

## THE ENIGMA OF ARTICLE 5 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: CENTRAL OR PERIPHERAL?

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### Abstract

The United Nations Convention on the Rights of the Child sets the gold standard for the rights of children and young people, placing the obligation on States parties to ensure their realisation. Since most children live in families, recognising their rights has implications for other family members, particularly their parents.

Article 5 creates a framework for balancing the rights and obligations of the parties – the child, the parents and the state – in this triangular relationship, requiring States parties to respect the right of parents to direct and guide the child in the exercise of Convention rights. Yet other Convention provisions address the parties' roles, calling into question the need for article 5.

This article sets the scene for those that follow in this issue, exploring what the drafters of the Convention were seeking to achieve in article 5 and highlighting issues that proved controversial, before focussing on the work of the United Nations Committee on the Rights of the Child to drill down into its content and address its place in the Convention.

**Keywords:** United Nations Convention on the Rights of the Child; article 5; direction; guidance; evolving capacities; child; parent; family; kinship group; United Nations Committee on the Rights of the Child.

## 1 Introduction

Some thirty years ago, the General Assembly of the United Nations set the gold standard for children's rights when it adopted the Convention on the Rights of the Child<sup>1</sup> ("CRC" or "Convention"), a comprehensive statement of the civil, political, social, economic and cultural rights of children and young people. It is familiar territory that the Convention came into force more quickly than any other human rights instrument, less than a year after its adoption, and has now been ratified by every country in the world save the United States.<sup>2</sup>

Since most children live in families, recognition of their rights has implications for the responsibilities and rights of other family members, most notably their parents. The CRC recognises the importance of the family, describing it in its Preamble as 'the fundamental group of society' and various articles elaborate on the role of parents and the state's obligations to them. Article 5 seeks to regulate the relationship between the parties – the child, the parents (and, sometimes, the wider family or community) and the state – in this triangular relationship.<sup>3</sup> To that end, it requires States parties to respect the responsibilities, rights and duties of parents to provide direction and guidance to the child in exercising Convention rights. Parental authority is not unfettered, however, and the obligation applies only to parental direction and guidance that is both appropriate and provided in a manner consistent with the evolving capacities of the child.

There is no equivalent of article 5 in the Declaration of the Rights of the Child which inspired the CRC and it did not feature in the early Polish drafts of the Convention. While the US delegation was motivated to propose its inclusion by a desire to

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<sup>1</sup> United Nations Convention on the Rights of the Child, 1577 UNTS 3, adopted 20 November 1989, entered into force 2 September 1990.

<sup>2</sup> The failure of the US to ratify the Convention is a sad irony given its considerable contribution to the drafting process (Cohen, 2006).

<sup>3</sup> E/CN.4/1989/48, paras. 188 and Office of the United Nations High Commissioner for Human Rights (2007). *Legislative History of the Convention on the Rights of the Child*. New York: United Nations (hereinafter "*Legislative History*"), Vol 1, 362. The *Legislative History* was published in two volumes and can be found at: [www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf](http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc1en.pdf) and [www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf](http://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf) [Accessed 31 October 2019]. See also, Detrick, with Doek and Cantwell, 1992.

emphasise the importance of the family in the child's life and protect the family from undue state intrusion, others saw the value of article 5 as protecting the rights of the child in the family setting. Yet numerous other articles in the Convention seek to achieve each of these goals, calling into question whether article 5 adds anything.

The United Nations Committee on the Rights of the Child (UNCRC), the body responsible for monitoring implementation of, and compliance with, the Convention, has not classified article 5 as one of the four general principles underpinning the CRC, that honour being confined to articles 2 (non-discrimination), 3(1) (primacy of the child's best interests), 6 (the child's right to life, survival and development) and 12 (the child's participation rights).<sup>4</sup> However, the impact of article 5, like that of the four general principles, is pervasive in so far as it applies across the sectoral rights set out in the Convention, begging the question whether it should be accorded the same status.<sup>5</sup>

This article sets the scene for those that follow in this issue, exploring what the drafters of the Convention were seeking to achieve in article 5 and highlighting issues that they found particularly controversial.<sup>6</sup> Using textual analysis and the work of the UNCRC,<sup>7</sup> other human rights bodies and scholars, it then drills down into the

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<sup>4</sup> United Nations Committee on the Rights of the Child, *General Comment No. 5, General Measures of implementation of the Convention on the Rights of the Child* (2003), CRC/GC/2003/5, para.12.

<sup>5</sup> As Tobin and Varadan note (2019, p.185), despite the UNCRC's reluctance to identify Art. 5 as one of the general principles, 'its jurisprudence increasingly suggests that this is precisely how the Committee views' the principle of evolving capacities. For further exploration of this thesis, see, Varadan, 2019.

<sup>6</sup> While the work of the drafters provides a backdrop to understanding the Convention, it is worth remembering Tobin's warning (2019, p.9) that, '[t]oo often engagement with the Convention is unaccompanied by any explanation as to the methodology being employed to generate the meaning of its provisions' and his injunction (2019, p.10) that its interpretation should be 'principled, practical, coherent and context sensitive.' At the heart of principled interpretation, lies the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, adopted 23 May 1969, in force 27 January 1980, Art. 31(1), requiring that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The remainder of Art. 31 elaborates on that theme, while Art. 32 addresses supplementary means of interpretation, either to confirm the results of applying Art. 31, or to deal with remaining ambiguity and the like.

<sup>7</sup> While the Committee's *General Comments* provide immensely helpful guidance on what it understands the various Convention provisions to mean, strictly speaking, these interpretations are not binding on States parties, since the UN Convention, like other human rights treaties, does not give the relevant treaty body express power to adopt binding

content and import of article 5, assessing whether it is, indeed, central to the Convention or of peripheral importance.

## 2 Drafting

Unlike many of the other provisions in the Convention, there was no early version of article 5 in the First Polish draft, nor did its content feature in the views received on that draft.<sup>8</sup> Rather, the seeds of what became article 5 were planted by the Danish delegation, in 1981,<sup>9</sup> with a more detailed version being put forward by the NGO Ad Hoc Group in 1984.<sup>10</sup> These saplings informed a proposal put to the Working Group by Australia and United States, in 1987, and the following year the Working Group discussed this amended version of the Australian-US text which was supported by Austria and the Netherlands:

The States Parties to the present Convention shall respect the rights and duties of the parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his or her rights enumerated in the present Convention in a manner consistent with the evolving capacities of the child, having due regard to the importance of promoting the development of the skills and knowledge required for an independent adulthood.<sup>11</sup>

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interpretations of the treaty (International Law Association: Committee on International Human Rights Law and Practice 2004, paras. 16 and 18). However, it is widely accepted that the views expressed in *General Comments* are 'non-binding norms that interpret and add detail to the rights and obligations' (Alston 2001, p. 775).

<sup>8</sup> E/CN.4/1324, Corr.1 and Add.1-5, and *Legislative History*, Vol 1, 357.

