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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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INTRODUCTION

This chapter undertakes an interpretative analysis of article 5, discussing its scope, content and function under the United Nations Convention on the Rights of the Child (CRC).¹ Article 5 can be explained in two ways. It affirms the special role that parents and family play in the realization of children's rights, recognising their right to provide direction and guidance to their child. However, it also introduces a framework to navigate the parenting relationship in a manner that recognises the child's status as a rights holder with evolving capacities in the exercise of rights under the CRC. Viewed this way, article 5 does not impose a legal obligation on States as much as it provides a framework that informs the scope and content of other legal obligations under the CRC. It is likely for this reason that article 5 has been called a 'cross-cutting standard'² and 'umbrella'³ provision, 'under the shadow of which the remaining provisions of the Convention are to be applied.'⁴

This dissertation suggests that article 5 functions as a framework in two broad respects under the CRC: (1) it provides an avenue to identify a child's carers, ensuring that 'whoever is primarily responsible for the child, whatever the nature of their exact legal relationship to the child, is recognised and protected under the CRC'⁵; (2) it navigates the parenting relationship between a child and her carers, ensuring children are respected and supported as individuals within the family, with evolving capacities in the exercise of their rights under the CRC.

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- 1 United Nations Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 U.N.T.S 3 ('CRC').
 - 2 Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin: A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25(2) *International Journal on the Rights of the Child*, 285-306, 302. DOI: 10.1163/15718182-02502011.
 - 3 Geraldine Van Bueren, *The International Law on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 1995); Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Hague: Martinus Nijhoff Publishers, 1999); Philip Alston, 'The Legal Framework of the Convention on the Rights of the Child'(1992) 91/2 *United Nations Bulletin of Human Rights: The Rights of the Child* 1-15, 11.
 - 4 Philip Alston, (1994) 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' 8 *International Journal of Law, Policy and the Family* 1-25, 11.
 - 5 Detrick 1999 (n 3).

As a starting point, it is worthwhile to revisit the text of article 5 of the CRC

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

Drawing together the four academic manuscripts that make up this dissertation, I engage in an analysis of article 5, relying on an interpretative methodology that encompasses four dimensions:

- (1) *Interpretative principles* – the rules of treaty interpretation, the principles of non-restrictive interpretation, effectiveness and dynamic interpretation, and the work of the CRC Committee as an authoritative legal source for the interpretation and implementation of the CRC;
- (2) *Practicability* – the need for a clear, practicable and implementable framework for children’s rights;
- (3) *Coherence* – the importance of coherence both in reasoning and alignment within the CRC and international law;
- (4) *Context sensitivity* – the value of a flexible and adaptable interpretation that accommodates diverse cultural and contextual settings.

This chapter is presented in five parts. Part I contemplates the nature of the right created under article 5 of the CRC. It suggests that article 5 should be understood as a right of the child to receive parental guidance and direction, rather than a right of parents to have their parental authority respected by the State.

Part II examines the nature of the legal obligation created under article 5 of the CRC. It begins by considering the meaning of the legal obligation to ‘respect’ under international law. It then examines the specific obligation to ‘respect’ under article 5 of the CRC. It suggests that the relational dimension of article 5 poses a challenge to States seeking to implement their legal obligations into domestic law. It is thus argued that while article 5 embodies a legal obligation to ‘respect’, it is practically implemented through other provisions of the CRC. Interrogating the work of the CRC Committee, it is posited that article 5 is not viewed as a stand-alone legal provision, but as a guiding framework that navigates the scope and content of other provisions surrounding the relationship between a child and her carers under the CRC. To this end, the CRC Committee has derived two broad functions for article 5 in its interpretation and implementation of other provisions under the CRC.

Part III focuses on the first broad function of article 5 – an inclusive framework to identify a child’s carers under the CRC. Article 5 reflects an understanding that parenting practices and family structures may not always be reflected

in formal legal systems: it provides a framework that ensures whoever is primarily responsible for the child, 'whatever the nature of their exact legal relationship to the child'⁶ will be recognised under the CRC. Its formulation, however, does not displace the role of parents or legal guardians primarily responsible for the child. The use of 'or' (rather than 'and') within article 5, suggests a disjunctive approach towards informal carers, deferring to parents in the first instance, and in the alternative, 'or where applicable' to informal carers within the 'extended family or community'[emphasis added]. The qualification of 'as provided for by local custom' further denotes an intention to capture only those informal carers genuinely caring for the child, and who are recognised as such within the child's community. At the same time, an argument could be made for using article 5 to recognise informal carers where it contributes to children securing the enjoyment of their rights across diverse socio-cultural settings. Drawing on a case study – paediatric clinical research in Thailand, we consider the value of article 5 as a legal framework to recognise informal carers acting as primary caregivers *alongside* parents in the informed consent process in paediatric clinical research.

Part IV focuses on the second broad function of article 5 – a framework to navigate the parenting relationship that affirms the child's status as an individual rights-holder within the family with evolving capacities in the exercise of rights under the CRC. In this section, we underscore that the scope of article 5 is the family setting. It provides a model of parenting that promotes a parent-child decision-making process grounded in participatory dialogue, collaboration and mutual respect. Using medical research as a case study, we consider how article 5 could be applied to navigate the parent-child decision-making process in proxy informed consent. It is suggested that the CRC framework, and more specifically article 5, present a different vantage point to view the proxy informed consent process:

- 1) it introduces boundaries around the decision-making authority of a proxy;
- 2) it recognises the child as an active participant in the informed consent process, modelling a parent-child decision-making process that is collaborative, participatory and based on mutual respect;
- 3) it fosters respect for children's autonomy, recognising that every child has unique and evolving capacities which must be taken into account in the decision-making process.

In sum, article 5 offers a model of parenting that encourages what Daly terms as 'capacity rights', enabling children to receive the guidance and support needed to assume progressive agency over the exercise of their rights under the CRC.⁷ Viewed this way, article 5 functions as a framework that informs

6 Detrick 1999 (n 3) 121.

7 Aoife Daly, 'Assessing Children's Capacity,' (2020) 28(3) *International Journal of Children's Rights* 471-499, 480.

not only the content but the manner in which parenting support and assistance is provided under the CRC.

Part V examines the scope and function of ‘the evolving capacities of the child’ referenced in article 5 (and article 14(2)) of the CRC. I suggest that the CRC Committee’s treatment of ‘evolving capacities’ goes well beyond the domain of parental guidance and indeed the scope and function of article 5 of the CRC. We query whether the concept of ‘evolving capacities’ finds its genesis in article 5, or whether it is embedded more broadly (and implicitly) within the framework of the CRC. The idea that a child’s capacities evolve and should be recognised accordingly, will likely be relevant to not just parental guidance, but the realization of all rights under the CRC. Indeed, the concept of ‘evolving capacities’ has found expression in other areas of the CRC, such as the assessment of the best interests of the child under article 3(1) and the child’s right to be heard under article 12 of the CRC. It is thus argued that the reference to ‘evolving capacities’ under article 5 is not exclusive to parental guidance, but forms part of a broader overarching principle embedded within the CRC. At the same time, the text of the CRC does not explicitly recognise a broad principle of evolving capacities, similar to that of the best interests of the child, nor does the CRC Committee discuss its meaning and scope. There are legitimate concerns that imputing a broad principle of ‘evolving capacities’, could be used to obstruct rather than enable children’s enjoyment of rights under the CRC.⁸ For example, the CRC Committee’s tendency to rely on ‘open norms’ such as ‘evolving capacities’ in tandem with its firm recommendations on minimum age standards has led to a confused and somewhat conflicted approach to age limits that has had implications for children’s rights and protections, particularly in judicial proceedings.⁹ It is thus posited that while some recognition of a child’s evolving capacities will likely be both inevitable and necessary for the realization of children’s rights, more guidance is needed from the CRC Committee on the meaning and scope of ‘the evolving capacities of the child’ before it can be embraced as an overarching or enabling principle of the CRC.

8 Noam Peleg, *The Child’s Right to Development* (Cambridge: Cambridge University Press, 2019) 74; Kay Tisdall, ‘Challenging Competency and Capacity? Due Weight to Children’s Views in Family Law Proceedings’ (2018) 26 *International Journal of Children’s Rights* 159-182; Priscilla Alderson, ‘Giving Children’s Views “Due Weight” in Medical Law’ (2018) 26 *International Journal of Children’s Rights* 16-37.

9 Stephanie Rap, Eva Schmidt & Ton Liefwaard, ‘Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?’ (2020) 1 *Erasmus Law Review* 4-11, DOI: 10.5553/ELR000158; see also Ursula Kilkelly, ‘“Evolving Capacities” and “Parental Guidance” in The context of Youth Justice’ (2020) 28 *International Journal of Children’s Rights* 500-520, 509.

1 THE NATURE OF THE RIGHT CREATED UNDER ARTICLE 5 OF THE CRC

A plain reading of article 5 suggests it creates two different rights-based entitlements: a right of parents and other carers to have their 'responsibilities, right and duties' to provide parental guidance respected by the State; and a right of children to receive appropriate direction and guidance consistent with their evolving capacities in the exercise of rights under the CRC.

However, when article 5 is positioned within the broader text of the CRC, (the preamble and substantive provisions) and due consideration is given to the object and purpose of the Convention,¹⁰ it is understood as a right of the child to receive guidance and direction in the exercise of rights, rather than a right of parents (and other carers) to have their rights and responsibilities respected by the State.¹¹ It recognises that a child's enjoyment of rights will be deeply connected to and dependent upon the relationships and family environment in which she grows up.¹² This is expressed in the opening paragraphs of the preamble, which affirm 'the family, as the fundamental group of society and the natural environment for the growth and well-being of its members and particularly children', and declare that '...for the full and harmonious development of his or her personality, [a child] should grow up in a family environment, in an atmosphere of happiness, love and understanding'.¹³ This is further corroborated in the discussions of the CRC Working Group, in which delegates expressed concern that 'the family must not be given arbitrary control over the child' under the CRC.¹⁴

The ambition of article 5 was to acknowledge the relational dimension of children's rights, striking a delicate balance that accords respect to the special role of parents and family, while also affirming the child's status as an independent rights-holder under the CRC. The rights conferred to parents (and other

10 Article 31(1), 31(2), and 31(3), Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 U.N.T.S 331 ('VCLT'); see also Martin Scheinin, 'The art and science of interpretation in human rights law' in in Bård A. Andreassen, Hans-Otto Sano & Siobhán McInerney-Lankford (eds) *Research Methods in Human Rights: A Handbook* (Cheltenham: Edward Elgar Publishing Ltd 2017) 17-37, 23.

11 John Tobin and Sheila Varadan, 'Article 5: The Right to Parental Direction and Guidance Consistent with a Child's Evolving Capacities' in John Tobin and Philip Alston (eds) *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 159-185, 161.

12 John Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395-441, 424.

13 Preamble, para 6, CRC (n 1).

14 United Nations Commission on Human Rights, 'Report of the Working Group on a draft convention on the rights of the child'(1987), E/CN.4/1987/25, para 106; see also Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 28(2) *International Journal of Children's Rights* 306 - 338, 313.

carers) should thus be understood as ‘limited’ and ‘functional’,¹⁵ linked to and dependent upon the child’s enjoyment and exercise of rights under the CRC.¹⁶

The CRC Committee affirms this reading of article 5, recognising a right of children, ‘to be directed and guided in the exercise of their rights by caregivers, parents and community members, in line with children’s evolving capacities.’¹⁷ The CRC Committee further elaborates on the ‘functional’ and ‘limited’ nature of parental rights

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child ... While a young child generally requires more guidance than an older child it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations. Parents (and others) should be encouraged to offer “direction and guidance” in a child-centred way, through dialogue and example, in ways that enhance young children’s capacities to exercise their rights ...¹⁸

Viewed this way, article 5 is somewhat radical. It breaks from historical conceptions of the parent-child relationship, in which parents were conferred with unfettered rights over their children, and the child was viewed as a passive recipient of care within the family. In its place, it offers a parenting model that is not dissimilar to a trustee or fiduciary relationship, in which parents (and other carers) exercise authority not as independent rights-holders but as duty-bearers to their child in the child’s exercise of rights under international law. It is likely for this reason that article 5 has been described as innovative,¹⁹ making a vital contribution to the realization of children’s rights.²⁰ But it is also likely for the same reason that article 5 poses a challenge for those seeking to translate its relational dimensions into a practicable and implementable policy within the domestic legal framework.

