



Universiteit  
Leiden  
The Netherlands

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

Varadan, S.R.

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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 ...<sup>1</sup>*

*Matilda, Roald Dahl*

Matilda Wormwood, the heroine in Roald Dahl's classic novel *Matilda*,<sup>2</sup> 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,

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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.<sup>3</sup> Under Roman law, the doctrine of *patria potestas* gave a father, as head of the family, absolute power over his children,<sup>4</sup> including the right to determine the life or death of a child (*jus vitae necis*),<sup>5</sup> and the right to sell his child into slavery.<sup>6</sup> Though the doctrine of *patria potestas* eventually faded at the end of the nineteenth century,<sup>7</sup> giving way to the 'Child-Saving'<sup>8</sup> and 'Child Welfare'<sup>9</sup> 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*, 2<sup>nd</sup> 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 law<sup>10</sup> and continental European civil law<sup>11</sup> well into the twentieth century, casting a shadow on how children were viewed and treated within the family.<sup>12</sup>

## 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),<sup>13</sup> the first international instrument to focus on the plight of children,<sup>14</sup> and indeed coin the phrase ‘rights of the child’<sup>15</sup> did not enumerate any specific rights for the child, nor did it even use the word ‘rights’ within its five substantive paragraphs.<sup>16</sup> An initiative of Eglantyne Jebb (founder of Save the Children Fund UK),<sup>17</sup> 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,<sup>18</sup> 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.<sup>19</sup>

The Universal Declaration of Human Rights,<sup>20</sup> adopted in 1948, was the first instrument to recognise the rights of 'all members of the human family'.<sup>21</sup> 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.<sup>22</sup> The European Convention on Human Rights, adopted just two years after the Universal Declaration did not mention children at all,<sup>23</sup> while the American Declaration of the Rights and Duties of Man focused on the duties of parents towards their children.<sup>24</sup> The Covenant on Civil and Political Rights,<sup>25</sup> and the Covenant on Economic Social and Cultural Rights<sup>26</sup> drafted simultaneously in the early 1950s amid the Cold War were more explicit in their references to children.<sup>27</sup> However, again, emphasis was placed on protecting parental rights and the family unit<sup>28</sup> rather than enumerating specific rights for the child.<sup>29</sup>

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 Child<sup>30</sup> was something of a breakthrough for children's rights.<sup>31</sup> It was the first legal instrument to enumerate a set of substantive rights for children under international law.<sup>32</sup> Amongst its ten principles, Principle 6 held particular significance for children's rights within the family:<sup>33</sup> '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'.<sup>34</sup> 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'.<sup>35</sup> 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.<sup>36</sup>

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,<sup>37</sup> such as Ellen Keys and Janusz Korczak,<sup>38</sup> the notion of 'rights for children' would only begin to take hold in the 1970s.<sup>39</sup> The social movements of the 1960s – women's rights, civil rights and anti-war – bolstered the profile of children's rights.<sup>40</sup> When Hillary Rodham famously quipped that "'children's rights' is a slogan in search of a definition",<sup>41</sup> she brought into question how the law treated children, and the lack of meaningful respect for the child's voice and agency within society.<sup>42</sup>

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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.<sup>43</sup> 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.'<sup>44</sup> 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',<sup>45</sup> including the right to elect guardians to replace parents.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Although the Liberationist Movement faded at the end of the 1970s, and eventually dis-

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

#### 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 20<sup>th</sup> anniversary of the 1959 Declaration.<sup>52</sup> 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.<sup>53</sup> For the Polish delegation, an 'internationally binding instrument' would serve to 'strengthen the comprehensive care and ... well-being of children all over the world.'<sup>54</sup> 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.<sup>55</sup> 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.'<sup>56</sup> 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,<sup>57</sup> convening over 90 Working Group sessions,<sup>58</sup> with State delegates,<sup>60</sup> non-governmental organiza-

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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



tions<sup>61</sup> and intergovernmental organizations<sup>62</sup> to jointly discuss, negotiate and achieve consensus on each of the provisions in the Convention on the Rights of the Child.<sup>63</sup>