<sup>9</sup> HR/(XXXVII)/WG.1/WP.21 and *Legislative History*, Vol 1, 357. The text is as follows: 'Parents or other guardians have the main responsibility for the child. Every State Party has, however, the responsibility to satisfy the needs of the child and ensure the child the rights set forth in this Convention.'

<sup>10</sup> E/ CN.4/1985/WG.1/WP.1 and *Legislative History*, Vol 1, 357. The text is as follows:

'1. The protection of the child's interests cannot be dissociated from the protection of the child's natural family.

2. The responsibility of parents is to do everything in their power to ensure their children's well-being and harmonious development. Parents shall participate in all decision-making and orientation with regard to their children's education and future.

3. The States Parties to the present Convention undertake to recognize, support and protect the family unit in every way to enable it to carry out its function as provider of the most suitable environment for the child's emotional, physical, moral and social development.'

<sup>11</sup> E/CN.4/1988/WG.1/WP.22 and *Legislative History*, Vol 1, 360. What became article 5 was known as article 5 bis throughout First and Second readings. For simplicity, provisions will be referred to in this article by their number in the final text of the Convention.

The observer from Australia emphasised that the proposed text brought together ‘two important general concepts’, the child’s evolving capacities and the rights and duties of parents,<sup>12</sup> but it was clear from the outset that support for the proposal was motivated by quite distinct priorities.<sup>13</sup> For the United States delegation the central feature of the provision was the extent to which it protected the place of the family and particularly parents in the child’s life while, for others, it was the acknowledgement of the child’s emerging agency that was important, with the issue of parental authority proving particularly contentious. In addition, there were those amongst the drafters who doubted that there was any need for article 5, taking the view that other provisions afforded sufficient protection for the family in the child’s life.<sup>14</sup>

## 2.1 *The role of the family*

The US delegation focussed on the protection afforded to the family by article 5, arguing that there should be a provision early in the text of the Convention, recognising the central role of the family, ‘in order to emphasize its importance and relationship to all the other rights’ set out in it.<sup>15</sup> In this, it drew support from the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, both of which refer to the family as ‘the natural and fundamental group unit of society’.<sup>16</sup> It fell to the observer from Canada to point out that, while the

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<sup>12</sup> E/CN.4/1988/28, para. 28 and *Legislative History*, Vol 1, 360.

<sup>13</sup> For Kamchedzera (2012, para. 22), the innovation in Art. 5 emanated ‘from three bases’: ‘the need to take into account the evolving capacities of the child when providing appropriate direction and guidance’; ‘the centrality of a child rights’ rather than a ‘welfarist’ approach; and ‘the need to delineate the scope of parental authority and discretion’.

<sup>14</sup> E/CN.4/1987/25, para. 103 and *Legislative History*, Vol 1, 358.

<sup>15</sup> E/CN.4/1987/25, para. 101 and *Legislative History*, Vol 1, 358: “The representative of the United States explained that his country attached great importance to the family as the natural and fundamental group unit of society” explaining that “the family should be explicitly protected”.

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, adopted 16 December 1966, entered into force 23 March 1976, art. 10(1), (‘The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children ...’) and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, adopted 16 December 1966, entered into force 3 January 1976, art 23(1) (‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’)

Covenants sought to protect the family from the state, there was a need to ensure, as article 5 sought to do, that:

in protecting the family from the State, the family must not be given arbitrary control over the child. Any protection from the State given to the family must be equally balanced with the protection of the child within the family.<sup>17</sup>

## 2.2 *The child's evolving capacities*

Recognition of the child's evolving capacities can contribute to protecting the child from arbitrary family control. In the course of the drafting process, the concept was discussed in the context of a number of articles, including articles 13 (freedom of expression), 14 (right to freedom of thought, conscience and religion) and 15 (freedom of association and peaceful assembly),<sup>18</sup> leading some delegations to conclude that it had been addressed sufficiently and that article 5 was unnecessary.<sup>19</sup> Others, pressed for a general provision dealing with the child's evolving capacities.<sup>20</sup> In the event, there was no separate provision and reference to the concept only found its way into articles 5 and 14 of the final text of the Convention.

Given the importance that some of the drafters attached to the concept of the child's evolving capacities, it is curious that there was no real discussion of what the term actually means. The Australian-US proposal made reference to 'promoting the development of the skills and knowledge required for an independent adulthood', but that speaks to the goal of recognising the child's evolving capacities rather than its content. It is not clear why that elaboration did not make its way into the final text, but its omission may be no bad thing since it could be read as implying that children are valued as potential adults rather than – as the drafters intended – valued in their own right, as children. It may be that the failure to discuss the content of the child's

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<sup>17</sup> E/CN.4/1987/25, para. 106 and *Legislative History*, Vol 1, 358.

<sup>18</sup> *Legislative History*, Vol 1, 446, 467 and 470, respectively.

<sup>19</sup> E/CN.4/1987/25, para. 103 and *Legislative History*, Vol 1, 358.

<sup>20</sup> Canada, supported by Finland, raised the issue in 1987, but was content to leave the matter until after other substantive articles had been addressed: E/CN.4/1987/25, para. 104 and *Legislative History*, Vol 1, 358. *Legislative History*, Vol 1, 446. Canada and Norway raised the possibility during discussion of article 13: *Legislative History*, Vol 1, 446.

evolving capacities was prompted by recollections of the disagreement that arose during discussions of the related matter of parental authority.

### 2.3 *Parental authority*

While various delegations emphasised different aspects of article 5, they were all clear that it sought to balance the rights of the child, the parents and the state. That led some to express concern that its effect would be to curtail parental authority and, in order to offset that risk, the Federal Republic of Germany proposed inclusion in the Convention of the following provision:

Nothing in this Convention shall affect the right and the duty of parents and, where applicable, legal guardians to take measures as are required for the upbringing and well-being of the child.<sup>21</sup>

When the matter was raised in relation to article 5, one gets a sense that some delegates were anxious to avoid revisiting an issue that, it was emphasised, had been 'discussed at length' in the context of article 14,<sup>22</sup> when a sharp division emerged between states that insisted on children being raised in their parents' (or father's) religion and those that saw scope for the child to exercise freedom of choice.<sup>23</sup> Consensus proved elusive and the final text simply requires the States parties to respect both the child's right to freedom of thought conscience and religion and the rights of parents (and others) to provide direction to the child in a manner consistent with the child's evolving capacities.

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<sup>21</sup> E/CN.4/1988/WG.1/WP.22, para. 29 and *Legislative History*, Vol 1, 360. The proposal was to insert this provision into what became article 41 (respect for higher standards) of the final text. No such provision was inserted.

<sup>22</sup> E/CN.4/1988/WG.1/WP.22, para. 30 and *Legislative History*, Vol 1, 360.

