may be possible to obtain a waiver in the informed consent process to enable a child’s participation in clinical research, particularly where the anticipated risk in a study is negligible, again, this does not resolve the broader question of whether all children – including those living without parental care – have a right to support in the informed consent process whether through a proxy or on their own, to enable their access to and participation in clinical research.

There have been calls for more pragmatic ethical guidelines for clinical research in children, which better account for the limited regulatory infrastructure and diverse socio-cultural realities in lower- and middle-income coun-

65 See Thailand Civil and Commercial Code 2468 B.E., Book I: General Principles, Title II: Persons, Chapter I: Natural Persons, Part II: Capacity, sections 19, 20.

tries.⁶⁶ However, the legal complexities surrounding informed consent in children are not unique to LMICs. As Lepola et al., reveal in their comparative study of 27 European countries,⁶⁷ there are considerable differences in national legal requirements on informed consent and assent, which have often resulted in considerable time and resources being spent on reconciling these differences in multicentre clinical trials.⁶⁸ Lepola et al., have developed an 'Informed Consent and Assent Guide' as a tool to not only enhance ethical standards of informed consent practice, but also engender common practices for informed consent across multinational clinical paediatric trials. Whether such a tool could be developed and implemented in LMICs remains questionable. This is in part because many of the legal uncertainties arising in informed consent in paediatric clinical research emanate from the absence of relevant laws, rather than differences between existing applicable law. In this regard, we contemplate whether international legal frameworks, such as the UN Convention on the Right of the Child, could offer guidance on informed consent in paediatric clinical research where domestic laws are conflicting and ethical guidance is lacking.

4 NAVIGATING LEGAL UNCERTAINTY IN INFORMED CONSENT IN CHILDREN

The UN Convention on the Rights of the Child (CRC)⁶⁹ is an international human rights treaty, adopted by the United Nations General Assembly in 1989.⁷⁰ It is said to be the most comprehensive,⁷¹ and most ratified of all

66 P.D. Joseph, P.H.Y. Caldwell, A. Tong, C.S. Hanson, and J.C. Craig, 'Stakeholders View of Clinical Trials in Low- and Middle-Income Countries: A Systemic Review' (2016) 137(2) *Pediatrics* 1-19. e20152800.

67 P. Lepola, A. Needham, J. Mendum, P. Sallabank, D. Neubauer, and S. de Wildt, 'Informed consent for paediatric trials in Europe' (2016) 101 *Arch Dis Child* 1017-1025. DOI: 10.1136/archdischild-2015-310001.

68 P. Lepola, M. Kindred, V. Gianuzzi, H. Glosli, M. Dehliner-Kremer, H. Dalrymple, D. Neubauer, G.B. Boylan, J. Conway, J. Dewhurst, and D. Hoffman, 'Informed consent and assent guide for paediatric clinical trials in Europe' (2021) 0 *Arch Dis Child* 1-9. DOI:10.1136/archdischild-2021-322798.

69 United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S. 3 ('CRC').

70 UN General Assembly, 'Convention on the Rights of the Child,' UNGA Resolution 44/25, adopted without a vote, 61st plenary meeting, 20 November 1989.

71 J. Tobin, 'Introduction: The Foundation for Children's Rights' in J. Tobin and P. Alston (eds) *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 1-20, 1.

human rights conventions, with 196 States parties agreeing to be bound by its legal provisions.⁷²

At the crux of the CRC framework is its conception of the child as an independent rights-holder, whose voice and agency, even if not determinative, must be respected and listened to by adults exercising influence in her everyday life. It re-orientates the informed consent process from an entitlement held by the proxy over the child, to a right vested in the child, placing an obligation on those adults around the child – the proxy, researchers and ethics review committees – to provide support and guidance that enables children's access and participation in informed consent in the research setting.

4.1 Recognising the common responsibilities of both parents in the informed consent process

A unique feature of the CRC is its respect and support for both parents in the care and upbringing of a child.⁷³ Indeed, when the CRC was adopted, it offered more support and assistance to parents than any previous instrument under international law.⁷⁴ Article 2(1) requires States to respect and ensure children's rights without any discrimination, which includes preventing discrimination against a child on the basis of his or her parents. Article 18(1) imposes a legal obligation on States to 'use their best efforts' to 'ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.' Article 5 enshrines a right for all children to receive appropriate guidance and direction from both parents that is consistent with their evolving capacities in the exercise of rights. Taken together, articles 2(1), 18(1), and 5 provide a framework to recognise the legal authority of both parents – fathers and mothers – in the informed consent process.

72 As of June 2021, 196 State parties had ratified or acceded to the UN Convention on the Rights of the Child. See United Nations Treaty Collection, Status of Treaties. Accessed at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en (27 October 2021).

73 J. Doek, 'The Human Rights of Children: An Introduction' in U. Kil Kelly and T. Liefwaard (eds) *International Human Rights of Children* (Springer Nature Singapore, 2018) 1-15, 12-13; J. Tobin and S. Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in John Tobin and Philip Alston (eds) *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press, 2019) 159-185.

74 See Articles 3(2), 5, 9, 10, 16, 18(1), 18(2), 20, 21(a), 22(2), 23(2), 23(3), 24(2), 27(3), 27(4) and 29(1)(c), 37(c), 40(2)(b)(ii), 40(2)(b)(iii), CRC.

4.2 Recognising informal carers in the informed consent process

The CRC underscores the importance of ‘family’ and ‘family environment’ for children’s realization and enjoyment of rights. The preamble of the CRC recognises ‘family’ as the ‘fundamental group of society’⁷⁵ and the ‘natural environment’⁷⁶ for the child’s growth and well-being. Article 5 recognises the role of not just parents, but wider family and community ‘where applicable’ and ‘provided for by local custom.’⁷⁷ The explicit reference to ‘extended family and community’ within article 5 reflects an understanding that family structures and parenting arrangements may not always be formalized under the law, and are often dictated by socio-cultural norms.⁷⁸

Applied to the paediatric clinical research setting, article 5 and the CRC may offer a basis to justify a wider reading of ‘legally acceptable representative’ that takes into account extended family care arrangements where it is provided for by local custom. In this regard, if there is no direct legislation on paediatric clinical research, or conflicting legal frameworks, the CRC could offer guidance, recognising a child’s right to receive support and direction from not just parents but extended family and community, where such caregiving arrangements are accepted within the community. Such an approach would not only enable practical solutions but also support community-led practices in the ethical conduct of research.

4.3 Recognising the child’s right to guidance and direction in the informed consent process

The CRC recognises that all children, even very young children, are rights-holder entitled to guidance and direction that supports and respects their developing capacities in the exercise of rights.⁷⁹ The UN Committee on the Rights of the Child has said the concept of ‘evolving capacities’ should act as an enabling principle, requiring adults to provide guidance and direction that not only compensates for the child’s lack of knowledge, experience and understanding but also supports the child’s capacities to the maximum extent possible.⁸⁰ The CRC thus moves beyond the binary framework for legal com-

75 Preamble para 4, CRC.

76 Preamble para 5, CRC; A. Lopatka, ‘An Introduction to the United Nations Convention on the Rights of the Child’ (1996) 6 *Transnat’l L. & Contemp. Probs.* 251, 255.

77 Article 5, CRC.

78 Tobin and Varadan 2019 (n 73) 169-170.

79 S. Varadan, ‘The Role of Parents in the Proxy Informed Consent Process in Medical Research Involving Children’ (2020) 28(3) *International Journal of Children’s Rights* 521-546.

80 A. Daly, ‘Assessing Children’s Capacity: Reconceptualising our Understanding through the UN Convention on the Rights of the Child’ (2020) 28(3) *International Journal of Children’s Rights* 471-499; S. Varadan, ‘The Principle of Evolving Capacities under the UN Convention

petency, acknowledging that a child's capacities – physical, cognitive, moral, social, emotional and spiritual – will likely be acquired in a dynamic and fluid process, influenced by genetic, cultural, social and environmental factors.⁸¹ In the context of clinical research in Thailand, this would mean that children without legally authorised representatives would not be presumptively excluded from research, but rather assessed for their actual capacity to give informed consent, and then where necessary, provided with appropriate guidance to enable their participation in the informed consent process. In the case of children of minor parents, it would require a process that respects both the minor parent's 'capacity rights' to provide informed consent on behalf of her child, and the child's right to guidance that secures her protection and participation in the informed consent process in the paediatric clinical research setting.

It is important to clarify, that we are not proposing that the CRC be used as a direct substitute for national laws and regulations on paediatric clinical research. As with all international instruments, the CRC will generally not translate into national law, unless a State party takes direct measures to incorporate and implement its legal obligations into domestic law, policy and jurisprudence.⁸² As Kilkelly and others observe, how a State chooses to implement the CRC, and the measures it takes in this regard, will have a bearing on the culture of compliance and support for children's rights.⁸³ As such, the degree to which the CRC will be able to function as a framework to negotiate the legal complexities surrounding informed consent in paediatric research will depend in some part on what measures the State has taken – legal and non-legal – to incorporate and implement the CRC.⁸⁴ That said, with every country in the world (except the United States of America) having agreed to be legally bound by the provisions of the CRC, it offers the prospect of a viable and common framework to navigate the legal uncertainties in informed consent in a manner that accords respect and protection to children's rights in the paediatric clinical research setting.

on the Rights of the Child' (2019) 27(2) *International Journal of Children's Rights* 306-338; G. Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti, 2005).

81 Tobin and Varadan 2019 (n 73) 173.

82 U. Kilkelly, 'The UN convention on the rights of the child: incremental and transformative approaches to legal implementation' (2019) 23(2) *The International Journal of Human Rights* 323-337. DOI: 10.1080/13642987.2018.1558974K; K. McCall-Smith, 'To incorporate the CRC or not – is this really the question?' (2019) 23(3) *The International Journal of Human Rights* 425-441. DOI:10.1080/13642987.2018.1558990.

83 U. Kilkelly, L. Lundy and Bronagh Byrne, 'The Convention on the Rights of the Child: A Thematic Analysis of the Incorporation Journey' in U. Kilkelly, L. Lundy and B. Byrne (eds) *Incorporating the UN Convention on the Rights of the Child into National Law* (Intersentia, 2021) 333-351; Kilkelly 2019 (n 82) 332-333.

84 McCall-Smith 2019 (n 82).

CONCLUSION

Conducting clinical research in children is ethically and legally complex.⁸⁵ Part of that complexity emanates out of the legal ambiguities surrounding the role of the proxy in the informed consent process. This uncertainty is compounded by the diversity of family structures and parenting arrangements, which in most parts of the world involves informal carers within the extended family and wider community. The aim of this chapter has been to unravel some of the legal complexity, by demonstrating the degree of uncertainty that can arise when there are no direct laws or regulations relating to informed consent in paediatric clinical research. It contemplated how international legal frameworks, such as the UN Convention on the Rights of the Child, could be applied to negotiate these legal uncertainties in a manner that recognises the child's right to access and participate in informed consent in paediatric clinical research. By placing the child at the centre of the decision-making process, the CRC provides a framework that accommodates a diversity of socio-cultural environments, while also recognising the child's right to guidance and direction that enables her access to and participation in the informed consent process.

However, more research is needed to better understand the implications of legal uncertainty in informed consent and its impact on children's recruitment and enrolment in paediatric clinical research. A more comprehensive comparative legal study is needed on informed consent laws for children in lower- and middle-income countries, as well as a survey of best practices which have been developed to resolve legal gaps in informed consent practices. Finally, further research is needed to explore how international legal frameworks, such as the CRC, could be practically applied in the everyday research setting, assessing the challenges and benefits of using human rights frameworks alongside ethical guidelines.

85 CIOMS 2021 (n 21) 84-85.

INTRODUCTION

This chapter undertakes an interpretative analysis of article 5, discussing its scope, content and function under the United Nations Convention on the Rights of the Child (CRC).¹ Article 5 can be explained in two ways. It affirms the special role that parents and family play in the realization of children's rights, recognising their right to provide direction and guidance to their child. However, it also introduces a framework to navigate the parenting relationship in a manner that recognises the child's status as a rights holder with evolving capacities in the exercise of rights under the CRC. Viewed this way, article 5 does not impose a legal obligation on States as much as it provides a framework that informs the scope and content of other legal obligations under the CRC. It is likely for this reason that article 5 has been called a 'cross-cutting standard'² and 'umbrella'³ provision, 'under the shadow of which the remaining provisions of the Convention are to be applied.'⁴

This dissertation suggests that article 5 functions as a framework in two broad respects under the CRC: (1) it provides an avenue to identify a child's carers, ensuring that 'whoever is primarily responsible for the child, whatever the nature of their exact legal relationship to the child, is recognised and protected under the CRC'⁵; (2) it navigates the parenting relationship between a child and her carers, ensuring children are respected and supported as individuals within the family, with evolving capacities in the exercise of their rights under the CRC.

1 United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S 3 ('CRC').

2 Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin: A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25(2) *International Journal on the Rights of the Child*, 285-306, 302. DOI: 10.1163/15718182-02502011.

3 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 1995); Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 1999); Philip Alston, 'The Legal Framework of the Convention on the Rights of the Child' (1992) 91/2 *United Nations Bulletin of Human Rights: The Rights of the Child* 1-15, 11.

4 Philip Alston, (1994) 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 8 *International Journal of Law, Policy and the Family* 1-25, 11.

5 Detrick 1999 (n 3).

As a starting point, it is worthwhile to revisit the text of article 5 of the CRC

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Drawing together the four academic manuscripts that make up this dissertation, I engage in an analysis of article 5, relying on an interpretative methodology that encompasses four dimensions:

- (1) *Interpretative principles* – the rules of treaty interpretation, the principles of non-restrictive interpretation, effectiveness and dynamic interpretation, and the work of the CRC Committee as an authoritative legal source for the interpretation and implementation of the CRC;
- (2) *Practicability* – the need for a clear, practicable and implementable framework for children’s rights;
- (3) *Coherence* – the importance of coherence both in reasoning and alignment within the CRC and international law;
- (4) *Context sensitivity* – the value of a flexible and adaptable interpretation that accommodates diverse cultural and contextual settings.

This chapter is presented in five parts. Part I contemplates the nature of the right created under article 5 of the CRC. It suggests that article 5 should be understood as a right of the child to receive parental guidance and direction, rather than a right of parents to have their parental authority respected by the State.

Part II examines the nature of the legal obligation created under article 5 of the CRC. It begins by considering the meaning of the legal obligation to ‘respect’ under international law. It then examines the specific obligation to ‘respect’ under article 5 of the CRC. It suggests that the relational dimension of article 5 poses a challenge to States seeking to implement their legal obligations into domestic law. It is thus argued that while article 5 embodies a legal obligation to ‘respect’, it is practically implemented through other provisions of the CRC. Interrogating the work of the CRC Committee, it is posited that article 5 is not viewed as a stand-alone legal provision, but as a guiding framework that navigates the scope and content of other provisions surrounding the relationship between a child and her carers under the CRC. To this end, the CRC Committee has derived two broad functions for article 5 in its interpretation and implementation of other provisions under the CRC.

Part III focuses on the first broad function of article 5 – an inclusive framework to identify a child’s carers under the CRC. Article 5 reflects an understanding that parenting practices and family structures may not always be reflected

in formal legal systems: it provides a framework that ensures whoever is primarily responsible for the child, 'whatever the nature of their exact legal relationship to the child'⁶ will be recognised under the CRC. Its formulation, however, does not displace the role of parents or legal guardians primarily responsible for the child. The use of 'or' (rather than 'and') within article 5, suggests a disjunctive approach towards informal carers, deferring to parents in the first instance, and in the alternative, 'or where applicable' to informal carers within the 'extended family or community'[emphasis added]. The qualification of 'as provided for by local custom' further denotes an intention to capture only those informal carers genuinely caring for the child, and who are recognised as such within the child's community. At the same time, an argument could be made for using article 5 to recognise informal carers where it contributes to children securing the enjoyment of their rights across diverse socio-cultural settings. Drawing on a case study – paediatric clinical research in Thailand, we consider the value of article 5 as a legal framework to recognise informal carers acting as primary caregivers *alongside* parents in the informed consent process in paediatric clinical research.