### 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

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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,<sup>64</sup> the rights of working parents,<sup>65</sup> and the importance of supporting parents to ensure 'the interests and welfare of the child'.<sup>66</sup> 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'.<sup>67</sup> Finland suggested that States should provide financial support to parents,<sup>68</sup> while France,<sup>69</sup> Greece<sup>70</sup> and Sweden<sup>71</sup> drew attention to the importance of recognising fathers in the care and upbringing of children.<sup>72</sup>

At the request of the Polish Delegation, the International Commission of Jurists convened a conference in Warsaw<sup>73</sup> in 1979, issuing a 'Statement of Principles on the Legal Protection of the Rights of the Child'.<sup>74</sup> 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

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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 need<sup>75</sup> 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.'<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup>

## 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].<sup>79</sup> To this end, the Danish delegation proposed a separate provision

<sup>75</sup> OHCHR 2007 (n 13) Vol I, 51-52.

<sup>76</sup> OHCHR 2007 (n 13) Vol I, 51-52.

<sup>77</sup> 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.

<sup>78</sup> 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.

<sup>79</sup> 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].<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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'.<sup>85</sup> Canada supported Norway, expressing a 'wish that the principle [of evolving capacities] ... be dealt with in a comprehensive manner through a general article'.<sup>86</sup> The representatives of Argentina and Sweden

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<sup>80</sup> Ibid, para 75.

<sup>81</sup> OHCHR 2007 (n 13) Vol I, 455.

<sup>82</sup> 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.

<sup>83</sup> Ibid, 4; OHCHR 2007 (n 13) Vol I, 455

<sup>84</sup> 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).

<sup>85</sup> 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

<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup>

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,<sup>89</sup> 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.'<sup>90</sup> The feeling was that such a provision could strike a 'delicate balance between the rights of the child and the correlative rights of parents';<sup>91</sup> and by placing emphasis on the *evolving* capacities of the child, parents would still have an important role to play.<sup>92</sup>

When the text of article 5 was adopted during the second reading in 1989, it was labelled a 'general qualifying provision',<sup>93</sup> and placed among the first five provisions to signify its broader function in the interpretation and implementation of all other provisions under the CRC<sup>94</sup>

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.<sup>95</sup>

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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.<sup>96</sup> It has no antecedent and has not been replicated in any subsequent regional or international child rights instruments.<sup>97</sup> 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.<sup>98</sup>

Broadly, article 5 is understood as a mediating provision,<sup>99</sup> 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.<sup>100</sup>

Though the need for such a provision may appear obvious,<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> However, as Van Bueren points out, the framework of article 5 'is

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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 implementation<sup>105</sup>; what right of action would a child have against parents who fail to provide ‘appropriate direction and guidance’?<sup>106</sup> 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.’<sup>107</sup> 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.’<sup>108</sup>

It is likely for these reasons that article 5 has remained something of an ‘enigma’<sup>109</sup> in the 30 years since the CRC was adopted.<sup>110</sup> It has been called ‘unique’,<sup>111</sup> ‘ground-breaking’,<sup>112</sup> ‘innovative’<sup>113</sup> and ‘pivotal’,<sup>114</sup> making a ‘vital contribution’<sup>115</sup> 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),<sup>116</sup> and one of two provisions with ‘all-embracing relevance’ in the implementation of article 19.<sup>117</sup> The CRC Committee has also recognised article 5 as a key element in a holistic

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

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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 343<sup>rd</sup> 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 function<sup>124</sup> warrant further consideration as a general principle,<sup>125</sup> an 'umbrella principle'<sup>126</sup> and a 'cross-cutting standard'.<sup>127</sup> That said, the CRC Committee's treatment of article 5 may simply be a function of the CRC reporting process itself,<sup>128</sup> and the relative infancy of the CRC Communications procedure.<sup>129</sup> As Sutherland puts it: 'Like the capacities of children themselves, our understanding of article 5 and the scope for its application are evolving.'<sup>130</sup>

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?*

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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.<sup>131</sup> 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.'<sup>132</sup> 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.<sup>133</sup>

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.<sup>134</sup> Research methodology explains the theoretical approach, or conceptual framework that drives the research inquiry, and the assumptions that underpin its analysis.