<sup>23</sup> *Legislative History*, Vol 1, 458-459. The Permanent Representative of Bangladesh wrote to the UN Office in Geneva requesting that a paper be annexed to the report of the Working group in 1986: E/CN.4/1986/39, annex IV. It contained the following statements: 'Article 7 (bis) [later article 14] appears to run counter to the traditions of the major religious systems of the world and in particular to Islam. It appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents. We believe that the article as presently drafted will give rise to considerable difficulties in application and appears also to be in conflict with article 8.' The Permanent Representative of Morocco made a similar request in respect of a paper noting that, in Morocco, the child is raised in the father's religion: E/CN.4/1987/WG.1/WP.35

The nature of the child-parent relationship was also addressed when the representative of Senegal<sup>24</sup> proposed the addition of the following article:

The child has the duty to respect his parents and to give them assistance, in case of need.<sup>25</sup>

While that proposal garnered a degree of support, some of the drafters who were sympathetic to the sentiment it articulated felt that the obligation on a child to respect his or her parents was a moral, rather than a legal, one. The representative of Senegal accepted the Canadian suggestion that this matter might more appropriately be explored in the context of education and, in the event, what became article 29 (aims of education) states, as one of the objectives of education, 'the development of respect for the child's parents.'<sup>26</sup>

#### 2.4 *Beyond parents*

The early drafts of article 5 focussed on the role of the child's parents and legal guardians and, during the technical review in 1988, concern was expressed that the draft Convention as a whole 'may not adequately recognize the role of the extended family and community when parental care is not available', noting that 'cultures, traditions and customs in many countries and areas provide for such a role.'<sup>27</sup> That concern was taken on board during the Second Reading (1988-1989) and, while some disquiet was voiced over the extent to which inclusion of the broader group would alter 'the traditional triangular responsibility for the child', there was no strong opposition to amending the text to accommodate this aspect of cultural diversity.<sup>28</sup> In this, the inclusion, where applicable, of 'members of the extended family or

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<sup>24</sup> The representative of Senegal proposed, but later withdrew, another new article requiring States parties to 'provide, in case of need, appropriate assistance to the family with a view to helping it to assume its responsibilities for the harmonious development of the child.' E/CN.4/1989/WG.1/WP.17 and *Legislative History*, Vol 1, 363.

<sup>25</sup> E/CN.4/1989/WG.1/WP.17 and *Legislative History*, Vol 1, 363. A provision along these lines is found in the African Charter on the Rights and Welfare of the Child, art 31(a). See further, Sloth-Nielsen and Mezmur 2008.

<sup>26</sup> Article 29(1)(c).

<sup>27</sup> E/CN.4/1989/WG.1/CRP.1/Add.1, para.13 and *Legislative History*, Vol 1, 361.

<sup>28</sup> E/CN.4/1989/48, para. 180 and *Legislative History*, Vol 1, 362.

community as provided for by local custom' reflects recognition of the broader group and of its possible role both when parental care is present and when it is absent.

Article 5, as adopted by the General Assembly on 20 November 1989, provides:

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.

### **3 The content of Article 5**

As we have seen, article 5 seeks to regulate the roles of the parties in what is a triangular relationship. At the apex of the triangle, sits the child and the focus of article 5 is the exercise, by the child, of his or her Convention rights. At one corner of the base, are the parents and, sometimes, the wider family or community, with the right to provide appropriate direction and guidance to the child in a manner consistent with the child's evolving capacities.<sup>29</sup> At the other corner, is the State party, with the obligation to respect the parents' right to provide that direction and guidance. Couched in these terms, article 5 presents as a neat, conceptual, legal structure, but what does this tidy formulation really mean and does it make a difference beyond what is achieved by other provisions in the Convention?

Bearing in mind the 'universal, indivisible, interdependent, and interrelated' nature of human rights,<sup>30</sup> understanding the content of article 5 requires situating it in its wider human rights context, reading it alongside other human rights instruments and other

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<sup>29</sup> Kamchedzera (2012, para. 23) characterises Art. 5 as reflecting the child's right to receive appropriate direction and guidance, placing a correlative duty on parents to provide it. While Tobin and Varadan (2019, p. 161) endorse that characterisation, their detailed analysis of the duty owed by States parties to parents (pp.164-169), reflects acknowledgement that a right (at least, vis à vis the state) is bestowed on parents by Art. 5.

<sup>30</sup> Vienna Declaration and Programme of Action UN Doc A/CONF.157/23, adopted 12 July 1993, para 5. See also, Committee on the Rights of the Child, *General Comment No. 7 (2005) Implementing child rights in early childhood*, CRC/C/GC/7/Rev.1, para 3 ('The Committee reaffirms that the Convention on the Rights of the Child is to be applied holistically in early childhood, taking account of the principle of the universality, indivisibility and interdependence of all human rights.').

provisions in the CRC itself and, in particular, its general principles. While the work of other human rights bodies and the abundant scholarly literature in the field are of assistance in amplifying the obligations under the CRC, it is the UNCRC that makes the major contribution to understanding the substance of a particular provision. First, through its *Days of Discussion* and its *General Comments*,<sup>31</sup> it clarifies what it regards as being required by the various provisions. Secondly, it provides feedback to States parties in its *Concluding Observations* on their periodic reports. In addition, since 2014, it has been empowered to receive “communications”, as they are known – essentially, individual complaints about alleged violation of Convention rights by a State party that has ratified the Third Optional Protocol – and to make determinations thereon.<sup>32</sup> Yet only 2 of the 22 cases decided under the complaints procedure thus far raised an article 5 issue and, even then, only alongside numerous other Convention provisions.<sup>33</sup> Of the 65 cases pending, only three do so, again, alongside many other Convention provisions.<sup>34</sup> Before we drill down into the content of article 5, using these various resources to inform a textual analysis, it may be helpful to reflect upon it in the context of a criticism levelled at the CRC more generally.

### 3.1 *The Convention, the family and parental authority*

Critics of the CRC sometimes argue that recognising children as right-holders makes them autonomous, undermining the family and parental authority and leaving children unprotected and burdened with responsibilities they are not equipped to assume.<sup>35</sup> Yet the CRC recognises the importance of the family, with its Preamble

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<sup>31</sup> In this article, selective examples of *Concluding Observations* from the last five years, are used by way of illustration.

<sup>32</sup> *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, A/RES/66/138 (2011). Communications may also relate to breaches of the First and Second Optional Protocols to the Convention where the State party complained of has ratified the relevant Protocol.

<sup>33</sup> These figures state the position as at 6 August 2019. The two cases, *S.H. v Finland* CRC/C/81/D/6/2016 and *J.S.H.R. v Spain* CRC/C/81/D/13/2017, fell on admissibility grounds.

<sup>34</sup> Case no 30/2017 against Paraguay (Lack of access to child allegedly abducted by mother, residing in Paraguay, by father residing in Argentina); Case no 75/2019 against Germany (right to maintain personal relations and regular contact with both parents); Case no 87/2019 against Finland (family reunification, parental deportation).

