The common European asylum system and the rights of the child: an exploration of meaning and compliance

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5 The right of the child to protection and care

5.1 INTRODUCTION

This chapter explores the conformity of the CEAS with the rights of the child relating to protection and care. A general source for this right is the best interests principle which includes the obligation 'to ensure to the child such protection and care as is necessary for his or her wellbeing'. Furthermore, a specific right of asylum seeking and refugee children to protection and assistance is established in Article 22 CRC, which provides in the first paragraph that:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in this Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

A number of observations can be made about the scope of this provision. In terms of personal scope, it applies to both asylum seeking and refugee children: the former are entitled to *interim* protection and care while the latter are entitled to long-term protection and care in the form of durable solutions. However, there should be no major distinction between the two phases of protection and care since it is well recognized that, when it comes to children, the search for durable solutions should start immediately.[1] Moreover, the provision applies whether the child is unaccompanied or accompanied by his or her parents or by any other person. In terms of material scope, it is clear that Article 22 is very broad. It is essentially an umbrella provision, bringing asylum seeking and refugee children within the scope of application of applicable Convention rights as well as other rights established in international

1 As Goodwin Gill observes, '[t]here is no moment […] at which the refugee child in flight suddenly becomes ready for a durable solution; on the contrary, as the child will not postpone his or her growth or development, so the need to implement elements of a durable solution is immediate.' Guy Goodwin-Gill, 'Unaccompanied Refugee Minors, The Role and Place of International Law in the Pursuit of Durable Solutions', *International Journal of Children's Rights* 3 (1995): 415.

human rights and humanitarian law. As such, it is potentially relevant to all the chapters of this thesis and indeed has already featured in Chapters 3 and 4. For the purposes of this chapter, it is proposed to delimit the scope of application of Article 22 in three ways.

The first delimitation relates to the distinction between applicable Convention rights and other rights in international law such as the 1951 Convention relating to the Status of Refugees. Here the focus in on applicable rights in the CRC. The second, related, delimitation concerns the meaning of the term 'protection'. As Goodwin Gill notes, '[i]n refugee discourse, 'protection is a term of art, whose meanings are not always clear.'[2] In this chapter, the term 'protection' is used, not the classic refugee law sense of protection from *refoulement*, but rather in the more mundane (but equally important) sense of day-to-day protection and care of the child. Hence the question arises as to what rights in the Convention are applicable to the protection (in this specific sense) and care of the asylum seeking and refugee child? The answer to this question is still too broad to be useful: a great many rights in the CRC relate to protection and care, all of which are in principle applicable to all children by virtue of the general principle of non-discrimination laid down in Article 2.[3] So a third delimitation is necessary. This delimitation follows from the question: who, primarily, protects and cares for the child? In the normal course of events, children are primarily protected and cared for by their parents. Therefore the rights in the Convention that relate to keeping the family together – family unity, in other words – are key. However, in refugee-type situations it is not unusual for children to become separated from their parents. In such situations the state must step in and take over the parental role. Therefore the rights in the Convention that relate to surrogate protection and care are key.

Accordingly, the first substantive section of this chapter (section 5.2) relates to the concept of family unity. It explores the various rights of the child relating to family unity, focusing on the concept of derived rights, the prohibition on separating a child from his or her parents against their will and the right of the child to family reunification. It examines the extent to which the relevant CEAS instruments comply with these rights and evaluates the prospects for enhanced compliance in Phase Two. Section 5.3 relates to the protection and care of the unaccompanied or separated child. It sets out the

2 *Ibid*, at 406.

3 Article 2(1) CRC provides: 'States Parties shall respect and ensure the rights set forth in the present Covenant to each child within their jurisdiction without distinction of any kind, irrespective of the child's or his or her parent's or legal guardian's race color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' The term 'other status' has been interpreted by the Committee RC as extending to 'the status of a child as being unaccompanied or separated, or being a refugee, asylum seeker or migrant': General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc CRC/GC/2005/6 (2005), para. 18.

right of the child who is deprived of family to surrogate protection and assistance. This right covers the right of the child who is deprived of family to be identified as such, to a guardian or similar representative and to alternative care. Finally, it evaluates the extent of compliance of the relevant CEAS instruments in their first and second phases. The relevant CEAS instruments are the Reception Conditions Directive (RCD), which contain provisions relating to the *interim* protection and care of asylum seeking children and the Qualification Directive (QD), which contains provisions relating to the long-term protection and care of children who are beneficiaries of international protection. Some provisions of the Dublin Regulation (DR) are also relevant.

5.2 FAMILY UNITY

5.2.1 The right of the child to family unity

In general human rights terms, the right to family unity derives from the right to respect for private and family life, such as is established under Article 8 ECHR and Article 17 ICCPR.[4] A similar right is established in Article 16 of the CRC which provides:

> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.
> 2. The child has the right to the protection of the law against such interference or attacks.

However, this is only one of a host of rights in the Convention either directly or indirectly relating to the concept of family unity, broadly understood.[5] Thus, Article 7(1) CRC provides that the child, as far as possible, has the right to know and be cared for by his/her parents. Article 8(1) establishes the right of the child to preserve his or her identity, including family relations, without unlawful interference. Article 9, which is perhaps the single most important article relating to family unity, prohibits the separation of the child from his/her parents against their will unless it is determined that separation is necessary

4 Article 8(1) ECHR provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Article 17(1) ICCPR provides: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

5 Thus, family unity in international child rights law has a broader rights base than family unity in general human rights law. On the relationship between the terms 'family', 'family unity', 'family life' and 'family reunification' see Dallal Stevens, 'Asylum-Seeking Families in current legal discourse: a UK perspective', *Journal of Social Welfare and Family Law* 32, no. 1 (2010): 5-22.

for the best interests of the child. Article 9 further establishes the right of the child who is separated from one or both parents to maintain personal relations and direct contact with them, unless contrary to the child's best interests. Notably, this provision was the inspiration for Article 24(3) of the EU Charter of Fundamental Rights.[6] Furthermore, Articles 10 and 22(2) CRC relate to the right to family reunification – a right based on the logic of family unity.

Given the number of provisions of the CRC relevant to the right of the child to family unity, it is proposed to outline the normative content of the right under three headings: the concept of derived rights; the prohibition on separating a child from his/her parents; and the right to family reunification.

5.2.1.1 The concept of derived rights

Family unity is established as a kind of meta-norm in the CRC for two reasons, the first (more) ideological and the second (more) functional. The ideological rationale for family unity is most clearly expressed in the sixth preambular paragraph of the Convention which states that 'the child for the full and harmonious development of his/her personality should grow up in a family environment in an atmosphere of happiness, love and understanding'.

As to the more functional reason for the centrality of the concept of family unity in the Convention, this is best expressed in the fifth preambular paragraph of the Convention, which asserts that States Parties are '[c]onvinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly the children, should be afforded the necessary protection and assistance so that it can *fully assume its responsibilities within the Community*.'[7] This statement is based on the pragmatic consideration that in view of the inevitable dependence of the child on his/her parents or guardian, many of the rights in the Convention must be realized by or through the parents or guardian, albeit with the assistance of the State.[8] Thus, the Convention establishes in Article 18 the principle that parents or guardians have the primary responsibility for the child and the realization of his/her rights, with the state exercising a secondary role.[9] This principle is expressed in more applied terms in numerous other

6 Article 24(3) of the Charter of Fundamental Rights provides: 'Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

7 Emphasis added.

8 For critical commentary, see 'Donna Gomien, 'Whose Right (and Whose Duty) Is iI? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child', *New York Law School Journal of Human Rights* 7 (1989-1990): 161-175.