15 Roberta Ruggiero, Diana Volonakis and Karl Hanson, ‘The inclusion of “third parties”’: the status of parenthood in the Convention on the Rights of the Child’ in E. Brems, E. De-smet and W. Vanderhole (eds), *Children’s Rights Law in the Global Human Rights Landscape* (London: Routledge, Taylor and Francis, 2017) 73.

16 Tobin and Varadan 2019 (n 11) 161.

17 CRC Committee, General comment No. 13 (2011), The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, para 59.

18 CRC Committee, General Comment No. 7 (2005), Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, para 17.

19 Garton Kamchedzera, ‘Article 5: The Child’s Right to Appropriate Direction and Guidance’ in André Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans, Mieke Verheyde, and Bruce Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (Leiden: Martinus Nijhoff Publishers, 2012) 6.

20 E. Sutherland, The Enigma of Article 5 of the United Nations Convention on the Rights of The Child’ (2020) 28(3) *International Journal of Children’s Rights* 447-470, 467. DOI:10.1163/15718182-02803008.

2 THE NATURE OF THE LEGAL OBLIGATION UNDER ARTICLE 5

Article 5 requires States to ‘respect’ the responsibilities, rights and duties of parents and other carers. The obligation to ‘respect’ is found in other international human rights instruments;²¹ as such it is worth considering its meaning within the broader international human rights legal framework before contemplating its scope and content within the CRC.

2.1 The obligation to respect under international law

Under international law, the obligation to ‘respect’ is generally framed in negative terms, entailing a duty to refrain from conduct. Broadly it requires States to refrain from conduct that violates rights²² and to avoid measures that restrict or prevent the enjoyment of rights.²³ The UN Human Rights Committee has clarified that ‘[w]here such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of ... rights’²⁴ and under no circumstances should restrictions be applied in a manner that would impair the essence of the right.²⁵

However, an obligation to ‘respect’ may also encompass positive duties or obligations. The European Court of Human Rights has held that States hold positive obligations to ‘secure’ the enjoyment of Convention rights under article 1, which is broader in scope than ‘merely abstaining from interference’.²⁶ As first explained in 1979 in *Marckx*,²⁷ in the context of respect for family life

... the object of [Article 8] is ‘essentially’ that of protecting the individual against arbitrary interference by public authorities ... Nevertheless it *does not merely compel the State to abstain from such interference*: in addition to this primarily negative

21 Article 18(4), United Nations International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 (‘ICCPR’); see also Article 13(3) United Nations International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3 (‘ICESCR’).

22 UN Human Rights Committee, General Comment No. 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 6-7.

23 UN Committee on Economic, Social and Cultural Rights, General Comment No. 13, ‘The right to education (article 13 of the Covenant)’, 8 December 1999, E/C.12/1999/10, para 47.

24 HRC, General Comment No. 31, para 6.

25 *Ibid.*

26 Laurens Lavrysen, *Human rights in a positive state: rethinking the relationship between positive and negative obligations under the European Convention on Human Rights* (Intersentia: Cambridge, 2016) 4.

27 *Marckx v Belgium* (Plenary), no. 6844/74 (ECHR, June 1979).

undertaking, there may be positive obligations inherent in an effective ‘respect’ for family life.²⁸

As Fenton-Glynn explains, the doctrine of positive obligations is one of four primary principles of interpretation of the European Court of Human Rights, and is described as a ‘hallmark of the European Convention on Human Rights.’²⁹ It recognises that ‘in order to “secure” the Convention rights to all individuals ... as is required under Article 1 – it is not enough to refrain from acting, but states must also take certain positive steps to ensure their effective enjoyment.’³⁰ It involves both procedural and substantive obligations, including an ‘obligation to provide effective mechanisms for the prevention, detection and reporting of abuses of Convention rights, as well as to conduct effective investigations in response to any allegations.’³¹ It also requires States to ‘put in place appropriate safeguards to protect individuals from infringement on the part of private actors.’³² The Inter-American Court elaborates on this point in its often cited case, *Velásquez-Rodríguez*, where it affirms that States must not only refrain from conduct that violates rights, but also take due diligence measures to ‘prevent, investigate and punish violations’, as well as steps to restore the rights of victims through compensation and redress.³³ In the context of children’s rights, Fenton-Glynn suggests that such measures will ‘act as a limit on the action of parents, teachers and other individuals who may control their day-to-day lives.’³⁴

The doctrine of positive obligations is not dissimilar to the general obligation to ‘respect and ensure’ under the United Nations International Covenant on Civil and Political Rights.³⁵ The UN Human Rights Committee³⁶ has stated that while an obligation to ‘respect’ will entail a negative duty, an obligation to ‘ensure’ will encompass a positive duty to undertake measures that both protect and fulfil the enjoyment of rights. An obligation to protect will entail States taking measures that prevent non-State actors or third parties from engaging in conduct that violates or impairs the enjoyment of rights; and an obligation to fulfil will require active measures to secure the enjoyment of

28 *Marckx v Belgium*, para 31.

29 Claire Fenton-Glynn, ‘Introduction’ in *Children and the European Court of Human Rights* (Oxford: Oxford University Press, 2021) 5, 6; see also Lavrysen 2016 (n 30).

30 Fenton-Glynn 2021 (n 29) 5.

31 *Ibid*, 5, 6.

32 *Ibid*, 5.

33 Inter-American Court of Human Rights, *Velásquez-Rodríguez v Honduras*, 29 July 1988, Series C No. 1, para 166.

34 Fenton-Glynn 2021 (n 29) 5.

35 See Article 2(1), ICCPR.

36 The UN Human Rights Committee is a body of independent human rights experts tasked with monitoring States parties’ implementation of legal obligations under the ICCPR, accessed at : <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>; See articles 28-45, ICCPR.

rights and procedural measures to provide remedies and redress when rights are violated.³⁷ Thus, an obligation to ‘respect and ensure’ encompasses both negative and positive duties, including a due diligence component that requires States to take measures to prevent, investigate, punish and provide redress for human rights violations and abuses caused by private persons or other entities.

2.2 The obligation to respect under article 5 of the CRC

Any interpretation of the CRC will necessarily be guided by principles of legal interpretation under international law. In this regard, the obligation to ‘respect’ under article 5 should be broadly understood as a duty to ‘refrain’ from conduct that interferes with the enjoyment of rights under the CRC. However, it may also entail positive duties that ensure the effective enjoyment of rights, which will likely involve preventing non-State entities (including parents and other carers themselves) from interfering with rights, and due diligence measures to provide redress where rights are violated.

Within the framework of the CRC, it has been suggested that the general obligation to ‘respect and ensure’ rights under article 2(1) applies to the obligation to ‘respect’ under article 5 of the CRC.³⁸ If this is the case, then the obligation to ‘respect’ under article 5 will require States to not only refrain from conduct that interferes with the child’s right to parental guidance and the correlative rights of parents and other carers, but also to take active measures to protect and fulfil the rights enumerated under article 5 of the CRC.³⁹

However, imputing the broader obligation to ‘respect and ensure’ under article 2(1) onto article 5 seems questionable. Not only is the text of article 5 explicit – ‘States parties shall respect’ – but the relational dimension of article 5 makes it difficult to discern the precise scope of an obligation to ‘ensure’ rights and to whom the legal obligation would be owed. If the obligation to ‘respect and ensure’ is owed to parents, then measures to protect and fulfil the rights to provide direction and guidance would likely overlap with other legal obligations relating to parents under articles 7, 8(1), 9(1), 9(3), 10(1), 10(2), 10(3), 18(1), 18(2), 18(3), 27(3) and 19(2), raising the question of whether article 5 ‘adds anything’ to the CRC.⁴⁰ Moreover, introducing an obligation to ‘respect and ensure’ on the right to provide guidance and direction would likely involve a considerable amount of ‘reading-in’, stretching the text of article 5

37 HRC, General Comment No. 31, para 7-9.

38 Tobin and Varadan 2019 (n 11) 165; see also Samantha Besson and Eleonor Kleber, ‘Article 2: The Right to Non-Discrimination’ in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 21-40.

39 Ibid.

40 Sutherland 2020 (n 20) 448.

well beyond its scope and function to allow for positive measures to ‘protect’ and ‘fulfil’ the rights of parents and other carers under article 5 of the CRC.

If the legal obligation to ‘respect and ensure’ is owed to the child, then there are practical concerns over how a State will implement measures to protect and fulfil a child’s right to receive guidance within the family that do not amount to interference with the rights to privacy and family. Indeed, even a narrow reading of a legal obligation to ‘respect’ invites some concern over how States will implement due diligence measures to investigate, punish and provide redress for rights violations of article 5 under the CRC.

Commentators have questioned the practicality and feasibility of the legal obligation created under article 5 of the CRC. Detrick queries the nature of the legal obligation itself: ‘it does not constitute a comprehensive recognition of the “responsibilities, rights and duties” of parents and other carers as this is found elsewhere in the CRC⁴¹ nor does it impose specific legal duties on parents in respect of the manner in which they provide direction and guidance, as ‘an international convention cannot purport to impose, directly, any duties upon entities other than its States parties.’⁴² For Van Bueren, the concern lies with enforcing a rights-based obligation in a family setting, where children depend on parents and family for their upbringing and development. For instance, would article 5, ‘give children in [S]tates which incorporate the Convention a right of action against their parents for failing to provide “appropriate direction and guidance”?’⁴³ McGoldrick warns

the implementation [of article 5] is fraught with difficulty because those charged with providing “appropriate direction and guidance” to the child ... may well have an interest, personal or institutional in ensuring that the child does not exercise its rights.⁴⁴

Eekelaar makes a similar observation, noting an inherent tension within article 5: ‘the difficulty lies in the assumption that these adults will promote these rights.’⁴⁵ Article 5 ‘allows the adults “direction and guidance”’: but this must be *in the exercise* of the rights, not in derogation of rights.⁴⁶

What then is the nature of the legal obligation created under article 5 of the CRC? To answer this question, we look to the UN Committee on the Rights of the Child. Recalling the interpretative methodology set out in Chapter 1,

41 Detrick 1999 (n 3) 119.

42 Detrick 1999 (n 3) 119

43 Van Bueren 1995 (n 3) 50.

44 McGoldrick, ‘The United Nations Convention on the Rights of the Child’, (1991) 5 *International Journal of Law and Family* 132, 138; Detrick 1999 (n 3); see also Van Bueren 1995 (n 3) 49-50.

45 John Eekelaar, ‘The Importance of Thinking that Children have Rights’ in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press: Oxford, 1992) 221-235, 223.

46 *Ibid*, 223.

the CRC Committee holds *inherent power* to interpret the CRC pursuant to its mandate under article 43 and article 45(d) to monitor States' progress in the implementation of legal obligations under the CRC. Thus, the work of the CRC Committee – recommendations, general comments, jurisprudence and institutionalised practices – provides an authoritative legal source for the interpretation and implementation of provisions under the CRC.⁴⁷

2.3 The CRC Committee's approach to the legal obligation created under article 5

Reviewing the work of the CRC Committee, one finds a reluctant response to the question of what legal obligation is created under article 5 of the CRC. In its treaty-monitoring role, the CRC Committee accords little priority to States' implementation of article 5.⁴⁸ Reviewing the 568 Concluding Observations issued between 1993 and 2020, the CRC Committee references article 5 in just eight instances,⁴⁹ and has yet to issue a standalone recommendation in respect of article 5 under the CRC. Sutherland attributes the 'low profile' of article 5 to the reporting process itself,⁵⁰ drawing attention to the strict word limit and rigid reporting format, which do not allow for a careful consideration

47 See Chapter 1 – Introduction; see also Scheinin 2017 (n 10) 29, 30.

48 In the most recent version of the Treaty-specific guidelines on periodic reports by States parties under article 44, paragraph 1(b) of the Convention on the Rights of the Child, article 5 is embedded in a cluster of 10 provisions under Part V, 'Family Environment and Alternative care' the largest of the eight thematic sections (arts. 5, 9, 10, 11, 18(1), 18(2), 20, 21, 25, 27(4)). For reference, the thematic sections are broken down as follows: (1) General measures of implementation (arts. 4, 42 and 44(6)); (2) Definition of the child (art. 1); (3) General principles (arts. 2, 3, 6 and 12); (4) Civil rights and freedoms (arts. 7, 8, 13, 14, 15, 16 and 17); (5) Violence against children (arts. 19, 24(3), 28(2), 34, 37(a) and 39); (6) Family environment and alternative care (arts. 5, 9, 10, 11, 18(1), 18(2), 20, 21, 25, 27(4)); (7) Disability, basic health and welfare (arts. 6, 18(3), 23, 24, 26, 27(1), 27(2), 27(3)); (8) Education (arts. 28, 29, 30 and 31); (9) Special protection measures (arts. 22, 30, 32, 33, 35, 36, 37(b), 37(c), 37(d), and 38, 39 and 40), see UN Committee on the Rights of the Child, 'Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b) of the Convention on the Rights of the Child', 3 March 2015, UN Doc. CRC/C/58/Rev. 3.