Part IV focuses on the second broad function of article 5 – a framework to navigate the parenting relationship that affirms the child's status as an individual rights-holder within the family with evolving capacities in the exercise of rights under the CRC. In this section, we underscore that the scope of article 5 is the family setting. It provides a model of parenting that promotes a parent-child decision-making process grounded in participatory dialogue, collaboration and mutual respect. Using medical research as a case study, we consider how article 5 could be applied to navigate the parent-child decision-making process in proxy informed consent. It is suggested that the CRC framework, and more specifically article 5, present a different vantage point to view the proxy informed consent process:

- 1) it introduces boundaries around the decision-making authority of a proxy;
- 2) it recognises the child as an active participant in the informed consent process, modelling a parent-child decision-making process that is collaborative, participatory and based on mutual respect;
- 3) it fosters respect for children's autonomy, recognising that every child has unique and evolving capacities which must be taken into account in the decision-making process.

In sum, article 5 offers a model of parenting that encourages what Daly terms as 'capacity rights', enabling children to receive the guidance and support needed to assume progressive agency over the exercise of their rights under the CRC.⁷ Viewed this way, article 5 functions as a framework that informs

6 Detrick 1999 (n 3) 121.

7 Aoife Daly, 'Assessing Children's Capacity,' (2020) 28(3) *International Journal of Children's Rights* 471-499, 480.

not only the content but the manner in which parenting support and assistance is provided under the CRC.

Part V examines the scope and function of ‘the evolving capacities of the child’ referenced in article 5 (and article 14(2)) of the CRC. I suggest that the CRC Committee’s treatment of ‘evolving capacities’ goes well beyond the domain of parental guidance and indeed the scope and function of article 5 of the CRC. We query whether the concept of ‘evolving capacities’ finds its genesis in article 5, or whether it is embedded more broadly (and implicitly) within the framework of the CRC. The idea that a child’s capacities evolve and should be recognised accordingly, will likely be relevant to not just parental guidance, but the realization of all rights under the CRC. Indeed, the concept of ‘evolving capacities’ has found expression in other areas of the CRC, such as the assessment of the best interests of the child under article 3(1) and the child’s right to be heard under article 12 of the CRC. It is thus argued that the reference to ‘evolving capacities’ under article 5 is not exclusive to parental guidance, but forms part of a broader overarching principle embedded within the CRC. At the same time, the text of the CRC does not explicitly recognise a broad principle of evolving capacities, similar to that of the best interests of the child, nor does the CRC Committee discuss its meaning and scope. There are legitimate concerns that imputing a broad principle of ‘evolving capacities’, could be used to obstruct rather than enable children’s enjoyment of rights under the CRC.⁸ For example, the CRC Committee’s tendency to rely on ‘open norms’ such as ‘evolving capacities’ in tandem with its firm recommendations on minimum age standards has led to a confused and somewhat conflicted approach to age limits that has had implications for children’s rights and protections, particularly in judicial proceedings.⁹ It is thus posited that while some recognition of a child’s evolving capacities will likely be both inevitable and necessary for the realization of children’s rights, more guidance is needed from the CRC Committee on the meaning and scope of ‘the evolving capacities of the child’ before it can be embraced as an overarching or enabling principle of the CRC.

8 Noam Peleg, *The Child’s Right to Development* (Cambridge: Cambridge University Press, 2019) 74; Kay Tisdall, ‘Challenging Competency and Capacity? Due Weight to Children’s Views in Family Law Proceedings’ (2018) 26 *International Journal of Children’s Rights* 159-182; Priscilla Alderson, ‘Giving Children’s Views “Due Weight” in Medical Law’ (2018) 26 *International Journal of Children’s Rights* 16-37.

9 Stephanie Rap, Eva Schmidt & Ton Liefwaard, ‘Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?’ (2020) 1 *Erasmus Law Review* 4-11, DOI: 10.5553/ELR000158; see also Ursula Kilkelly, ‘“Evolving Capacities” and “Parental Guidance” in The context of Youth Justice’ (2020) 28 *International Journal of Children’s Rights* 500-520, 509.

1 THE NATURE OF THE RIGHT CREATED UNDER ARTICLE 5 OF THE CRC

A plain reading of article 5 suggests it creates two different rights-based entitlements: a right of parents and other carers to have their 'responsibilities, right and duties' to provide parental guidance respected by the State; and a right of children to receive appropriate direction and guidance consistent with their evolving capacities in the exercise of rights under the CRC.

However, when article 5 is positioned within the broader text of the CRC, (the preamble and substantive provisions) and due consideration is given to the object and purpose of the Convention,¹⁰ it is understood as a right of the child to receive guidance and direction in the exercise of rights, rather than a right of parents (and other carers) to have their rights and responsibilities respected by the State.¹¹ It recognises that a child's enjoyment of rights will be deeply connected to and dependent upon the relationships and family environment in which she grows up.¹² This is expressed in the opening paragraphs of the preamble, which affirm 'the family, as the fundamental group of society and the natural environment for the growth and well-being of its members and particularly children', and declare that '...for the full and harmonious development of his or her personality, [a child] should grow up in a family environment, in an atmosphere of happiness, love and understanding'.¹³ This is further corroborated in the discussions of the CRC Working Group, in which delegates expressed concern that 'the family must not be given arbitrary control over the child' under the CRC.¹⁴

The ambition of article 5 was to acknowledge the relational dimension of children's rights, striking a delicate balance that accords respect to the special role of parents and family, while also affirming the child's status as an independent rights-holder under the CRC. The rights conferred to parents (and other

10 Article 31(1), 31(2), and 31(3), Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S 331 ('VCLT'); see also Martin Scheinin, 'The art and science of interpretation in human rights law' in in Bård A. Andreassen, Hans-Otto Sano & Siobhán McNerney-Lankford (eds) *Research Methods in Human Rights: A Handbook* (Cheltenham: Edward Elgar Publishing Ltd 2017) 17-37, 23.

11 John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in John Tobin and Philip Alston (eds) *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 159-185, 161.

12 John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395-441, 424.

13 Preamble, para 6, CRC (n 1).

14 United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1987), E/CN.4/1987/25, para 106; see also Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 28(2) *International Journal of Children's Rights* 306 - 338, 313.

carers) should thus be understood as ‘limited’ and ‘functional’,¹⁵ linked to and dependent upon the child’s enjoyment and exercise of rights under the CRC.¹⁶

The CRC Committee affirms this reading of article 5, recognising a right of children, ‘to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children’s evolving capacities.’¹⁷ The CRC Committee further elaborates on the ‘functional’ and ‘limited’ nature of parental rights

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child ... While a young child generally requires more guidance than an older child it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Parents (and others) should be encouraged to offer “direction and guidance” in a child-centred way, through dialogue and example, in ways that enhance young children’s capacities to exercise their rights ...¹⁸

Viewed this way, article 5 is somewhat radical. It breaks from historical conceptions of the parent-child relationship, in which parents were conferred with unfettered rights over their children, and the child was viewed as a passive recipient of care within the family. In its place, it offers a parenting model that is not dissimilar to a trustee or fiduciary relationship, in which parents (and other carers) exercise authority not as independent rights-holders but as duty-bearers to their child in the child’s exercise of rights under international law. It is likely for this reason that article 5 has been described as innovative,¹⁹ making a vital contribution to the realization of children’s rights.²⁰ But it is also likely for the same reason that article 5 poses a challenge for those seeking to translate its relational dimensions into a practicable and implementable policy within the domestic legal framework.

15 Roberta Ruggiero, Diana Volonakis and Karl Hanson, ‘The inclusion of “third parties”: the status of parenthood in the Convention on the Rights of the Child’ in E. Brems, E. De-smet and W. Vanderhole (eds), *Children’s Rights Law in the Global Human Rights Landscape* (London: Routledge, Taylor and Francis, 2017) 73.

16 Tobin and Varadan 2019 (n 11) 161.

17 CRC Committee, General comment No. 13 (2011), The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, para 59.

18 CRC Committee, General Comment No. 7 (2005), Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, para 17.

19 Garton Kamchedzera, ‘Article 5: The Child’s Right to Appropriate Direction and Guidance’ in André Alen, Johan Vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans, Mieke Verheyde, and Bruce Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2012) 6.

20 E. Sutherland, The Enigma of Article 5 of the United Nations Convention on the Rights of The Child’ (2020) 28(3) *International Journal of Children’s Rights* 447-470, 467. DOI:10.1163/15718182-02803008.

2 THE NATURE OF THE LEGAL OBLIGATION UNDER ARTICLE 5

Article 5 requires States to ‘respect’ the responsibilities, rights and duties of parents and other carers. The obligation to ‘respect’ is found in other international human rights instruments;²¹ as such it is worth considering its meaning within the broader international human rights legal framework before contemplating its scope and content within the CRC.

2.1 The obligation to respect under international law

Under international law, the obligation to ‘respect’ is generally framed in negative terms, entailing a duty to refrain from conduct. Broadly it requires States to refrain from conduct that violates rights²² and to avoid measures that restrict or prevent the enjoyment of rights.²³ The UN Human Rights Committee has clarified that ‘[w]here such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of ... rights’²⁴ and under no circumstances should restrictions be applied in a manner that would impair the essence of the right.²⁵

However, an obligation to ‘respect’ may also encompass positive duties or obligations. The European Court of Human Rights has held that States hold positive obligations to ‘secure’ the enjoyment of Convention rights under article 1, which is broader in scope than ‘merely abstaining from interference’.²⁶ As first explained in 1979 in *Marckx*,²⁷ in the context of respect for family life

... the object of [Article 8] is ‘essentially’ that of protecting the individual against arbitrary interference by public authorities ... Nevertheless it *does not merely compel the State to abstain from such interference*: in addition to this primarily negative

21 Article 18(4), United Nations International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 (‘ICCPR’); see also Article 13(3) United Nations International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3 (‘ICESCR’).

22 UN Human Rights Committee, General Comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 6-7.

23 UN Committee on Economic, Social and Cultural Rights, General Comment No. 13, ‘The right to education (article 13 of the Covenant)’, 8 December 1999, E/C.12/1999/10, para 47.

24 HRC, General Comment No. 31, para 6.

25 Ibid.

26 Laurens Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (Intersentia: Cambridge, 2016) 4.

27 *Marckx v Belgium* (Plenary), no. 6844/74 (ECHR, June 1979).

undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life.²⁸

As Fenton-Glynn explains, the doctrine of positive obligations is one of four primary principles of interpretation of the European Court of Human Rights, and is described as a ‘hallmark of the European Convention on Human Rights.’²⁹ It recognises that ‘in order to “secure” the Convention rights to all individuals ... as is required under Article 1 – it is not enough to refrain from acting, but states must also take certain positive steps to ensure their effective enjoyment.’³⁰ It involves both procedural and substantive obligations, including an ‘obligation to provide effective mechanisms for the prevention, detection and reporting of abuses of Convention rights, as well as to conduct effective investigations in response to any allegations.’³¹ It also requires States to ‘put in place appropriate safeguards to protect individuals from infringement on the part of private actors.’³² The Inter-American Court elaborates on this point in its often cited case, *Velásquez-Rodríguez*, where it affirms that States must not only refrain from conduct that violates rights, but also take due diligence measures to ‘prevent, investigate and punish violations’, as well as steps to restore the rights of victims through compensation and redress.³³ In the context of children’s rights, Fenton-Glynn suggests that such measures will ‘act as a limit on the action of parents, teachers and other individuals who may control their day-to-day lives.’³⁴

The doctrine of positive obligations is not dissimilar to the general obligation to ‘respect and ensure’ under the United Nations International Covenant on Civil and Political Rights.³⁵ The UN Human Rights Committee³⁶ has stated that while an obligation to ‘respect’ will entail a negative duty, an obligation to ‘ensure’ will encompass a positive duty to undertake measures that both protect and fulfil the enjoyment of rights. An obligation to protect will entail States taking measures that prevent non-State actors or third parties from engaging in conduct that violates or impairs the enjoyment of rights; and an obligation to fulfil will require active measures to secure the enjoyment of

28 *Marckx v Belgium*, para 31.

29 Claire Fenton-Glynn, ‘Introduction’ in *Children and the European Court of Human Rights* (Oxford: Oxford University Press, 2021) 5, 6; see also Lavrysen 2016 (n 30).

30 Fenton-Glynn 2021 (n 29) 5.

31 *Ibid*, 5, 6.

32 *Ibid*, 5.

33 Inter-American Court of Human Rights, *Velásquez-Rodríguez v Honduras*, 29 July 1988, Series C No. 1, para 166.

34 Fenton-Glynn 2021 (n 29) 5.

35 See Article 2(1), ICCPR.

36 The UN Human Rights Committee is a body of independent human rights experts tasked with monitoring States parties’ implementation of legal obligations under the ICCPR, accessed at : <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>; See articles 28-45, ICCPR.

rights and procedural measures to provide remedies and redress when rights are violated.³⁷ Thus, an obligation to 'respect and ensure' encompasses both negative and positive duties, including a due diligence component that requires States to take measures to prevent, investigate, punish and provide redress for human rights violations and abuses caused by private persons or other entities.

2.2 The obligation to respect under article 5 of the CRC

Any interpretation of the CRC will necessarily be guided by principles of legal interpretation under international law. In this regard, the obligation to 'respect' under article 5 should be broadly understood as a duty to 'refrain' from conduct that interferes with the enjoyment of rights under the CRC. However, it may also entail positive duties that ensure the effective enjoyment of rights, which will likely involve preventing non-State entities (including parents and other carers themselves) from interfering with rights, and due diligence measures to provide redress where rights are violated.

Within the framework of the CRC, it has been suggested that the general obligation to 'respect and ensure' rights under article 2(1) applies to the obligation to 'respect' under article 5 of the CRC.³⁸ If this is the case, then the obligation to 'respect' under article 5 will require States to not only refrain from conduct that interferes with the child's right to parental guidance and the correlative rights of parents and other carers, but also to take active measures to protect and fulfil the rights enumerated under article 5 of the CRC.³⁹

However, imputing the broader obligation to 'respect and ensure' under article 2(1) onto article 5 seems questionable. Not only is the text of article 5 explicit – 'States parties shall respect' – but the relational dimension of article 5 makes it difficult to discern the precise scope of an obligation to 'ensure' rights and to whom the legal obligation would be owed. If the obligation to 'respect and ensure' is owed to parents, then measures to protect and fulfil the rights to provide direction and guidance would likely overlap with other legal obligations relating to parents under articles 7, 8(1), 9(1), 9(3), 10(1), 10(2), 10(3), 18(1), 18(2), 18(3), 27(3) and 19(2), raising the question of whether article 5 'adds anything' to the CRC.⁴⁰ Moreover, introducing an obligation to 'respect and ensure' on the right to provide guidance and direction would likely involve a considerable amount of 'reading-in', stretching the text of article 5

37 HRC, General Comment No. 31, para 7-9.

38 Tobin and Varadan 2019 (n 11) 165; see also Samantha Besson and Eleonor Kleber, 'Article 2: The Right to Non-Discrimination' in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 21-40.

39 Ibid.

40 Sutherland 2020 (n 20) 448.

well beyond its scope and function to allow for positive measures to ‘protect’ and ‘fulfil’ the rights of parents and other carers under article 5 of the CRC.

If the legal obligation to ‘respect and ensure’ is owed to the child, then there are practical concerns over how a State will implement measures to protect and fulfil a child’s right to receive guidance within the family that do not amount to interference with the rights to privacy and family. Indeed, even a narrow reading of a legal obligation to ‘respect’ invites some concern over how States will implement due diligence measures to investigate, punish and provide redress for rights violations of article 5 under the CRC.

Commentators have questioned the practicality and feasibility of the legal obligation created under article 5 of the CRC. Detrick queries the nature of the legal obligation itself: ‘it does not constitute a comprehensive recognition of the “responsibilities, rights and duties” of parents and other carers as this is found elsewhere in the CRC⁴¹ nor does it impose specific legal duties on parents in respect of the manner in which they provide direction and guidance, as ‘an international convention cannot purport to impose, directly, any duties upon entities other than its States parties.’⁴² For Van Bueren, the concern lies with enforcing a rights-based obligation in a family setting, where children depend on parents and family for their upbringing and development. For instance, would article 5, ‘give children in [S]tates which incorporate the Convention a right of action against their parents for failing to provide “appropriate direction and guidance”?’⁴³ McGoldrick warns

the implementation [of article 5] is fraught with difficulty because those charged with providing “appropriate direction and guidance” to the child ... may well have an interest, personal or institutional in ensuring that the child does not exercise its rights.⁴⁴

Eekelaar makes a similar observation, noting an inherent tension within article 5: ‘the difficulty lies in the assumption that these adults will promote these rights.’⁴⁵ Article 5 ‘allows the adults “direction and guidance”’: but this must be *in the exercise* of the rights, not in derogation of rights.⁴⁶

What then is the nature of the legal obligation created under article 5 of the CRC? To answer this question, we look to the UN Committee on the Rights of the Child. Recalling the interpretative methodology set out in Chapter 1,

41 Detrick 1999 (n 3) 119.

42 Detrick 1999 (n 3) 119

43 Van Bueren 1995 (n 3) 50.

44 McGoldrick, ‘The United Nations Convention on the Rights of the Child’, (1991) 5 *International Journal of Law and Family* 132, 138; Detrick 1999 (n 3); see also Van Bueren 1995 (n 3) 49-50.