<sup>35</sup> Hafen and Hafen 1996. In contrast, Kamchedzera (2012, para. 30-39) criticises the ‘obsession with “families”, parenthood and adult-centred liberal relativism’ in analysing Art. 5

echoing the reference to protecting the family ‘as the fundamental group of society’, found in earlier human rights instruments, and elaborating on that theme with the addition of the words ‘and the natural environment for the growth and wellbeing of all its members and particularly children.’ The important role of parents in the child’s life is reflected in numerous articles in the Convention, including article 5.<sup>36</sup> Nor are children left to their own devices, with their best interests being accorded primacy by article 3(1), States parties being required to ensure their care and protection by article 3(2) and through the application of concepts like “the child’s age and maturity” and “the child’s evolving capacities”.

Since its earliest days, the UNCRC has stressed the central role of the family, with a Day of General Discussion, in 1994, being devoted to ‘The role of the family in the promotion of the rights of the child’. There, the Committee recognised that, whereas ‘traditionally, the child has been seen as a dependent, invisible and passive family member’, the child now had a higher profile with the right to be heard and respected. In this context, it stressed the central role of the family as ‘an essential agent for creating awareness and preservation of human rights, and respect for human values, cultural identity and heritage, and other civilizations’ and acknowledged the need to find ‘appropriate ways of ensuring balance between parental authority and the realization of the rights of the child.’<sup>37</sup>

Reflecting the fact that, in many societies, the wider kinship group plays an important part in nurturing and raising children,<sup>38</sup> the obligation placed on States parties under article 5 extends, not simply to the child’s parents, but also, where appropriate, to members of the extended family or community as provided for by local custom. In its elaboration on what this means, the UNCRC has taken an inclusive approach,

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and provides six reasons why this emphasis is misleading (in terms of his ‘progressive dignified life’ approach).

<sup>36</sup> See also, articles 3(2) (care and protection, taking account of the duties of parents), 9 (separation from parents), 10 (family reunification), 14 (freedom of thought, conscience and religion), 18 (parental responsibilities), 27(3) (provision of assistance to parents) and article 29(1)(c) (development of respect for the child’s parents).

<sup>37</sup> Committee on the Rights of the Child, Report on the fifth session, January 1994, CRC/C/24, Annex V, p. 63.

<sup>38</sup> Examples of wider family groups include the African, First Nation Canadian and Native American tribe, the Hawaiian *‘ohana* and the Maori *whānau*.

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’.<sup>39</sup> When it turned its attention to children in street situations, it noted that many retain contact with their families but, for those who do not, it recognised that the community becomes all the more important and endorsed support being provided by ‘trustworthy adults associated with civil society organizations.’<sup>40</sup>

In its *Concluding Observation* on States parties’ periodic reports, the UNCRC has expressed concern that many are not doing enough to combat the obstacles some families experience in parenting, highlighting the particular difficulties faced by those impacted by poverty<sup>41</sup> and in indigenous, minority and Roma communities, where children are at higher risk of family separation and institutionalisation.<sup>42</sup> It has been troubled by the prevalence of children without parental supervision who serve as heads of household and are vulnerable to abuse, neglect, and other rights violations.<sup>43</sup> Numerous countries have been criticised for not doing enough to help working parents<sup>44</sup> and the Committee has repeatedly recommended that States

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<sup>39</sup> Committee on the Rights of the Child, *General Comment No. 7 (2005)*, para. 35.

<sup>40</sup> Committee on the Rights of the Child, *General Comment No. 21 (2017) on children in street situations*, CRC/C/GC/21, para. 35.

<sup>41</sup> See, for example, UNCRC *Concluding Observations* on Argentina, CRC/C/ARG/CO/5-6, 2018, para 36; Australia, CRC/C/AUS/CO/4, 2012, para 50; Brazil, CRC/C/BRA/CO/2-4, 2015, para 46; Honduras, CRC/C/HND/CO/4-5, 2015, para 51; Mongolia, CRC/C/MNG/CO/5, 2017, para 26; Pakistan, CRC/C/PAK/CO/5, 2016, para 42; Senegal, CRC/C/SEN/CO/3-5/, 2016, para 44; Switzerland, CRC/C/CHE/ CO/2-4, 2017, para 52; Timor-Leste, CRC/C/TLS/CO/2-3, 2015, para 38; and Uruguay, CRC/C/URY/CO/3-5, 2015, para 45.

<sup>42</sup> See, for example, UNCRC *Concluding Observations* on Bulgaria, CRC/C/BGR/CO/3-5, 2017, para 35; France, CRC/C/FRA/CO/5, 2016, para 53; Ireland, CRC/C/IRL/CO/3-4, 2016, para 43; New Zealand, CRC/C/NZL/CO/5, 2016, para 27; Norway, CRC/C/NOR/CO/5-6, 2018, para 21; Pakistan, CRC/C/PAK/CO/5, 2016, para 42; and Romania, CRC/C/ROU/CO/5, 2017, para 28.

<sup>43</sup> See, for example, UNCRC *Concluding Observations* on Kenya, CRC/C/KEN/CO/3-5, 2016, para 41; Mongolia, CRC/C/MNG/CO/5, 2017, para 25; South Africa, CRC/C/ZAF/CO/2, 2016, para 42; and Tanzania, CRC/C/TZA/CO/3-5, 2015, para 48.

<sup>44</sup> See, for example, UNCRC *Concluding Observations* on Australia, CRC/C/AUS/CO/4, 2012, para 49 (latest available); France, CRC/C/FRA/CO/5, 2016, para 55; Gambia, CRC/C/GMB/CO/2-3, 2015, para 52; Jamaica, CRC/C/JAM/CO/3-4, 2015, para 36; Maldives, CRC/C/MDV/CO/4-5, 2016, para 50; Peru, CRC/C/PER/CO/4-5, 2016, para 45; Suriname, CRC/C/SUR/CO/3-4, 2016, para 23; and the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 2016, paras 50-51.

parties take account of the effect on children of parental incarceration.<sup>45</sup> It has noted the continuing impact of gender inequality on parents, in some countries, and, where this applies, has recommended that mothers and fathers be given equal legal responsibility for children<sup>46</sup> and an end to the practice of taking children away from their mothers' care at a certain age in the event of parental divorce.<sup>47</sup> It is clear, then, that the UNCRC is alert to the importance of the family environment and of parental involvement with children.