49 Between 1993 and 2020, the CRC Committee referenced article 5 in 8 instances of its 566 concluding observations: CRC Committee, Concluding Observations: Holy See, 27 November 1995, CRC/C/15/Add.46, para 13; CRC Committee, Concluding Observations: Luxembourg, 24 June 1998, CRC/C/15/Add.92, para 13; CRC Committee, Concluding Observations: Democratic People's Republic of Korea, 24 June 1998, CRC/C/15/Add.88, para 18; CRC Committee, Concluding Observations: Sierra Leone, 24 February 2000, CRC/C/15/Add.116, para 49; CRC Committee, Concluding Observations: Cyprus, 2 July 2003, CRC/C/15/Add.205, para 37-38; CRC Committee, Concluding Observations: Saint Lucia, 21 September 2005, CRC/C/15/Add.258, para 36-37; CRC Committee, Concluding Observations: Oman, 29 September 2006, CRC/C/OMN/CO/2, para 37(e); CRC Committee, Concluding Observations: Malaysia, 25 June 2007, CRC/C/MYS/CO/1, para 51.

50 Sutherland 2020 (n 20) 467.

of every provision of the CRC. As Sutherland explains, as ‘one of ten enumerated points for the cluster, many of the other points, like ‘Separation from parents (Art. 9)’, ‘Children deprived of a family environment (Art. 20)’ and ‘Adoption (Art. 21)’ may require more explanation.’⁵¹

Reviewing the General Comments of the CRC Committee, one finds a similarly opaque response to the question of what legal obligation is created under article 5 of the CRC. Article 5 is referenced 28 times across 11 of the 25 General Comments.⁵² However, in only three instances does the CRC Committee engage in a standalone discussion on the rights and obligations created under article 5 of the CRC.⁵³ In the remaining 25 instances, the CRC Committee invokes article 5 alongside its discussion of other provisions, namely article 18(2), article 27(3), article 19(2), article 12, article 3(1), article 20 and article 37 of the CRC.

Examining each of the three instances in which the CRC Committee specifically discusses article 5, the focus appears to be on the rights, responsibilities and duties of parents, leaving open the question of what legal obligations States hold in respect of article 5 of the CRC. In its General Comment No. 4 on adolescent health and development, the CRC Committee emphasises that ‘parents or other persons legally responsible for the child need to fulfil with care their rights and responsibility to provide direction and guidance to their adolescent

51 Sutherland 2020 (n 20) 462.

52 CRC Committee, General Comment No. 1 (2001) Article 29(1): The Aims of Education, 17 April 2001, CRC/GC/2001/1, para 6; CRC Committee, General Comment No. 4, Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, para 15; CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1), 29 May 2013, CRC/C/GC/14, paras 1, 7, 9, 15; CRC Committee, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, paras 10, 15, 16, 17, 22, 29(a), 29(b); CRC Committee, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para.2; and 37, inter alia), 2 March 2007, CRC/C/GC/8, paras 8 and 47; CRC Committee, General Comment No. 11, Indigenous children and their rights under the Convention, 12 February 2009, CRC/C/GC/11, para 46; CRC Committee, General Comment No. 12 (2009) The right of the child to be heard, 20 July 2009, CRC/C/GC/12, paras 69, 84; CRC Committee, General Comment No. 13 (2011) The right of the child to freedom from all forms of violence, 18 April 2011, CRC/C/GC/13, paras 7(b), 59, 66; CRC Committee, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)*, 29 May 2013, CRC/C/GC/14, paras 44, 59; CRC Committee, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20*, paras 18, 19, 20, 50; CRC Committee, General Comment No. 21 (2017) on children in street situations, 21 June 2017, CRC/C/GC/21, paras 15, 35; CRC Committee, General Comment No. 25 (2021) Children’s rights in relation to the digital environment, 13 August 2020, CRC/C/GC/25, paras 20, 91, 92.

53 General Comment No. 4, para 7; General Comment No. 7, para 17; General Comment No. 20, paras 18, 19, 20.

children in the exercise by the latter of their rights.⁵⁴ To this end, the CRC Committee recognises an obligation on parents and other carers 'to take into account the adolescents' views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop.'⁵⁵ The CRC Committee does not directly address the legal obligation of States parties under article 5 of the CRC. Given that international legal instruments cannot directly impose legal obligations on non-State entities,⁵⁶ this raises the question of how the rights and responsibilities placed on parents and carers will be enforced, and what legal obligations States will hold in this regard under article 5 of the CRC.

In its General Comment No 7 on implementing children's rights in early childhood, the CRC Committee treats article 5, not as a legal provision, but as a principle that guides how parental guidance and direction is provided in respect of other provisions of the CRC:

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to a child. These adjustments take account of a child's interests and wishes as well as the child's capacities for autonomous decision-making and comprehension of his or her best interests ... Parents (and others) should be encouraged to offer "direction and guidance " in a child-centred way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (Art. 12) and their right to freedom of thought, conscience and religion (Art. 14).⁵⁷

The CRC Committee provides its most detailed analysis of article 5 in its General Comment No. 20 on the implementation of the rights of the child during adolescence

Article 5 of the Convention requires that parental direction and guidance be provided in a manner consistent with the evolving capacities of the child. The Committee defines evolving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights. The Committee has argued that the more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing. The Committee emphasizes that the right to exercise increasing levels of responsibilities does not obviate States' obligations to guarantee protection. Gradual emergence from the protection of the family or another care environment, together with relative

54 General Comment No. 4, para 7.

55 General Comment No. 4, para 7.

56 Detrick 1999 (n 3); Alston 1992 (n 3); see also Ian Brownlie, *Principles of Public International Law*, Seventh ed., (Oxford: Oxford University Press, 2008).

57 General Comment No. 7, para 17.

inexperience and lack of power, can render adolescents vulnerable to violations of their rights. The Committee stresses that engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them will lead to more effective protection. By being guaranteed the right to be heard, to challenge rights violations and to seek redress, adolescents are enabled to exercise agency progressively in their own protection.

In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacities.⁵⁸

Even in this extended discussion, the CRC Committee does not directly address or acknowledge a specific legal obligation to 'respect' under article 5. Rather it relies on article 5 as a framework to inform the interpretation and implementation of other provisions of the CRC. In its most recent General Comments No. 25 on children's rights in relation to the digital environment, the CRC Committee is more explicit in its use of article 5 as a framework, and 'evolving capacities' as a guiding principle to inform States' legal obligations to provide support and assistance to parents

States should take into account that support and guidance provided to parents and caregivers should be based on an understanding of the specificity and uniqueness of parent-child relations. Such guidance should support parents sustaining an appropriate balance between the child's protection and emerging autonomy, based on mutual empathy and respect over prohibition or control. To help parents and caregivers to maintain a balance between parental responsibilities and children's rights, the best interests of the child, applied together with consideration of the child's evolving capacities, should be guiding principles.⁵⁹

Thus, it would appear the CRC Committee does not treat article 5 as a standalone legal obligation, but rather as a framework that guides the interpretation and implementation of other legal obligations under the CRC. So, while article 5 embodies a legal obligation to 'respect', it is practically implemented through other provisions of the CRC.

That article 5 should be understood as a guiding framework rather than a standalone legal provision may offer an alternate explanation for its 'low profile' in the Concluding Observations of the CRC Committee. Indeed, reviewing the 568 Concluding Observations again, three additional observations can

58 General Comment No. 20, paras 18-20.

59 General Comment No. 25, para 92.

be made. First, the CRC Committee, while not directly referencing article 5, frequently invokes its components, notably the 'evolving capacities of the child' to frame its concluding observations in respect of other provisions under the CRC.⁶⁰ Second, in the eight instances where the CRC Committee explicitly references article 5, it does so in the context of other provisions of the CRC.⁶¹ Third, the role of extended family, which is referenced just once in the CRC

60 The CRC Committee references the 'evolving capacities of the child' in 27 instances, and in the majority of cases, the reference to 'evolving capacities' is delinked from article 5, and instead used in the interpretation of other legal obligations under the CRC, see section 5.1.1., footnotes 164-168.

61 In its Concluding Observation to the Holy See, the CRC Committee referenced article 5 to clarify the scope of States' legal obligations under article 12, stating that the 'rights and prerogatives of parents may not undermine the rights of the child' to express her views and have those views taken into account, see CRC/C/15/Add.46, para 13. In its Concluding Observations to Luxembourg and North Korea, the CRC Committee relied on article 5 alongside articles 3 and 19 to express concern that corporal punishment was not specifically prohibited by law, see CRC/C/15/Add.92, 24 June 1998, para 13 and CRC/C/15/Add.88, 24 June 1998, para 18. In its Concluding Observations to Sierra Leone and Cyprus, the CRC Committee referenced article 5 to require States to take measures under article 18(2) to strengthen the capacities of parents to provide guidance and direction that is appropriate and consistent with children's evolving capacities in the exercise of rights, see CRC/C/15/Add.205, 21 July 2003, para 37-38 and CRC/C/15/Add.116, 24 February 2000, para 49. In its Concluding Observations to Malaysia, Oman, Saint Lucia and Nigeria, the CRC Committee again relied on article 5 to interpret States' legal obligations under articles 18(2) and 42, calling for parental education programmes, family counselling services and awareness-raising campaigns that affirmed children's rights within the family and their status as rights holders with evolving capacities in the exercise of rights, see CRC/C/15/Add.258, 21 September 2005, para 36-37, CRC/C/OMN/CO/2, 29 September 2006, para 37(e), and CRC/C/MYS/CO/1, 25 June 2007, para 51 and CRC/C/NGA/CO/3-4, 21 June 2010, para 49. In its Concluding Observations to Cyprus, the CRC Committee raised concern 'about the traditional and rather paternalistic view of the child held by parents, teachers, authorities and society at large,' referencing article 5 to require States to take 'measures at all levels and public campaigns to raise awareness on the Convention', see CRC/C/15/Add.205, para 37, 38.

under article 5, features prominently in the Concluding Observations,⁶² particularly in respect of States' obligations under article 20 of the CRC.

The remainder of this chapter considers the CRC Committee's treatment of article 5 as a framework to guide the interpretation and implementation of other provisions under the CRC. It suggests the CRC Committee derives two broad interpretative functions for article 5 under the CRC: (1) a framework to identify a child's carers; (2) a framework to navigate the parenting relationship between a child and her carers in a manner that affirms the child's status as an individual rights-holder within the family, with evolving capacities in the exercise of rights under the CRC.