9 Article 18 provides *inter alia*: '1. […] Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing

articles of the Convention.[10] In this regard, family unity is the mechanism through which the child realizes his/her rights, the extent of the state obligation depending on the circumstances of the parents. In the refugee law context, the term used to express this dynamic is 'derived rights' whereby the child who is accompanied by his/her parents or guardian derives his/her entitlements from their status.[11]

Ironically, in view of the centrality of family unity in the Convention scheme, the term 'family' is not defined in the Convention. The CRC uses a wide variety of terms to refer to family relationships.[12] Moreover, the Convention offers no definition of the term 'guardian' and seems to accept that the role of primary carer can be played, *de facto* or *de jure*, by a range of different adults who may or may not have blood ties with the child.[13] This suggests that the concept of family should be construed widely. Such an interpretation is supported by the broad purposive understanding of 'family' adopted by the ECtHR in its interpretation of Article 8 ECHR, which parallels Article 16 CRC.[14]

If the Convention's understanding of the family is unclear, by contrast, its understanding of who constitutes a child is unequivocal. Thus, Article 1 of the Convention provides that '[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

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responsibilities and shall ensure the development of institutions, facilities and services for the care of children.'

10 For example, Article 27 CRC relating to the right of the child to an adequate standard of living provides that the primary responsibility for securing an adequate standard of living for the child lies with the parents or other persons responsible for the child but that the State is under an obligation to assist the parents or others responsible for the child in this regard. See further Articles 3(2), 5, 14(2), 23(2) and (3), 24(2)(e) and (f) and 26(2).

11 The term 'family asylum' is sometimes used. See Christoph Bierwirth, 'The Protection of Refugee and Asylum Seeking Children, the Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child', *Refugee Survey Quarterly* 24, no. 2 (2005): 102.

12 The following terms can be found in the Convention: 'parents', 'family members', 'legal guardians', 'parents or other members of the family', 'other individuals/persons legally responsible for the child', 'persons having responsibility for the maintenance of the child', 'others having financial responsibility for the child', 'members of the extended family or community as provided by local custom', 'others responsible for the child' and 'any other person who has the care of the child'.

13 *Ibid*.

14 The ECtHR has recognised the following relationship to constitute 'family': husband, wife and dependent children, including illegitimate and adopted children (*B. v UK*, Appl. No. 8940/82, Judgment of 8 July 1987; siblings (*Moustaquim v Belgium*, Appl. No. 12313/86, Judgment of 18 February 1991; grandparents (*Vermeire v Belgium*, Appl. No. 12849/87, Judgment of 29 November 1991; and importantly, 'young adults who had not yet founded a family of their own [and] their parents and other close family members' (*Osman v Denmark*, Appl. No. 38058/09, Judgment of 14 June 2011, para. 54).

In sum, the child (i.e. anyone under the age of 18 unless a lower age of majority is provided for in domestic law) is entitled to derive rights from the status of his her parents, guardian or other family members, as appropriate. This follows from the functional rationale for family unity that underpins many of the rights in the CRC.

5.2.1.2 The prohibition on separating a child from his/her parents

Although Article 7(1) CRC relates to the right of the child to know and be cared for by his/her parents and Article 8(1) relates to the right of the child to preserve family relations, it is Article 9 that does all the heavy lifting when it comes to supplying a 'core' right of the child to family unity. The first two paragraphs of Article 9 are of particular importance and will be analyzed in turn. They provide:

> 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
> 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

Article 9(1) is a complex provision establishing a general rule – no separation of the child from his/her parents against their will, and a limitation – except where competent authorities subject to judicial review determine in accordance with law that such separation is necessary for the best interests of the child. Two examples are provided of when a separation might be deemed to be necessary for the best interests of the child: abuse or neglect of the child and where the parents are living separately and a decision must be made about the child's place of residence. A number of observations may be made on the operation of this provision.

First, the best interests of the child functions differently in Article 9 CRC than it does when it operates as a general principle in Article 3 CRC. The general principle of the best interests of the child involves an evaluation of all available options with a view to deciding which is best; thus identified, the best interests of the child must be a primary, but not necessarily the paramount, consideration. By contrast, there is a presumption in Article 9 CRC that family unity with the parents is in the best interests of the child. This presumption is rebutted where it is shown that separation is necessary for the best interests of the child. Here the best interests of the child becomes the paramount consideration (c.f. 'necessary'). The illustrative examples of when

separation may be necessary for the best interests of the child – child abuse and custody arrangements when the parents are living separately – indicate that the reasons for separation are limited to those relating to the relationship between and personal circumstances of the child and his/her parents. Consequently, extraneous considerations relating to the interests of the State or the rights of others are immaterial.[15]

Second, whether separation is necessary for the best interests of the child must be determined in accordance with applicable law and procedures. This is akin to the requirement under Article 8 ECHR that the right to family life can only be interfered with 'except such as is in accordance with law and is necessary in a democratic society'.[16] Such a decision can only be taken by 'competent authorities'. While this term could apply equally to a court or an administrative body, the key requirement for the deciding body is competence. In his commentary on Article 9, Doek notes that:

> [C]ompetent means that the authority specially designated for the determination of the necessity of a separation, should not only be mandated to do so ('competent' in legal terms) but also competent in substantive terms. The authority concerned should be well-trained and have the necessary knowledge of child psychology and child development, parent-child attachment and of the existing alternative ways and means to address the problems in the parent-child relationship without resorting to separation.[17]

These observations are consistent with emerging 'soft law' standards relating to the formal determination of best interests and also with the requirements of Article 3(3) CRC which obliges states to 'ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as in competent supervision.'

Third, the decision of the competent authority must be subject to judicial review. However, this is not limited to an initial review of the placement on appeal but extends to a periodic review. In this regard, Doek links Article 9 with Article 25 CRC concerning placement of the child for the purposes of care, protection or treatment of his physical or mental health. He notes that 'separa-

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15 See Jacqueline Bhabha and Wendy Young 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines', *International Journal of Refugee Law* 11, no. 1 (1999): 84-125.

16 Indeed, in its jurisprudence on Article 8 EHCR as it relates to the separation of children from their parents, the ECtHR's approach is very similar to that required by Article 9 CRC. See, for example, *A.D. and O.D. v United Kingdom*, Appl. No. 28680/06, Judgment of 16 March 2010.

17 Jaap Doek, *A Commentary on the United Nations Convention on the Rights of the Child, Article 8, The Right to Preservation of Identity and Article 9, The Right Not to be Separated From his or her Parents* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 26.

tion from the parents by a competent authority is a placement'.[18] Article 25 obliges states to undertake 'a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.'

Article 9(2) specifies further procedural guarantees: all interested parties must be allowed to participate in the proceedings and make their views known. The interested parties are not limited to the parents, but extend to the child him/herself. This is evident when Article 9(2) is read in conjunction with Article 12 CRC, a general principle of the Convention which, as outlined in Chapter 4, establishes the right of the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

In sum, Article 9 establishes that the separation of a child from his or her parents is highly exceptional, relating only to reasons associated with the child-parent relationship; otherwise, the state is under an obligation not to separate a child from his/her parents or, put differently, to facilitate the unity of the child with his/her parents. When, exceptionally, separation is contemplated, it is subject to requirements of lawfulness, periodic judicial review and participation of the child in the decision.

5.2.1.3 The right of the child to family reunification

Article 22 CRC relating to the right of the child seeking or enjoying refugee status to appropriate protection and humanitarian assistance provides in paragraph 2, *inter alia*:

> For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations to protect and assist such a child and to trace the parents of other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

Thus, Article 22(2) establishes an obligation to assist in efforts to trace the family of the refugee child, the purpose of such which is to facilitate the reunification of the child with his/her family. In addition to Article 22, various other articles of the CRC are relevant to the question of a right to family reunification, not least the plethora of provisions relating to the concept of family unity. However, before proceeding to that discussion, it is useful to situate the right to family reunification in the CRC in the broader context of the right to family reunification in general human rights law.

18 *Ibid*.