45 John Eekelaar, ‘The Importance of Thinking that Children have Rights’ in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press: Oxford, 1992) 221-235, 223.

46 Ibid, 223.

the CRC Committee holds *inherent power* to interpret the CRC pursuant to its mandate under article 43 and article 45(d) to monitor States' progress in the implementation of legal obligations under the CRC. Thus, the work of the CRC Committee – recommendations, general comments, jurisprudence and institutionalised practices – provides an authoritative legal source for the interpretation and implementation of provisions under the CRC.⁴⁷

2.3 The CRC Committee's approach to the legal obligation created under article 5

Reviewing the work of the CRC Committee, one finds a reluctant response to the question of what legal obligation is created under article 5 of the CRC. In its treaty-monitoring role, the CRC Committee accords little priority to States' implementation of article 5.⁴⁸ Reviewing the 568 Concluding Observations issued between 1993 and 2020, the CRC Committee references article 5 in just eight instances,⁴⁹ and has yet to issue a standalone recommendation in respect of article 5 under the CRC. Sutherland attributes the 'low profile' of article 5 to the reporting process itself,⁵⁰ drawing attention to the strict word limit and rigid reporting format, which do not allow for a careful consideration

⁴⁷ See Chapter 1 – Introduction; see also Scheinin 2017 (n 10) 29, 30.

⁴⁸ In the most recent version of the Treaty-specific guidelines on periodic reports by States parties under article 44, paragraph 1(b) of the Convention on the Rights of the Child, article 5 is embedded in a cluster of 10 provisions under Part V, 'Family Environment and Alternative care' the largest of the eight thematic sections (arts. 5, 9, 10, 11, 18(1), 18(2), 20, 21, 25, 27(4)). For reference, the thematic sections are broken down as follows: (1) General measures of implementation (arts. 4, 42 and 44(6)); (2) Definition of the child (art. 1); (3) General principles (arts. 2, 3, 6 and 12); (4) Civil rights and freedoms (arts. 7, 8, 13, 14, 15, 16 and 17); (5) Violence against children (arts. 19, 24(3), 28(2), 34, 37(a) and 39); (6) Family environment and alternative care (arts. 5, 9, 10, 11, 18(1), 18(2), 20, 21, 25, 27(4)); (7) Disability, basic health and welfare (arts. 6, 18(3), 23, 24, 26, 27(1), 27(2), 27(3)); (8) Education (arts. 28, 29, 30 and 31); (9) Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37(b), 37(c), 37(d), and 38, 39 and 40), see UN Committee on the Rights of the Child, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b) of the Convention on the Rights of the Child', 3 March 2015, UN Doc. CRC/C/58/Rev. 3.

⁴⁹ Between 1993 and 2020, the CRC Committee referenced article 5 in 8 instances of its 566 concluding observations: CRC Committee, Concluding Observations: Holy See, 27 November 1995, CRC/C/15/Add.46, para 13; CRC Committee, Concluding Observations: Luxembourg, 24 June 1998, CRC/C/15/Add.92, para 13; CRC Committee, Concluding Observations: Democratic People's Republic of Korea, 24 June 1998, CRC/C/15/Add.88, para 18; CRC Committee, Concluding Observations: Sierra Leone, 24 February 2000, CRC/C/15/Add.116, para 49; CRC Committee, Concluding Observations: Cyprus, 2 July 2003, CRC/C/15/Add.205, para 37-38; CRC Committee, Concluding Observations: Saint Lucia, 21 September 2005, CRC/C/15/Add.258, para 36-37; CRC Committee, Concluding Observations: Oman, 29 September 2006, CRC/C/OMN/CO/2, para 37(e); CRC Committee, Concluding Observations: Malaysia, 25 June 2007, CRC/C/MYS/CO/1, para 51.

⁵⁰ Sutherland 2020 (n 20) 467.

of every provision of the CRC. As Sutherland explains, as ‘one of ten enumerated points for the cluster, many of the other points, like ‘Separation from parents (Art. 9)’, ‘Children deprived of a family environment (Art. 20)’ and ‘Adoption (Art. 21)’ may require more explanation.’⁵¹

Reviewing the General Comments of the CRC Committee, one finds a similarly opaque response to the question of what legal obligation is created under article 5 of the CRC. Article 5 is referenced 28 times across 11 of the 25 General Comments.⁵² However, in only three instances does the CRC Committee engage in a standalone discussion on the rights and obligations created under article 5 of the CRC.⁵³ In the remaining 25 instances, the CRC Committee invokes article 5 alongside its discussion of other provisions, namely article 18(2), article 27(3), article 19(2), article 12, article 3(1), article 20 and article 37 of the CRC.

Examining each of the three instances in which the CRC Committee specifically discusses article 5, the focus appears to be on the rights, responsibilities and duties of parents, leaving open the question of what legal obligations States hold in respect of article 5 of the CRC. In its General Comment No. 4 on adolescent health and development, the CRC Committee emphasises that ‘parents or other persons legally responsible for the child need to fulfil with care their rights and responsibility to provide direction and guidance to their adolescent

51 Sutherland 2020 (n 20) 462.

52 CRC Committee, General Comment No. 1 (2001) Article 29(1): The Aims of Education, 17 April 2001, CRC/GC/2001/1, para 6; CRC Committee, General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, para 15; CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), 29 May 2013, CRC/C/GC/14, paras 1, 7, 9, 15; CRC Committee, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, paras 10, 15, 16, 17, 22, 29(a), 29(b); CRC Committee, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para.2; and 37, inter alia), 2 March 2007, CRC/C/GC/8, paras 8 and 47; CRC Committee, General Comment No. 11, Indigenous children and their rights under the Convention, 12 February 2009, CRC/C/GC/11, para 46; CRC Committee, General Comment No. 12 (2009) The right of the child to be heard, 20 July 2009, CRC/C/GC/12, paras 69, 84; CRC Committee, General Comment No 13 (2011) The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras 7(b), 59, 66; CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 29 May 2013, CRC/C/GC/14, paras 44, 59; CRC Committee, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20*, paras 18, 19, 20, 50; CRC Committee, General Comment No. 21 (2017) on children in street situations, 21 June 2017, CRC/C/GC/21, paras 15, 35; CRC Committee, General Comment No. 25 (2021) Children’s rights in relation to the digital environment, 13 August 2020, CRC/C/GC/25, paras 20, 91, 92.

53 General Comment No. 4, para 7; General Comment No. 7, para 17; General Comment No. 20, paras 18, 19, 20.

children in the exercise by the latter of their rights.⁵⁴ To this end, the CRC Committee recognises an obligation on parents and other carers 'to take into account the adolescents' views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop.'⁵⁵ The CRC Committee does not directly address the legal obligation of States parties under article 5 of the CRC. Given that international legal instruments cannot directly impose legal obligations on non-State entities,⁵⁶ this raises the question of how the rights and responsibilities placed on parents and carers will be enforced, and what legal obligations States will hold in this regard under article 5 of the CRC.

In its General Comment No 7 on implementing children's rights in early childhood, the CRC Committee treats article 5, not as a legal provision, but as a principle that guides how parental guidance and direction is provided in respect of other provisions of the CRC:

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests ... Parents (and others) should be encouraged to offer "direction and guidance " in a child-centred way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (Art. 12) and their right to freedom of thought, conscience and religion (Art. 14).⁵⁷

The CRC Committee provides its most detailed analysis of article 5 in its General Comment No. 20 on the implementation of the rights of the child during adolescence

Article 5 of the Convention requires that parental direction and guidance be provided in a manner consistent with the evolving capacities of the child. The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights. The Committee has argued that the more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing. The Committee emphasizes that the right to exercise increasing levels of responsibilities does not obviate States' obligations to guarantee protection. Gradual emergence from the protection of the family or another care environment, together with relative

54 General Comment No. 4, para 7.

55 General Comment No. 4, para 7.

56 Detrick 1999 (n 3); Alston 1992 (n 3); see also Ian Brownlie, *Principles of Public International Law*, Seventh ed., (Oxford: Oxford University Press, 2008).

57 General Comment No. 7, para 17.

inexperience and lack of power, can render adolescents vulnerable to violations of their rights. The Committee stresses that engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them will lead to more effective protection. By being guaranteed the right to be heard, to challenge rights violations and to seek redress, adolescents are enabled to exercise agency progressively in their own protection.

In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacities.⁵⁸

Even in this extended discussion, the CRC Committee does not directly address or acknowledge a specific legal obligation to ‘respect’ under article 5. Rather it relies on article 5 as a framework to inform the interpretation and implementation of other provisions of the CRC. In its most recent General Comments No. 25 on children’s rights in relation to the digital environment, the CRC Committee is more explicit in its use of article 5 as a framework, and ‘evolving capacities’ as a guiding principle to inform States’ legal obligations to provide support and assistance to parents

States should take into account that support and guidance provided to parents and caregivers should be based on an understanding of the specificity and uniqueness of parent-child relations. Such guidance should support parents sustaining an appropriate balance between the child’s protection and emerging autonomy, based on mutual empathy and respect over prohibition or control. To help parents and caregivers to maintain a balance between parental responsibilities and children’s rights, the best interests of the child, applied together with consideration of the child’s evolving capacities, should be guiding principles.⁵⁹

Thus, it would appear the CRC Committee does not treat article 5 as a standalone legal obligation, but rather as a framework that guides the interpretation and implementation of other legal obligations under the CRC. So, while article 5 embodies a legal obligation to ‘respect’, it is practically implemented through other provisions of the CRC.

That article 5 should be understood as a guiding framework rather than a standalone legal provision may offer an alternate explanation for its ‘low profile’ in the Concluding Observations of the CRC Committee. Indeed, reviewing the 568 Concluding Observations again, three additional observations can

58 General Comment No. 20, paras 18-20.

59 General Comment No. 25, para 92.

be made. First, the CRC Committee, while not directly referencing article 5, frequently invokes its components, notably the ‘evolving capacities of the child’ to frame its concluding observations in respect of other provisions under the CRC.⁶⁰ Second, in the eight instances where the CRC Committee explicitly references article 5, it does so in the context of other provisions of the CRC.⁶¹ Third, the role of extended family, which is referenced just once in the CRC

60 The CRC Committee references the ‘evolving capacities of the child’ in 27 instances, and in the majority of cases, the reference to ‘evolving capacities’ is delinked from article 5, and instead used in the interpretation of other legal obligations under the CRC, see section 5.1.1., footnotes 164-168.

61 In its Concluding Observation to the Holy See, the CRC Committee referenced article 5 to clarify the scope of States’ legal obligations under article 12, stating that the ‘rights and prerogatives of parents may not undermine the rights of the child’ to express her views and have those views taken into account, see CRC/C/15/Add.46, para 13. In its Concluding Observations to Luxembourg and North Korea, the CRC Committee relied on article 5 alongside articles 3 and 19 to express concern that corporal punishment was not specifically prohibited by law, see CRC/C/15/Add.92, 24 June 1998, para 13 and CRC/C/15/Add.88, 24 June 1998, para 18. In its Concluding Observations to Sierra Leone and Cyprus, the CRC Committee referenced article 5 to require States to take measures under article 18(2) to strengthen the capacities of parents to provide guidance and direction that is appropriate and consistent with children’s evolving capacities in the exercise of rights, see CRC/C/15/Add.205, 21 July 2003, para 37-38 and CRC/C/15/Add.116, 24 February 2000, para 49. In its Concluding Observations to Malaysia, Oman, Saint Lucia and Nigeria, the CRC Committee again relied on article 5 to interpret States’ legal obligations under articles 18(2) and 42, calling for parental education programmes, family counselling services and awareness-raising campaigns that affirmed children’s rights within the family and their status as rights holders with evolving capacities in the exercise of rights, see CRC/C/15/Add.258, 21 September 2005, para 36-37, CRC/C/OMN/CO/2, 29 September 2006, para 37(e), and CRC/C/MYS/CO/1, 25 June 2007, para 51 and CRC/C/NGA/CO/3-4, 21 June 2010, para 49. In its Concluding Observations to Cyprus, the CRC Committee raised concern ‘about the traditional and rather paternalistic view of the child held by parents, teachers, authorities and society at large,’ referencing article 5 to require States to take ‘measures at all levels and public campaigns to raise awareness on the Convention’, see CRC/C/15/Add.205, para 37, 38.

under article 5, features prominently in the Concluding Observations,⁶² particularly in respect of States' obligations under article 20 of the CRC.

The remainder of this chapter considers the CRC Committee's treatment of article 5 as a framework to guide the interpretation and implementation of other provisions under the CRC. It suggests the CRC Committee derives two broad interpretative functions for article 5 under the CRC: (1) a framework to identify a child's carers; (2) a framework to navigate the parenting relationship between a child and her carers in a manner that affirms the child's status as an individual rights-holder within the family, with evolving capacities in the exercise of rights under the CRC.

3 A FRAMEWORK TO RECOGNISE CARERS UNDER THE CRC

In Chapter 2, 'There's no place like home: The role of informal carers under the UN Convention on the Rights of the Child', I considered how informal carers have come to be recognised and supported under the CRC. Reviewing the CRC General Comments, there are at least 37 instances,⁶³ in which the

62 Some examples include: CRC Committee, Concluding Observations: Sudan, 9 October 2002, CRC/C/15/Add.190, para 41, 42(a); CRC Committee, Concluding Observations: Eritrea, 2 July 2003, CRC/C/15/Add.204, para 36; CRC Committee, Concluding Observations: Zambia, 2 July 2003, CRC/C/15/Add.206, para 37; CRC Committee, Concluding Observations: Honduras, 3 May 2007, CRC/C/HND/CO/3, para 48(b); CRC Committee, Concluding Observations: Mali, 3 May 2007, CRC/C/MLI/CO/2, para 42(b); CRC Committee, Concluding Observations: Bhutan, 8 October 2008, CRC/C/BTN/CO/2, para 44; CRC Committee, Concluding Observations: Guinea-Bissau, 8 July 2013, CRC/C/GNB/CO/2-4, para 49(b); CRC Committee, Concluding Observations: Cook Islands, CRC/C/COK/CO/2-5, para 34; CRC Committee, Concluding Observations: Micronesia, 3 April 2020, CRC/C/FSM/CO/2, para 44, 45(c); CRC Committee, Concluding Observations, Ethiopia, CRC/C/ETH/CO/3, para 37, 38(b); CRC Committee, Concluding Observations: Uganda, 23 November 2005, CRC/C/UGA/CO/2, para 42(b); CRC Committee, Concluding Observations: Congo, 20 October 2006, CRC/C/COG/CO/1, para 47(a); CRC Committee, Concluding Observations: Swaziland, 16 October 2006, CRC/C/SWZ/CO/1, para 40, 41(b); CRC Committee, Concluding Observations: Eritrea, 23 June 2008, CRC/C/ERI/CO/3, para 45(a); CRC Committee, Concluding Observations: Malawi, 27 March 2009, CRC/C/MWI/CO/2, para 41, 42(b); CRC Committee, Concluding Observations: Mauritania, 17 June 2009, CRC/C/MRT/CO/2, para 47(a); CRC Committee, Concluding Observations: Nepal, 21 September 2005, CRC/C/15/Add.261, para 52; CRC Committee, Concluding Observations: Mexico, 8 June 2006, CRC/C/MEX/CO/3, para 38, 39, 40.

63 CRC Committee, General Comment No. 3 (2003) HIV/AIDS and the rights of the child, 17 March 2003, CRC/GC/2993/3, paras 33, 34; CRC Committee, General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, para 15; CRC Committee, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras 7, 8, 34, 40, 39; CRC Committee, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, paras 8, 15, 19, 20; CRC Committee, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or

CRC Committee applies a wider reading to ‘parent’,⁶⁴ ‘family’⁶⁵ or ‘family environment’,⁶⁶ relying in some measure on article 5 to identify the role of extended family or community members involved in the everyday care of a child. But before I consider the scope of carers identified under article 5, it is worth considering the scope of parenting functions captured within article 5 – ‘the responsibilities, rights and duties’ to provide direction and guidance in the exercise of rights under the CRC. Does article 5 extend to the everyday parenting of a child?