There is no denying that the Convention brought a radical change in the recognition of children's rights. That, after all, was its purpose. It will be recalled that, during the drafting of the Convention, a small number of states sought the addition of a provision that would have secured for parents almost-unfettered authority over their children.<sup>48</sup> Happily, they did not prevail because, had they done so, the rights

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<sup>45</sup> See, for example, UNCRC *Concluding Observations* on Bangladesh, CRC/C/BGD/CO/5, 2015, para 50; Brazil, CRC/C/BRA/CO/2-4, 2015, para 49-50; Dominican Republic, CRC/C/DOM/CO/3-5, 2015, para 45; Guinea, CRC/C/GIN/CO/3-6, 2019, para 32; Iran, CRC/C/IRN/CO/3-4, 2016, para 63; Malawi, CRC/C/MWI/CO/305, 2017, para 31; Mauritius, CRC/C/MUS/CO/3-5, 2015, para 47; Norway, CRC/C/NOR/CO/5-6, 2018, para 21; Qatar, CRC/C/QAT/CO/3-4, 2017, para 27-28; Samoa, CRC/C/WSM/CO/2-4, 2016, para 39; Sweden, CRC/C/SWE/CO/5, 2015, para 36; Switzerland, CRC/C/CHE/CO/2-4, 2017, para 52; United Arab Emirates, CRC/C/ARE/CO/2, 2015, para 51; and the United Kingdom of Great Britain and Northern Ireland: CRC/C/GBR/CO/5, 2016, para 54.

<sup>46</sup> See, for example, UNCRC *Concluding Observations* on Bhutan, CRC/C/BTN/CO/3-5, 2017, para 28(a)(b); Central Africa Republic, CRC/C/CAF/CO/2, 2017, para 47, Gambia, CRC/C/GMB/CO/2-3, 2015, para 51; Senegal, CRC/C/SEN/CO/3-5/, 2016, para 44; and Iraq, CRC/C/IRQ/CO/2-4, 2015, para 50.

<sup>47</sup> See, for example, UNCRC *Concluding Observations* on Gabon, CRC/C/GAB/CO/2, 2016, para 40; Gambia, CRC/C/GMB/CO/2-3, 2015, para 51; Iraq, CRC/C/IRQ/CO/2-4, 2015, para 50; Kenya, CRC/C/KEN/CO/3-5, 2016, para 39; Oman, CRC/C/OMN/CO/3-4, 2016, para 43; Pakistan, CRC/C/PAK/CO/5, 2016, para 32; Saudi Arabia, CRC/C/SAU/CO/3-4, 2016, para 32; United Arab Emirates: CRC/C/ARE/CO/2, 2015, para 47.

<sup>48</sup> See footnotes 22-24, above, and the accompanying text. A small number of States parties have shown a strong attachment to the notion of parental authority, entering declarations or reservations on the matter when they ratified the Convention. See, "Declarations and Reservations" at:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en)

[11&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en) [Accessed 31 October 2019]. The following declaration is one example: 'The Republic of Kiribati considers that a child's rights as defined in the Convention, in particular the rights defined in articles 12-16 shall be exercised with respect for parental authority, in accordance with the Kiribati customs and traditions regarding the place of the child within and outside the family.' The last *Concluding Observations* on Kiribati were in 2006, CRC/C/KIR/CO/1, when the UNCRC urged withdrawal of the declaration, and the second report from Kiribati, lodged on 13 February 2019, notes its withdrawal. Poland made a similar declaration and the Holy See has entered a reservation that it 'interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of

guaranteed to children by the Convention would have been downgraded from entitlements to privileges, available only at the discretion of their parents. Instead, the Convention places limits on parental authority, through its general principles, sectoral rights and the balancing exercise embodied in article 5.

Article 5 does not, however, pose a threat to healthy families. It and other provisions in the Convention aim to secure respect for the rights of children and to prevent families from becoming havens for tyrants, just as the United Nations Convention on the Elimination of Discrimination Against Women<sup>49</sup> sought to end the scope for the tyranny that can flow from gender-based inequality in families. Parents and others who find these developments threatening should, perhaps, ask themselves why.

### 3.2 *The State party's obligations to the child*

By requiring States parties to respect the responsibilities and rights of parents to provide direction and guidance to the child in exercising Convention rights, article 5 does not absolve the state itself of its other responsibilities to children, including the obligation, under article 3(2), to ensure to the child such protection and care as is necessary for his or her well-being, an obligation amplified in article 19 (prevention of abuse and neglect) and other articles.<sup>50</sup> The UNCRC has made quite clear that, while recognition of the evolving capacities of young people means they have increased levels of agency to take responsibility and exercise their rights, this does 'not obviate States' obligations to guarantee protection', since 'engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them will lead to more effective protection.'<sup>51</sup>

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parents, in particular insofar as these rights concern education (articles 13 and 28), religion (article 14), association with others (article 15) and privacy (article 16).' See, UNCRC *Concluding observations* on Poland, CRC/C/POL/CO/3-4, 2015, paras 6-7 (urging withdrawal of a declaration in similar terms) and on the Holy See, CRC/C/VAT/CO/2, 2014, para. 31 (welcoming plans to re-examine its reservations).

<sup>49</sup> 1249 U.N.T.S. 13 (1979), adopted 18 December 1979, entered into force 3 September 1981.

<sup>50</sup> See also articles 34 (sexual exploitation and sexual abuse), 35 (sale, trafficking and abduction) and 36 (other forms of exploitation).

<sup>51</sup> Committee on the Rights of the Child, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, para. 19.

The importance of this obligation to ensure that children are protected, as well as recognition of the family as the optimum environment for children-rearing and the state's role in supporting parents, is reflected in the UNCRC's *Concluding Observations* on States parties' periodic reports. It has noted, with approval, examples of states that offer guidance to families and caregivers on child rearing<sup>52</sup> or provide additional support to families living in poverty.<sup>53</sup> Numerous countries have been praised for making reform of the child care system a governmental priority,<sup>54</sup> while others have been recognised for their progress in deinstitutionalising out-of-family care of children;<sup>55</sup> for promoting family-based and general foster care;<sup>56</sup> and for increasing the number of children with disabilities and special needs being adopted.<sup>57</sup>

Conversely, the UNCRC has noted, with concern, that a small number of countries lacked any cohesive, consistent legal framework for alternative care and foster care<sup>58</sup> while, in others, insufficient human, technical and financial resources were allocated to the child protection system.<sup>59</sup> Many states have been urged to establish

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<sup>52</sup> See, for example, UNCRC *Concluding Observations* on Australia, CRC/C/AUS/CO/4, 2012 (last available), para 49; Bhutan, CRC/C/BTN/CO/3-5, 2017, para 28; Chile, CRC/C/CHL/CO/4-5, 2015, para 52; Jamaica, CRC/C/JAM/CO/3-4, 2015, para 36; Oman, CRC/C/OMN/CO/3-4, 2016, para 43; and Switzerland, CRC/C/CHE/CO/2-4, 2017, para 44.

<sup>53</sup> See, for example, UNCRC *Concluding Observations* on Jamaica, CRC/C/JAM/CO/3-4, 2015, para 43; Peru, CRC/C/PER/CO/4-5, 2016, para 45; and the United Arab Emirates, CRC/C/ARE/CO/2, 2015, para 6.

<sup>54</sup> See, for example, UNCRC *Concluding Observations* on Jamaica, CRC/C/JAM/CO/3-4, 2015, para 38; Oman, CRC/C/OMN/CO/3-4, 2016, para 45; Romania, CRC/C/ROU/CO/5, 2017, para 28; and the United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/5, 2016, para 50.