As is well known, there is no free-standing right to family reunification in general human rights law. Family reunification may arise as part of the right to respect for family life under Article 8 ECHR or Article 17 ICCPR. The focus here will be on the former, as the ECtHR has the most developed case-law on the subject. In the main, Article 8 ECHR involves the (negative) obligation not to interfere in family life, but it may, depending on the facts of the case, have a positive dimension, obliging states to permit family reunification in order to facilitate the enjoyment of family life.[19] The case-law of the ECtHR on this aspect of the right is not settled.[20] However, it appears that if there are 'obstacles'[21] or 'major impediments'[22] to the enjoyment of family life in the country of origin, then the state will be obliged to facilitate family reunification on its territory. As to what constitute such obstacles or impediments, the Court's case-law is rather inconsistent.[23] No case has yet been taken by a recognized refugee or beneficiary of subsidiary protection in respect of a family member left behind. It would seem logical to suggest that the 'obstacles/major impediments' test would be made out *ipso facto* in such cases.

In this rather unsettled context, the question arises as to whether the child beneficiary of international protection has a more established right to family reunification deriving from the CRC. As previously mentioned, Article 16 CRC corresponds to Article 8 ECHR. However, Article 9 and 10 CRC are also of relevance – provisions that are bolstered by the many references in the Convention to the concept of family unity.[24]

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19 ECtHR, *Abdulaziz, Cabales and Balkandali v The United Kingdom,* Appl No. 9214/80; 9473/81; 9474/81, Judgment (Plenary Court) of 28 May 1985.

20 See Thomas Spijkerboer, 'Structural Instability: Strasbourg Case Law on Children's Family Reunion', *European Journal of Migration and Law* 11 (2009): 271-293.

21 ECtHR, *Gül v Switzwerland*, Appl. No. 23218/94, Judgment of 29 February 1996, para. 42; ECtHR, *Sen v the Netherlands*, Appl. No. 31465/96, Judgment of 21 December 2001, para 40.

22 ECtHR, *Tuquablo-Teckle v The Netherlands*, Appl. No. 60665/00, Judgment of 1 December 2005, para. 48.

23 For example, contrast *Gül*, in which the fact that husband and wife had been granted humanitarian leave to remain in Switzerland, that they had a daughter there who was living in a care placement, that the wife's health was very poor and the husband was disabled were held not to be obstacles to return to their country of origin to reunify with their son who was aged 7 at the time of the initial application for family reunification, with *Sen* and *Tuquablo-Teckle*, in which the families' settled status in the Netherlands was held to be an obstacle to return to their country of origin to reunify with their daughters who were aged 9 and 15 respectively at the time of the initial application for family reunification. For critical commentary, see Thomas Spijkerboer, *supra* n. 20.

24 In *European Parliament v Council*, the ECJ referred to Articles 9 and 10 CRC when discussing the question of whether children have a right to family reunification. Thus, after analyzing Article 8 EHCR, paraphrasing Articles 9(1) and 10(1) of the CRC, and listing various relevant articles of the EU Charter of Fundamental Rights, the Court went on to find that, '[t]hese various instruments stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for

A literal reading of Article 9 suggests that it is limited to decisions about separating a child from his/her parents. Nevertheless, the Committee RC grounds its recommendations relating to family reunification principally in Article 9. Thus, in its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee states:

> In order to pay full respect to the obligation of states under article 9 of the Convention to ensure that a child shall not be separated from his or her parents against their will, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child […] While the considerations explicitly listed in article 9, paragraph 1 sentence 2, namely, cases involving abuse or neglect of the child by the parents, may prohibit reunification at any location, other best-interests considerations *can provide an obstacle to reunification at specific locations only*.[25]

What is interesting about the Committee's choice of Article 9 CRC to found a right of family reunification is that it establishes a) that the only impediment to family reunification with parents can be the best interests of the child (understood in the narrow sense of Article 9(2)); and b) that the only consideration regarding the location of family reunification with parents is the best interests of the child. As regards the refugee child or child beneficiary of subsidiary protection, one can observe that it can never be in the best interests of such a child to be returned to a country where he/she has a well founded fear of being persecuted or is at real risk of suffering serious harm. The contrary proposition leads to the absurd conclusion that it could be in the best interests of the child to be *refouled*. The Committee RC is quite categorical on this point, stating:

> Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a 'reasonable risk' that such a return would lead to the violation of fundamental human rights of the child. Such risk is *indisputably documented* in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations (including those deriving from article 3 of the Convention Against Torture and

family reunification.' Case C-540/03, Judgment (GC) of 27 June 2006, para 59. However, the case concerned family reunification of immigrant, as opposed to refugee, children. Moreover, the Court undertook no separate analysis of the substantive content of the CRC rights, simply assuming that the content was the same as that of Article 8 ECHR. This is debatable.

25 Committee RC, General Comment No. 6, 'Treatment of unaccompanied and separated children outside their country of origin', U.N. Doc. CRC/GC/2005/6 (2005), para. 81 (emphasis added).

> Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6 and 7 of the International Covenant on Civil and Political Rights).[26]

It follows necessarily from point a) above that (absent a resettlement country in which the family can reunite) such a child must be reunited with his/her parents in the country that granted international protection. However, at this juncture, the Committee deploys Article 10 too, arguing that '[w]henever family reunification in the country or origin is not possible […] due to legal obstacles to return […] the obligation under articles 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein.'[27]

Article 10 CRC provides *inter alia*:

> 1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
> 2. A child whose parents reside in different states shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. […]

Article 10(1) seems at first like a firm foundation for establishing a right to family reunification. However, the Committee RC is reluctant to deploy Article 10 to this end because of its uncertain scope *ratione personae* and *materiae*. There is some confusion as to whether Article 10(1) should be interpreted in the light of 10(2) or whether Article 10(1) establishes the general principle, with Article 10(2) pertaining to the specific situation of parental separation in different states.[28] If the former interpretation is adopted, this narrows the personal and material scope of Article 10(1), respectively, to situations of parental separation across states and to the right to leave any country and to enter one's *own* country. Owing to this ambiguity, the Committee has been slow to use

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26 *Ibid*, para. 82 (emphasis added).

27 *Ibid*, para. 83.

28 For example, the *travaux préparatoires* of the CRC reveal that 'Article 10 is intended to apply to separations involving different countries and relating to cases of family reunification. Article 10 is not intended to affect the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations.' Statement made by the chairman of the open-ended Working Group, reported in S. Detrick (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Preparatoires*, (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992), 168.

Article 10 as anything other than supplementary to Article 9.[29] Nevertheless, it is submitted that Article 9 alone or in combination with Article 10 suffices to establish a right of the child beneficiary of international protection to family reunification.

There remains the question of the right to family reunification of a child who has not (yet) been determined to be in need of international protection – in other words, the asylum-seeking child. Normally family reunification in the host country during the asylum process is premature, since family reunification in the country of origin remains a real possibility unless and until the child qualifies for international protection. However, the situation of an unaccompanied child with a family member in another EU Member State is different, since reunification with that family member is an *interim* measure pending the outcome of the asylum application. Here, the relevant provision of the CRC is Article 3 – the general principle of the best interests of the child. Subject to verification of the family relationship, of the ability and willingness of the family member to take care of the child and of the wishes of the child, it can be assumed that family reunification is in the best interests of the child. This also follows from the ideological rationale for family unity that permeates the CRC.

In brief, the child beneficiary of international protection has a right to family reunification with his/her parents in the country granting international protection, while it is likely to be in the best interests of the asylum-seeking child, as an *interim* measure, to be reunited with a family member in another EU Member State.

5.2.2 Phase One CEAS: compliance with the right of the child to family unity

This sub-section is structured, for convenience, according to the headings under which the right of the child to family unity have just been analyzed, namely, the concept of derived rights, the prohibition on separating a child from his/her parents and the right to family reunification. The provisions of the CEAS instruments that relate to family unity will be critiqued under these headings. The relevant CEAS instruments are the RCD, the QD and, to a limited extent, the DR.