3.1 The scope of ‘responsibilities, duties and rights’ under article 5 of the CRC

There is no definition of *responsibilities, rights and duties* within the CRC, and the CRC Working Group did not discuss or delineate the scope of ‘responsibilities, rights and duties’ when it drafted article 5 of the CRC. Kamchedzera suggests the ‘use of all the three words indicates its spirit to be as encompassing as possible...’⁶⁷ However, Detrick and Alston argue that ‘Article 5 does not constitute a comprehensive recognition of the “responsibilities, rights, and duties ...” *per se*’ as this is found elsewhere in the CRC.⁶⁸ Sutherland

degrading forms of punishment (arts. 19, 28, para 2; and 27 *inter alia*), 2 March 2007, CRC/C/GC/8*, paras 38, 47; CRC Committee, General Comment No. 9 (2006), The rights of children with disabilities, 27 February 2007, CRC/C/GC/9, paras 41, 45, 49; CRC Committee, General Comment No. 11 (2009) Indigenous children and their rights under the Convention, 12 February 2009, CRC/C/GC/11, paras 46, 47; CRC Committee, General Comment No. 12 (2009) The right of the child to be heard (2009), 20 July 2009, CRC/C/GC/12, paras 90, 91, 92; General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras 5, 47(c)(i), 59, 66, 72(d); CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), 29 May 2013, CRC/C/GC/14, paras 59, 70, 60; General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, paras 61, 67, 78; General Comment No. 21 (2017) on children in street situations, 21 June 2017, CRC/C/GC/21, paras 11(b), 35; CRC Committee and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on States obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return’, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 27; CRC Committee, General Comment No. 24 (2019) on children’s rights in the child justice system, 18 September 2019, CRC/C/GC/24*, paras 9, 10, 57.

⁶⁴ General Comment No. 6, para 8; General Comment No. 7, para 15, 19, 20; General Comment No. 14, para 60; General Comment No. 15, paras 61, 67, 78; General Comment No. 23, para 27; General Comment No. 24, para 57.

⁶⁵ General Comment No. 7, para 15; General Comment No. 14, para 59.

⁶⁶ General Comment No. 14, para 70.

⁶⁷ Kamchedzera 2012 (n 19) 24.

⁶⁸ Detrick 1999 (n 3) 119.

suggests the ‘responsibilities, rights and duties’ enumerated under article 5 should be understood as directed towards the guidance and direction provided to the child in the child’s exercise of rights.⁶⁹

Positioning article 5 within the context of the CRC, and taking into account the importance of interpretative coherence, any reading of ‘responsibilities, rights and duties’ will be informed by other provisions of the CRC, including article 5 itself.⁷⁰ Article 18(1) recognises a common responsibility of both parents in the upbringing and development of the child. It also recognises that ‘parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child’ with ‘the bests interest of the child’ as ‘their basic concern’.⁷¹ Article 27(2) recognises that ‘parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development’.⁷² Article 5 recognises the ‘responsibilities, rights and duties’ of parents and other carers in so far as they provide direction and guidance that is ‘appropriate’ and ‘in a manner consistent with the evolving capacities of the child’ in the exercise of rights under the CRC. In this regard, the content and scope of ‘responsibilities, rights and duties’ envisaged under article 5 is informed by the scope and content of responsibilities accorded to parents under articles 18, 27 and 5 of the CRC.

Taking into account the principle of ‘effectiveness’, the scope of ‘responsibilities, rights and duties’ envisaged under article 5 will likely also be circumscribed by children’s enjoyment of all other rights under the CRC. In other words, the ‘responsibilities, rights and duties’ exercised by parents and other carers in providing guidance and direction must be linked with furthering the child’s enjoyment of rights under the CRC. Put more simply, the scope of ‘responsibilities, rights and duties’ would not extend to conduct that amounts to a violation or abuse of rights, such as negligent treatment,⁷³ physical or mental violence,⁷⁴ sexual exploitation,⁷⁵ harmful practices⁷⁶ or discriminatory treatment.⁷⁷ It would also not extend to conduct that undermines or interferes with a child’s exercise of rights under the CRC. Finally, the need for practicality and context-sensitivity would likely favour a broad and flexible approach to ‘responsibilities, rights and duties’, which captures a range of parenting styles and arrangements, assuring the child the widest possible

69 Sutherland 2020 (n 24) 463.

70 Tobin and Varadan 2019 (n 11), 170.

71 Article 18(1), CRC.

72 Article 27(2), CRC.

73 Article 19(1), CRC.

74 Article 19(1), CRC.

75 Article 34, CRC.

76 Article 24(3), CRC.

77 Article 2(1), CRC.

recognition of her right to receive appropriate guidance and direction in the exercise of rights under the CRC.

Turning to our second line of enquiry, does article 5 provide a framework to identify a broad range of carers involved in the everyday parenting of a child?

3.2 Recognising informal carers and informal care arrangements under the CRC

A plain reading of article 5 suggests it was not intended to capture any and all informal care arrangements. Its focus is on those informal carers genuinely caring for the child, and whom are recognised as such within the child's community. The wording of article 5 further suggests a disjunctive approach towards informal care, according respect to parents in the first instance, and then in the alternative 'or where applicable' to 'members of the extended family or community' followed by 'legal guardians or other persons legally responsible for the child'. In other words, article 5 does not seek to displace parents, but rather accommodate the role of wider family and community where it aligns with local custom. So while article 5 provides an avenue to recognise informal carers, its framework is not open-ended.⁷⁸

3.2.1 *Informal carers acting in lieu of parents*

As discussed in Chapter 2, 'There's no place like home: The role of informal carers under the UN Convention on the Rights of the Child', the CRC Committee has been willing to recognise informal carers where parents are unavailable, and it aligns with preserving a child's family environment. This is likely explained by the absence of a provision for 'kinship' care and the 'legal no-man's land' between articles 9 and 20, which together yield an unintended outcome: the institutionalization of children who are separated or deprived of parental care, yet remain in the informal care of extended family or community.⁷⁹ While the CRC Committee has sought out practical solutions for this effectiveness gap, as Tobin cautions, it has struggled to find an interpretative resolution that aligns with the intended scope and function of the provisions and the treaty itself.⁸⁰ As such, the CRC Committee has continually expressed reservations over the lack of oversight in informal care arrangements, suggesting that more consideration needs to be given to how informal carers are supported to ensure children are protected when parental care is not

⁷⁸ Detrick 1999 (n 3) 121, 122.

⁷⁹ John Tobin, 'Introduction' in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 1-20, 18.

⁸⁰ Ibid, 19.

available. Whether article 5 provides enough of a legal basis to recognise the role of informal carers, and function as a legal framework to manage informal care arrangements thus remains unclear.

3.2.2 *Informal carers acting alongside parents*

Kamchedzera suggests the formulation of article 5, specifically its use of “‘where applicable’” over “‘when applicable’” implies that ‘the reference to extended family members cannot be limited to situations where the child has no parents’, and as such ‘members of extended family [will be] duty bearers for the child’s right, where local custom provides so.’⁸¹ Sutherland adds that the CRC Committee has ‘taken an inclusive approach, reaching beyond the traditional to embrace more recent developments by referring to “the nuclear family, the extended family and other traditional and modern community-based arrangements”’.⁸²

In Chapter 5, ‘The proxy dilemma: Informed consent in paediatric clinical research – a case study of Thailand’ I contemplate whether article 5 could be used to recognise informal carers acting as primary caregivers in the context of informed consent in paediatric clinical research. In many lower- and middle-income countries (LMICs), the legislative and regulatory framework for informed consent in medical research,⁸³ particularly paediatric clinical research, is either weak or non-existent. This poses a challenge for the recruitment and enrolment of children in paediatric clinical trials.⁸⁴ In Thailand, where currently there is no law on human subject research and no specific regulations for informed consent in paediatric clinical research, there is considerable uncertainty surrounding the designation of a child’s ‘proxy’, which has implications for children’s enrolment in paediatric clinical studies. Adding to this uncertainty, it is not uncommon for children to grow up in the fulltime care of grandparents, while parents work outside the home. For the most part, these childcare arrangements are informal, with parents retaining legal authority over their children, and grandparents relying on entrenched socio-cultural norms to validate their parenting role. This introduces an ethico-legal quandary

81 Kamchedzera 2012 (n 19) 24.

82 Sutherland 2020 (n 24) 457.

83 Clinical research in resource-limited settings. A consensus by a CIOMS Working Group. Geneva, Switzerland. Council for International Organizations of Medical Sciences (CIOMS), 2021. Appendix 1. Special Populations; Joseph, P.D., Craig, J.C., Tong, A., & Caldwell, P., (2016). Researchers’, Regulators’, and Sponsors’ Views on Pediatric Clinical Trials: A Multinational Study. *Pediatrics*. 138(4); Vischer, N., Pfeiffer, C., Joller, A., Klingmann, I., Ka, A., Kpormegbe, S.K., & Burri, C., (2016). The Good Clinical Practice guideline and its interpretation – perceptions of clinical trial teams in sub-Saharan Africa. *Topical Medicine and International Health*. 21(8) pp 1040-1048, 1043; Cheah, P.Y., & Parker, M., (2014). Consent and assent in paediatric research in low-income settings. *BMC Medical Ethics*. 15(22), 1-10, 6.

84 Ibid.

in the informed consent process, whereby the primary caregivers for the child (grandparents) are not legally recognised, while the legal representatives of the child (parents) are not available to provide informed consent. As a result, children are excluded from clinical research, not out of ethical concern but due to a lack of legal guidance on how to recognise the genuine, albeit informal carers for the child in the informed consent process. The presumptive exclusion of children from clinical research holds longer-term implications for children's health and well-being, particularly in resource-limited settings, where clinical studies can yield immediate improvements in health interventions and access to healthcare. Thus, a compelling argument could be made for using article 5 to recognise informal carers *alongside* parents, where failing to do so would interfere with a child's right to receive guidance and direction that secures the effective enjoyment of other rights under the CRC.

At the same time, according broad respect and recognition to informal carers *alongside* parents may lead to interpretative incoherence, creating more confusion rather than clarity in the implementation of children's rights. First, in the context of informed consent, it introduces uncertainty as to who holds legal responsibility over the child. Second, depending on how broadly the concept of parenting is understood, it potentially creates a tension between States' legal obligations to protect and ensure the child's right to know and be cared for by her biological parents under articles 7(1), 8(1) and 9(1) and the child's rights to an adequate standard of living and a family environment under articles 18(1), 18(2), 27(3) and 20, resulting in fragmentation and internal incoherence in the care and upbringing of the child. Third, it arguably uses article 5 in a way it was not intended. While article 5 acknowledges a range of carers providing direction and guidance to a child, its formulation suggests it was not intended to displace parental rights, but to supplement the child's right to receive appropriate guidance and direction by recognising other carers beyond biological or legal parents 'where appropriate' and 'as provided for by local custom'. Fourth, it does not account for tensions between formal and informal carers in the everyday parenting of the child. For example, if a grandparent were to give direction and guidance to a child which conflicted with the guidance provided by a parent, what obligation, if any, would the State hold towards the child in respect of her rights under article 5? The CRC Committee does not directly address this issue. Indeed, reviewing the Concluding Observations, the CRC Committee appears to assume a complementary rather than conflicting relationship between parents and other carers in the parenting of a child.⁸⁵ However, in the reality of everyday parenting, there are likely to be conflicting perspectives on what constitutes appropriate guidance, and

85 CRC Committee, Concluding Observations: Nigeria, 13 April 2005, CRC/C/15/Add.257, paras 40, 41; CRC Committee, Concluding Observations: Guyana, 26 February 2004, CRC/C/15/Add. 224, para 33, 34; CRC Committee, Concluding Observations: Palau, 21 February 2001, CRC/C/15/Add.149, para 38, 39.

how a child's evolving capacities should be recognised and supported in the enjoyment and exercise of rights.

For its part, the CRC Committee has sought to balance the need to accommodate the fluidity in caregiving relationships,⁸⁶ with a recognition and respect for the primary role of parents in the care and upbringing of the child.⁸⁷ In its General Comment No. 15 on the right to health, the CRC Committee elaborates on this point: 'Parents are the most important source of early diagnosis and primary care for small children, and the most important protective factor against high-risk behaviours in adolescents' however '[c]hildren's socialization processes, which are crucial for understanding and adjusting to the world in which they grow up, are strongly influenced by their parents, *extended family and other caregivers* [emphasis added].⁸⁸ So, while the CRC Committee is willing to accord respect to informal carers, it does so with an understanding that parents or others legally responsible for the child retain primary responsibility over the care and upbringing of the child.

If article 5 does not provide a legal basis to recognise informal carers, particularly in situations where a child is regularly cared for by multiple caregivers, this raises a broader concern. Is the CRC framework capable of accommodating the diversity of family structures and parenting arrangements in which children grow up? During the decade-long drafting process, there were concerns that the CRC Working Group was composed primarily of delegates from European countries, who held 'a bias in favour of nuclear-family households which [was] unrealistic and impractical in most parts of the world.'⁸⁹ When the Working Group sought to revise article 5 during the second reading in 1989, it was largely motivated by these concerns, recognising the need to acknowledge the role of extended families and community to reflect the social realities of parenting and family in most parts of the world.⁹⁰ Yet, for many, the singular reference to extended family and community under article 5 was not sufficient and failed to heed the calls from indigenous communities for wider protection of traditional extended family and communities under the CRC. Indeed, when the CRC was adopted, Nigel Cantwell, speaking on behalf of non-governmental organizations expressed disappointment over 'the limited recognition given to the actual or potential primary role of extended family members in caring for and bringing up children.'⁹¹

⁸⁶ See General Comment No. 7, paras 15, 19.

⁸⁷ CRC Committee, General Comment No. 7, para 29.

⁸⁸ CRC Committee, General Comment No. 15, para 67.

⁸⁹ Russell Lawrence Barsh, 'The Draft Convention on the Rights of the Child: A Case for Eurocentricism in Standard-Setting' (1989) 58 *Nordic Journal of International Law* 24-34, 28.

⁹⁰ Van Bueren 1995 (n 3) 71.

⁹¹ Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Volume I (Geneva: OHCHR, 2007), 229; see also E/CN.4/1989/SR.55, para 107.

Without clearer guidance from the CRC Committee on the role of informal carers and informal care arrangements, it is likely children will not be afforded the full enjoyment of their right to receive appropriate guidance and direction from *their carers* in the exercise of rights under the CRC.

4 A FRAMEWORK TO NAVIGATE THE PARENTING RELATIONSHIP

At the crux of article 5 is its attempt to strike a ‘delicate balance’, which seeks to respect the role of parents and other carers, while also recognising the child’s status as a rights-holder with evolving capacities in the exercise of rights under the CRC. It introduces a framework to navigate the parenting relationship, ensuring that children are listened to and respected by those adults exercising influence over their everyday lives.⁹² In this regard, article 5 holds a transformative dimension for the parent-child relationship and indeed parenthood itself. It reframes the role of parents from that of exclusive rights-holder over the child to duty-bearer to the child, providing direction and guidance that furthers the child’s enjoyment and exercise of rights under the CRC.

However, it is important to underscore that the scope of article 5 is the family setting. Applying its framework thus falls on parents and other carers involved in the everyday care of the child. It would be neither reasonable nor practicable to expect States to intervene in the parent-child relationship, prescribing a specific kind of parental guidance and direction for a child. In this regard, article 5 should be understood as a model for parenting – promoting a particular conception of the parent-child relationship, that is grounded in participatory dialogue, mutual trust and a recognition of the child’s status as a rights-holder and individual within the family.

For its part, the CRC Committee has frequently relied on article 5 to inform its interpretation of States’ legal obligations surrounding the role of parents, both in its General Comments and Concluding Observations. Indeed, of the 28 instances in which the CRC Committee specifically mentions article 5 in its General Comments, at least half involve a discussion of States’ legal obligations under article 18 of the CRC.⁹³ In its Concluding Observations, the CRC Committee refers to article 5 and article 18 jointly in at least five of the eight instances in which it makes reference to article 5.⁹⁴

⁹² Tobin and Varadan 2019 (n 11) 173.

⁹³ See General Comment No. 1, para 6; General Comment No. 4, para 15; General Comment No. 7, paras 10, 15, 16, 22, 29(a); General Comment No. 8, paras 28, 47; General Comment No. 11, para 46; General Comment No. 13, para 13; General Comment No. 20, paras 50; General Comment No. 21, para 15; General Comment No. 25, para 91.