3 A FRAMEWORK TO RECOGNISE CARERS UNDER THE CRC

In Chapter 2, 'There's no place like home: The role of informal carers under the UN Convention on the Rights of the Child', I considered how informal carers have come to be recognised and supported under the CRC. Reviewing the CRC General Comments, there are at least 37 instances,⁶³ in which the

62 Some examples include: CRC Committee, Concluding Observations: Sudan, 9 October 2002, CRC/C/15/Add.190, para 41, 42(a); CRC Committee, Concluding Observations: Eritrea, 2 July 2003, CRC/C/15/Add.204, para 36; CRC Committee, Concluding Observations: Zambia, 2 July 2003, CRC/C/15/Add.206, para 37; CRC Committee, Concluding Observations: Honduras, 3 May 2007, CRC/C/HND/CO/3, para 48(b); CRC Committee, Concluding Observations: Mali, 3 May 2007, CRC/C/MLI/CO/2, para 42(b); CRC Committee, Concluding Observations: Bhutan, 8 October 2008, CRC/C/BTN/CO/2, para 44; CRC Committee, Concluding Observations: Guinea-Bissau, 8 July 2013, CRC/C/GNB/CO/2-4, para 49(b); CRC Committee, Concluding Observations: Cook Islands, CRC/C/COK/CO/2-5, para 34; CRC Committee, Concluding Observations: Micronesia, 3 April 2020, CRC/C/FSM/CO/2, para 44, 45(c); CRC Committee, Concluding Observations, Ethiopia, CRC/C/ETH/CO/3, para 37, 38(b); CRC Committee, Concluding Observations: Uganda, 23 November 2005, CRC/C/UGA/CO/2, para 42(b); CRC Committee, Concluding Observations: Congo, 20 October 2006, CRC/C/COG/CO/1, para 47(a); CRC Committee, Concluding Observations: Swaziland, 16 October 2006, CRC/C/SWZ/CO/1, para 40, 41(b); CRC Committee, Concluding Observations: Eritrea, 23 June 2008, CRC/C/ERI/CO/3, para 45(a); CRC Committee, Concluding Observations: Malawi, 27 March 2009, CRC/C/MWI/CO/2, para 41, 42(b); CRC Committee, Concluding Observations: Mauritania, 17 June 2009, CRC/C/MRT/CO/2, para 47(a); CRC Committee, Concluding Observations: Nepal, 21 September 2005, CRC/C/15/Add.261, para 52; CRC Committee, Concluding Observations: Mexico, 8 June 2006, CRC/C/MEX/CO/3, para 38, 39, 40.

63 CRC Committee, General Comment No. 3 (2003) HIV/AIDS and the rights of the child, 17 March 2003, CRC/GC/2993/3, paras 33, 34; CRC Committee, General Comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child, 1 July 2003, CRC/GC/2003/4, para 15; CRC Committee, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, 1 September 2005, CRC/GC/2005/6, paras 7, 8, 34, 40, 39; CRC Committee, General Comment No. 7 (2005) Implementing child rights in early childhood, 20 September 2006, CRC/C/GC/7/Rev.1, paras 8, 15, 19, 20; CRC Committee, General Comment No. 8 (2006), The right of the child to protection from corporal punishment and other cruel or

CRC Committee applies a wider reading to ‘parent’,⁶⁴ ‘family’⁶⁵ or ‘family environment’,⁶⁶ relying in some measure on article 5 to identify the role of extended family or community members involved in the everyday care of a child. But before I consider the scope of carers identified under article 5, it is worth considering the scope of parenting functions captured within article 5 – ‘the responsibilities, rights and duties’ to provide direction and guidance in the exercise of rights under the CRC. Does article 5 extend to the everyday parenting of a child?

3.1 The scope of ‘responsibilities, duties and rights’ under article 5 of the CRC

There is no definition of *responsibilities, rights and duties* within the CRC, and the CRC Working Group did not discuss or delineate the scope of ‘responsibilities, rights and duties’ when it drafted article 5 of the CRC. Kamchedzera suggests the ‘use of all the three words indicates its spirit to be as encompassing as possible...’⁶⁷ However, Detrick and Alston argue that ‘Article 5 does not constitute a comprehensive recognition of the “responsibilities, rights, and duties ...” *per se*’ as this is found elsewhere in the CRC.⁶⁸ Sutherland

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

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

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

66 General Comment No. 14, para 70.

67 Kamchedzera 2012 (n 19) 24.

68 Detrick 1999 (n 3) 119.

suggests the ‘responsibilities, rights and duties’ enumerated under article 5 should be understood as directed towards the guidance and direction provided to the child in the child’s exercise of rights.⁶⁹

Positioning article 5 within the context of the CRC, and taking into account the importance of interpretative coherence, any reading of ‘responsibilities, rights and duties’ will be informed by other provisions of the CRC, including article 5 itself.⁷⁰ Article 18(1) recognises a common responsibility of both parents in the upbringing and development of the child. It also recognises that ‘parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child’ with ‘the bests interest of the child’ as ‘their basic concern’.⁷¹ Article 27(2) recognises that ‘parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.’⁷² Article 5 recognises the ‘responsibilities, rights and duties’ of parents and other carers in so far as they provide direction and guidance that is ‘appropriate’ and ‘in a manner consistent with the evolving capacities of the child’ in the exercise of rights under the CRC. In this regard, the content and scope of ‘responsibilities, rights and duties’ envisaged under article 5 is informed by the scope and content of responsibilities accorded to parents under articles 18, 27 and 5 of the CRC.

Taking into account the principle of ‘effectiveness’, the scope of ‘responsibilities, rights and duties’ envisaged under article 5 will likely also be circumscribed by children’s enjoyment of all other rights under the CRC. In other words, the ‘responsibilities, rights and duties’ exercised by parents and other carers in providing guidance and direction must be linked with furthering the child’s enjoyment of rights under the CRC. Put more simply, the scope of ‘responsibilities, rights and duties’ would not extend to conduct that amounts to a violation or abuse of rights, such as negligent treatment,⁷³ physical or mental violence,⁷⁴ sexual exploitation,⁷⁵ harmful practices⁷⁶ or discriminatory treatment.⁷⁷ It would also not extend to conduct that undermines or interferes with a child’s exercise of rights under the CRC. Finally, the need for practicality and context-sensitivity would likely favour a broad and flexible approach to ‘responsibilities, rights and duties’, which captures a range of parenting styles and arrangements, assuring the child the widest possible

69 Sutherland 2020 (n 24) 463.

70 Tobin and Varadan 2019 (n 11), 170.

71 Article 18(1), CRC.

72 Article 27(2), CRC.

73 Article 19(1), CRC.

74 Article 19(1), CRC.

75 Article 34, CRC.

76 Article 24(3), CRC.

77 Article 2(1), CRC.

recognition of her right to receive appropriate guidance and direction in the exercise of rights under the CRC.

Turning to our second line of enquiry, does article 5 provide a framework to identify a broad range of carers involved in the everyday parenting of a child?

3.2 Recognising informal carers and informal care arrangements under the CRC

A plain reading of article 5 suggests it was not intended to capture any and all informal care arrangements. Its focus is on those informal carers genuinely caring for the child, and whom are recognised as such within the child's community. The wording of article 5 further suggests a disjunctive approach towards informal care, according respect to parents in the first instance, and then in the alternative 'or where applicable' to 'members of the extended family or community' followed by 'legal guardians or other persons legally responsible for the child'. In other words, article 5 does not seek to displace parents, but rather accommodate the role of wider family and community where it aligns with local custom. So while article 5 provides an avenue to recognise informal carers, its framework is not open-ended.⁷⁸

3.2.1 *Informal carers acting in lieu of parents*

As discussed in Chapter 2, 'There's no place like home: The role of informal carers under the UN Convention on the Rights of the Child', the CRC Committee has been willing to recognise informal carers where parents are unavailable, and it aligns with preserving a child's family environment. This is likely explained by the absence of a provision for 'kinship' care and the 'legal no-man's land' between articles 9 and 20, which together yield an unintended outcome: the institutionalization of children who are separated or deprived of parental care, yet remain in the informal care of extended family or community.⁷⁹ While the CRC Committee has sought out practical solutions for this effectiveness gap, as Tobin cautions, it has struggled to find an interpretative resolution that aligns with the intended scope and function of the provisions and the treaty itself.⁸⁰ As such, the CRC Committee has continually expressed reservations over the lack of oversight in informal care arrangements, suggesting that more consideration needs to be given to how informal carers are supported to ensure children are protected when parental care is not

78 Detrick 1999 (n 3) 121, 122.

79 John Tobin, 'Introduction' in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 1-20, 18.

80 *Ibid*, 19.

available. Whether article 5 provides enough of a legal basis to recognise the role of informal carers, and function as a legal framework to manage informal care arrangements thus remains unclear.

3.2.2 *Informal carers acting alongside parents*

Kamchedzera suggests the formulation of article 5, specifically its use of “where applicable” over “when applicable” implies that ‘the reference to extended family members cannot be limited to situations where the child has no parents’, and as such ‘members of extended family [will be] duty bearers for the child’s right, where local custom provides so.’⁸¹ Sutherland adds that the CRC Committee has ‘taken an inclusive approach, reaching beyond the traditional to embrace more recent developments by referring to “the nuclear family, the extended family and other traditional and modern community-based arrangements”’.⁸²

In Chapter 5, ‘The proxy dilemma: Informed consent in paediatric clinical research – a case study of Thailand’ I contemplate whether article 5 could be used to recognise informal carers acting as primary caregivers in the context of informed consent in paediatric clinical research. In many lower- and middle-income countries (LMICs), the legislative and regulatory framework for informed consent in medical research,⁸³ particularly paediatric clinical research, is either weak or non-existent. This poses a challenge for the recruitment and enrolment of children in paediatric clinical trials.⁸⁴ In Thailand, where currently there is no law on human subject research and no specific regulations for informed consent in paediatric clinical research, there is considerable uncertainty surrounding the designation of a child’s ‘proxy’, which has implications for children’s enrolment in paediatric clinical studies. Adding to this uncertainty, it is not uncommon for children to grow up in the fulltime care of grandparents, while parents work outside the home. For the most part, these childcare arrangements are informal, with parents retaining legal authority over their children, and grandparents relying on entrenched socio-cultural norms to validate their parenting role. This introduces an ethico-legal quandary

81 Kamchedzera 2012 (n 19) 24.

82 Sutherland 2020 (n 24) 457.

83 Clinical research in resource-limited settings. A consensus by a CIOMS Working Group. Geneva, Switzerland. Council for International Organizations of Medical Sciences (CIOMS), 2021. Appendix 1. Special Populations; Joseph, P.D., Craig, J.C., Tong, A., & Caldwell, P., (2016). Researchers’, Regulators’, and Sponsors’ Views on Pediatric Clinical Trials: A Multinational Study. *Pediatrics*. 138(4); Vischer, N., Pfeiffer, C., Joller, A., Klingmann, I., Ka, A., Kpormegbe, S.K., & Burri, C., (2016). The Good Clinical Practice guideline and its interpretation – perceptions of clinical trial teams in sub-Saharan Africa. *Topical Medicine and International Health*. 21(8) pp 1040-1048, 1043; Cheah, P.Y., & Parker, M., (2014). Consent and assent in paediatric research in low-income settings. *BMC Medical Ethics*. 15(22), 1-10, 6.

84 *Ibid.*

in the informed consent process, whereby the primary caregivers for the child (grandparents) are not legally recognised, while the legal representatives of the child (parents) are not available to provide informed consent. As a result, children are excluded from clinical research, not out of ethical concern but due to a lack of legal guidance on how to recognise the genuine, albeit informal carers for the child in the informed consent process. The presumptive exclusion of children from clinical research holds longer-term implications for children's health and well-being, particularly in resource-limited settings, where clinical studies can yield immediate improvements in health interventions and access to healthcare. Thus, a compelling argument could be made for using article 5 to recognise informal carers *alongside* parents, where failing to do so would interfere with a child's right to receive guidance and direction that secures the effective enjoyment of other rights under the CRC.