<sup>55</sup> See, for example, UNCRC *Concluding Observations* on Bulgaria, CRC/C/BGR/CO/3-5, 2017, para 34; Georgia, CRC/C/GEO/CO/4, 2017, para 26; Nauru, CRC/C/NRU/CO/1, 2016, para 5; Timor-Leste, CRC/C/TLS/CO/2-3, 2015, para 32; Serbia, CRC/C/SRB/CO/2-3, 2017, para 39; Turkmenistan, CRC/C/TKM/CO/2-4, 2017, para 36; and Uruguay, CRC/C/URY/CO/3-5, 2015, para 37.

<sup>56</sup> See, for example, UNCRC *Concluding Observations* on Antigua and Barbuda, CRC/C/ATG/CO/2-4, 2017 para 36; Barbados, CRC/C/BRB/CO/2, 2017, para 41; Mauritius, CRC/C/MUS/CO/3-5, 2015, para 43; South Africa, CRC/C/ZAF/CO/2, 2016, para 41; and Tanzania, CRC/C/TZA/CO/3-5, 2015, para 48.

<sup>57</sup> See, for example, UNCRC *Concluding Observations* on Serbia, CRC/C/SRB/CO/2-3, 2017, para 41 and Yemen, CRC/C/YEM/CO/4, 2014, para 53.

<sup>58</sup> See, for example, UNCRC *Concluding Observations* on Mauritius: CRC/C/MUS/CO/3-5, 2015, para 43; Nepal, CRC/C/NPL/CO/3-5, 2016, para 43; and Switzerland, CRC/C/CHE/CO/2-4, 2017, para 49.

<sup>59</sup> See, for example, UNCRC *Concluding Observations* on Barbados, CRC/C/BRB/CO/2, 2017, para 44; Cameroon, CRC/C/CMR/CO/305, 2017, para 31; Estonia, CRC/C/EST/CO/2-

adequate safeguards and clear criteria for determining whether children should be placed in alternate care;<sup>60</sup> to provide support and facilitate family-based care for all children;<sup>61</sup> and the UNCRC has repeatedly recommended that material poverty should never be the sole justification for removing a child from parental care.<sup>62</sup> It is clear, then, that numerous States parties are falling short in respect of their child protection obligations, although whether that stems from undue deference to parents, rather than a lack of resources or commitment, is a more complex issue that is outwith the scope of this article.<sup>63</sup> Certainly, in some countries, an appreciation of the value of family-based care – whether through support of the child’s own family or by securing an alternative family environment – is lacking.

In each case, the UNCRC rarely makes specific reference to the obligation on States parties under article 5, anchoring its observations and recommendations to other

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4, 2017, para 26; Georgia, CRC/C/GEO/CO/4, 2017, para 26; Iraq, CRC/C/IRQ/CO/2-4, 2015, para 53; Lebanon, CRC/C/LBN/CO/4-5, 2017, para 26; New Zealand, CRC/C/NZL/CO/5, 2016, para 27; Saint Vincent and the Grenadines, CRC/C/VCT/CO/2-3, 2017, para 38; Slovakia, CRC/C/SVK/CO/3-5, 2016, para 35; South Africa, 2016, CRC/C/ZAF/CO/2, para 42; Suriname, CRC/C/SUR/CO/3-4, 2016, para 24; United Kingdom of Great Britain and Northern Ireland: CRC/C/GBR/CO/5, 2016, para 53; and Zambia, CRC/C/ZMB/CO/2-4, 2016, para 42.

<sup>60</sup> See, for example, UNCRC *Concluding Observations* on Chile, CRC/C/CHL/CO/4-5, 2015, para 55; France, CRC/C/FRA/CO/5, 2016, para 54; Gambia, CRC/C/GMB/CO/2-3, 2015, para 53; Honduras, CRC/C/HND/CO/4-5, 2015, para 54; Jamaica, CRC/C/JAM/CO/3-4, 2015, para 39; Japan, CRC/C/JPN/CO/4-5, 2019, para 29; Kenya, CRC/C/KEN/CO/3-5, 2016, para 42; Nauru, CRC/C/NRU/CO/1, 2016, para 37; Nepal, CRC/C/NPL/CO/3-5, 2016, para 43; New Zealand, CRC/C/NZL/CO/5, 2016, para 27; Oman, CRC/C/OMN/CO/3-4, 2016, para 46; Samoa, CRC/C/WSM/CO/2-4, 2016, para 34; Slovakia, CRC/C/SVK/CO/3-5, 2016, para 35; and Zambia, CRC/C/ZMB/CO/2-4, 2016, para 42.

<sup>61</sup> See, for example, UNCRC *Concluding Observations* on Argentina, CRC/C/ARG/CO/5-6, 2018, paras 27-28; Belgium, CRC/C/BEL/CO/5-6, 2019, para 28; Colombia, CRC/C/COL/CO/4-5, 2015, para 34; Democratic Republic of the Congo, CRC/C/COD/CO/3-5, 2017, para 31; France, CRC/C/FRA/CO/5, 2016, para 54; Gabon, CRC/C/GAB/CO/2, 2016, para 43; Ireland, CRC/C/IRL/CO/3-4, 2016, para 44; Italy, CRC/C/ITA/CO/5-6, 2019, para 24; Japan, CRC/C/JPN/CO/4-5, 2019, para 29; Lebanon, CRC/C/LBN/CO/4-5, 2017, para 26; Qatar, CRC/C/QAT/CO/3-4, 2017, para 27-28; Saudi Arabia, CRC/C/SAU/CO/3-4, 2016, para 33; Suriname, CRC/C/SUR/CO/3-4, 2016, para 24; Timor-Leste, CRC/C/TLS/CO/2-3, 2015, para 41; and Uruguay, CRC/C/URY/CO/3-5, 2015, para 38.

<sup>62</sup> See, for example, UNCRC *Concluding Observations* on Colombia, CRC/C/COL/CO/4-5, 2015, para 33; Dominican Republic, CRC/C/DOM/CO/3-5, 2015, para 42; Lebanon: CRC/C/LBN/CO/4-5, 2017, para 26; Malawi, CRC/C/MWI/CO/3-5, 2017, para 29; Mauritius, CRC/C/MUS/CO/3-5, 2015, para 44; Pakistan, CRC/C/PAK/CO/5, 2016, para 41; and Romania, CRC/C/ROU/CO/5, 2017, para 29.