⁹⁴ In its Concluding Observations to Sierra Leone and Cyprus, the CRC Committee referenced article 5 to inform States legal obligations under article 18(2), recommending measures to strengthen the capacities of parents to provide guidance and direction that is appropriate and consistent with children’s evolving capacities in the exercise of rights, see CRC/C/15/

In Chapter 4, ‘The Role of Parents in Proxy Informed Consent in Medical Research involving Children’, I contemplate how article 5 could be used to navigate the parent-child decision-making relationship in the proxy informed consent in medical research. The CRC framework and article 5 offer a different vantage point to view the proxy informed consent process in medical research, recasting children from non-autonomous beings to active participants with voice and agency in the research setting. In so doing, it reframes the decision-making relationship between the proxy and the child, vesting the right to informed consent in the child, with an obligation on those adults around the child to provide direction and guidance to support her participation in the decision-making process.

In assessing the usefulness of the CRC as a framework to navigate the proxy informed consent process, I contemplated the nature of the parenting relationship envisaged under article 5, and more specifically the meaning of ‘appropriate guidance and direction’ provided ‘in a manner consistent with the evolving capacities of the child’ in the child’s exercise of rights.

4.1 The meaning of ‘appropriate direction and guidance’ under article 5 of the CRC

The CRC Working Group members did not directly discuss the meaning of ‘appropriate direction and guidance’ when it drafted article 5 of the CRC.⁹⁵ However, it bears mentioning that the term ‘appropriate’ appears 49 times within the preamble and substantive provisions of the CRC.⁹⁶ In at least 23

Add.205, 21 July 2003, para 37-38 and CRC/C/15/Add.116, 24 February 2000, para 49. In its Concluding Observations to Malaysia, Oman, Saint Lucia and Nigeria, the CRC Committee again relied on article 5 to interpret States’ legal obligations under articles 18(2) and 42, calling for parental education programmes, family counselling services and awareness-raising campaigns that affirmed the rights of the child within the family and their status as rights holders with evolving capacities in the exercise of rights, see CRC/C/15/Add.258, 21 September 2005, para 36-37; CRC/C/OMN/CO/2, 29 September 2006, para 37(e); CRC/C/MYS/CO/1, 25 June 2007, para 51; CRC/C/NGA/CO/3-4, 21 June 2010, para 49. In its Concluding Observations to Cyprus, the CRC Committee expressed concern ‘about the traditional and rather paternalistic view of the child held by parents, teachers, authorities and society at large,’ referencing article 5 to recommend that the State take ‘measures at all levels and public campaigns to raise awareness on the Convention’, see CRC/C/15/Add.205, para 37, 38.

⁹⁵ Tobin and Varadan 2019 (n 11) 171.

⁹⁶ See Preamble, para 9, and articles 2(2), 3(2), 4, 5, 8(2), 9(4), 12(2), 17(e), 18(2), 18(3), 19(1), 19(2), 21(d), 21(e), 22(1) (appears twice), 22(2), 23(2), 23(4), 24(2), 24(2)(d), 24(3), 26(2), 27(3), 27(4) (appears twice), 28(1)(b), 28(1)(c), 28(2), 31(1), 31(2), 32(2)(b), 32(2)(c), 33, 34, 35, 37(b), 37(d), 39, 40(2)(b)(ii) (appears twice), 40(2)(b)(iii), 40(3)(b) (appears twice), 42, 45(a), 45(b) of the CRC.

instances, ‘appropriate’ is used to qualify ‘measures’⁹⁷ or ‘assistance’⁹⁸ provided by States to parents and other carers. The relative frequency of ‘appropriate’ intimates an awareness on the part of CRC drafters that context and culture would play a role in shaping a child’s realization of rights under the UN Convention.⁹⁹ Taking into account the value of context-sensitivity, Doek suggests the term ‘appropriate functions’ as ‘a key provider of space for accommodating cultural and other diversities because it requires consideration of what would be suitable in a given culture.’¹⁰⁰

At the same time, by placing ‘appropriate’ in front of ‘guidance and direction’ the CRC drafters remove any suggestion that parents and other carers ‘enjoy *carte blanche* to provide any type of direction to the child they believe fitting.’¹⁰¹ It introduces an objective element of ‘appropriateness’¹⁰² on the guidance and direction provided to a child that is both informed and circumscribed by other rights under the CRC. Applying the interpretative principle of ‘effectiveness’, ‘appropriate guidance and direction’ should be understood as the guidance and direction needed to secure the enjoyment of rights under the CRC. In other words, any guidance and direction that interferes with or undermines children’s enjoyment or exercise of rights, will not be ‘appropriate’ for the purposes of article 5 of the CRC. The CRC Committee affirms this point in its General Comment No. 8 on corporal punishment: ‘any interpretation of “appropriate” direction and guidance must be consistent with the whole Convention and leaves no room for justification of violent or other cruel or degrading forms of discipline’.¹⁰³

Any guidance and direction provided by parents (and other carers) will only be appropriate if it is *also* provided in a manner that is consistent with the child’s evolving capacities in the exercise of the rights under the CRC. We consider the meaning of these terms in the next section.

4.2 The child’s status as a rights-holder within the family

That the child should be seen as an independent holder of rights with voice and agency within the family represented a radical break from previous

97 The term ‘appropriate measures’ appears 17 times under articles 2(2), 3(2), 4, 18(3), 19(1), 19(2) 21(d), 22(1), 24(2), 24(3), 27(3), 27(4), 28(1)(b), 28(2), 33, 35 and 39 of the CRC.

98 The term ‘appropriate assistance’ appears 5 times under articles 8(2), 18(2), 37(d), 40(2)(b)(ii), 40(2)(b)(iii) of the CRC.

99 Tobin 2013 (n 12), 422; Alston 1994 (n 4) 20.

100 Jaap Doek, ‘The Human Rights of Children: An Introduction’ in U. Kil Kelly and T. Lief aard (eds) *International Human Rights of Children* (Springer Nature Singapore, 2018) 14.

101 Detrick 1999 (n 3) 119; Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti: Florence, 2005).

102 Lansdown 2005; see also Van Bueren 1995 (n 3) 50; Detrick 1999 (n 3) 120; Tobin and Varadan 2019 (n 11) 171-172.

103 CRC Committee, General Comment No. 8, para 28.

conceptions of childhood, which viewed children as vulnerable¹⁰⁴ and dependent¹⁰⁵ – seen but not heard. Importantly, the idea that all children, even very young children, are independent rights-holders within the family extinguished any lingering notion of children as the property of their parents,¹⁰⁶ introducing a model for parent-child relationships that is grounded in mutual respect, rather than authoritarianism and control.¹⁰⁷ Thus, in affirming the child's status as a rights-holder, article 5 introduces a framework that transforms the parenting relationship, re-imaging the child from an object of concern, to an active agent and participant in the family.

The CRC Committee affirmed this reading of article 5 in its General Comment No. 8 on parental discipline and corporal punishment

The Convention asserts the status of the child as an individual person and holder of human rights. *The child is not a possession of parents, nor of the States, nor simply an object of concern. In this spirit, article 5 requires parents (or where applicable, members of the extended family or community) to provide the child with appropriate direction and guidance, in a manner consistent with his/her evolving capacities, in the exercise by the child of the rights recognised in the Convention ...* This emphasizes the need for styles of parenting, caring and teaching that respect children's participation rights [emphasis added].¹⁰⁸

The CRC Committee further clarified that all children, even very young children, are independent rights-holders under the CRC¹⁰⁹

... children, including the very youngest children, [must] be respected as persons in their own right. Young children should be recognised as active members of families, communities and societies, with their own concerns, interests and points of view.¹¹⁰

104 John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155.

105 Tobin 2015; Peleg 2019 (n 8); Adam Lopatka, 'An Introduction to the United Nations Convention on the Rights of the Child' (1996) 6 *Transnat'l L. & Contemp. Probs.* 251-262.

106 David Archard, 'Do parents own their children?' (1993) 1 *International Journal of Children's Rights* 293 - 301, 301, 294.

107 Lopatka 1996 (n 105); John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in M. D. Ruck, M. Peterson-Badali, and M. Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Abingdon: Taylor and Francis, 2017); John Tobin, 'Parents and Children's Rights under the Convention on the Rights of the Child: Finding Reconciliation in a Misunderstood Relationship' (2005) 7(2) *Australian Journal of Professional and Applied Ethics* 31-46.

108 General Comment No. 8, para 28.

109 General Comment No. 7, para 3.

110 General Comment No. 7, para 5.

To make this point explicit, the CRC Committee drew a distinction between a child's dependency on carers, and a child's independence as a rights-holder within the family:

Babies and infants are entirely dependent on others, but they are not *passive recipients of care, direction and guidance. They are active social agents, who seek protection, nurturance and understanding from parents or other caregivers* ... Parents (and others) should be encouraged to offer "direction and guidance" in a child-centred way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14) [emphasis added].¹¹¹

In its Concluding Observations, the CRC Committee has frequently expressed concern that 'traditional' and 'paternalistic' attitudes undermine the child's status as a rights holder within the family and community.¹¹² To this end, the CRC Committee has relied on article 5 as a framework to inform the content of legal obligations, requiring States to take measures that raise awareness about children's rights and the child's status as a rights-holder within her family and community, as per article 18 and article 42 of the CRC.¹¹³

Applied to the medical research setting, the CRC framework and article 5 transform how children are viewed in the informed consent process. Whereas research ethics has essentialized children as 'non-autonomous' and 'vulnerable' in need of protection from research, the CRC and article 5 provide a framework that empowers children as active participants, entitled to guidance and direction that enables their participation, while also ensuring their protection in the research setting. Thus, from the vantage point of the CRC, informed consent becomes a right vested in the child, with the proxy holding rights and responsibilities that are functional and limited to the child's enjoyment and exercise of rights in the research setting.

4.3 The evolving capacities of the child in the exercise of rights

Underscoring the child's status as a rights-holder is a understanding that childhood is not a fixed, singular or universal concept.¹¹⁴ As children grow and develop, they gradually acquire skills, maturity, knowledge, and experience, which enable them to exercise increasing levels of agency and autonomy in their everyday lives. The concept of 'evolving capacities' acknow-

¹¹¹ General Comment No. 7, paras 16, 17.

¹¹² CRC Committee, Concluding Observations: Cyprus, 2 July 2003, UN Doc. CRC/C/15/Add.205, para 37-38; CRC Committee, Concluding Observations: Saint Lucia, 21 September 2005, UN Doc. CRC/C/15/Add.258, para 36-37.

¹¹³ CRC/C/15/Add.205, para 38; CRC/C/15/Add.258, para 36-37

¹¹⁴ Lansdown 2005 (n 101), 22; see also Van Bueren 1995 (n 3) 50.

ledges that children will require varying levels of support, guidance and protection for the enjoyment and exercise of their rights. It also recognises that children acquire capacities – moral, social, cognitive, physical, and emotional – unevenly depending on the nature of the task, their personal experiences, the expectations placed on them and the social context in which they live.¹¹⁵ As Lansdown explains, ‘while all the rights embodied in the Convention apply to all children, the capacities and context of the individual child must influence both how they are applied and the degree of autonomy of the child in their exercise.’¹¹⁶ The concept of evolving capacities thus rejects prescriptive and linear models of child development, which focus on fixed stages of growth or developmental benchmarks,¹¹⁷ in favour of a fluid and individual framework that reflects the lived experiences, social context and unique qualities of each child.

The CRC Committee has suggested that the concept of ‘evolving capacities’ will inform how parental guidance and direction is to be provided to a child in at least three broad respects. First, it will require parents to be responsive to the child’s unique needs, while also considering the specific context and circumstances in which they are providing guidance to their child

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to the child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations.¹¹⁸

The concept of evolving capacities is thus predicated on the idea that parents and other carers will continue to provide appropriate levels of protection so that the child does not find herself in a situation in which she lacks the competency, maturity or experience to handle. As the CRC Committee explains in the context of the digital environment, the guidance and direction provided by parents and other carers must seek to balance protecting the child with enabling her agency, relying on the best interests of the child, and the concept of evolving capacities as ‘guiding principles.’¹¹⁹

Second, the concept of evolving capacities promotes a model of the parent-child relationship that rejects control-based parenting, in favour of approaches that embrace dialogue, collaboration and mutual respect. In this regard, ‘[e]volving capacities should be seen as a positive and enabling process, not

¹¹⁵ Lansdown 2005 (n 101) 23.

¹¹⁶ Lansdown 2005 (n 101) 22.

¹¹⁷ Lansdown 2005 (n 101) 13.

¹¹⁸ General Comment No. 7, para 17.

¹¹⁹ General Comment No. 25, para 86.

an excuse for authoritarian practices that restrict children's autonomy and self-expression', and

[p]arents (and others) should be encouraged to offer "direction and guidance" in a child-centred way, that through dialogue and example ... enhance young children's capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14).¹²⁰

The CRC Committee relies on the concept of 'evolving capacities' to inform States' legal obligations to provide parenting support

States should take into account that support and guidance provided to parents and caregivers should be based on an understanding of the specificity and uniqueness of parent-child relations. Such guidance should support parents in sustaining an appropriate balance between the child's protection and emerging autonomy, based on mutual empathy and respect, over prohibition or control.¹²¹

The concept of evolving capacities thus promotes a model of parenting that encourages dialogue and participation, demanding that parents not only listen to their child but also actively involve them in the decisions that affect their lives. To this end, the CRC Committee has drawn a link between a child's right to be heard under article 12 and the child's right to parental guidance and direction under article 5: 'the connection of article 12 to article 5 ... is of special relevance, since it is crucial that the guidance given by parents takes account of the evolving capacities of the child.'¹²² As the CRC Committee explains, 'the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities as stated in [article 5]'.¹²³

Third, the concept of evolving capacities assumes that as children grow and develop, respect for their autonomy should concurrently increase, and a time will come when a child will no longer need to rely on the guidance and direction of parents, family or community to secure the enjoyment of rights under international law.¹²⁴ As the CRC Committee explains:

120 General Comment No. 7, para 17.

121 General Comment No. 25, para 86.

122 General Comment No. 12, para 69.

123 General Comment No. 12, para 84.

124 Noam Peleg, 'International Children's Rights Law: General Principles' in T. Liefaard and U. Kilkelly (eds) *International Human Rights of Children* (Singapore: Springer Nature Singapore, 2017) 2-19, 16; Tobin 2013 (n 12).

... the more the child knows, has experienced and understands, the more the parent or legal guardian has to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing.¹²⁵

In this regard, article 5 should be understood as a scaffolding provision designed to equip the child with the guidance and direction needed for *her* to secure the enjoyment of rights at a specific moment in time.¹²⁶ Viewed this way, parenthood is not unlimited or indefinite; the role of parents in providing direction and guidance will necessarily dwindle as a child's capacities evolve. At the same time, article 5 does not explicate how a child's 'evolving capacities' will be assessed nor does it provide a framework to negotiate how decision-making will devolve from a parent to the child. Without more guidance from the CRC Committee, there is a risk that the concept of 'evolving capacities' could be used to undermine rather than enable a child's autonomy and agency in the exercise of rights.

In summation, article 5 provides a framework that informs the parenting relationship in four ways:

- 1) it introduces boundaries around parental authority, requiring parental guidance to be provided in a manner that is consistent with the child's enjoyment and exercise of rights under the CRC;
- 2) it recognises the child as a rights-holder, encouraging a parent-child decision-making process that is grounded in mutual respect, dialogue and collaboration;
- 3) it requires parents and others carers to be responsive to the unique and evolving capacities of the child, providing guidance that is attuned to the particular context and circumstances in which the child finds herself;
- 4) it expects that parents and other carers will gradually and progressively devolve decision-making to their child, recognising their child's evolving agency over matters of concern in their lives.

In terms of States' legal obligations in respect of parenting support, article 5 provides a model of parenting that affirms children's status as rights-holders and individuals within the family. It thus informs the content of States' legal obligations to provide parenting support and assistance under articles 18(2) and 19(2), as well as wider obligations to foster awareness of children's status as rights holders under article 42 of the CRC.

¹²⁵ General Comment No. 21, para 35; General Comment No. 14, para 44; General Comment No. 20, para 18; General Comment No. 12, para 84.

¹²⁶ Tobin and Varadan 2019 (n 11) 177.

5 THE CONCEPT OF EVOLVING CAPACITIES UNDER THE CRC

In this last section, I consider the concept of ‘evolving capacities’ outside of the framework of article 5 of the CRC. In Chapter 3, ‘The principle of evolving capacities under the UN Convention on the Rights of the Child’, I interrogated the CRC Committee’s treatment of ‘evolving capacities’ within its General Comments, suggesting that it has stretched the scope and function of ‘evolving capacities’ well beyond the framework of parental guidance and article 5.