29 This is evident in its General Comments. However, the Committee often uses the language of Article 10 CRC (i.e. dealing with applications for family reunification in a 'positive, humane and expeditious manner') in relation to family reunification of refugees in its concluding observations. See for example, Concluding Observations to Belgium in 2010, U.N. Doc. CRC/C/BEL/CO/3-4, para. 75 and Concluding Observations to Sweden in 2005, U.N. Doc. CRC/C/15/Add.248, § 7.

5.2.2.1 The concept of derived rights

The functional dimension of the right of the child to family unity finds expression in the refugee law context in the concept of derived rights, whereby children derive their rights from their parents' status. This concept is well recognized in both the RCD and the QD.

Thus, the personal scope of the RCD extends to asylum applicants and their family members if the latter are 'covered by such application for asylum according to the national law'.[30] In order to understand the meaning of this provision it is necessary to cross-reference the APD which provides in Article 6(4) that Member States may determine in national legislation the cases in which a minor can make an application on his/her own behalf and the cases in which an application by an adult is deemed to cover the application of any unmarried minor child. In the case of the former, the child is the asylum applicant and is directly entitled to the rights in the RCD; in the case of the latter, the concept of derived rights applies, as outlined in Chapter 3. State practice reveals that most Member States subsume the child's application into that of his/her parents'.[31]

Similarly, the QD establishes in Article 23(2) that 'Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24-34, in accordance with national procedures and as far as compatible with the personal legal status of the family member.' However, of some concern, the next subparagraph states that '[i]nsofar as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.' This provision, which authorizes the placing of limits on the derived rights of children of beneficiaries of subsidiary protection, is contrary to the functional dimension of the right to family unity. The extent to which Member States have availed of it is unclear.[32]

However, the major problem with the concept of derived rights as provided for in both the RCD and the QD lies in the definition of the term 'family members'. Art 2(d) of the RCD provides:

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30 Article 3(1) (Scope).

31 The Commission evaluation of the APD states that applicants made by parents 'generally' cover dependant minors. 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status', COM (2010) 465 final, § 4.3.1.1. Hereinafter, 'Commission evaluation of the APD'.

32 No information on the operation of this provision is provided in the Commission's evaluation of the QD. 'Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection', COM (2010) 314 final. Hereinafter, 'Commission evaluation of the QD'.

> '[F]amily members' shall mean, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:
> (i) spouse or unmarried partner of the asylum seeker or his or her unmarried partner in a stable relationship […];
> (ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law.

Article 2(h) of the QD supplies exactly the same definition of family members of the refugee or beneficiary of subsidiary protection status. This definition can be criticized for a number of reasons.

First, the definition freezes membership of the family at the moment the family left the country of origin. This means that any children born during transit or after arriving in the EU do not qualify as family members and consequently do not benefit from derived rights under the directives. This is rather startling, especially in view of the fact that pregnant women are included in the illustrative list of 'vulnerable persons' in Article 17 RCD and in Article 20(3) QD whose specific situation Member States must take into account in implementing, respectively, the provisions of the RCD relating to material reception conditions and health care and the chapter of the QD relating to the content of international protection. It may be observed that the vulnerability of pregnant women is unlikely to be diminished post-partum if their children are excluded from the scope of application of the directives.

Second, minor children are only comprehended within the definition if they are unmarried and dependent. This is a way of constructing the emancipation of children and, as *de facto* adults, of denying them their convention rights. It is inconsistent with the scheme of the CRC which defines the child as anyone under the age of 18 unless majority is attained earlier under domestic law and which conceives of child marriage as itself a cause for concern. In this regard, it is worth quoting from the Committee RC's General Comment No. 4 on adolescent health and development:

> [I]n some States Parties married children are legally considered adults, even if they are under 18, depriving them of all the special protection measures they are entitled under the Convention. The Committee strongly recommends that States Parties review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.[33]

33 U.N. Doc. CRC/GC/2003/4 (2003), para. 20. The Committee on the Elimination of Discrimination against Women has made a similar recommendation in its General Comment No. 21 of 1994. The Convention on the Elimination of Discrimination Against Women states in Article 16(2): 'The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage […].'

Given these concerns, it follows that it may be in the best interests of the married/independent child to be included in the parents' family unit and derive his/her rights accordingly. But this possibility is precluded by the definition of family in the directives.

Third, the definition of family member omits any reference to a guardian or responsible adult in situations where there are no parents, meaning that the child is not entitled to derive rights from the status of that person. Presumably, such a child could make his/her own application for international protection under the APD, thereby becoming directly entitled to the rights in the RCD and the QD (if found eligible).[34] However, such a child would not be considered to be an 'unaccompanied minor' and thus entitled to special protection and assistance. This is because the term 'unaccompanied minor' is defined in the RCD and the QD as 'persons below the age of eighteen who arrive in the territory of the Member State *unaccompanied by an adult responsible for them whether by law or by custom*, and for as long as they are not effectively taken into the care of such a person.'[35] Therefore, there is an inconsistency between the definition of family member in the directives and the definition of an unaccompanied minor, the net effect of which is that the child who is accompanied by an adult who is not a parent but who is responsible for him/her whether by law or custom is considered not to be an unaccompanied minor by virtue of that relationship but is not entitled to derive any rights from the relationship. However, inconsistently, the RCD does envisage that such children should be lodged with the adult family member responsible for them, as will be outlined below.

Fourth, the definition of family member is constructed solely from an adult perspective, encompassing spouse or partner and (some) minor children. The lack of a definition of family member from the perspective of the child effectively means that a child cannot be the central claimant from whom other family members, such as parents or siblings, derive their rights. This signals a resistance to the idea of the child as a person with distinct protection needs and to the concept of asylum as an appropriate remedy for the child in his/her own right – ideas that were developed in Chapters 3 and 4.

In conclusion, although the concept of derived rights is amply provided for in both the RCD and QD, the latter authorizes placing restrictions on the derived rights of family members of beneficiaries of subsidiary protection. Furthermore, both directives define family members narrowly such that certain categories of children – those born after the family left the country of origin and married and presumptively independent children – are precluded from

34 Article 6(4) APD provides that Member States may determine in national legislation the cases in which a minor can make an application on his/her own behalf and the cases in which an application by an adult is deemed to cover the application of any unmarried minor child – the term 'child' presumably meaning child of the adult.

35 Article 2(h) RCD and Article 2(i) QD. Emphasis added.

deriving their rights from their parents' status. Children in the company of a guardian or responsible adult who is not a parent are in a particularly invidious position: precluded from being considered as unaccompanied minors but not entitled to derive any rights from the relevant adult's status. Finally, there is no definition of family member from the point of view of the child, meaning that the child cannot be the person from whom other family members derive their rights. In sum, the RCD and QD recognize the concept of derived rights but severely curtail the beneficiaries of such rights.

5.2.2.2 The prohibition on separating a child from his/her parents

Article 9 CRC establishes an absolute prohibition on separating a child from his/her parents unless, subject to various procedural guarantees, the separation is necessary for the best interests of the child. To what extent is this right reflected in the relevant CEAS instruments? The relevant instruments are the RCD, the QD and the DR.