<sup>63</sup> For a forthright and comprehensive analysis of the shortcoming of the child protection systems in Aotearoa New Zealand, Australia, Canada and the United Kingdom, see, Cleland 2016, pp.131-146.

aspects of the Convention. To some extent, that is a product of the reporting process itself. The UNCRC has issued guidelines to States parties on the form and content of their periodic reports, most recently, in 2015.<sup>64</sup> States parties are directed that the treaty-specific portion of their report ‘should not exceed 21,200 words’ and that information about compliance with specific articles in the Convention should be provided under various headings – or “clusters” – which group cognate articles together, and address particular points.<sup>65</sup> Article 5 is clustered with articles 9-11, 18(1) and (2), 20, 21, 25 and 27(4). While States parties are directed to address, ‘Family environment and parental guidance in a manner consistent with the evolving capacities of the child (art. 5)’, 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. Bearing in mind the word limit, States parties may say little (or nothing) about article 5, devoting attention to the other points. When the UNCRC publishes its *Concluding Observations*, the format mirrors this model based on the clusters and, while there are subdivisions within each of the clusters, it is in the nature of the issues other than the obligation under article 5 that they tend to attract greater comment.<sup>66</sup> Nonetheless, there is the sense that, had article 5 been absent, the important issues would still have been addressed, raising the question whether the drafters who thought it unnecessary might have had a point.

### 3.3 *Respecting the right of parents and others to direct and guide the child*

The underlying function of article 5 is to mediate the relationship between the parents and States parties in facilitating the exercise, by the child, of Convention

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<sup>64</sup> *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child*, CRC/C/58/Rev.3, 2015. In addition, the Committee has made the Simplified Reporting Procedure available to States parties whose periodic reports are due from 1 September 2019 onwards: see, <https://ohchr.org/EN/HRBodies/CRC/Pages/ReportingProcedure.aspx> [Accessed 31 October 2019].

<sup>65</sup> *Treaty-specific guidelines*, above, paras 10 and 17, respectively.

<sup>66</sup> It is worth noting that, following the General Assembly resolution on *Strengthening and enhancing the effective functioning of the human rights treaty body system*, A/RES/68/268, adopted 9 April 2014, the UNCRC, at its 1928th meeting, agreed to ‘reduce the word length of concluding observations by 20% of the current average length by the end of 2015’.

rights. In this, it applies not only to the exercise of rights within the family, but also to their exercise in all other settings: at school, in the medical arena,<sup>67</sup> in adoption proceedings;<sup>68</sup> in the child protection context,<sup>69</sup> in the public sphere and so forth.<sup>70</sup> By requiring States parties to respect the rights and responsibilities of parents to direct and guide the child in exercising rights, article 5 acknowledges their important role in the child's life. It does not, however, signal acceptance of unfettered parental authority. First, the obligation placed on States parties is one of respect, not mandatory deference.<sup>71</sup> Secondly, it applies only where the direction and guidance is both appropriate and provided in a manner consistent with the child's evolving capacities. Ultimately – and aside from cases where the communications procedure under the Third Optional Protocol is invoked – it will be for the State party to decide whether parental authority is being so exercised. What, then, is the import of these various qualifications?

### 3.3.1 Direction and guidance

Does direction differ from guidance? It can be presumed that it does since, if the drafters had thought that the terms meant the same thing, there would have been no need to use them both. The UNCRC does not elaborate on the distinction but, applying ordinary linguistic interpretation, it is reasonable to posit that direction takes the form of an instruction to the child, whereas guidance denotes something less peremptory and more in the nature of advice. Indeed, rather than being a dichotomy, direction and guidance can be viewed as something of a continuum.

### 3.3.2 “Appropriate” direction and guidance

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<sup>67</sup> Mills and Thompson, in this issue.

<sup>68</sup> Sloan, in this issue.

<sup>69</sup> Black and Skivenes, both in this issue.

<sup>70</sup> Henaghan, in this issue (addressing Art. 5 in the context of the child's choice of hair length; cultural identity; possible right to be breastfed; and right to be protected while maintaining bonds with parents).

<sup>71</sup> As Tobin and Varadan note (2019, p.165), the obligation to respect reaches beyond 'a negative obligation to refrain from interfering' to encompass 'a positive burden for states to take measures to ensure the effective enjoyment of a right'.

What constitutes “appropriate” direction or guidance will be context-specific and other articles in this issue explore what it means in particular settings.<sup>72</sup> However, some general observations may be made. Given the pervasive application of the general principles, direction or guidance that conflicts with any of them is unlikely to be deemed to be appropriate, always bearing in mind the scope for conflict between the principles themselves.<sup>73</sup> Thus, for example, direction that promotes or perpetuates discrimination prohibited by article 2 would not be regarded as “appropriate” and the UNCRC has not been slow to criticise States parties for failing to do enough to tackle social and cultural norms and persistent patriarchal attitudes that present females as inferior to males.<sup>74</sup> Similarly, since article 3(1) has been characterised by the UNCRC as both a substantive right and a fundamental interpretive legal principle,<sup>75</sup> parental guidance that does not accord primacy to the child’s best interests would not be regarded as “appropriate”.<sup>76</sup> Direction or guidance that does not reflect respect for the child’s right to life, survival or development, as required by article 6, would, again, be inappropriate. So, for example, when the UNCRC turned its attention to physical punishment of children, it roundly condemned the practice, finding that it not only violated article 5, but also articles 3, 6 and 19.<sup>77</sup> The fourth of the general principles, the article 12 obligation to take

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<sup>72</sup> While Tobin and Varadan (2019, p.171 *et seq.*) predict that the ‘meaning of “appropriate direction and guidance” will remain contentious’, they note that this ‘does not mean ... that its contours are without limit’, offering helpful analysis of how this plays out in various contexts.

<sup>73</sup> See, for example, the scope for conflict between articles 3 and 12, discussed by Sutherland (2016, pp.34-35).

<sup>74</sup> See, for example, the *Concluding Observations* on Bhutan, CRC/C/BTN/CO/3-5, 2017, para 28; Fiji, CRC/C/FJI/CO/2-4, 2014, para 22; Gabon, CRC/C/GAB/CO/2, 2016, para 41; India, CRC/C/IND/CO/3-4, 2014, para. 33; Iran, CRC/C/IRN/CO/3-4, 2016, para 61; Iraq, CRC/C/IRQ/CO/2-4, 2015, para 51; Jordan, CRC/C/JOR/CO/4-5, 2014, para 17; Oman, CRC/C/OMN/CO/3-4, 2016, para 43; Senegal, CRC/C/SEN/CO/3-5/, 2016, para 43; Venezuela, CRC/C/VEN/CO/3-5, 2014, para. 27; and Yemen, CRC/C/YEM/CO/4, 2014, para 29.

<sup>75</sup> Committee on the Rights of the Child, *General Comment No. 14 on the rights of the child to have his or her best interests taken as a primary consideration* (2013), CRC/C/GC/14, para. 6, describing article 3(1) as a “threefold concept”, the third element being that it is a rule of procedure.

<sup>76</sup> That point is reinforced by article 18(1), recognising the primary responsibility of parents or legal guardians for the upbringing and development of the child and that ‘the best interests of the child will be their basic concern’.

<sup>77</sup> Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence* (2011), CRC/C/GC/13, developing what it said in *General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (2006), CRC/C/GC/8.

account of any views the child wishes to express, is discussed more fully below in the context of the evolving capacities of the child.