At the same time, according broad respect and recognition to informal carers *alongside* parents may lead to interpretative incoherence, creating more confusion rather than clarity in the implementation of children's rights. First, in the context of informed consent, it introduces uncertainty as to who holds legal responsibility over the child. Second, depending on how broadly the concept of parenting is understood, it potentially creates a tension between States' legal obligations to protect and ensure the child's right to know and be cared for by her biological parents under articles 7(1), 8(1) and 9(1) and the child's rights to an adequate standard of living and a family environment under articles 18(1), 18(2), 27(3) and 20, resulting in fragmentation and internal incoherence in the care and upbringing of the child. Third, it arguably uses article 5 in a way it was not intended. While article 5 acknowledges a range of carers providing direction and guidance to a child, its formulation suggests it was not intended to displace parental rights, but to supplement the child's right to receive appropriate guidance and direction by recognising other carers beyond biological or legal parents 'where appropriate' and 'as provided for by local custom'. Fourth, it does not account for tensions between formal and informal carers in the everyday parenting of the child. For example, if a grandparent were to give direction and guidance to a child which conflicted with the guidance provided by a parent, what obligation, if any, would the State hold towards the child in respect of her rights under article 5? The CRC Committee does not directly address this issue. Indeed, reviewing the Concluding Observations, the CRC Committee appears to assume a complementary than conflicting relationship between parents and other carers in the parenting of a child.⁸⁵ However, in the reality of everyday parenting, there are likely to be conflicting perspectives on what constitutes appropriate guidance, and

85 CRC Committee, Concluding Observations: Nigeria, 13 April 2005, CRC/C/15/Add.257, paras 40, 41; CRC Committee, Concluding Observations: Guyana, 26 February 2004, CRC/C/15/Add. 224, para 33, 34; CRC Committee, Concluding Observations: Palau, 21 February 2001, CRC/C/15/Add.149, para 38, 39.

how a child's evolving capacities should be recognised and supported in the enjoyment and exercise of rights.

For its part, the CRC Committee has sought to balance the need to accommodate the fluidity in caregiving relationships,⁸⁶ with a recognition and respect for the primary role of parents in the care and upbringing of the child.⁸⁷ In its General Comment No. 15 on the right to health, the CRC Committee elaborates on this point: 'Parents are the most important source of early diagnosis and primary care for small children, and the most important protective factor against high-risk behaviours in adolescents' however '[c]hildren's socialization processes, which are crucial for understanding and adjusting to the world in which they grow up, are strongly influenced by their parents, *extended family and other caregivers* [emphasis added].⁸⁸ So, while the CRC Committee is willing to accord respect to informal carers, it does so with an understanding that parents or others legally responsible for the child retain primary responsibility over the care and upbringing of the child.

If article 5 does not provide a legal basis to recognise informal carers, particularly in situations where a child is regularly cared for by multiple caregivers, this raises a broader concern. Is the CRC framework capable of accommodating the diversity of family structures and parenting arrangements in which children grow up? During the decade-long drafting process, there were concerns that the CRC Working Group was composed primarily of delegates from European countries, who held 'a bias in favour of nuclear-family households which [was] unrealistic and impractical in most parts of the world.'⁸⁹ When the Working Group sought to revise article 5 during the second reading in 1989, it was largely motivated by these concerns, recognising the need to acknowledge the role of extended families and community to reflect the social realities of parenting and family in most parts of the world.⁹⁰ Yet, for many, the singular reference to extended family and community under article 5 was not sufficient and failed to heed the calls from indigenous communities for wider protection of traditional extended family and communities under the CRC. Indeed, when the CRC was adopted, Nigel Cantwell, speaking on behalf of non-governmental organizations expressed disappointment over 'the limited recognition given to the actual or potential primary role of extended family members in caring for and bringing up children.'⁹¹

86 See General Comment No. 7, paras 15, 19.

87 CRC Committee, General Comment No. 7, para 29.

88 CRC Committee, General Comment No. 15, para 67.

89 Russell Lawrence Barsh, 'The Draft Convention on the Rights of the Child: A Case for Eurocentricism in Standard-Setting' (1989) 58 *Nordic Journal of International Law* 24-34, 28.

90 Van Bueren 1995 (n 3) 71.

91 Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, Volume I (Geneva: OHCHR, 2007), 229; see also E/CN.4/1989/SR.55, para 107.

Without clearer guidance from the CRC Committee on the role of informal carers and informal care arrangements, it is likely children will not be afforded the full enjoyment of their right to receive appropriate guidance and direction from *their carers* in the exercise of rights under the CRC.

4 A FRAMEWORK TO NAVIGATE THE PARENTING RELATIONSHIP

At the crux of article 5 is its attempt to strike a ‘delicate balance’, which seeks to respect the role of parents and other carers, while also recognising the child’s status as a rights-holder with evolving capacities in the exercise of rights under the CRC. It introduces a framework to navigate the parenting relationship, ensuring that children are listened to and respected by those adults exercising influence over their everyday lives.⁹² In this regard, article 5 holds a transformative dimension for the parent-child relationship and indeed parenthood itself. It reframes the role of parents from that of exclusive rights-holder over the child to duty-bearer to the child, providing direction and guidance that furthers the child’s enjoyment and exercise of rights under the CRC.

However, it is important to underscore that the scope of article 5 is the family setting. Applying its framework thus falls on parents and other carers involved in the everyday care of the child. It would be neither reasonable nor practicable to expect States to intervene in the parent-child relationship, prescribing a specific kind of parental guidance and direction for a child. In this regard, article 5 should be understood as a model for parenting – promoting a particular conception of the parent-child relationship, that is grounded in participatory dialogue, mutual trust and a recognition of the child’s status as a rights-holder and individual within the family.

For its part, the CRC Committee has frequently relied on article 5 to inform its interpretation of States’ legal obligations surrounding the role of parents, both in its General Comments and Concluding Observations. Indeed, of the 28 instances in which the CRC Committee specifically mentions article 5 in its General Comments, at least half involve a discussion of States’ legal obligations under article 18 of the CRC.⁹³ In its Concluding Observations, the CRC Committee refers to article 5 and article 18 jointly in at least five of the eight instances in which it makes reference to article 5.⁹⁴

92 Tobin and Varadan 2019 (n 11) 173.

93 See General Comment No. 1, para 6; General Comment No. 4, para 15; General Comment No. 7, paras 10, 15, 16, 22, 29(a); General Comment No. 8, paras 28, 47; General Comment No. 11, para 46; General Comment No. 13, para 13; General Comment No. 20, paras 50; General Comment No. 21, para 15; General Comment No. 25, para 91.

94 In its Concluding Observations to Sierra Leone and Cyprus, the CRC Committee referenced article 5 to inform States legal obligations under article 18(2), recommending measures to strengthen the capacities of parents to provide guidance and direction that is appropriate and consistent with children’s evolving capacities in the exercise of rights, see CRC/C/15/

In Chapter 4, 'The Role of Parents in Proxy Informed Consent in Medical Research involving Children', I contemplate how article 5 could be used to navigate the parent-child decision-making relationship in the proxy informed consent in medical research. The CRC framework and article 5 offer a different vantage point to view the proxy informed consent process in medical research, recasting children from non-autonomous beings to active participants with voice and agency in the research setting. In so doing, it reframes the decision-making relationship between the proxy and the child, vesting the right to informed consent in the child, with an obligation on those adults around the child to provide direction and guidance to support her participation in the decision-making process.

In assessing the usefulness of the CRC as a framework to navigate the proxy informed consent process, I contemplated the nature of the parenting relationship envisaged under article 5, and more specifically the meaning of 'appropriate guidance and direction' provided 'in a manner consistent with the evolving capacities of the child' in the child's exercise of rights.

4.1 The meaning of 'appropriate direction and guidance' under article 5 of the CRC

The CRC Working Group members did not directly discuss the meaning of 'appropriate direction and guidance' when it drafted article 5 of the CRC.⁹⁵ However, it bears mentioning that the term 'appropriate' appears 49 times within the preamble and substantive provisions of the CRC.⁹⁶ In at least 23

Add.205, 21 July 2003, para 37-38 and CRC/C/15/Add.116, 24 February 2000, para 49. In its Concluding Observations to Malaysia, Oman, Saint Lucia and Nigeria, the CRC Committee again relied on article 5 to interpret States' legal obligations under articles 18(2) and 42, calling for parental education programmes, family counselling services and awareness-raising campaigns that affirmed the rights of the child within the family and their status as rights holders with evolving capacities in the exercise of rights, see CRC/C/15/Add.258, 21 September 2005, para 36-37; CRC/C/OMN/CO/2, 29 September 2006, para 37(e); CRC/C/MYS/CO/1, 25 June 2007, para 51; CRC/C/NGA/CO/3-4, 21 June 2010, para 49. In its Concluding Observations to Cyprus, the CRC Committee expressed concern 'about the traditional and rather paternalistic view of the child held by parents, teachers, authorities and society at large,' referencing article 5 to recommend that the State take 'measures at all levels and public campaigns to raise awareness on the Convention', see CRC/C/15/Add.205, para 37, 38.

⁹⁵ Tobin and Varadan 2019 (n 11) 171.

⁹⁶ See Preamble, para 9, and articles 2(2), 3(2), 4, 5, 8(2), 9(4), 12(2), 17(e), 18(2), 18(3), 19(1), 19(2), 21(d), 21(e), 22(1) (appears twice), 22(2), 23(2), 23(4), 24(2), 24(2)(d), 24(3), 26(2), 27(3), 27(4) (appears twice), 28(1)(b), 28(1)(c), 28(2), 31(1), 31(2), 32(2)(b), 32(2)(c), 33, 34, 35, 37(b), 37(d), 39, 40(2)(b)(ii) (appears twice), 40(2)(b)(iii), 40(3)(b) (appears twice), 42, 45(a), 45(b) of the CRC.

instances, 'appropriate' is used to qualify 'measures'⁹⁷ or 'assistance'⁹⁸ provided by States to parents and other carers. The relative frequency of 'appropriate' intimates an awareness on the part of CRC drafters that context and culture would play a role in shaping a child's realization of rights under the UN Convention.⁹⁹ Taking into account the value of context-sensitivity, Doek suggests the term 'appropriate functions' as 'a key provider of space for accommodating cultural and other diversities because it requires consideration of what would be suitable in a given culture.'¹⁰⁰

At the same time, by placing 'appropriate' in front of 'guidance and direction' the CRC drafters remove any suggestion that parents and other carers 'enjoy *carte blanche* to provide any type of direction to the child they believe fitting.'¹⁰¹ It introduces an objective element of 'appropriateness'¹⁰² on the guidance and direction provided to a child that is both informed and circumscribed by other rights under the CRC. Applying the interpretative principle of 'effectiveness', 'appropriate guidance and direction' should be understood as the guidance and direction needed to secure the enjoyment of rights under the CRC. In other words, any guidance and direction that interferes with or undermines children's enjoyment or exercise of rights, will not be 'appropriate' for the purposes of article 5 of the CRC. The CRC Committee affirms this point in its General Comment No. 8 on corporal punishment: 'any interpretation of "appropriate" direction and guidance must be consistent with the whole Convention and leaves no room for justification of violent or other cruel or degrading forms of discipline'.¹⁰³

Any guidance and direction provided by parents (and other carers) will only be appropriate if it is *also* provided in a manner that is consistent with the child's evolving capacities in the exercise of the rights under the CRC. We consider the meaning of these terms in the next section.

4.2 The child's status as a rights-holder within the family

That the child should be seen as an independent holder of rights with voice and agency within the family represented a radical break from previous

97 The term 'appropriate measures' appears 17 times under articles 2(2), 3(2), 4, 18(3), 19(1), 19(2) 21(d), 22(1), 24(2), 24(3), 27(3), 27(4), 28(1)(b), 28(2), 33, 35 and 39 of the CRC.

98 The term 'appropriate assistance' appears 5 times under articles 8(2), 18(2), 37(d), 40(2)(b)(ii), 40(2)(b)(iii) of the CRC.

99 Tobin 2013 (n 12), 422; Alston 1994 (n 4) 20.

100 Jaap Doek, 'The Human Rights of Children: An Introduction' in U. Kilkelly and T. Liefaard (eds) *International Human Rights of Children* (Springer Nature Singapore, 2018) 14.

101 Detrick 1999 (n 3) 119; Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF Innocenti: Florence, 2005).

102 Lansdown 2005; see also Van Bueren 1995 (n 3) 50; Detrick 1999 (n 3) 120; Tobin and Varadan 2019 (n 11) 171-172.

103 CRC Committee, General Comment No. 8, para 28.

conceptions of childhood, which viewed children as vulnerable¹⁰⁴ and dependent¹⁰⁵ – seen but not heard. Importantly, the idea that all children, even very young children, are independent rights-holders within the family extinguished any lingering notion of children as the property of their parents,¹⁰⁶ introducing a model for parent-child relationships that is grounded in mutual respect, rather than authoritarianism and control.¹⁰⁷ Thus, in affirming the child's status as a rights-holder, article 5 introduces a framework that transforms the parenting relationship, re-imagining the child from an object of concern, to an active agent and participant in the family.