In the 25 General Comments issued between 2001 and 2021, the CRC Committee refers to ‘evolving capacities’ over 90 times.¹²⁷ Reviewing the 568 Concluding Observations issued between 1993 and 2020, the CRC Committee invokes the ‘evolving capacities of the child’¹²⁸ 27 times, and in almost every instance it is delinked from article 5 and the framework of parental guidance. Examining the 23 Days of General Discussion, there are references to ‘evolving capacities’ in at least five discussions, intersecting with a range of CRC provisions across divergent settings. Indeed, during its 20th Anniversary commemorative event, the CRC Committee convened a panel on ‘evolving capacities as an enabling principle’ in which it highlighted the need for a broader consideration of the implications of recognising ‘the child as a person with evolving capacities to exercise her or his own rights’.¹²⁹

From this analysis, three observations can be made. First, in the majority of instances, the CRC Committee invokes the ‘evolving capacities of the child’ outside of the framework of article 5, relying on it as a broader enabling principle relevant to children’s realization of all rights under the CRC. Second, the CRC Committee appears to rely on the ‘evolving capacities of the child’

127 General Comment No. 1, paras 1, 9, 12; General Comment No. 3, paras 12 (twice), 20, 22, 23, 29 (twice), 40(f); General Comment No. 4, paras 1, 7, 9, 12, 16, 33; General Comment No. 5, paras 69; General Comment No. 7, paras 3, 13, 17 (twice), 33; General Comment No. 8, paras 13, 28, 47; General Comment No. 9, paras 32 (twice), 68; General Comment No. 10, para 16; General Comment No. 11, para 46; General Comment No. 12, paras 31, 69 (twice), 79, 80, 84, 91, 94, 100, 134(e), 134(g); General Comment No. 13, paras 5, 33, 59, 66, 72(a); General Comment No. 14, paras 44, 55, 84, 93 (thrice); General Comment No. 15, paras 21, 22, 31, 78; General Comment No. 16, paras 23, 31; General Comment No. 17, paras 14(a), 18, 32, 34, 57(b); General Comment No. 18, para 20; General Comment No. 20, paras 1, 7(c), 18 (twice), 20, 22, 37(e), 39, 40, 42, 43, 46, 50; General Comment No. 21, paras 11(b), 15, 33, 35; General Comment No. 22, para 34; General Comment No. 25, paras 19, 20, 51, 54, 76, 82, 85 (twice).

128 The CRC Committee cites the ‘evolving capacities of the child’ in 27 of its Concluding Observations. In every instance the reference to ‘evolving capacities’ is delinked from article 5, and invoked in the interpretation of other legal obligations under the CRC: See CRC/C/15/Add.46, 27 November 1995, para 13; CRC/C/15/Add.92, 24 June 1998, para 13; CRC/C/15/Add.88, 24 June 1998, para 18; CRC/C/15/Add.205, 21 July 2003, para 37-38; CRC/C/15/Add.116, 24 February 2000, para 49; CRC/C/15/Add.258, 21 September 2005, para 36-37; CRC/C/OMN/CO/2, 29 September 2006, para 37(e); CRC/C/MYS/CO/1, 25 June 2007, para 51; CRC/C/NGA/CO/3-4, 21 June 2010, para 49; CRC/C/15/Add.205, para 37, 38.

129 CRC Committee, 20th Anniversary, Recommendation 5.

as a framework to guide its interpretation of the general principles of the CRC, notably the assessment of best interests of the child under article 3(1) and the child's right to be heard under article 12 of the CRC. Third, the CRC Committee invokes the concept of 'evolving capacities' as a policy tool in its recommendations to States on the implementation of the CRC. The CRC Committee thus appears to treat the 'evolving capacities of the child' as a broader principle of the CRC, that informs not only the manner in which parental guidance is provided under article 5, but the interpretation and implementation of all other rights.

This raises the question of how and on what basis the CRC Committee justifies its treatment of 'evolving capacities' as a broader principle of the CRC. If the concept of evolving capacities finds its genesis in article 5, then the CRC Committee's treatment of 'evolving capacities' is undoubtedly an overreach of the scope and function of article 5. If, however, the concept of 'evolving capacities' is said to be embodied, perhaps implicitly, in the framework of the CRC, then its mention under article 5 (and article 14(2)) does not confine its scope of application to parental guidance under the CRC. This dissertation makes an argument for the latter. That a child's capacities will evolve, and as such should be accounted for in the realization of her rights is implied throughout the CRC framework, and thus informs the interpretation and implementation of all rights under the CRC. The principle of evolving capacities serves as a balancing mechanism, ensuring a child is protected but also enabled as an independent, conscious and voluntary participant¹³⁰ in the exercise of her own rights.¹³¹ At the same time, in the absence of any explicit recognition of 'evolving capacities' as a broader principle under the CRC, and indeed more guidance from the CRC Committee on its scope and meaning, imputing its function as an enabling principle or otherwise risks inflating the terms of article 5 and the CRC itself.

5.1 The concept of evolving capacities within the CRC

The words 'evolving capacities' appear just twice in the CRC, under articles 5 and 14(2). However, the concept of 'evolving capacities' finds expression across a number of provisions.

5.1.1 *The concept of evolving capacities and 'due weight' under the CRC*

Article 12(1) assures the child a right to express her views in matters of concern; it also *requires* that those views be given 'due weight' in accordance with

¹³⁰ Lopatka 1996 (n 105) 255.

¹³¹ Daly 2020 (n 7); Doek 2018 (n 100).

‘the age and maturity’ of the child. The reference to ‘age and maturity’ is not dissimilar to the concept of evolving capacities. As Lundy, Tobin and Parkes explain, article 12 signals an awareness that ‘children, even from birth are “very active, constructive thinkers and learners”’, recognising a child as ‘having an evolving capacity to form and express views on matters that affect them.’¹³² The CRC Committee has frequently relied on the concept of ‘evolving capacities’ to inform ‘due weight in accordance with age and maturity’, explaining that ‘as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them.’¹³³ In some cases, the CRC Committee has used ‘evolving capacities’ interchangeably with ‘age and maturity’: in its 1996 Reporting Guidelines, the CRC Committee instructed States to ‘provide information on legislative and other measures taken to ensure the right of the child to express views in a manner consistent with his or her evolving capacities’ in matters involving ‘family life, school life, the administration of juvenile justice, placement and life in institutional and other forms of care, and asylum-seeking procedures.’¹³⁴ Reviewing the 27 instances in which the CRC Committee references ‘evolving capacities’ in its Concluding Observations, the majority of instances involve the child’s right to be heard,¹³⁵ and the weight to be accorded to children’s views in adoption proceedings¹³⁶ judicial hearings,¹³⁷ decisions regarding medical treatment¹³⁸ and counselling.¹³⁹

132 Laura Lundy, John Tobin and Aisling Parkes, ‘Article 12: The Right to Respect for the Views of the Child’ in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 397-434, 399.

133 CRC Committee, General Comment No. 12, para 85.

134 CRC Committee, Reporting Guidelines 1996, para 43.

135 CRC Committee, Concluding Observations: United Kingdom of Great Britain and Northern Ireland – Overseas Territories, 16 October 2000, CRC/C/15/Add.135, para 27; CRC Committee, Concluding Observations: Côte d’Ivoire, 9 July 2001, CRC/C/15/Add. 155, para 27; CRC Committee, Concluding Observations: Denmark, 10 July 2001, CRC/C/15/Add. 151, para 31; CRC Committee, Concluding Observations: Monaco, 9 July 2001, CRC/C/15/Add.158, para 23; CRC Committee, Concluding Observations: Lithuania, 17 March 2006, CRC/C/LTU/CO/2, para 32(c); CRC Committee, Concluding Observations: The former Yugoslav Republic of Macedonia, 23 June 2010, CRC/C/MKD/CO/2, para 30.

136 CRC Committee, Concluding Observations: Italy, 28 February 2019, CRC/C/ITA/CO/5-6, para 25(c); CRC Committee, Concluding Observations: New Zealand, 21 October 2016, CRC/C/NZL/CO/5, para 29(c); CRC Committee, Concluding Observations: Ecuador, 26 October 2017, CRC/C/ECU/CO/5-6, para 31(d); CRC Committee, Concluding Observations: Bosnia and Herzegovina, 5 December 2019, CRC/C/BIH/CO/5-6, para 31(c).

137 CRC Committee, Concluding Observations: Nicaragua, 24 August 1999, CRC/C/15/Add.108, para 25.

138 CRC Committee, Concluding Observations: Ireland, 1 March 2016, CRC/C/IRL, CO/3-4, para 54(a); CRC Committee, Concluding Observations: Romania, 13 July 2017, CRC/C/ROU/CO/5, para 36(b).

139 CRC Committee, Concluding Observations: Ukraine, 9 October 2002, CRC/C/15/Add.191, para 59(a); CRC Committee, Concluding Observations: Romania, 18 March 2003, CRC/C/15/Add.199, para 47(a).

5.1.2 *The concept of evolving capacities in the assessment of the best interests of the child*

The CRC Committee appears to also consider a child's evolving capacities in its assessment of the best interests of the child, highlighting an inextricable link between articles 3(1) and 12(1) of the CRC. The CRC Committee has said that an '[a]ssessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child'¹⁴⁰ and to this end, '[t]he evolving capacities of the child ... must be taken into consideration when the child's best interests and right to be heard are at stake'.¹⁴¹ As the CRC Committee further explains, '*as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests* [emphasis added]'.¹⁴² The CRC Committee draws out this point more explicitly in its discussion on children's rights during adolescence: 'when determining best interests, the child's views should be taken into account, consistent with their evolving capacities ... to ensure that appropriate weight is afforded to the views of adolescents as they acquire understanding and maturity'.¹⁴³ It is important to point out that while article 18(1) references the best interest of the child as a basic concern of parents, the CRC Committee invokes the concept of 'evolving capacities' outside of the parent-child relationship, to inform States' obligations under article 3(1) of the CRC.

5.1.3 *The concept of evolving capacities as a procedural consideration*

The CRC Committee also takes notice of a child's evolving capacities in judicial hearings, requiring that any formal hearing be undertaken and completed in a timely manner, and reassessed regularly to reflect the child's evolving capacities. The Committee has specifically taken notice of children's capacities as a basis to inform the manner and timing of decisions on the best interests of the child:

... In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive or irreversible decisions.¹⁴⁴

140 CRC Committee, General Comment No. 14, 43.

141 CRC Committee, General Comment No. 14, para 44.

142 CRC Committee, General Comment No. 14, para 44.

143 CRC Committee, General Comment No. 20, para 22.

144 CRC Committee, General Comment No. 14, para 84.

The Committee further elaborates on this point:

... The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.... decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves ...¹⁴⁵

The CRC Committee adopts similar language in its guidance on review of care decisions under article 25

All decisions on care, treatment, placement and other measures concerning the child must be reviewed periodically in terms of his or her perception of time, and his or her evolving capacities and development (art. 25).¹⁴⁶

In the context of business practices and children's rights, the CRC Committee invokes 'evolving capacities' to inform States' obligations to provide remedy and reparations to children under article 4 of the CRC. Here, the CRC Committee uses 'evolving capacities' to inform its recommendations to States, suggesting that remedies must not only be timely, but also take into account that injuries and damages can have a long-term impact on children as they develop and their capacities evolve:

When determining the level or form of reparation, mechanisms should take into account that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage. They should also take into account the evolving nature of children's development and capacities and reparation should be timely to limit ongoing and future damage to the child or children ...

In ascribing a procedural function to 'evolving capacities', the CRC Committee affirms that children's capacities are constantly developing and changing, and as such will be relevant to the realisation of rights, not just within the family but in wider interactions within formal legal proceedings.

5.1.4 The concept of evolving capacities in the exercise of civil and political rights

The CRC also appears to rely on the concept of evolving capacities to inform the scope and content of civil and political rights, such as freedom of expression (art. 13) and access to information (art. 17): 'These articles establish that children are subjects of rights and, together with article 12, they assert

¹⁴⁵ CRC Committee, General Comment No. 14, para 93.

¹⁴⁶ CRC Committee, General Comment No. 14, para 93.

that the child is entitled to exercise those rights on his or her own behalf, in accordance with her or his evolving capacities.¹⁴⁷ In its recent General Comment No. 25 on children's rights in relation to the digital environment, the CRC Committee devotes a section to the 'evolving capacities of the child', viewing it as 'an enabling principle' and 'guiding framework' that ensures policies reflect 'an appropriate balance between protection and emerging autonomy'.¹⁴⁸

So, while the words 'evolving capacities' only appear twice in the CRC, I argue that the concept finds expression, in both procedural and substantive dimensions of children's rights across a range of provisions under the CRC. Kamchedzera has described the concept of evolving capacities as a 'synergy of correlative duties whose performance is essential for the realization of the child's rights [at] all societal levels'.¹⁴⁹

5.2 A broad principle of evolving capacities under the CRC

Recalling Chapter 1, the interpretative process should be guided not only by the legal principles of treaty interpretation¹⁵⁰ but also broader considerations of practicability, coherence and context-sensitivity so as to ensure the widest consensus on the meaning and scope of legal obligations under an international human rights treaty.¹⁵¹ If this is the case, determining the scope of 'evolving capacities' will not be definitively answered by a textual interpretation of article 5. It will require some consideration of how the concept of 'evolving capacities' contributes to a practicable, coherent and context-sensitive interpretation of children's rights under the CRC.

There is a degree of common sense to the notion that children's capacities are evolving, and that this dynamic process will play some role in how they secure the enjoyment of rights. Indeed, much of the debate surrounding the theory of children's rights turns on their 'capacities' to exercise and claim rights entitlements. Brighthouse argues that while 'it is quite plausible to attribute children rights which protect their standard welfare interests' it is 'generally inappropriate to ascribe agency rights to children, at least to young children' because they lack capacity or agency.¹⁵² Griffin argues that human rights

147 CRC Committee, General Comment No. 12, paras 80, 81.

148 CRC Committee, General Comment No. 25, paras 20, 21.

149 Kamchedzera 2012 (n 19) 40.

150 Scheinin 2017 (n 10).

151 John Tobin 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1-50.

152 H. Brighthouse, 'What Rights (If Any) Do Children Have?' in D. Archard and C.M. Macleod (eds) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2003) 45-46.

should be reserved for agents – those who are capable of agency;¹⁵³ and as such cannot extend to infants who are not capable of exercising agency over their rights. However, Griffin qualifies that as children acquire agency, they should acquire corresponding rights.¹⁵⁴

For Freeman, Eekelaar and Tobin, a child's capacities will not be determinative of whether she holds rights, but rather will inform how those rights are claimed.¹⁵⁵ To this end, the concept of evolving capacities serves as an enabling mechanism, ensuring that children are seen as conscious and voluntary participants in the claiming and exercise of their rights under international law.¹⁵⁶ So, while it is a fact that children are born in a state of dependency, requiring support and guidance from adults around them, the notion that every child possesses unique and evolving capacities ensures that children are not viewed 'in purely instrumental terms or as objects in need of protection, but as human beings in possession of rights' with a dynamic role to play in the enjoyment and exercise of those rights.¹⁵⁷

However, in the absence of any explicit recognition of a principle of evolving capacities within the text of the CRC, there remain concerns that imputing a broader principle, even if it contributes to the realisation of children's rights, will be seen as inflating the terms of article 5 and indeed the CRC itself. That 'evolving capacities' was never expressly discussed during the drafting of the CRC lends further weight to concerns that a broad application of this vague and relatively undefined concept may foster more fragmentation rather than coherence in the implementation of the CRC. Kilkelly makes this point in the context of the minimum age of criminal responsibility. While it has been suggested that the notion that children's evolving capacities is not inconsistent with a child-rights approach to criminal responsibility,¹⁵⁸ Kilkelly queries whether embracing 'evolving capacities as a broad enabling principle will be compatible with the fundamental tenet of children's rights.'¹⁵⁹ Rap, Schmidt and Liefwaard consider the practical implications of the CRC Committee's use of 'open norms' such as 'evolving capacities' which afford 'considerable leeway' to States in deciding how and whether children should be involved in judicial proceedings.¹⁶⁰ As Rap, Schmidt and Liefwaard explain, the use of 'evolving capacities' in tandem with firm recommendations for minimum

153 J. Griffin., 'Do Children Have Rights?' in D. Archard and C.M. Macleod (eds) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2003) 27.

154 Ibid, 28.

155 Tobin 2013 (n 12).

156 J. Eekelaar., 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42; J. Eekelaar, 'The Importance of Thinking that Children have Rights' in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Oxford: Clarendon Press, 1992) 221-232.