Beyond applying the general principles, the open-ended nature of the word “appropriate” suggests that there may be scope for a State party to evaluate the quality of the parental direction or guidance. Arguably, that does not permit it simply to refuse to respect parental input with which it disagrees where the parental position falls within a range of reasonable views on the matter at hand. Direction or guidance that exposes the child to harm would, clearly, never be appropriate and there will be other instances where parental direction is so far outwith normal parameters that the State party may treat it as inappropriate. It is also worth bearing in mind that a loving, committed parent may, nonetheless, be a person whose judgment, generally or on a specific issue, is abysmal and it is the responsibility of the state to shield the child from it.<sup>78</sup>

### 3.3.3 Evolving capacities of the child

States parties are only required to respect the parental right to direct and guide the child where the direction and guidance is provided in accordance with the child’s evolving capacities. What, then, is meant by “evolving capacities”?<sup>79</sup> The UNCRC explains that the term:

refers to the processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and about how they can best be realized.<sup>80</sup>

Its use reflects that fact that the CRC applies to all children and young people, from infants to 17 year-olds.<sup>81</sup> Like articles 3 and 12, it acknowledges the unique nature of each child and the need for individualised assessment of their capacities. The UNCRC acknowledges that all children have capacities and makes clear that the concept should not be used as ‘an excuse for authoritarian practices that restrict

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<sup>78</sup> See further, Eekelaar, in this issue.

<sup>79</sup> For a very full analysis of the discussion of “evolving capacities” in the UNCRC *General Comments*, see, Varadan 2019, pp.316-328.

<sup>80</sup> Committee on the Rights of the Child, *General Comment No. 7 (2005)*, para. 17.

<sup>81</sup> Article 1, defining the child as ‘every human being below the age of 18 years’.

children's autonomy and self-expression.<sup>82</sup> In various *General Comments*, it expands on the different capacities of children, citing the example of the ability of an infant to recognise a parent or caregiver and bond with that person as the foundation of the child's development.<sup>83</sup> Beyond infancy, it counsels that parental direction and guidance will 'compensate for the lack of knowledge, experience and understanding of the child' but that, as the child develops in these respects, the parent will 'have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing.'<sup>84</sup> The child's evolving capacities are not determined simply by age since children of the same age may differ, one from another, and a given child may demonstrate greater competency in some situations than in others, with economic, social and cultural factors playing a part in the child's opportunity to develop his or her abilities.<sup>85</sup> In this, evolving capacity both overlaps with, and is broader than, the concept of "age and maturity" found in article 12.

Gerison Lansdown's much-cited conceptual framework of evolving capacities as a developmental concept, a participatory or emancipatory concept and a protective concept<sup>86</sup> highlights the considerable overlap between evolving capacities and the general principles embodied in articles 3 and 12. As we have seen, article 5 does not absolve States parties of their obligation, under article 3(2), to ensure to the child such protection and care as is necessary for his or her well-being.<sup>87</sup> Does article 5 do anything more? While both articles 3(2) and 5 acknowledge the role of parents and states, article 3(2) is confined to the child who may be in need of protection when, it can be assumed, the child's capacities would be an inherent part of assessing the need for protection and the form of any protection required. Article 5 is broader in

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<sup>82</sup> *General Comment No. 7 (2005)*, para. 17. See also, Committee on the Rights of the Child, *General Comment No. 20 (2016)*, para. 18, describing "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.'

<sup>83</sup> *General Comment No. 7 (2005)*, para. 16.

<sup>84</sup> Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, para. 84.

<sup>85</sup> *General Comment No. 7*, para. 17.

<sup>86</sup> Lansdown 2005, p.x. See also, Kilkelly, "The limits of evolving capacity from a children's rights perspective", in this issue.

<sup>87</sup> See footnotes 51-65, above, and accompanying text.

scope and covers the role of parents, and the State party's obligation to respect it, in any exercise of rights by the child.

Turning to the participatory or emancipatory nature of evolving capacities, does article 5 add anything to the obligation, embodied in article 12, to take account of any views the child wishes to express, in all matters affecting the child, in accordance with the child's age and maturity? Again, article 5 is broader, since it is not confined to the child's views, extending to the child's agency, more generally.

#### **4 Conclusions**

Article 5 seeks to facilitate the exercise, by children and young people, of the rights guaranteed to them by the Convention. For some of its drafters, its importance lay in protecting the family from undue state intrusion, enabling parents and, sometimes, the wider kinship group, to provide the child with direction and guidance in exercising rights. Others emphasised the need to protect children within the family in order to secure their opportunity to exercise Convention rights. Yet other of the drafters, however, thought article 5 to be unnecessary.

In so far as article 5 regulates the power balance between parents (and, where appropriate, members of the extended family or community) and the state, it can certainly be argued that article 18(1) protects parents from undue state interference by acknowledging that they 'have the primary responsibility for the upbringing and development of the child,' albeit, it makes no mention of the wider kinship group. Similarly, it can be argued that children are given a degree of protection within the family by numerous of the Convention's provisions, in particular, articles 3 and 12. Perhaps the nay-sayers had a point.

Yet article 5 makes a vital contribution to the realisation of children's rights. First, it addresses squarely the place of parents and the state in the exercise of rights by the child, providing the criteria to be applied in striking the crucial balance between their respective roles. As we have seen, its low profile in *Concluding Observations* is, in all probability, a function of the reporting process itself. Nor can the fact that article 5 has yet to feature prominently in cases decided under the CRC communications

procedure be regarded as significant. The procedure itself is in the early days of operation and few cases have been decided under it. Not only is article 5 cited in pending cases, but there is the, as yet, unrealised possibility of it being used in domestic courts once the jurisprudence on it under the communications procedure develops. In that, its full potential has still to be realised, something explored in other articles in this issue when it is applied in a variety of specific contexts.

Secondly, had article 5 been omitted, the concept of the child's evolving capacities would have been confined to the narrow ambit of their right to freedom of thought, conscience and religion, guaranteed by article 14. It now has a central place, applying to the exercise of rights by the child across the board where parents seek to offer direction and guidance. As a result, the UNCRC has taken the opportunity, in numerous *General Comments*, to expand upon its content, elaborating on what it means both conceptually and in particular contexts, and the body of academic literature is growing. These contributions would not have been anything like as extensive without article 5. Like the capacities of children, themselves, our understanding of article 5 and the scope for its application are evolving.<sup>88</sup>

By providing explicitly for balancing of the rights of the various players and articulating the pervasive application of the evolving capacities of the child, article 5 makes a central contribution to the understanding and implementation of children's rights. In this, it reminds us, in the words of the UNCRC, that 'The child is not a possession of parents, nor of the State, nor simply an object of concern.'<sup>89</sup>

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<sup>88</sup> As Kamchedzera notes (2012, para.75), 'the notion of the child's evolving capacities has only recently started to gain recognition as a principle applicable to all other rights in the CRC.'

<sup>89</sup> United Nations Committee on the Rights of the Child, *General Comment No. 8: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (2006), CRC/C/GC/8, para. 47.

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