The CRC Committee affirmed this reading of article 5 in its General Comment No. 8 on parental discipline and corporal punishment

The Convention asserts the status of the child as an individual person and holder of human rights. *The child is not a possession of parents, nor of the States, nor simply an object of concern. In this spirit, article 5 requires parents (or where applicable, members of the extended family or community) to provide the child with appropriate direction and guidance, in a manner consistent with his/her evolving capacities, in the exercise by the child of the rights recognised in the Convention ...* This emphasizes the need for styles of parenting, caring and teaching that respect children's participation rights [emphasis added].¹⁰⁸

The CRC Committee further clarified that all children, even very young children, are independent rights-holders under the CRC¹⁰⁹

... children, including the very youngest children, [must] be respected as persons in their own right. Young children should be recognised as active members of families, communities and societies, with their own concerns, interests and points of view.¹¹⁰

104 John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155.

105 Tobin 2015; Peleg 2019 (n 8); Adam Lopatka, 'An Introduction to the United Nations Convention on the Rights of the Child' (1996) 6 *Transnat'l L. & Contemp. Probs.* 251-262.

106 David Archard, 'Do parents own their children?' (1993) 1 *International Journal of Children's Rights* 293 - 301, 301, 294.

107 Lopatka 1996 (n 105); John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in M. D. Ruck, M. Peterson-Badali, and M. Freeman (eds) *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (Abingdon: Taylor and Francis, 2017); John Tobin, 'Parents and Children's Rights under the Convention on the Rights of the Child: Finding Reconciliation in a Misunderstood Relationship' (2005) 7(2) *Australian Journal of Professional and Applied Ethics* 31-46.

108 General Comment No. 8, para 28.

109 General Comment No. 7, para 3.

110 General Comment No. 7, para 5.

To make this point explicit, the CRC Committee drew a distinction between a child's dependency on carers, and a child's independence as a rights-holder within the family:

Babies and infants are entirely dependent on others, but they are not *passive recipients of care, direction and guidance*. They are *active social agents, who seek protection, nurturance and understanding from parents or other caregivers* ... Parents (and others) should be encouraged to offer "direction and guidance" in a child-centred way, through dialogue and example, in ways that enhance young children's capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14) [emphasis added].¹¹¹

In its Concluding Observations, the CRC Committee has frequently expressed concern that 'traditional' and 'paternalistic' attitudes undermine the child's status as a rights holder within the family and community.¹¹² To this end, the CRC Committee has relied on article 5 as a framework to inform the content of legal obligations, requiring States to take measures that raise awareness about children's rights and the child's status as a rights-holder within her family and community, as per article 18 and article 42 of the CRC.¹¹³

Applied to the medical research setting, the CRC framework and article 5 transform how children are viewed in the informed consent process. Whereas research ethics has essentialized children as 'non-autonomous' and 'vulnerable' in need of protection from research, the CRC and article 5 provide a framework that empowers children as active participants, entitled to guidance and direction that enables their participation, while also ensuring their protection in the research setting. Thus, from the vantage point of the CRC, informed consent becomes a right vested in the child, with the proxy holding rights and responsibilities that are functional and limited to the child's enjoyment and exercise of rights in the research setting.

4.3 The evolving capacities of the child in the exercise of rights

Underscoring the child's status as a rights-holder is a understanding that childhood is not a fixed, singular or universal concept.¹¹⁴ As children grow and develop, they gradually acquire skills, maturity, knowledge, and experience, which enable them to exercise increasing levels of agency and autonomy in their everyday lives. The concept of 'evolving capacities' acknow-

111 General Comment No. 7, paras 16, 17.

112 CRC Committee, Concluding Observations: Cyprus, 2 July 2003, UN Doc. CRC/C/15/Add.205, para 37-38; CRC Committee, Concluding Observations: Saint Lucia, 21 September 2005, UN Doc. CRC/C/15/Add.258, para 36-37.

113 CRC/C/15/Add.205, para 38; CRC/C/15/Add.258, para 36-37

114 Lansdown 2005 (n 101), 22; see also Van Bueren 1995 (n 3) 50.

ledges that children will require varying levels of support, guidance and protection for the enjoyment and exercise of their rights. It also recognises that children acquire capacities – moral, social, cognitive, physical, and emotional – unevenly depending on the nature of the task, their personal experiences, the expectations placed on them and the social context in which they live.¹¹⁵ As Lansdown explains, ‘while all the rights embodied in the Convention apply to all children, the capacities and context of the individual child must influence both how they are applied and the degree of autonomy of the child in their exercise.’¹¹⁶ The concept of evolving capacities thus rejects prescriptive and linear models of child development, which focus on fixed stages of growth or developmental benchmarks,¹¹⁷ in favour of a fluid and individual framework that reflects the lived experiences, social context and unique qualities of each child.

The CRC Committee has suggested that the concept of ‘evolving capacities’ will inform how parental guidance and direction is to be provided to a child in at least three broad respects. First, it will require parents to be responsive to the child’s unique needs, while also considering the specific context and circumstances in which they are providing guidance to their child

Article 5 contains the principle that parents (and others) have the responsibility to continually adjust the levels of support and guidance they offer to the child. These adjustments take account of a child’s interests and wishes as well as the child’s capacities for autonomous decision-making and comprehension of his or her best interests. While a young child generally requires more guidance than an older child, it is important to take account of individual variations in the capacities of children of the same age and of their ways of reacting to situations.¹¹⁸

The concept of evolving capacities is thus predicated on the idea that parents and other carers will continue to provide appropriate levels of protection so that the child does not find herself in a situation in which she lacks the competency, maturity or experience to handle. As the CRC Committee explains in the context of the digital environment, the guidance and direction provided by parents and other carers must seek to balance protecting the child with enabling her agency, relying on the best interests of the child, and the concept of evolving capacities as ‘guiding principles.’¹¹⁹

Second, the concept of evolving capacities promotes a model of the parent-child relationship that rejects control-based parenting, in favour of approaches that embrace dialogue, collaboration and mutual respect. In this regard, ‘[e]volving capacities should be seen as a positive and enabling process, not

115 Lansdown 2005 (n 101) 23.

116 Lansdown 2005 (n 101) 22.

117 Lansdown 2005 (n 101) 13.

118 General Comment No. 7, para 17.

119 General Comment No. 25, para 86.

an excuse for authoritarian practices that restrict children's autonomy and self-expression', and

[p]arents (and others) should be encouraged to offer "direction and guidance" in a child-centred way, that through dialogue and example ... enhance young children's capacities to exercise their rights, including their right to participation (art. 12) and their right to freedom of thought, conscience and religion (art. 14).¹²⁰

The CRC Committee relies on the concept of 'evolving capacities' to inform States' legal obligations to provide parenting support

States should take into account that support and guidance provided to parents and caregivers should be based on an understanding of the specificity and uniqueness of parent-child relations. Such guidance should support parents in sustaining an appropriate balance between the child's protection and emerging autonomy, based on mutual empathy and respect, over prohibition or control.¹²¹

The concept of evolving capacities thus promotes a model of parenting that encourages dialogue and participation, demanding that parents not only listen to their child but also actively involve them in the decisions that affect their lives. To this end, the CRC Committee has drawn a link between a child's right to be heard under article 12 and the child's right to parental guidance and direction under article 5: 'the connection of article 12 to article 5 ... is of special relevance, since it is crucial that the guidance given by parents takes account of the evolving capacities of the child.'¹²² As the CRC Committee explains, 'the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities as stated in [article 5]'.¹²³

Third, the concept of evolving capacities assumes that as children grow and develop, respect for their autonomy should concurrently increase, and a time will come when a child will no longer need to rely on the guidance and direction of parents, family or community to secure the enjoyment of rights under international law.¹²⁴ As the CRC Committee explains:

120 General Comment No. 7, para 17.

121 General Comment No. 25, para 86.

122 General Comment No. 12, para 69.

123 General Comment No. 12, para 84.

124 Noam Peleg, 'International Children's Rights Law: General Principles' in T. Liefaard and U. Kilkelly (eds) *International Human Rights of Children* (Singapore: Springer Nature Singapore, 2017) 2-19, 16; Tobin 2013 (n 12).

... the more the child knows, has experienced and understands, the more the parent or legal guardian has to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing.¹²⁵

In this regard, article 5 should be understood as a scaffolding provision designed to equip the child with the guidance and direction needed for *her* to secure the enjoyment of rights at a specific moment in time.¹²⁶ Viewed this way, parenthood is not unlimited or indefinite; the role of parents in providing direction and guidance will necessarily dwindle as a child's capacities evolve. At the same time, article 5 does not explicate how a child's 'evolving capacities' will be assessed nor does it provide a framework to negotiate how decision-making will devolve from a parent to the child. Without more guidance from the CRC Committee, there is a risk that the concept of 'evolving capacities' could be used to undermine rather than enable a child's autonomy and agency in the exercise of rights.

In summation, article 5 provides a framework that informs the parenting relationship in four ways:

- 1) it introduces boundaries around parental authority, requiring parental guidance to be provided in a manner that is consistent with the child's enjoyment and exercise of rights under the CRC;
- 2) it recognises the child as a rights-holder, encouraging a parent-child decision-making process that is grounded in mutual respect, dialogue and collaboration;
- 3) it requires parents and others carers to be responsive to the unique and evolving capacities of the child, providing guidance that is attuned to the particular context and circumstances in which the child finds herself;
- 4) it expects that parents and other carers will gradually and progressively devolve decision-making to their child, recognising their child's evolving agency over matters of concern in their lives.

In terms of States' legal obligations in respect of parenting support, article 5 provides a model of parenting that affirms children's status as rights-holders and individuals within the family. It thus informs the content of States' legal obligations to provide parenting support and assistance under articles 18(2) and 19(2), as well as wider obligations to foster awareness of children's status as rights holders under article 42 of the CRC.

125 General Comment No. 21, para 35; General Comment No. 14, para 44; General Comment No. 20, para 18; General Comment No. 12, para 84.

126 Tobin and Varadan 2019 (n 11) 177.

5 THE CONCEPT OF EVOLVING CAPACITIES UNDER THE CRC

In this last section, I consider the concept of ‘evolving capacities’ outside of the framework of article 5 of the CRC. In Chapter 3, ‘The principle of evolving capacities under the UN Convention on the Rights of the Child’, I interrogated the CRC Committee’s treatment of ‘evolving capacities’ within its General Comments, suggesting that it has stretched the scope and function of ‘evolving capacities’ well beyond the framework of parental guidance and article 5.

In the 25 General Comments issued between 2001 and 2021, the CRC Committee refers to ‘evolving capacities’ over 90 times.¹²⁷ Reviewing the 568 Concluding Observations issued between 1993 and 2020, the CRC Committee invokes the ‘evolving capacities of the child’¹²⁸ 27 times, and in almost every instance it is delinked from article 5 and the framework of parental guidance. Examining the 23 Days of General Discussion, there are references to ‘evolving capacities’ in at least five discussions, intersecting with a range of CRC provisions across divergent settings. Indeed, during its 20th Anniversary commemorative event, the CRC Committee convened a panel on ‘evolving capacities as an enabling principle’ in which it highlighted the need for a broader consideration of the implications of recognising ‘the child as a person with evolving capacities to exercise her or his own rights’.¹²⁹

From this analysis, three observations can be made. First, in the majority of instances, the CRC Committee invokes the ‘evolving capacities of the child’ outside of the framework of article 5, relying on it as a broader enabling principle relevant to children’s realization of all rights under the CRC. Second, the CRC Committee appears to rely on the ‘evolving capacities of the child’

127 General Comment No. 1, paras 1, 9, 12; General Comment No. 3, paras 12 (twice), 20, 22, 23, 29 (twice), 40(f); General Comment No. 4, paras 1, 7, 9, 12, 16, 33; General Comment No. 5, paras 69; General Comment No. 7, paras 3, 13, 17 (twice), 33; General Comment No. 8, paras 13, 28, 47; General Comment No. 9, paras 32 (twice), 68; General Comment No. 10, para 16; General Comment No. 11, para 46; General Comment No. 12, paras 31, 69 (twice), 79, 80, 84, 91, 94, 100, 134(e), 134(g); General Comment No. 13, paras 5, 33, 59, 66, 72(a); General Comment No. 14, paras 44, 55, 84, 93 (thrice); General Comment No. 15, paras 21, 22, 31, 78; General Comment No. 16, paras 23, 31; General Comment No. 17, paras 14(a), 18, 32, 34, 57(b); General Comment No. 18, para 20; General Comment No. 20, paras 1, 7(c), 18 (twice), 20, 22, 37(e), 39, 40, 42, 43, 46, 50; General Comment No. 21, paras 11(b), 15, 33, 35; General Comment No. 22, para 34; General Comment No. 25, paras 19, 20, 51, 54, 76, 82, 85 (twice).