As regards the RCD, various provisions of Chapter II (General Provisions on Reception Conditions) speak to the issue of family unity. Article 8 provides, *inter alia*, 'Member States shall take appropriate measures to maintain *as far as possible* family unity as present within their territory, *if applicants are provided with housing by the Member State concerned*.'[36] Article 14(2) stipulates that Member States must ensure the protection of family life where housing-in-kind is provided. Article 14(3) establishes the specific entitlement of the child to family unity, providing that 'Member States shall ensure, *if appropriate*, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.'[37] However, Article 14(8) permits Member States to 'exceptionally' derogate from the Article 14 guarantees in four circumstances: (a) when an initial assessment of the specific needs of the applicant is required; (b) when material reception conditions are not available in a certain geographical area; (c) when housing capacities normally available are temporarily exhausted; (d) when the asylum seekers is in detention or confined to border posts. In such circumstances, different rules may apply 'for a reasonable period which shall be as short as possible'. In other words, in such circumstances, the duty to provide housing that assures protection of family life and to accommodate children with their parents may be limited.

These various provisions can be criticized from the point of view of the right of the child not to be separated from his/her parents on a number of grounds. First, the qualifying terms ('as far as possible', 'if applicants are provided with housing by the Member State concerned', 'if appropriate') are problematic. Article 9(1) CRC provides that the only situation in which the

36 Emphasis added.
37 Emphasis added.

separation of a child from his/her parents is permitted is if the separation is necessary for the best interests of the child. Consequently, predicating family unity on what is 'possible' (presumably, in terms of administrative convenience) and 'appropriate' (meaning unclear) is contrary to the requirements of Article 9. By the same token, limiting the State's obligation to situations of direct provision of accommodation overlooks the fact that where an accommodation allowance is provided it must be sufficient to pay for family accommodation.

Second, the derogation provision in Article 14(8) implicitly allows the child to be lodged separately from one or both parents for a number of management and administrative reasons. Since the only legitimate reason for separating a child from his or her parents is where separation is necessary for best interests – understood solely in terms of the relationship between and personal circumstances of the child and his/her parents – the derogation provision is contrary to Article 9(1) CRC. Article 14(3), which establishes the specific entitlement of the child to family unity, would seem to come within the scope of application of Article 18 of the directive which provides that '[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve minors.' Therefore any derogation from Article 14(3) would also be subject to a best interests assessment. However, as previously explained, the general principle of the best interests of the child (which is reflected in Article 18 RCD) is weaker than the specific best interests obligation in the context of forced separation, making Article 18 RCD of little succor in this context.

Third, Article 9(1) and (2) CRC mandate that any separation decision be taken by competent authorities subject to periodic judicial review and that all interested parties, including the child, be given the opportunity to make their views known and have their views considered. Chapter V RCD on appeals is potentially relevant to this issue. It contains just one article (21) which provides in the first paragraph that:

> Member States shall ensure that negative decisions relating to the granting of benefits under this Directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance the possibility of an appeal or review before a judicial body shall be granted.

Article 7 (an opaque provision permitting detention) is found in Chapter II, as are the provisions on family unity. Does this mean that any 'negative decision' taken under Chapter II, including therefore decisions relating to family unity, fall within the scope of application of Article 21? It is submitted that such an interpretation is unlikely from a schematic and purposive perspective. If Article 21 were applicable to every exercise of discretion or every use of a permitted derogation by Member States under Chapter II, then this would stymie the flexibility given to Member States as regards general re-

ception conditions. It is more likely that the reference to 'negative decisions relating to the granting of benefits under this Directive' relates principally to Chapter III of the directive (Reduction or Withdrawal of Reception Conditions). Chapter III outlines various presumed instances of abuse of the reception system and provides, by way of response, for the reduction, withdrawal and even outright refusal of reception conditions. That Article 21 relates principally to Chapter III is underscored by the express reference to Article 7 – a reference that would be superfluous if Chapter II generally fell within the scope of application of Article 21. Consequently, it is unlikely that Article 21 has any application to decisions interfering with the unity of the family taken under Chapter II, with the exception of when family unity is interfered with in detention. Therefore, the procedural requirements of Article 9(1) and (2) CRC are not met in the RCD.

Finally, it is unclear how the narrow definition of family member in Article 2(d) RCD, which has already been commented upon, maps on to the provisions relating to family unity. If Member States restrict the provisions on family unity to the family as defined in the directive, then children born after the parent(s) arrived in the EU and married and independent children will not benefit from the provisions on family unity. In sum, the family unity provisions of the RCD fall short of the strict requirements of Article 9 CRC not to separate the child from his/her parents against their will.

The QD and the DR also contain provisions relating to the issue of family unity of a child with his/her parents. The concept of family unity is provided for in Article 23 of the QD, with paragraph 1 providing that 'Member States *shall ensure* that family unity can be maintained.'[38] While, unlike the RCD, there is no separate statement of the child's entitlement to family unity, it is submitted that this is inconsequential in view of the categorical terms of Article 23(1). However, if this provision is interpreted in light of the narrow definition of 'family member' in Article 2(h) QD then not all children will benefit.

As regards the DR, Article 4(3) provides:

> For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i), shall be in dissociable from that of his parent or guardian and shall be a matter for the Member State responsible for examining the application for asylum of that parent or guardian, even if the minor is not individually an asylum seeker. The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States without the need to initiate a new procedure for taking charge of them.

This provision guarantees that the accompanied child will remain with his/her parents or guardian wherever they end up, thereby securing the unity of the

38 Emphasis added.

family.[39] Unlike the RCD and QD, the child born after arrival in the EU is included in the definition of family member in Article 2(i). However, like those two directives, the definition excludes married and independent children.

In sum, the RCD is problematic from the point of view of the right of the child not to be separated from his/her parents. This is because the family unity provisions are amenable to being applied (and derogated from) in a manner that undermines family unity. The QD and the DR are more robust in this regard, although an unfortunate feature of all the instruments is the narrow definition of 'family member'.

5.2.2.3 The right of the child to family reunification

Beginning with the obligation ancillary to family reunification, namely, the duty to assist in efforts to conduct family tracing, the 'Dublin system' (i.e. the DR, the Eurodac Regulation and the Dublin Detailed Rules), the RCD and QD all contain provisions of relevance to this issue.

As regards the Dublin System, none of the instruments contains an explicit provision on family tracing. However, it can be observed that Chapter VI of the DR relating to administrative cooperation, which envisages the exchange of a large amount of information about the applicant, together with the Eurodac database, effectively operate as channels for family tracing.

As regards the RCD, Article 19(3) provides:

> Member States, protecting the unaccompanied minor's best interests, shall endeavor to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety.

An identical provision appears in Article 30(5) of the QD. While the passive connotations of the phrase 'endeavor to trace' are unfortunate (it is unclear whether the state has acquitted its obligation if it tries (once) and fails to trace family members or whether the absence of any family tracing mechanisms within the state could vitiate the obligation), the wording does at least convey the importance of family tracing.

As for family reunification, a right of the unaccompanied minor seeking asylum to family reunification within the EU is foreseen in the DR, while a right of the refugee child to family reunification is provided for, not in the QD, but

39 The DR as a specialized form of 'safe third country' and its implications for the rights of the child were analyzed in Chapters 3 and 4.

in the Family Reunification Directive.[40] These instruments will be considered in turn.

A number of the criteria laid down in the DR for determining the Member State responsible for processing a given asylum claim are based on the concept of family reunification.[41] Of particular note, Article 6 provides that the Member State responsible for examining the application of an unaccompanied minor is that where a member of his or her family is legally present, provided that this is in the best interests of the minor.[42] Unlike the RCD and the QD, the term 'family member' is not defined solely from the perspective of an adult, but is also defined from the perspective of a child as 'the father, mother or guardian when the applicant or refugee is a minor and unmarried'.[43] The inclusion of the child's guardian within the family unit is noteworthy. However, the fact that married unaccompanied minors are precluded from reuniting with their parents is unfortunate. Also of note, a 'humanitarian clause' in Article 15 allows (but does not compel) Member States to reunite an unaccompanied minor who has a relative or relatives in another MS who can take care of him or her.[44] The concept of 'relatives' is undefined and it is unclear whether the term could cover siblings. It is to be regretted that this potentially important provision is discretionary.

