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

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ABSTRACT

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

12 CRC, preamble paras 4

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

14 Tobin, 2013 (n 6) 424.

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

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

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

18 Lopatka, 1996 (n 6) 255.

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

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

21 Article 5, CRC.

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

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

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

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

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

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

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

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

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

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

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

1 DRAFTING HISTORY – FINDING A COMMON GROUND FOR CARERS

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

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

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

30 Ibid.

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

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

33 CRC Working Group Report 1988, para 242

34 CRC Working Group Report 1988, para 242.

35 CRC Working Group Report 1988, para 242..

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

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

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

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

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

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

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

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

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

38 Ibid, para 4.

39 Ibid, para 6.

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

41 Cantwell and Holzscheiter 2008 (n 37) 32.

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

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

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

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

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

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

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

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

45 Van Bueren 1995 (n 2) 71.

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

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

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

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

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

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

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

48 Article 5, CRC.

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

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

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

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

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

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

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

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

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

55 Detrick 1999 (n 22), 121.

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

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

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

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

Since then, the CRC Committee has consistently affirmed that

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

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

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

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

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

60 Ibid, para 2.1

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

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

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

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

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

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

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

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

66 General Comment No. 14, para 15.

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

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

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

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

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

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

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

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

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

70 General Comment No. 14, para 59.

71 General Comment No. 23, para 27.

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

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

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

73 General Comment No. 23, para 4

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

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

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

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

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

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

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

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

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

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

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

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

3 RECOGNISING INFORMAL CARERS ALONGSIDE PARENTS

3.1 Providing parental support and assistance to informal carers

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

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

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

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

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

⁸⁴ See Article 18(1) of the CRC.

⁸⁵ Article 27(2) of the CRC.

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

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

⁸⁸ Tobin, 2013 (n 6) 425.

⁸⁹ Ibid.

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

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

⁹⁰ General Comment No. 7, para 15.

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

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

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

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

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

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

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

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

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

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

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

⁹⁷ General Comment No. 7, para 26.

⁹⁸ General Comment No. 14, para 61.

⁹⁹ General Comment No. 14, para 61.

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

¹⁰¹ General Comment No. 13, para 5.

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

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

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

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

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

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

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

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

105 Henaghan 2020 (n 94) 609.

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

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

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

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

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

3.3.3 *Addressing risks of child-offending*

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

¹⁰⁸ General Comment No. 13, para 59.

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

¹¹⁰ General Comment No. 15, para 6.

¹¹¹ General Comment No. 15, para 67.

¹¹² General Comment No. 15, para 61.

¹¹³ General Comment No. 15, para 78.

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

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

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

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

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

116 General Comment No. 24, para 9.

117 General Comment No. 24, para 10.

118 General Comment No. 24, para 11

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

120 Ibid.

121 General Comment No. 24, para 57.

122 General Comment No. 24, para 57.

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

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

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

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

4 RECOGNISING INFORMAL CARERS FOR CHILDREN WITHOUT PARENTAL CARE

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

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

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

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

126 Cantwell and Holtzscheiter 2008 (n 37) 8.

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

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

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

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

127 Cantwell and Holzscheiter 2008 (n 37) 36.

128 Tobin 2019 (n 39) 734.

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

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

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

132 Cantwell and Holtzscheiter 2008 (n 37) 35.

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

134 Cantwell and Holtzscheiter 2008 (n 37) 8.

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

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

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

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

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

136 General Comment No. 3, para 34.

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

138 General Comment No. 14, para 60.

139 General Comment No. 14, para 70.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