128 The CRC Committee cites the ‘evolving capacities of the child’ in 27 of its Concluding Observations. In every instance the reference to ‘evolving capacities’ is delinked from article 5, and invoked in the interpretation of other legal obligations under the CRC: See CRC/C/15/Add.46, 27 November 1995, para 13; CRC/C/15/Add.92, 24 June 1998, para 13; CRC/C/15/Add.88, 24 June 1998, para 18; CRC/C/15/Add.205, 21 July 2003, para 37-38; CRC/C/15/Add.116, 24 February 2000, para 49; CRC/C/15/Add.258, 21 September 2005, para 36-37; CRC/C/OMN/CO/2, 29 September 2006, para 37(e); CRC/C/MYS/CO/1, 25 June 2007, para 51; CRC/C/NGA/CO/3-4, 21 June 2010, para 49; CRC/C/15/Add.205, para 37, 38.

129 CRC Committee, 20th Anniversary, Recommendation 5.

as a framework to guide its interpretation of the general principles of the CRC, notably the assessment of best interests of the child under article 3(1) and the child's right to be heard under article 12 of the CRC. Third, the CRC Committee invokes the concept of 'evolving capacities' as a policy tool in its recommendations to States on the implementation of the CRC. The CRC Committee thus appears to treat the 'evolving capacities of the child' as a broader principle of the CRC, that informs not only the manner in which parental guidance is provided under article 5, but the interpretation and implementation of all other rights.

This raises the question of how and on what basis the CRC Committee justifies its treatment of 'evolving capacities' as a broader principle of the CRC. If the concept of evolving capacities finds its genesis in article 5, then the CRC Committee's treatment of 'evolving capacities' is undoubtedly an overreach of the scope and function of article 5. If, however, the concept of 'evolving capacities' is said to be embodied, perhaps implicitly, in the framework of the CRC, then its mention under article 5 (and article 14(2)) does not confine its scope of application to parental guidance under the CRC. This dissertation makes an argument for the latter. That a child's capacities will evolve, and as such should be accounted for in the realization of her rights is implied throughout the CRC framework, and thus informs the interpretation and implementation of all rights under the CRC. The principle of evolving capacities serves as a balancing mechanism, ensuring a child is protected but also enabled as an independent, conscious and voluntary participant¹³⁰ in the exercise of her own rights.¹³¹ At the same time, in the absence of any explicit recognition of 'evolving capacities' as a broader principle under the CRC, and indeed more guidance from the CRC Committee on its scope and meaning, imputing its function as an enabling principle or otherwise risks inflating the terms of article 5 and the CRC itself.

5.1 The concept of evolving capacities within the CRC

The words 'evolving capacities' appear just twice in the CRC, under articles 5 and 14(2). However, the concept of 'evolving capacities' finds expression across a number of provisions.

5.1.1 *The concept of evolving capacities and 'due weight' under the CRC*

Article 12(1) assures the child a right to express her views in matters of concern; it also *requires* that those views be given 'due weight' in accordance with

130 Lopatka 1996 (n 105) 255.

131 Daly 2020 (n 7); Doek 2018 (n 100).

‘the age and maturity’ of the child. The reference to ‘age and maturity’ is not dissimilar to the concept of evolving capacities. As Lundy, Tobin and Parkes explain, article 12 signals an awareness that ‘children, even from birth are “very active, constructive thinkers and learners”’, recognising a child as ‘having an evolving capacity to form and express views on matters that affect them.’¹³² The CRC Committee has frequently relied on the concept of ‘evolving capacities’ to inform ‘due weight in accordance with age and maturity’, explaining that ‘as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them.’¹³³ In some cases, the CRC Committee has used ‘evolving capacities’ interchangeably with ‘age and maturity’: in its 1996 Reporting Guidelines, the CRC Committee instructed States to ‘provide information on legislative and other measures taken to ensure the right of the child to express views in a manner consistent with his or her evolving capacities’ in matters involving ‘family life, school life, the administration of juvenile justice, placement and life in institutional and other forms of care, and asylum-seeking procedures.’¹³⁴ Reviewing the 27 instances in which the CRC Committee references ‘evolving capacities’ in its Concluding Observations, the majority of instances involve the child’s right to be heard,¹³⁵ and the weight to be accorded to children’s views in adoption proceedings¹³⁶ judicial hearings,¹³⁷ decisions regarding medical treatment¹³⁸ and counselling.¹³⁹

132 Laura Lundy, John Tobin and Aisling Parkes, ‘Article 12: The Right to Respect for the Views of the Child’ in John Tobin and Philip Alston (eds), *The UN Convention on the Rights of the Child: a Commentary* (Oxford University Press 2019) 397-434, 399.

133 CRC Committee, General Comment No. 12, para 85.

134 CRC Committee, Reporting Guidelines 1996, para 43.

135 CRC Committee, Concluding Observations: United Kingdom of Great Britain and Northern Ireland – Overseas Territories, 16 October 2000, CRC/C/15/Add.135, para 27; CRC Committee, Concluding Observations: Côte d’Ivoire, 9 July 2001, CRC/C/15/Add. 155, para 27; CRC Committee, Concluding Observations: Denmark, 10 July 2001, CRC/C/15/Add. 151, para 31; CRC Committee, Concluding Observations: Monaco, 9 July 2001, CRC/C/15/Add.158, para 23; CRC Committee, Concluding Observations: Lithuania, 17 March 2006, CRC/C/LTU/CO/2, para 32(c); CRC Committee, Concluding Observations: The former Yugoslav Republic of Macedonia, 23 June 2010, CRC/C/MKD/CO/2, para 30.

136 CRC Committee, Concluding Observations: Italy, 28 February 2019, CRC/C/ITA/CO/5-6, para 25(c); CRC Committee, Concluding Observations: New Zealand, 21 October 2016, CRC/C/NZL/CO/5, para 29(c); CRC Committee, Concluding Observations: Ecuador, 26 October 2017, CRC/C/ECU/CO/5-6, para 31(d); CRC Committee, Concluding Observations: Bosnia and Herzegovina, 5 December 2019, CRC/C/BIH/CO/5-6, para 31(c).

137 CRC Committee, Concluding Observations: Nicaragua, 24 August 1999, CRC/C/15/Add.108, para 25.

138 CRC Committee, Concluding Observations: Ireland, 1 March 2016, CRC/C/IRL, CO/3-4, para 54(a); CRC Committee, Concluding Observations: Romania, 13 July 2017, CRC/C/ROU/CO/5, para 36(b).

139 CRC Committee, Concluding Observations: Ukraine, 9 October 2002, CRC/C/15/Add.191, para 59(a); CRC Committee, Concluding Observations: Romania, 18 March 2003, CRC/C/15/Add.199, para 47(a).

5.1.2 *The concept of evolving capacities in the assessment of the best interests of the child*

The CRC Committee appears to also consider a child's evolving capacities in its assessment of the best interests of the child, highlighting an inextricable link between articles 3(1) and 12(1) of the CRC. The CRC Committee has said that an '[a]ssessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child'¹⁴⁰ and to this end, '[t]he evolving capacities of the child ... must be taken into consideration when the child's best interests and right to be heard are at stake'.¹⁴¹ As the CRC Committee further explains, '*as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests* [emphasis added].'¹⁴² The CRC Committee draws out this point more explicitly in its discussion on children's rights during adolescence: 'when determining best interests, the child's views should be taken into account, consistent with their evolving capacities ... to ensure that appropriate weight is afforded to the views of adolescents as they acquire understanding and maturity.'¹⁴³ It is important to point out that while article 18(1) references the best interest of the child as a basic concern of parents, the CRC Committee invokes the concept of 'evolving capacities' outside of the parent-child relationship, to inform States' obligations under article 3(1) of the CRC.

5.1.3 *The concept of evolving capacities as a procedural consideration*

The CRC Committee also takes notice of a child's evolving capacities in judicial hearings, requiring that any formal hearing be undertaken and completed in a timely manner, and reassessed regularly to reflect the child's evolving capacities. The Committee has specifically taken notice of children's capacities as a basis to inform the manner and timing of decisions on the best interests of the child:

... In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive or irreversible decisions.¹⁴⁴

140 CRC Committee, General Comment No. 14, 43.

141 CRC Committee, General Comment No. 14, para 44.

142 CRC Committee, General Comment No. 14, para 44.

143 CRC Committee, General Comment No. 20, para 22.

144 CRC Committee, General Comment No. 14, para 84.

The Committee further elaborates on this point:

... The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.... decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves ...¹⁴⁵

The CRC Committee adopts similar language in its guidance on review of care decisions under article 25

All decisions on care, treatment, placement and other measures concerning the child must be reviewed periodically in terms of his or her perception of time, and his or her evolving capacities and development (art. 25).¹⁴⁶

In the context of business practices and children's rights, the CRC Committee invokes 'evolving capacities' to inform States' obligations to provide remedy and reparations to children under article 4 of the CRC. Here, the CRC Committee uses 'evolving capacities' to inform its recommendations to States, suggesting that remedies must not only be timely, but also take into account that injuries and damages can have a long-term impact on children as they develop and their capacities evolve:

When determining the level or form of reparation, mechanisms should take into account that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage. They should also take into account the evolving nature of children's development and capacities and reparation should be timely to limit ongoing and future damage to the child or children ...

In ascribing a procedural function to 'evolving capacities', the CRC Committee affirms that children's capacities are constantly developing and changing, and as such will be relevant to the realisation of rights, not just within the family but in wider interactions within formal legal proceedings.

5.1.4 *The concept of evolving capacities in the exercise of civil and political rights*

The CRC also appears to rely on the concept of evolving capacities to inform the scope and content of civil and political rights, such as freedom of expression (art. 13) and access to information (art. 17): 'These articles establish that children are subjects of rights and, together with article 12, they assert

145 CRC Committee, General Comment No. 14, para 93.

146 CRC Committee, General Comment No. 14, para 93.

that the child is entitled to exercise those rights on his or her own behalf, in accordance with her or his evolving capacities.¹⁴⁷ In its recent General Comment No. 25 on children's rights in relation to the digital environment, the CRC Committee devotes a section to the 'evolving capacities of the child', viewing it as 'an enabling principle' and 'guiding framework' that ensures polices reflect 'an appropriate balance between protection and emerging autonomy.'¹⁴⁸

So, while the words 'evolving capacities' only appear twice in the CRC, I argue that the concept finds expression, in both procedural and substantive dimensions of children's rights across a range of provisions under the CRC. Kamchedzera has described the concept of evolving capacities as a 'synergy of correlative duties whose performance is essential for the realization of the child's rights [at] all societal levels'.¹⁴⁹

5.2 A broad principle of evolving capacities under the CRC

Recalling Chapter 1, the interpretative process should be guided not only by the legal principles of treaty interpretation¹⁵⁰ but also broader considerations of practicability, coherence and context-sensitivity so as to ensure the widest consensus on the meaning and scope of legal obligations under an international human rights treaty.¹⁵¹ If this is the case, determining the scope of 'evolving capacities' will not be definitively answered by a textual interpretation of article 5. It will require some consideration of how the concept of 'evolving capacities' contributes to a practicable, coherent and context-sensitive interpretation of children's rights under the CRC.