As regards the right of the refugee child to family reunification, although the QD is silent on the issue of family reunification, the issue of family reunification of refugees is dealt with in the Family Reunification Directive. The Directive establishes a *right* of family reunification of refugees. Article 10(3) provides:

> If the refugee is an unaccompanied minor, the Member States:
> (a) shall authorize the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line […]

40 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

41 Four out of nine of the criteria for determining the Member State responsible relate to family reunification: Article 6, 7, 8 and 14.

42 Article 6 is silent on which Member State is responsible if family reunification is not in the best interests of the child. However, it does provide that, in the absence of a family member, the Member State responsible for examining the application is that where the minor lodged his or her application. This is not made subject to a best interests assessment.

43 Article 2(i)(iii).

44 Important safeguards regarding possible reunification with relatives are found in Article 12(1) of the Dublin Detailed Rules (Commission Regulation (EC) No. 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national.)

(b) may authorize the entry and residence for the purposes of family reunification of his/her legal guardian or any other member of the family, where the refugee has no relatives in the direct ascending line or such relatives cannot be traced.

Thus, the unaccompanied minor refugee is entitled to reunification with his/her parents, consistent with Articles 9 and 10 CRC. Problems arise thereafter. Member States retain discretion about whether or not to reunite the child with his/her legal guardian or other family members if he/she has no or no traceable parents. It is submitted that the distinction between parents and legal guardian is not justifiable. Moreover, the reference to 'any other member of the family' is somewhat confusing, as 'family members' are defined in Article 4 of the directive exclusively from the adult perspective.[45] Therefore, it is not clear what family members the unaccompanied minor might be permitted to reunite with.

Furthermore, the right of the child to family reunification is less extensive than that of an adult. Owing to the definition in the directive of family member from the perspective of an adult (per Article 4: spouse and minor children) where the refugee is an adult, he/she is entitled to reunification with his/her entire nuclear family.[46] Conversely, where the refugee is a child, he/she is entitled only to reunification with his/her parents, but not his/her siblings. This difference in treatment is problematic.[47] It places the parents of the refugee unaccompanied minor who have more than one child in the invidious position of having to choose between their children. This would seem to give rise on the part of the parent to a claim under Article 8 ECHR that his/her right

45 Article 4 defines family members as: sponsor's spouse, minor children of sponsor and spouse, minor children of sponsor or spouse subject to custody guarantees, dependent parents who do not enjoy family support in the country of origin, adult unmarried children of sponsor or spouse where they are objectively unable to provide for their own needs on account of their state of health, sponsor's unmarried partner in a stable relationship subject to the laws of the Member State.

46 It is not suggested that family reunification with 'the entire nuclear family' is enough, just that the unaccompanied minor refugee is not even entitled to that degree of family reunification. For crucial commentary of the narrow construction of family in EU law as regards third country nationals see, Dallal Stevens (2010), *supra* n. 5.

47 It would be difficult to establish that this constitutes discrimination on grounds of age, since arguably adults are not in a comparable position to children when it comes to family reunification. Indeed, in *European Parliament v Council*, the Court held that 'the fact that a spouse and a child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents.' Case C-540/03, Judgment (GC) of 27 June 2006, para. 75. From a child-rights perspective, one might agree with the Court about the differences between spouses and children over 12, but use those differences as an argument for more rather than less entitlement to family reunification on the part of the child. In any event, because of the comparability problem in arguing discrimination on grounds of age, a different argument is advanced here, based on the parents' right to family reunification.

to family life is being violated, since an 'obstacle' or 'major impediment' to reunification in the country of origin with the child or children left behind is the presence of the refugee child in the Member State.

However, arguably the biggest shortcoming of the Family Reunification Directive is the exclusion of beneficiaries of subsidiary protection from its personal scope.[48] While this exclusion is easily understandable from a chronological perspective – the concept of subsidiary protection not forming part of the asylum *acquis* at the time of the adoption of the Family Reunification Directive – it effectively means that the right of the minor beneficiary of subsidiary protection to family reunification is not met.

In sum, the DR establishes a right of family reunification for the unmarried, unaccompanied minor asylum seeker with his parents or guardian, while Member States retain discretion about reunification with other relatives. The Family Reunification Directive establishes a right of the refugee child to family reunification with his/her parents, but Member States retain discretion about reunification with his/her guardian or other family members. The child beneficiary of subsidiary protection currently has no right under EU law to family reunification. Therefore, the CEAS instruments only partially comply with the obligations in the CRC regarding family reunification.

5.2.3 Phase Two CEAS: prospects for enhanced compliance

5.2.3.1 The concept of derived rights

The central problem with both the RCD and the QD on the issue of derived rights is the restrictive definition of 'family member'. Do the proposed recast RCD and the recast QD solve this problem?

As regards the proposed recast RCD, it can be observed that first, the family is still limited to the family as it existed in the country of origin, thereby excluding children born after arrival or in transit.[49] Second, the exclusion of unmarried and dependent children from the definition of family is partly remedied. The dependency criterion is removed and some married minor children now fall within the definition of family, namely, those who are not accompanied by their spouses and in whose best interests it is to be considered as family members.[50] Third, for the first time, 'family member' is defined from the perspective of the child. However, a distinction is made in this regard

48 Article 3(2)(c) of the directive provides that the directive shall not apply where the sponsor is: 'authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of Member States'.

49 Article 2(c).

50 Article 2(c)(i).

between unmarried and married minors. When the applicant is an unmarried minor, family members comprise the parents or the responsible adult and minor siblings subject to various caveats relating to their marital status.[51] When the applicant is a married minor, the above persons are also included within the definition of family member, 'provided the applicant is not accompanied by his/her spouse and it is in the best interests of the applicant or his/her siblings to consider [these persons] as family members.'[52] Fourth, in the definition of family member from the perspective of a child, the first degree relatives in the direct ascending line are not limited to parents but extend to the 'adult responsible for the applicant whether by law or national practice of the Member State concerned'. This phraseology is also used in the revised definition of 'unaccompanied minor', thereby correcting the existing inconsistency between the two definitions.[53]

As regards the recast QD, it can be observed that exactly the same changes as outlined above were contained in the Commission proposal for a recast QD.[54] However, many of the changes were whittled down during the negotiation process. Thus, while Article 2(j) of the recast QD removes the dependency criterion in respect of minor, unmarried children, it fails to include any new provision in respect of married minor children.[55] It adds a new provision to the definition of family member from the perspective of the child, but only where the child is unmarried. Family members are defined as father, mother or other adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned. Like the proposed recast RCD, the latter phraseology is also used in the revised definition of 'unaccompanied minor'.[56] However, no mention is made of siblings. Hence, the situation of married minors is not improved under the recast QD and even unmarried minors who are siblings are not considered to be each other's family members. The recast QD does, however, delete the problematic sub-paragraph in current Article 23(2) which permits Member States 'to define the conditions' applicable to the benefits accruing to the family members of beneficiaries of subsidiary protection.

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51 Article 2(c)(ii) relates to minor siblings provided they are unmarried or, if they are married, provided they are unaccompanied by their spouses and it is in the best interests of the siblings to be together.

52 Article 2(c)(iii).

53 Article 2(e).

54 Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM (2009) 551, Article 2(j).

55 However, Recital 38 is of some succor in this regard, providing, *inter alia*, that '[i]n exceptional circumstances, where the close relative of the beneficiary of international protection is a married minor but not accompanied by his or her spouse, the best interests of the minor may be seen to lie with his or her original family.'