157 Tobin 2013 (n 12) 434.

158 Kilkelly 2020 (n 9).

159 Kilkelly 2020 (n 9) 507.

160 Rap, Schmidt and Liefwaard 2020 (n 9) 11.

age limits has led to a 'rather scattered and inconsistent image of age limits under the CRC',¹⁶¹ which has had implications for children's rights and protections. Ages limits offer assurances that children will not be subjected to prosecution as adults, and provides guarantees of legal support and assistance in the criminal justice process.¹⁶² Rap, Schmidt and Liefwaard do not dispute that children's capacities are evolving and dynamic; however, they argue that more circumspection is needed when using terms such as 'evolving capacities', calling for a more coherent approach to children's evolving autonomy, which takes into account 'scientific insights' and evidence-based research.¹⁶³

Peleg has voiced concern that framing a child's capacities as 'evolving' reinforces the perception that children are 'human becomings,' relegating childhood to 'a process of maturation, with the objective of creating a competent adult' and according priority to children's rights on the basis of protecting their 'development potential and their vulnerabilities.'¹⁶⁴ Tisdall makes a similar observation in the context of children's participation in family law proceedings in Scotland. Tisdall argues that framing children's capacities as 'evolving' propagates the 'age and stage' approach, which already has a stronghold in the case law. Tisdall further warns that viewing children's capacities as 'evolving' shifts the focus to children's interests in the future rather than the 'here and now' issues,¹⁶⁵ which can undermine their participation rights in favour of ensuring their future welfare interests.¹⁶⁶ At the same time, both Peleg and Tisdall do not dispute the idea that children's capacities are evolving, and thus need to be considered in the realization of their rights. The basis of their concern turns on how this dynamic process is characterised, and the degree of support and consideration given to children's autonomy and agency in the exercise of their rights. Peleg proposes a hybrid conception of childhood in which 'the child's present and future are recognised and intertwined and equally important' in the realization of children's rights.¹⁶⁷ Tisdall draws on the UN Convention on the Rights of Persons with Disabilities¹⁶⁸ to reframe evolving capacities through the lens of situational and relational autonomy.¹⁶⁹ Daly proposes a concept of 'supported autonomy', which balances 'children's autonomy and protection rights in accordance with their capacities'.¹⁷⁰

161 Ibid.

162 Ibid, 11.

163 Ibid, 11.

164 Peleg 2019 (n 8) 74.

165 Tisdall 2018 (n 8).

166 Ibid.

167 Peleg 2019 (n 8) 189.

168 UN Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, 2515 U.N.T.S. 3 ('CRPD').

169 Tisdall 2018 (n 8) 177.

170 Daly 2020 (n 7) 480.

What we are left with is a broad consensus that children's capacities do evolve and as such need to be considered in the realization of their rights. However, what remains unclear is how this development process should be conceptualized and recognised within the CRC, and whether framing a child's capacities as 'evolving' risks hindering, rather than enabling children's realization of rights under the CRC. More guidance is needed from the CRC Committee on the role of 'evolving capacities' within the CRC. Without more clarity on the scope and meaning of 'evolving capacities', it remains somewhat precarious, if not reckless, to continue to invoke a broad principle of evolving capacities even if it is both necessary and practicable for the implementation of children's rights under the CRC.

CONCLUSION – THE CURIOUS CASE OF ARTICLE 5 OF THE CRC

Recalling the problem statement in Chapter 1, article 5 has been described as 'unique',¹⁷¹ 'ground-breaking',¹⁷² 'innovative'¹⁷³ and 'pivotal',¹⁷⁴ making a 'vital contribution'¹⁷⁵ to the realization of all rights within the CRC. However, it has also been characterised as 'enigmatic',¹⁷⁶ 'overlooked',¹⁷⁷ 'neglected',¹⁷⁸ and indeed a provision that 'brings together ... all the natural tensions that inevitably flow through the Convention.'¹⁷⁹ Looking back on our interpretative analysis, it is now possible to see a thread of truth in each of these observations. At first glance, the CRC Committee's treatment of article 5 suggests it does not hold much priority for the implementation of children's rights. However, a closer examination reveals a more complex, and at times, ambiguous relationship with article 5, which informs the scope and content of a wide range of provisions within the CRC.

More guidance is needed from the CRC Committee, not only in respect of article 5, but more broadly, on the role that parenting plays in children's enjoyment and exercise of rights under the CRC. To this end, and as a conclusion to our discussion chapter, I suggest some avenues for further consideration by the CRC Committee, in the hopes of encouraging greater circumspection

171 Kamchedzera 2012 (n 19) 6.

172 Daly 2020 (n 7) 471.

173 Kamchedzera 2012 (n 19) 6.

174 Kil Kelly 2020 (n 9) 500.

175 Lansdown 2005 (n 101); Sutherland 2020 (n 20) 447.

176 Ibid.

177 Claire Fenton-Glynn and Brian Sloan, 'Editorial' (2020) 28 *International Journal of Children's Rights* 444.

178 Kil Kelly 2020 (n 9) 501.

179 Mark Henaghan, 'New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 United Nations Convention on the Rights of the Child' (2020) 28(3) *International Journal of Children's Rights* 588-612, 589.

on the role of parents and family in children's enjoyment and exercise of rights under the CRC.

First, as the only provision to reference 'extended family' and 'community' alongside parents and other carers, article 5 has come to be viewed as a framework to identify informal carers and informal care arrangements under the CRC. Yet, a plain reading of article 5 suggests it was not meant to function as an open-ended framework for informal carers nor does it provide enough of a legal basis to manage informal care arrangements under the CRC. What is needed from the CRC Committee is clearer guidance on the role of informal carers, and the extent to which States hold a legal obligation to support, assist and protect their caregiving role as part of children's right to receive appropriate guidance and direction in the exercise of their rights under the CRC. In this regard, the CRC Committee should give more consideration to the inter-relationship between article 5 and articles 9 and 20, and importantly, how a child's right to guidance and direction will impact States' legal obligations towards children separated or deprived of parental care and children deprived of their family environment. The CRC Committee should also consider whether a broader reading of article 5, which takes into account informal carers and informal care arrangements, aligns with principles of effectiveness, non-restrictiveness and dynamic interpretation, contributing to a more practicable, coherent and context-sensitive framework for the realization of children's rights under the CRC.

Second, the ambition of article 5 was to strike a 'delicate balance,' that respects the role of parents while also recognising the child's status as a rights-holder. However, its relational dimension presents a challenge for States seeking to implement and enforce its framework within the domestic legal setting. Its scope is on the parenting relationship within the family setting. But, its breadth extends to a child's exercise of all rights under the CRC. This creates a daunting task for States, who must navigate their obligation to respect rights to privacy and family, together with a child's right to receive guidance and direction that is appropriate and consistent with her evolving capacities in the exercise of rights under the CRC. While the CRC Committee has elaborated on the model of parenting envisaged under article 5, it has yet to provide practical guidance to States on how they should implement article 5 or enforce its legal framework within the family setting. More clarity is needed from the CRC Committee on the nature of the legal obligation created under article 5, and what measures will be needed to ensure its practicable and effective implementation. In this regard, consideration should be given to the inter-relationship between article 5, and provisions related to parental support and assistance, notably articles 18(2), 19(2) and 27(3). As well, the CRC Committee should consider whether States' implementation of article 42 (raising awareness on the rights and principles under the CRC) will have any bearing on the implementation of article 5, particularly in encouraging a model of

parenting that is aligned with children's enjoyment and exercise of rights under the CRC.

Third, the CRC Committee's treatment of the concept of evolving capacities raises questions, if not concerns, over its meaning and scope of application under the CRC. It is a fact that all children will undergo a process of development from infancy to adulthood. It is also undeniable that children's capacities will play a direct role in how they are able to claim and exercise rights. Article 5 (and article 14(2)) acknowledge that a child's evolving capacities will have a direct bearing on her ability to exercise and enjoy specific rights within the family. However, whether a child's evolving capacities should be acknowledged and taken into account in the exercise of other rights under the CRC remains unclear. More guidance is needed from the CRC Committee, not only on the meaning of 'evolving capacities', but importantly on the scope of its application within the CRC. In this regard, it would be worthwhile for the CRC Committee to explain the reasoning for its treatment of 'evolving capacities' as an enabling principle, interpretative principle and policy principle within the CRC, clarifying whether it has come to view the concept as a broader principle delinked from article 5 of the CRC. Without such guidance, there remains concern that imputing a broad principle of evolving capacities may be used to hinder rather than enable a child's exercise of rights under the CRC.

Even with such guidance from the CRC Committee, however, there remain unanswered questions about the meaning and scope of article 5 and its implications for children's enjoyment and exercise of rights under international law. In this discussion chapter, I did not set out to provide definitive answers for the interpretation of article 5 of the CRC. My ambitions were simply to shed light on how this innovative yet often overlooked provision is understood, and to draw attention to the role that parents and other carers will play in children's realization of rights under the CRC.

7 | Innovation or enigma?

Children are not the people of tomorrow, but are people of today. They have a right to be taken seriously, and to be treated with tenderness and respect. They should be allowed to grow into whoever they were meant to be – the unknown person inside each of them is our hope for the future.

Loving Every Child: Wisdom for Parents, Janusz Korczak

At the crux of article 5 is an ambition to re-imagine the parent-child relationship, recognising that all children deserve to be parented with respect and tenderness.¹ It promotes a conception of the child as an independent rights-holder, whose voice and agency, even if not determinative, must be respected and listened to by family members exercising influence in her everyday life.² It challenges the traditional liberal western notion of ‘family’,³ offering in its place, a model of parenthood that is not dissimilar to a fiduciary relationship, in which parents exercise rights not for their own benefit, but for the benefit of their child’s enjoyment of rights.⁴ In this regard, it strikes ‘a delicate balance’ that accords respect to the special role of parents, while also recognising the child’s status as an individual and rights-holder within the family.⁵ Finally, it extinguishes any lingering notion that parental rights are

1 Garton Kamchedzera, ‘Article 5: The Child’s Right to Appropriate Direction and Guidance’ in André Alen, Johan Vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans, Mieke Verheyde, and Bruce Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2012) 13.

2 David Archard, *Children: Rights and childhood*, 2nd ed., (London: Routledge, Taylor and Francis, 2004) 58.

3 Archard, 2004 (n 2) 167-177, 169.

4 Gerison Lansdown, *The Evolving Capacities of the Child* (Florence: UNICEF Innocenti, 2005), ix; David Archard, ‘Do parents own their children?’ (1993) 1 *International Journal of Children’s Rights* 293-301.

5 John Tobin and Sheila Varadan, ‘Article 5: The Right to Parental Direction and Guidance Consistent with a Child’s Evolving Capacities’ in John Tobin and Philip Alston (eds) *The UN Convention on the Rights of the Child: A Commentary* (Oxford: Oxford University Press, 2019) 159-185, 159; Elaine Sutherland, ‘The Enigma of Article 5 of the United Nations Convention on the Rights of the Child: Central or Peripheral?’ in Brian Sloan and Claire Fenton-Glynn (eds) *Parental Guidance, State Responsibility and Evolving Capacities: Article 5 of the United Nations Convention on the Rights of the Child* (Leiden: Brill Nijhoff, 2021) 13-35, 13.

ownership rights, transforming the role of parents from rights-holders over their child to duty-bearers to their child in the child's exercise of rights.⁶

But how does article 5 directly contribute to children's enjoyment and exercise of rights in their everyday lives?

1 UNRAVELLING THE ENIGMA OF ARTICLE 5

This dissertation contemplated this question in two ways. It embarked on a legal doctrinal analysis, examining the scope, content and function of article 5 within the CRC. It then considered the implications of article 5 on children's enjoyment and exercise of rights in the context of informed consent in medical research. Through this analysis, I observed that article 5 functions, not as a standalone legal provision, but as a broader framework informing the interpretation and implementation of other provisions within the CRC: (1) it provides a framework to identify a child's carers; (2) it navigates the parenting relationship between a child and her carers in a manner that accords respect to the child as a rights-holder within the family. I concluded that more guidance is needed from the CRC Committee, specifically to elaborate on the inter-relationship between article 5 and other provisions of the CRC, and to provide guidance to States on the measures needed to ensure its effective implementation. I also called on the CRC Committee to give more consideration to its treatment of 'evolving capacities', providing greater clarity on its meaning and scope of application in the interpretation and implementation of the CRC.

But more research is needed to better understand the implications of article 5, not only for children's rights but for international human rights law more generally. In this brief conclusion, I map out a research agenda, identifying three areas of further inquiry for article 5 of the CRC.

2 NEXT STEPS – A RESEARCH AGENDA FOR ARTICLE 5

2.1 A relational conception of rights under international law

Article 5 introduces a relational conception of rights, which recognises that children will require some degree of support, direction and guidance to claim and exercise their rights under international law.⁷ Article 5 thus acknowledges,

6 Lansdown 2005 (n 4); Tobin and Varadan 2019 (n 5) 184; see also Kamchedzera 2012 (n 1), 13-14; Sutherland 2020 (n 5).

7 John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395-441, 407; John Eekelaar, 'The Importance of Thinking that Children Have Rights' in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights, and the Law* (Oxford: Clarendon Press, 1994) 221-236.

and indeed expects that a child's enjoyment of rights will be connected to and interdependent upon her relationships with parents, families and communities.⁸

However, this relational conception of rights directly challenges the liberal and individualist framework underpinning international human rights law, which has traditionally focused on the vertical relationship between the individual rights-holder and the State, and the formal legal setting for the implementation and enforcement of rights.⁹ A relational conception of rights shifts the focus from the conduct of the State duty-bearer to the intermingled relationships in which an individual lives, relying on those relationships as the basis to claim, realise and enjoy rights.¹⁰ It sees the 'individual as both separate and situated within a web of relationships of care, attachments and interdependency', making it 'impossible to consider the welfare or rights of one [person] in isolation', and understanding the 'family as a unit determined both by the individuals of which it is comprised and by the existing social, political and historical context'.¹¹ A relational conception of rights has implications for the enforcement of legal obligations not only under the CRC, but within international law more generally. The CRC Committee has yet to answer the question of how States should enforce legal obligations under article 5, nor has it elaborated on the legal remedies for violations of article 5 under the CRC. Of the 54 complaints submitted to the CRC Committee under its Optional Protocol to the Convention on the Rights of the Child on a communications procedure,¹² only five allege a violation of article 5,¹³ and thus far, no substantive decision has been issued regarding States' legal obligations in respect of a violation of article 5 under the CRC. More research is needed to better

8 Tobin, 2013 (n 7) 424.

9 I. Brownlie, 'The Protection of Individuals and Groups: Human Rights and Self-Determination' in *Principles of Public International Law*, 7th ed., (Oxford: Oxford University Press, 2008) 553-586, 584.

10 Aoife Daly, 'Chapter 3: The "Liberal Ideal": Autonomy Capacity and the Adult/Child Divide' in *Autonomy and the Courts: Beyond the Right to Be Heard* (Leiden: Brill Nijhoff, 2017) 115-191.

11 Jonathan Herring, 'Compassion, ethics of care and legal rights' (2017) 13(2) *International Journal of Law in Context* 158-171, 165-166; Jonathan Herring, 'Forging a relational approach: Best interests or human rights?' (2013) 13(1) *Medical Law International* 32-54, 48; Jonathan Herring, *Caring and the Law* (Oxford: Hart Publishing, 2013) 1-10, 4.

12 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, entered into force 14 April 2014, adopted by UN General Assembly Resolution, A/RES/66/138, 19 December 2011.

13 CRC Committee, *L.H.L. and A.H.L. v Spain*, Communication No. 13/2017, CRC/C/81/D/13/2017, 17 June 2019; CRC Committee, *X, Y and Z v Finland*, Communication No 6/2016, CRC/C/81/D/2016, 15 May 2019; CRC Committee, *J.J., O.L., A.J. and A.S. vs Finland*, Communication No 87/2019, CRC/C/85/D/87/2019, 11 November 2020; CRC Committee, *Y.F., F.F., T.F. and E.F. vs Panama*, Communication No 48/2018, CRC/C/83/D/48/2018, 28 February 2020; CRC Committee, *C.R. vs Paraguay*, Communication No 20/2017, CRC/C/83/D/30/2017, 12 March 2020.

understand how a relational conception of rights will affect States' legal obligations to provide remedies and redress for rights violations under international human rights law.