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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.<sup>135</sup>

#### 4.1 Research methodology

As a starting point, a legal doctrinal approach is used as the primary research methodology.<sup>136</sup> Traditional doctrinal scholarship has generally focused on the meaning and content of norms expressed in the law,<sup>137</sup> 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.<sup>138</sup> In human rights law, legal doctrinal analysis continues to be ‘a cornerstone of human rights research methodology’,<sup>139</sup> with its focus on the process of ‘identifying the applicable human rights norms, their legal nature and scope of application and their correct interpretation.’<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup>

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<sup>135</sup> Ibid, 1-2.

<sup>136</sup> 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.

<sup>137</sup> 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.

<sup>138</sup> McNerney-Lankford 2017 (n 136) 39-67, 43.

<sup>139</sup> Andreassen, Sano and McNerney-Lankford 2017 (n 131) 7.

<sup>140</sup> Scheinin 2017 (n 137) 20.

<sup>141</sup> Ibid, 42.

<sup>142</sup> 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.

<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> To this end, the Vienna Convention on the Law of Treaties<sup>146</sup> (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.<sup>147</sup> 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.<sup>148</sup> 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.’<sup>149</sup> 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.<sup>150</sup> Article 32 allows for recourse to preparatory work (‘travaux’) and treaty conclusions (reservations, declarations) as a ‘supplementary means of interpretation.’<sup>151</sup> 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.’<sup>152</sup>

Gardiner warns that the VCLT should not be treated as ‘a step-by-step formula for producing an irrebuttable interpretation in every case.’<sup>153</sup> 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*, 2<sup>nd</sup> 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.<sup>154</sup> 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.'<sup>155</sup> The Vienna Rules should thus be viewed as a framework to guide the interpretative process<sup>156</sup> rather than 'a straightjacket that constrains the application and interpretation of a treaty according to its own rules and procedures.'<sup>157</sup>

(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.<sup>158</sup> 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.<sup>159</sup> Moreover, unlike other areas of international law, there is no adjudicative body to enforce State compliance in human rights instruments.<sup>160</sup> 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.<sup>161</sup>

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.'<sup>162</sup> 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'.<sup>163</sup> Such is the case with the European Convention of Human Rights where there is an established and ongoing

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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.<sup>164</sup>

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.<sup>165</sup> But this does not resolve the question of whether a UN treaty-body,

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<sup>164</sup> Tobin 2010 (n 142) 22.

<sup>165</sup> 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.<sup>166</sup> 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.'<sup>167</sup> 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'<sup>168</sup> 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.'<sup>169</sup> 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.'<sup>170</sup> 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.'<sup>171</sup>

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<sup>166</sup> Tobin 2010 (n 142) 14.

<sup>167</sup> Tobin 2010 (n 142) 7.

<sup>168</sup> Tobin 2010 (n 142) 7.

<sup>169</sup> Tobin 2010 (n 142) 25.

<sup>170</sup> Tobin 2010 (n 142) 26, 28.

<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> 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.’<sup>176</sup>

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).<sup>177</sup>

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.<sup>178</sup>

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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.<sup>179</sup> 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.<sup>180</sup> This will be especially important in situations where terms or issues are either undefined or omitted from the CRC.<sup>181</sup> Described as ‘blind spots’ or ‘burdens of inertia’, these gaps can undermine the principle of effectiveness in the interpretation and implementation of the CRC.<sup>182</sup> 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.’<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup> 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.’<sup>186</sup>

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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,<sup>187</sup> 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.<sup>188</sup> 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;<sup>189</sup> (2) five hundred and sixty-eight Concluding Observations<sup>190</sup> 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;<sup>191</sup> (4) reports and recommendations from 23 Days of General Discussion held between 1993 and 2018;<sup>192</sup> (5) treaty reporting guidelines issued by the CRC Committee between 1996 and 2015;<sup>193</sup> (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](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](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 343<sup>rd</sup> 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.<sup>194</sup> Third, it relies on scholarly literature on article 5,<sup>195</sup> 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,

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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](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](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 20<sup>th</sup> 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 25<sup>th</sup> 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’<sup>196</sup> 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-

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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'<sup>197</sup> 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',<sup>198</sup> 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.

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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',<sup>199</sup> 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

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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.