56 Article 2(l).

To summarize, there are some significant improvements in the definition of family member in the proposed recast RCD. Of note is the definition, for the first time, of the family from the perspective of the child and the inclusion of the responsible adult within that definition. However, children born in transit or after arrival are still excluded from the definition and Member States are still permitted to make distinctions between children on the basis of their marital status. Moreover, concern must be expressed that the improvements in the proposed recast RCD will be whittled down during negotiations, as they were during the negotiations of the recast QD. This seems highly likely if consistency is to be maintained across the recasts. If so, Phase Two CEAS will comprise only a modest improvement on Phase One from the point of view of the derived rights of the accompanied child.

5.2.3.2 The prohibition on separating a child from his/her parents

A number of problems were identified in the critique of the family unity provisions in the RCD: the use of qualifying phrases in the provisions relating to family unity, the possibility of derogating from the guarantees relating to family unity, the lack of any procedural safeguards in decisions interfering with family unity and the narrow definition of 'family member'. As the latter has just been discussed, the focus here will be on the other problems and on whether they are remedied in the proposed recast of the directive. The DR also has a family unity provision which is undermined somewhat by the narrow definition of the family. The situation under the proposed recast DR will be briefly addressed in turn.

The general provision on 'families' in Article 8 of the RCD which obliges Member States to take appropriate measures to maintain family unity 'as far as possible' but only 'if applicants are provided with housing by the Member State concerned' remains unchanged (in Article 12 of the proposed recast). However, the specific right of minors to family unity is moved from the article on 'Modalities for material reception conditions' to the article on 'Minors' (Article 23 of the proposed recast). The significance of this move is that it is no longer subject to the derogation provision which implicitly permits the separation of the child from his/her parents. Furthermore, the qualifying term 'if appropriate' is removed and a new sentence is added relating to best interests. Thus, article 23(5) reads:

> Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or the national practice of the Member States concerned, provided this is in the best interests of the minors concerned.

Furthermore, an enhanced provision on best interests (Article 23(2) of the proposed recast) provides that in assessing best interests, Member States must take due account of, *inter alia*, the minor's well-being and social development,

taking into particular consideration the minor's ethnic, religious, cultural and linguistic background and safety and security considerations. When these two paragraphs of Article 23 are read together, they present a strong case for family unity and, it is submitted, are consistent with the requirements, including the procedural requirements, of Article 9 CRC.

As regards the proposed recast DR, Article 4(3), which guarantees that the situation of an accompanied minor who meets the definition of family member in the regulation is in dissociable from that of his/her parent or guardian, is restated in Article 20(3).[57] However, the category of minor children who are cognizable as family members is expanded in Article 2(i) to include independent minor children and even married minor children 'where it is in their best interests to reside with the applicant'. Therefore, such children cannot be separated from their parent or guardian in the Dublin process. However, an anomaly – possibly a drafting oversight, but none the less important for that – should be noted. Article 20(3) does not envisage that the situation of siblings should be in dissociable from one another, even though Article 2(i) expands the definition of family members to include certain siblings.[58] The effect of this is that the presence of a sibling in another Member State is grounds for a transfer under the Dublin Regulation, but the presence of a sibling in the same Member State will not guarantee that they will not be separated by virtue of the regulation.

Notwithstanding this anomaly, it is submitted that, overall, the proposed recast DR and the proposed recast RCD are consistent with the right of the child not to be separated from his/her parents against their will.

5.2.3.3 The right of the child to family reunification

As regards the family tracing obligation, relevant provisions of both the RCD and the QD are set to be enhanced in Phase Two. Thus Article 24(3) first sentence of the proposed recast RCD reads:

> Member States shall establish mechanisms for tracing the family members of an unaccompanied minor. They shall start to trace the members of the unaccompanied minor's family, where necessary with the assistance of international or of other relevant organizations, as soon as possible after an application for international protection is made whilst protecting his/her best interests.

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57 It is anticipated that the term 'guardian' in the proposed recast DR will be replaced during negotiations by the broader phrase 'other adult responsible for [the minor] whether by law or practice of the Member State concerned', since this is the expression used in the proposed recast RCD and recast QD.

58 Article 2(i)(v): minor unmarried siblings of the applicant, when the latter is a minor and unmarried, or when the applicant or his/her siblings are minors and married but it is in the best interests of one or more of them that they reside together

Similarly, Article 31(5) first sentence of the recast QD reads:

> If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, while protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate.

The net effect of these two amended provisions is that an unequivocal obligation is placed on Member States to initiate and continue family tracing as a matter of urgency, which may require the assistance of specialist international and other organizations. However, it can be observed that the rationale for the obligation to trace the family of a child beneficiary of subsidiary protection is somewhat unclear, given that this child has no right to family reunification.

As for family reunification, the right of the unaccompanied minor asylum seeker to family reunification within the EU is enhanced under the proposed recast DR in two ways. First, the definition of family members is expanded as outlined in the previous subsection. Second, the provision of the 'humanitarian clause' which permits reunification of an unaccompanied minor with a relative in another Member State is elevated to a binding criterion (currently Article 6; Article 8 under the proposed recast). Thus, Article 8(2) stipulates that '[w]here the applicant is an unaccompanied minor who has a relative legally present in another Member State who can take care of him or her, that Member State shall be responsible for examining the application, provided that this is in the best interests of the minor.' These provisions constitute a substantial improvement on the family reunification provisions of the current DR.

The prospects for enhanced family reunification rights for refugee children and for the creation of a right to family reunification for the child beneficiary of international protection are less clear. At the time of writing, the Family Reunification Directive is the subject of a Green Paper and public consultation, the aim of which is to inform an eventual Commission decision about whether to retain the existing directive, issue interpretative guidelines or propose amendments to the directive.[59] However, it is too early to predict if or how the Family Reunification Directive might be amended.

59 European Commission, 'Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)', COM (2011) 735 final, section 4.1. The Green Paper identifies certain 'questions for stakeholders'. One such question is whether the rules on eligible family members are adequate and broad enough to take into account the different definitions of family existing other than that of the nuclear family. Possibly this will prompt a debate on the definition of family from the point of view of the refugee child. Another question is whether beneficiaries of subsidiary protection should be brought within the personal scope of the directive.

In sum, the proposed recast DR expands the opportunities for family reunification of unaccompanied minor asylum seekers within the EU. There is currently no proposal to amend the Family Reunification Directive although such a proposal may be made in the medium term. In the meantime, there will continue to be a disconnect between the family reunification rights of child refugees and beneficiaries of international protection.

5.3 THE PROTECTION AND CARE OF THE UNACCOMPANIED AND SEPARATED CHILD

Having explored the right of the asylum seeking/refugee child to family unity, which is the principal means of ensuring the protection and care of the child, this section turn to the protection and care of the asylum seeking/refugee child who is unaccompanied or separated and therefore bereft of family.

5.3.1 The right of the child without family to special protection and assistance

It will be recalled that Article 22(2) CRC imposes an obligation on States to assist in efforts to trace the members of the child's family with a view to family reunification. The final sentence of that provision provides that '[i]n cases where no parents or other members of the family can be found, the child shall be accorded the same protection and care as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.' In turn, Article 20 CRC provides:

> (1) A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State;
> (2) States Parties shall in accordance with their national laws ensure alternative care for the child;
> (3) Such care could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

The right of the child without family to special protection and assistance is well established in international and regional human rights law. For example, it is implicit in Article 24 ICCPR relating to the right of the child to special

measures of protection,[60] and is found in the Revised European Social Charter.[61] In extreme cases, inadequate care and protection of an unaccompanied child may amount to inhuman treatment contrary to Article 3 ECHR.[62] Furthermore, there is a large body of soft-law guidance about the right of the child without family to special protection and assistance in general,[63] and about its specific application to unaccompanied minors.[64] Three questions arise in relation to this right: a) What child is entitled to special protection and assistance? b) Who should oversee the special protection and assistance? c) What alternative care must be provided for the child? In answering these questions, the normative content of the right will be sketched.