2.2 The evolving capacities of the child

The idea that a person's capacities can be dynamic and evolving represents a radical break from individualistic conceptions of competence and autonomy, which were historically framed in binary or absolute terms.¹⁴ It introduces a balancing framework¹⁵ to navigate children's agency, which responds to each child's unique, dynamic and evolving capacities.¹⁶ As Daly explains, it allows children to 'have their autonomy respected without being given the same status as adults and without being abandoned to harmful fates unaided.'¹⁷ Daly proposes a rights-based framework for supporting autonomy that centres around the child's 'capacity rights' under article 5 of the CRC.¹⁸ It places the burden on parents and other carers to support children, providing them with the direction and guidance needed to maximize their capacities.¹⁹ Article 5 thus moves away from a conception of childhood as a fixed or universal concept, recognising that children are not a homogenous group, and capacities will be fluid, dynamic and evolving.²⁰

However, as Rap, Schmidt and Liefwaard warn, the lack of a consistent and 'overarching view on the evolving autonomy of children as rights-holders' can lead to 'arbitrary, restrictive and rigid' age-based policies, which can either exclude children from legal proceedings or presumptively include them without an individualised assessment of their capacities.²¹ Rap, Schmidt and Liefwaard argue for a 'dynamic and coherent perspective on children's growing autonomy' that takes into account 'scientific insights on the development of children.'²² Daly also emphasises that a 'basic understanding' of child development will not only be necessary but critically important to understand how to maximize children's capacities through autonomy support.²³ However, Peleg raises concerns that relying too heavily on developmental psychology or child development science risks treating children as a homogenous group,

14 Tobin, 2013 (n 8) 426-429; see also Tobin and Varadan 2019 (n 2).

15 Aoife Daly, 'Assessing Children's Capacity' (2020) 28(3) *International Journal of Children's Rights* 471-499.

16 Ibid, 480.

17 Daly 2017 (n 10) 132.

18 Daly 2020 (n 15) 471-499.

19 Ibid, 489.

20 Tobin 2013 (n 7) 428; Archard 2004 (n 2) 64.

21 Stephanie Rap, Eva Schmidt & Ton Liefwaard, 'Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?' (2020) 1 *Erasmus Law Review*, 4-11, 11.

22 Ibid, 11.

23 Daly 2020 (n 15) 490.

and fails to take into account the child's unique and individual capabilities.²⁴ It also overlooks the complexity and multidimensional nature of development itself, which encompasses a broader range of disciplines beyond child development science, such as pedagogy, sociology, psychiatry, psychology, anthropology, medicine and political science.²⁵

More consideration needs to be given to the inter-relationship between child development, the right to development, and the evolving capacities of the child under the CRC.²⁶ Peleg suggests that a process of engagement between law and other disciplines could distil a more meaningful understanding of child development that transcends the confines of development psychology or child development science.²⁷ Such an exercise would undoubtedly contribute to a deeper understanding of the scope and content of children's evolving capacities in the exercise and enjoyment of rights under the CRC.

Finally, more research is needed to critically examine how States have come to understand the meaning of 'evolving capacities', to ensure it is being used to support rather than undermine children's enjoyment and exercise of rights under the CRC.

2.3 Non-State parties as rights-holders and duty-bearers

The inclusion of non-State parties as rights-holders and duty-bearers has been described as an innovation of the CRC that may hold promise for other branches of human rights, such as disability rights or rights of elderly persons, both of which rely heavily on non-State actors for the implementation of rights.²⁸ In this regard, the broad inclusion of carers – parents, legal guardians, extended family, community members – under article 5 potentially offers a model framework on how to recognise and support non-State actors who will inevitably play an important role in the implementation of rights.²⁹

24 Noam Peleg, *The Child's Right to Development* (Cambridge: Cambridge University Press, 2019) 198.

25 Ibid, 198.

26 Peleg (n 24) 208; see also Sheila Varadan, 'The Child's Right to Development by Noam Peleg' (2020) 34(3) *International Journal of Law, Policy and the Family* 328-332.

27 Peleg 2019 (n 24) 200, 201.

28 Roberta Ruggiero, Diana Volonakis and Karl Hanson, 'The inclusion of "third parties": the status of parenthood in the Convention on the Rights of the Child' in Eva Brems, Ellen Desmet and Wouter Vanderhole (eds) *Children's Rights Law in the Global Human Rights Landscape* (Routledge, Taylor and Francis: London, 2017) 71 - 89.

29 Eva Brems, Ellen Desmet and Wouter Vanderhole, 'Children's rights law and human rights law: analysing present and possible future interactions' in Eva Brems, Ellen Desmet and Wouter Vanderhole (eds) *Children's Rights Law in the Global Human Rights Landscape* (Routledge, Taylor and Francis: London, 2017) 2-5.

However, as Brems, Desmet and Vanderhole observe,³⁰ relying on third parties as duty-bearers can pose challenges for the implementation and enforcement of rights within a formal legal setting. First, there remains ambiguity over who should be recognised as a ‘third-party’ duty-bearer, and how far States’ legal obligations should extend to recognise the responsibilities of non-State actors in the implementation of rights. In the context of the CRC, an overly broad inclusion of carers risks introducing legal incoherence and fragmentation, particularly in respect of States’ legal obligations to those non-State actors primarily responsible for the child, such as biological or legal parents. At the same time, an overly narrow approach risks excluding genuine carers from accessing the assistance and protection needed for them to support and further children’s enjoyment and exercise of rights.

Second, as Ruggiero, Volonakis and Hanson observe, introducing third-parties may enable States to evade their own legal obligations as duty-bearers, by hiding behind the (mis)conduct of non-State actors.³¹ As Ruggiero, Volonakis and Hanson discuss in the context of violence against children, States have sometimes attempted to conceal their own duties to respond to structural causes of violence by emphasising the misconduct of parents or other carers.³²

Third, relying on non-State actors for the implementation of rights assumes a degree of good faith in how these non-State actors exercise their rights and responsibilities. Indeed, as Eekelaar points out, the difficulty of article 5 ‘lies in the assumption that these adults will promote [children’s] rights’, providing direction and guidance that is ‘in the exercise of rights, not in derogation of rights’.³³ As noted above, it remains unclear what steps will need to be taken to ensure carers exercise their rights in a manner that furthers children’s enjoyment and exercise of rights under the CRC. In this regard, more research is needed to better understand the implications of relying on non-State ‘third-party’ actors (parents and other carers) as duty-bearers, and how the State will respond when these duty-bearers fail to uphold their obligations towards the rights-holder. This will be important not only for the enforcement of article 5 but also for the enforcement of rights for other vulnerable persons, such as elderly persons and persons with disabilities, who will also rely on family carers for the implementation of rights and obligations.

3 FINAL THOUGHTS

Returning to the adventures of our heroine Matilda Wormwood, we see a child who is determined to ensure that all children are treated with decency, dignity

³⁰ Ibid.

³¹ Ruggiero, Volonakis and Hanson 2017 (n 28) 84, 85.

³² Ibid, 85.

³³ Eekelaar 1994 (n 7) 233.

and respect by those adults exercising authority over their everyday lives. Whether it means secretly placing superglue in her father's favourite hat or using magic to instil terror in the deplorable Mrs Trunchbull, Matilda is convinced that parents, and indeed all adults, ought to be taught a lesson when they choose to disabuse a child of their rights and dignity. In the end, Matilda finds the guidance and support she needs in Miss Honey, a kind and attentive primary school teacher. When the Wormwood family hurriedly flees to Spain, Matilda orchestrates her own adoption, and Miss Honey becomes her primary caregiver.

But for children in the real world, swapping families, trading in parents or conjuring magic to exact revenge on an unkind carer will simply not be possible. Parenting styles and family relationships will be determined by socio-cultural norms and the realities of life rather than a child's conviction to be treated with respect and dignity within the family. Whether article 5 can truly transform the parent-child relationship and reshape how we view parenthood remains to be seen. At the very least, it forces us to reimagine how we see children within the family, encouraging us to give greater consideration to their unique identities, individuality and evolving capacities in the decisions we make in their everyday lives.

Summary

ARTICLE 5 OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD *Parental Guidance and the Evolving Capacities of the Child*

For the most part, history has treated children as the possession of their parents. The right to family was understood as an entitlement of parents over their children, rather than a relational right flowing in both directions between a child and her family. Parenting was viewed as a private matter with little guidance or support from the State in the everyday care of a child. That a child should be seen as an individual and rights-holder within the family was not recognised nor likely contemplated under international law prior to the UN Convention on the Rights of the Child (CRC).

This dissertation focuses on article 5 of the CRC. At the crux of article 5 is an ambition to re-imagine the parent-child relationship, recognising that all children have a right to be parented with respect and tenderness. It promotes a conception of the child as an independent rights-holder, whose voice and agency, even if not determinative, must be respected and listened to by those adults exercising influence over their everyday lives. It challenges the traditional liberal western notion of 'family', offering a model of parenthood that is not dissimilar to a fiduciary relationship, in which parents exercise rights not for their own benefit, but for the benefit of their child's enjoyment of rights. In so doing, it strikes 'a delicate balance', according respect to the child's status as an individual rights-holder, while also acknowledging the indispensable role that parents and family will play in the everyday care and upbringing of a child. Importantly, article 5 extinguishes any lingering notion of parental rights as ownership rights, transforming the role of parents from that of rights-holders over their child to duty-bearers to their children in the child's individual exercise of rights.

But how does article 5 directly contribute to children's enjoyment and exercise of rights in their everyday lives?

This dissertation contemplated this question in two ways. It embarked on a legal doctrinal analysis, examining the scope, content and function of article 5 within the CRC. It then considered the implications of article 5 on children's exercise of rights in the informed consent process in medical research. Through the analysis, I observed that article 5 functions, not as a standalone legal provision, but as a broader framework informing the interpretation and imple-

mentation of other provisions within the CRC: (1) it provides a framework to identify a child's carers; and (2) it navigates the parent-child decision-making relationship in a manner that accords respect to the child as an individual rights-holder with evolving capacities within the family. In the context of medical research, it reframes the child from a passive and non-autonomous being, to an active agent and rights-holder with evolving autonomy in the informed consent process.

This dissertation concludes by identifying three avenues of further inquiry for article 5 of the CRC: (1) the relational dimension of children's rights under international human rights law; (2) the scope and meaning of 'evolving capacities'; (3) the challenges of recognising non-State 'third-parties' as rights-holders and duty-bearers in international human rights law. Article 5 has been described as 'innovative', 'ground-breaking' and 'transformative', yet it remains elusive. More research is needed to fully understand the implications of article 5 – not only for children's rights but for international human rights law more generally.

Samenvatting (Dutch summary)

ARTIKEL 5 VAN HET VN-VERDRAG INZAKE DE RECHTEN VAN HET KIND *Ouderlijke begeleiding en de zich ontwikkelende vermogens van het kind*

In het verleden werden kinderen doorgaans behandeld als bezit van hun ouders. Het recht op familie is van oudsher opgevat als een recht van ouders op hun kinderen, in plaats van een relationeel recht tussen een kind en zijn/haar familie. Ouderschap werd beschouwd als een privékwestie, waarbij staten weinig begeleiding of ondersteuning boden in de dagelijkse zorg voor een kind. Dat kinderen gerespecteerd zouden moeten worden als individuele rechthebbenden binnen de familie/het gezin, werd niet erkend en waarschijnlijk ook niet overwogen binnen de internationale wetgeving voorafgaand aan het VN-verdrag inzake de Rechten van het Kind (IVRK).

Dit proefschrift richt zich op artikel 5 van het IVRK. De kern van artikel 5 is een ambitie om de ouder-kindrelatie opnieuw vorm te geven, waarbij wordt erkend dat alle kinderen het recht hebben om met respect en tederheid te worden opgevoed. Het bevordert een begrip van het kind als een individuele rechthebbende, wiens stem en 'agency' (vrij vertaald: het vermogen om zelf beslissingen te nemen of actie te ondernemen), zelfs als die niet bepalend zijn, gerespecteerd en gehoord moet worden door de volwassenen die invloed uitoefenen op zijn/haar dagelijks leven. Het daagt de traditionele liberale westerse opvatting van 'familie' uit en biedt een model van ouderschap dat lijkt op een soort voogdij, waarbinnen ouders rechten niet in hun eigen belang uitoefenen, maar opdat hun kind zijn/haar rechten kan genieten. Om dit te bewerkstelligen, zoekt artikel 5 naar een delicaat evenwicht waarbij enerzijds de status van het kind als een individuele rechthebbende gerespecteerd wordt, en anderzijds de onmisbare rol wordt erkend die ouders en familie spelen in de dagelijkse zorg en opvoeding van het kind. Het doet elke resterende opvatting van ouderlijke rechten als eigendomsrechten verdwijnen, waardoor de rol van ouders wordt getransformeerd van rechthebbenden over hun kind tot plichtsdragers ten aanzien van hun kind in zijn/haar individuele uitoefening van rechten.

Maar hoe draagt artikel 5 op directe wijze bij aan de uitoefening van rechten door kinderen in hun dagelijks leven?

Dit proefschrift heeft deze vraag op twee manieren benaderd. Er werd een analyse uitgevoerd van de juridische doctrine, waarbij de reikwijdte, inhoud en functie van artikel 5 binnen het IVRK werden bestudeerd. Vervolgens is gekeken naar de implicaties van artikel 5 voor de uitoefening van rechten door kinderen in het proces van geïnformeerde toestemming door een vertegenwoordiger in het kader van medisch onderzoek. Door middel van deze analyse is geobserveerd dat artikel 5 niet functioneert als een op zichzelf staande wettelijke bepaling, maar als een breder kader voor de interpretatie en implementatie van andere bepalingen binnen het IVRK: (1) het voorziet in een kader om de verzorgers van een kind te identificeren; en (2) het geeft richting aan de ouder-kind besluitvormingsrelatie op een manier die het kind respecteert als individuele rechthebbende met zich ontwikkelende vermogens binnen de familie/het gezin. In de context van medisch onderzoek wordt het kind in een nieuw kader geplaatst; in plaats van als passief en niet-autonoom wezen wordt het gezien als een actieve actor en rechthebbende met evoluerende autonomie in het proces van geïnformeerd toestemming geven.

Meer onderzoek is nodig om de implicaties van artikel 5 volledig te begrijpen, niet alleen voor wat betreft de uitoefening van rechten door kinderen in hun dagelijks leven, maar ook voor internationale mensenrechtenwetgeving in het algemeen. Dit proefschrift eindigt met de identificatie van drie verdere onderzoeksrichtingen voor artikel 5 van het IVRK: (1) de relationele dimensie van kinderrechten onder de internationale mensenrechtenwetgeving; (2) de reikwijdte en betekenis van zich ontwikkelende vermogens; (3) de uitdagingen van het erkennen van niet-statelijke 'derde partijen' als rechthebbenden en plichtdragende binnen internationale mensenrechtenwetgeving.

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Curriculum vitae

Sheila Varadan was born on 24 February 1976 in Simcoe, Ontario Canada. She completed her primary and secondary education in Toronto, Ontario Canada. Sheila pursued post-secondary education in political science and international development, earning an honours Bachelor of Arts (with distinction) from the University of Guelph in 2000. Sheila then gained admission to the transsystemic law programme at McGill University in Montreal Quebec, earning a Juris Doctor (with distinction) and a Bachelor of Civil Law (with distinction) in 2004. After qualifying as a barrister/solicitor with the Law Society of Ontario in 2005, Sheila was awarded the Harold G. Fox Scholarship to undertake barrister pupillage in London, United Kingdom. Sheila returned to Toronto in 2006, where she began practising criminal law as an assistant crown attorney for the Ontario Ministry of Attorney General. In 2007, Sheila received the British Council Chevening Scholarship and the London Good-enough Association of Canada Scholarship, and headed back to England where she completed a Master of Laws in Human Rights (with distinction) at the London School of Economics and Political Science. In 2008, Sheila relocated to Thailand to work on an access to justice project in the ethnic Burmese refugee camps on the Thai-Myanmar border. In 2011, Sheila began working for the International Commission of Jurists where she led the South Asia access to justice programme. In 2014, Sheila moved to ECPAT International, heading the Global Legal Programme under the guidance of Professor Jaap Doek.

In 2016, Sheila left full-time work to pursue a doctorate (as an external candidate) at Leiden Law School under the supervision of Professor Jaap Doek and Professor Ton Liefwaard. Alongside her doctoral studies, Sheila continued working as an independent human rights consultant for UN agencies (UN Women, UNICEF and UNESCAP) and the University of Oxford.

Sheila has been living in Bangkok Thailand with her husband Yoel and two sons, Sam and Jude for the past 13 years.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2020, 2021 and 2022

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