There is a degree of common sense to the notion that children's capacities are evolving, and that this dynamic process will play some role in how they secure the enjoyment of rights. Indeed, much of the debate surrounding the theory of children's rights turns on their 'capacities' to exercise and claim rights entitlements. Brighouse argues that while 'it is quite plausible to attribute children rights which protect their standard welfare interests' it is 'generally inappropriate to ascribe agency rights to children, at least to young children' because they lack capacity or agency.¹⁵² Griffin argues that human rights

147 CRC Committee, General Comment No. 12, paras 80, 81.

148 CRC Committee, General Comment No. 25, paras 20, 21.

149 Kamchedzera 2012 (n 19) 40.

150 Scheinin 2017 (n 10).

151 John Tobin 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 *Harvard Human Rights Journal* 1-50.

152 H. Brighouse, 'What Rights (If Any) Do Children Have?' in D. Archard and C.M. Macleod (eds) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2003) 45-46.

should be reserved for agents – those who are capable of agency;¹⁵³ and as such cannot extend to infants who are not capable of exercising agency over their rights. However, Griffin qualifies that as children acquire agency, they should acquire corresponding rights.¹⁵⁴

For Freeman, Eekelaar and Tobin, a child's capacities will not be determinative of whether she holds rights, but rather will inform how those rights are claimed.¹⁵⁵ To this end, the concept of evolving capacities serves as an enabling mechanism, ensuring that children are seen as conscious and voluntary participants in the claiming and exercise of their rights under international law.¹⁵⁶ So, while it is a fact that children are born in a state of dependency, requiring support and guidance from adults around them, the notion that every child possesses unique and evolving capacities ensures that children are not viewed 'in purely instrumental terms or as objects in need of protection, but as human beings in possession of rights' with a dynamic role to play in the enjoyment and exercise of those rights.¹⁵⁷

However, in the absence of any explicit recognition of a principle of evolving capacities within the text of the CRC, there remain concerns that imputing a broader principle, even if it contributes to the realisation of children's rights, will be seen as inflating the terms of article 5 and indeed the CRC itself. That 'evolving capacities' was never expressly discussed during the drafting of the CRC lends further weight to concerns that a broad application of this vague and relatively undefined concept may foster more fragmentation rather than coherence in the implementation of the CRC. Kilkelly makes this point in the context of the minimum age of criminal responsibility. While it has been suggested that the notion that children's evolving capacities is not inconsistent with a child-rights approach to criminal responsibility,¹⁵⁸ Kilkelly queries whether embracing 'evolving capacities as a broad enabling principle will be compatible with the fundamental tenet of children's rights.'¹⁵⁹ Rap, Schmidt and Liefwaard consider the practical implications of the CRC Committee's use of 'open norms' such as 'evolving capacities' which afford 'considerable leeway' to States in deciding how and whether children should be involved in judicial proceedings.¹⁶⁰ As Rap, Schmidt and Liefwaard explain, the use of 'evolving capacities' in tandem with firm recommendations for minimum

153 J. Griffin., 'Do Children Have Rights?' in D. Archard and C.M. Macleod (eds) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2003) 27.

154 *Ibid.*, 28.

155 Tobin 2013 (n 12).

156 J. Eekelaar., 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42; J. Eekelaar, 'The Importance of Thinking that Children have Rights' in Philip Alston, Stephen Parker and John Seymour (eds), *Children, Rights and the Law* (Oxford: Clarendon Press, 1992) 221-232.

157 Tobin 2013 (n 12) 434.

158 Kilkelly 2020 (n 9).

159 Kilkelly 2020 (n 9) 507.

160 Rap, Schmidt and Liefwaard 2020 (n 9) 11.

age limits has led to a 'rather scattered and inconsistent image of age limits under the CRC',¹⁶¹ which has had implications for children's rights and protections. Ages limits offer assurances that children will not be subjected to prosecution as adults, and provides guarantees of legal support and assistance in the criminal justice process.¹⁶² Rap, Schmidt and Liefwaard do not dispute that children's capacities are evolving and dynamic; however, they argue that more circumspection is needed when using terms such as 'evolving capacities', calling for a more coherent approach to children's evolving autonomy, which takes into account 'scientific insights' and evidence-based research.¹⁶³

Peleg has voiced concern that framing a child's capacities as 'evolving' reinforces the perception that children are 'human becomings,' relegating childhood to 'a process of maturation, with the objective of creating a competent adult' and according priority to children's rights on the basis of protecting their 'development potential and their vulnerabilities.'¹⁶⁴ Tisdall makes a similar observation in the context of children's participation in family law proceedings in Scotland. Tisdall argues that framing children's capacities as 'evolving' propagates the 'age and stage' approach, which already has a stronghold in the case law. Tisdall further warns that viewing children's capacities as 'evolving' shifts the focus to children's interests in the future rather than the 'here and now' issues,¹⁶⁵ which can undermine their participation rights in favour of ensuring their future welfare interests.¹⁶⁶ At the same time, both Peleg and Tisdall do not dispute the idea that children's capacities are evolving, and thus need to be considered in the realization of their rights. The basis of their concern turns on how this dynamic process is characterised, and the degree of support and consideration given to children's autonomy and agency in the exercise of their rights. Peleg proposes a hybrid conception of childhood in which 'the child's present and future are recognised and intertwined and equally important' in the realization of children's rights.¹⁶⁷ Tisdall draws on the UN Convention on the Rights of Persons with Disabilities¹⁶⁸ to reframe evolving capacities through the lens of situational and relational autonomy.¹⁶⁹ Daly proposes a concept of 'supported autonomy', which balances 'children's autonomy and protection rights in accordance with their capacities'.¹⁷⁰

161 Ibid.

162 Ibid, 11.

163 Ibid, 11.

164 Peleg 2019 (n 8) 74.

165 Tisdall 2018 (n 8).

166 Ibid.

167 Peleg 2019 (n 8) 189.

168 UN Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, 2515 U.N.T.S. 3 ('CRPD').

169 Tisdall 2018 (n 8) 177.

170 Daly 2020 (n 7) 480.

What we are left with is a broad consensus that children's capacities do evolve and as such need to be considered in the realization of their rights. However, what remains unclear is how this development process should be conceptualized and recognised within the CRC, and whether framing a child's capacities as 'evolving' risks hindering, rather than enabling children's realization of rights under the CRC. More guidance is needed from the CRC Committee on the role of 'evolving capacities' within the CRC. Without more clarity on the scope and meaning of 'evolving capacities', it remains somewhat precarious, if not reckless, to continue to invoke a broad principle of evolving capacities even if it is both necessary and practicable for the implementation of children's rights under the CRC.

CONCLUSION – THE CURIOUS CASE OF ARTICLE 5 OF THE CRC

Recalling the problem statement in Chapter 1, article 5 has been described as 'unique',¹⁷¹ 'ground-breaking',¹⁷² 'innovative'¹⁷³ and 'pivotal',¹⁷⁴ making a 'vital contribution'¹⁷⁵ to the realization of all rights within the CRC. However, it has also been characterised as 'enigmatic',¹⁷⁶ 'overlooked',¹⁷⁷ 'neglected',¹⁷⁸ and indeed a provision that 'brings together ... all the natural tensions that inevitably flow through the Convention.'¹⁷⁹ Looking back on our interpretative analysis, it is now possible to see a thread of truth in each of these observations. At first glance, the CRC Committee's treatment of article 5 suggests it does not hold much priority for the implementation of children's rights. However, a closer examination reveals a more complex, and at times, ambiguous relationship with article 5, which informs the scope and content of a wide range of provisions within the CRC.

More guidance is needed from the CRC Committee, not only in respect of article 5, but more broadly, on the role that parenting plays in children's enjoyment and exercise of rights under the CRC. To this end, and as a conclusion to our discussion chapter, I suggest some avenues for further consideration by the CRC Committee, in the hopes of encouraging greater circumspection

171 Kamchedzera 2012 (n 19) 6.

172 Daly 2020 (n 7) 471.

173 Kamchedzera 2012 (n 19) 6.

174 Kilkelly 2020 (n 9) 500.

175 Lansdown 2005 (n 101); Sutherland 2020 (n 20) 447.

176 Ibid.

177 Claire Fenton-Glynn and Brian Sloan, 'Editorial' (2020) 28 *International Journal of Children's Rights* 444.

178 Kilkelly 2020 (n 9) 501.

179 Mark Henaghan, 'New Zealand Case Studies to Test the Meaning and Use of Article 5 of the 1989 United Nations Convention on the Rights of the Child' (2020) 28(3) *International Journal of Children's Rights* 588-612, 589.

on the role of parents and family in children's enjoyment and exercise of rights under the CRC.

First, as the only provision to reference 'extended family' and 'community' alongside parents and other carers, article 5 has come to be viewed as a framework to identify informal carers and informal care arrangements under the CRC. Yet, a plain reading of article 5 suggests it was not meant to function as an open-ended framework for informal carers nor does it provide enough of a legal basis to manage informal care arrangements under the CRC. What is needed from the CRC Committee is clearer guidance on the role of informal carers, and the extent to which States hold a legal obligation to support, assist and protect their caregiving role as part of children's right to receive appropriate guidance and direction in the exercise of their rights under the CRC. In this regard, the CRC Committee should give more consideration to the inter-relationship between article 5 and articles 9 and 20, and importantly, how a child's right to guidance and direction will impact States' legal obligations towards children separated or deprived of parental care and children deprived of their family environment. The CRC Committee should also consider whether a broader reading of article 5, which takes into account informal carers and informal care arrangements, aligns with principles of effectiveness, non-restrictiveness and dynamic interpretation, contributing to a more practicable, coherent and context-sensitive framework for the realization of children's rights under the CRC.

Second, the ambition of article 5 was to strike a 'delicate balance,' that respects the role of parents while also recognising the child's status as a rights-holder. However, its relational dimension presents a challenge for States seeking to implement and enforce its framework within the domestic legal setting. Its scope is on the parenting relationship within the family setting. But, its breadth extends to a child's exercise of all rights under the CRC. This creates a daunting task for States, who must navigate their obligation to respect rights to privacy and family, together with a child's right to receive guidance and direction that is appropriate and consistent with her evolving capacities in the exercise of rights under the CRC. While the CRC Committee has elaborated on the model of parenting envisaged under article 5, it has yet to provide practical guidance to States on how they should implement article 5 or enforce its legal framework within the family setting. More clarity is needed from the CRC Committee on the nature of the legal obligation created under article 5, and what measures will be needed to ensure its practicable and effective implementation. In this regard, consideration should be given to the inter-relationship between article 5, and provisions related to parental support and assistance, notably articles 18(2), 19(2) and 27(3). As well, the CRC Committee should consider whether States' implementation of article 42 (raising awareness on the rights and principles under the CRC) will have any bearing on the implementation of article 5, particularly in encouraging a model of

parenting that is aligned with children's enjoyment and exercise of rights under the CRC.

Third, the CRC Committee's treatment of the concept of evolving capacities raises questions, if not concerns, over its meaning and scope of application under the CRC. It is a fact that all children will undergo a process of development from infancy to adulthood. It is also undeniable that children's capacities will play a direct role in how they are able to claim and exercise rights. Article 5 (and article 14(2)) acknowledge that a child's evolving capacities will have a direct bearing on her ability to exercise and enjoy specific rights within the family. However, whether a child's evolving capacities should be acknowledged and taken into account in the exercise of other rights under the CRC remains unclear. More guidance is needed from the CRC Committee, not only on the meaning of 'evolving capacities', but importantly on the scope of its application within the CRC. In this regard, it would be worthwhile for the CRC Committee to explain the reasoning for its treatment of 'evolving capacities' as an enabling principle, interpretative principle and policy principle within the CRC, clarifying whether it has come to view the concept as a broader principle delinked from article 5 of the CRC. Without such guidance, there remains concern that imputing a broad principle of evolving capacities may be used to hinder rather than enable a child's exercise of rights under the CRC.

Even with such guidance from the CRC Committee, however, there remain unanswered questions about the meaning and scope of article 5 and its implications for children's enjoyment and exercise of rights under international law. In this discussion chapter, I did not set out to provide definitive answers for the interpretation of article 5 of the CRC. My ambitions were simply to shed light on how this innovative yet often overlooked provision is understood, and to draw attention to the role that parents and other carers will play in children's realization of rights under the CRC.