5.3.1.1 Identification of the child entitled to special protection and assistance

This first issue relates to the personal scope of Article 20 CRC, taken in conjunction with Article 22 CRC. Article 20 refers to the child 'who has been temporarily or permanently deprived of his or her family environment'. Article 22 refers to the child who is without 'parents or other members of the family'. The issue to be resolved is whether the right to special protection and assistance is limited to the child who is without any relatives whatsoever (i.e. the child who is unaccompanied or totally alone) or extends to the child who is without parents or other primary care-givers but is in the company of other adult family members (i.e. the separated child). The answer to this question is of considerable consequence because a narrow interpretation means that the State is not primarily responsible for the separated child.

In its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, the Committee RC adopts a pragmatic middle ground: Article 20 applies to both groups but in the case of the separated child, guardianship should regularly be assigned to the accompanying adult family member 'unless there is an indication that it would

60 Thus the Human Rights Committee in its General Comment 17 on Article 24 ICCPR 'considers it useful that reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.' U.N. Doc HRI/GEN/1/Rev.1 (1994) at 23, para. 6.

61 Article 17 of the Revised European Social Charter establishes an obligation to 'provide protection and special aid […] for children and young persons temporarily or definitively deprived of their family's support.'

62 See ECtHR, *Mayeka v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006 and ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

63 For the most recent guidance see U.N. General Assembly, 'Guidelines for the Alternative Care of Children', A/RES/64/142 (2010). Hereinafter, 'General Assembly Guidelines 2010'.

64 For a cross-section of guidance, see Separated Children in Europe Programme (SCEP), 'Statement of Good Practice', 4th Revised ed. (2009) (hereinafter 'SCEP Statement of Good Practice'); Committee RC, General Comment No. 6, *supra* n. 26; UNHCR, 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' (1997).

not be in the best interests of the child to do so'[65] and the child should live with the accompanying adult family member 'unless such action would be contrary to the best interests of the child'.[66] Hence day-to-day protection and assistance are generally delegated to relatives but subject to state oversight. It follows that when a child is accompanied by a relative who is not a parent or primary care-giver, a process must be put in place to establish the nature of the relationship and the suitability and willingness of the relative to continue to care for the child.[67] This raises the larger issue of identification of unaccompanied minors.

Article 20 presupposes a mechanism for identifying whether a child is deprived of his or her family environment. Although there is no article in the Convention explicitly establishing such a mechanism, Article 8(1) is of relevance in this regard, providing: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.' Although originally intended to relate to 'disappeared' children,[68] the Committee RC considers that Article 8(1) extends to a duty to identify separated or unaccompanied children upon arrival at ports of entry or as soon as their presence in the country becomes known to the authorities.[69] This 'prioritized identification' process includes age assessment, prompt registration by means of an initial interview to collect bio-data and ascertain identity and on-going recording of further information including information pertaining to international protection needs. As regards age assessment, the Committee recommends that it:

> […] should not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.[70]

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65 Committee RC, General Comment No. 6, *supra* n. 25. para. 34.

66 *Ibid*, para. 40. The SCEP Statement of Good Practice goes further, requiring the appointment of an *independent* guardian (para. D3.1) and stating that '[w]here children live with or are placed with relatives, these relatives must be assessed for their ability to provide suitable care and undergo necessary recruitment checks' SCEP (2009) *supra* n. 64, § D8.1.1.

67 UNHCR's 1997 Guidelines provide practical guidance on how to carry out this assessment in Annex II. *Supra* n. 64. See also, EctHR, *Rahimi v Greece,* Appl. No. 8687/08, Judgment of 5 April 2011 in which the ECtHR reprimanded the government for failing to establish any mechanisms for verifying the relationship between a 15 year old boy and his supposed cousin. Paras. 70-73.

68 See Jaap Doek, *supra* n. 17.

69 Committee RC, General Comment No. 6, *supra* n. 25, para. 31.

70 *Ibid*, para. 31(i).

In short, the child who is entitled to special protection and assistance in the CRC is the child who is separated from his/her parents or primary care-givers, notwithstanding that the child may be with other relatives. There must be a mechanism for identifying such children, since otherwise the right to special protection and assistance would be largely deprived of application.

5.3.1.2 Oversight of care and protection

It follows from the personal scope of Article 20 that special protection and assistance has a surrogate function: it should, in so far as possible, take the place of parental protection and assistance. Accordingly, legal responsibility for the child should be vested in a designated individual who has the right and responsibility to make decisions *in lieu* of the parents. This suggests the appointment of a guardian. Surprisingly, in view of the many references in the CRC to the concept of guardianship, the Convention contains no provision on when a guardian should be appointed to a child.

However, Article 18(2) provides that '[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.' The Committee RC considers that this provision, in conjunction with Article 20(1), forms the basis of an obligation to appoint a guardian or adviser to the unaccompanied or separated child.[71] According to the Committee, the guardian or adviser should have the necessary expertise in the field of childcare so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered. Thus, the guardian's role is essentially to ensure that in all actions concerning the child, the best interests of the child is a primary consideration. This follows from Article 18(1) CRC which provides that '[p]arents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. They best interests of the child will be their basic concern.'

Moreover, in view of the pivotal role of the guardian in securing the child's protection and assistance, the Committee RC considers that the exercise of guardianship should be regularly monitored.[72] This obligation derives from Article 3(3) CRC which provides that 'States Parties shall ensure that the institu-

71 *Ibid*, paras. 33-38. Article 3(2) CRC is also of relevance in this regard: 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.'

72 *Ibid*, para. 35.

tions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and *suitability* of their staff, as well as *competent supervision*.'[73]

Finally, it should be noted that the obligation to appoint a guardian to secure the protection and assistance of unaccompanied minors may be classified as part of the state's positive obligations under Article 3 ECHR. In *Mayeka Mitunga v Belgium*, in which a five year old unaccompanied minor was detained for two months in an adult detention centre, the Court reprimanded the government for the haphazard care it provided to the child stating that '[t]he fact that the [child] received legal assistance, had daily telephone contact with her mother or uncle and that staff and residents at the centre did their best for her cannot be regarded as sufficient to meet all her needs as a five-year-old. The Court further considers that the uncoordinated attention she received was far from adequate.'[74] Although the Court did not expressly refer to a guardian, it is clear on the facts that the 'uncoordinated attention' that the child received was the result of not having been appointed one. In *Rahimi v Greece*, a case concerning the detention and subsequent abandonment by the state of a 15 year old unaccompanied minor, the Court was less circumspect on the issue of guardianship.[75] It found that the failure of the Greek authorities to appoint a guardian to the child with the result that he was left homeless and destitute until he happened to be taken charge of by an NGO constituted inhuman and degrading treatment contrary to Article 3 ECHR.

To summarize, special protection and assistance under Article 20 is surrogate parental protection. As such, it should principally be delegated to a guardian or adviser who has the right and responsibility to oversee the child's best interests. The exercise of guardianship should itself be overseen. The failure to appoint a guardian or adviser may lead to a situation amounting to inhuman and degrading treatment.

5.3.1.3 The provision of alternative care

Article 20(1) establishes that the child deprived of his/her family environment is entitled to special protection and care, while paragraphs two and three set out the requirement to provide alternative care for the child. But what, in practical terms, is the nature of the alternative care that must be provided? The answer lies in the scheme of Article 20 itself.

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73 Emphasis added.

74 ECtHR, *Mayeka Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006, para 52.

75 ECtHR, *Rahimi v Greece*, Appl. No. 8687/08, Judgment of 5 April 2011.

Discussions about alternative care for unaccompanied minors often focus on the *type* of care arrangement that should be put in place.[76] But Article 20 CRC does not mandate any particular type of care arrangement. In this regard it can be observed that the obligation in Article 20 diminishes in strength from paragraph (1) (the child 'shall be entitled to special protection and assistance provided by the state'), through paragraph 2 (States Parties 'shall' ensure alternative care but 'in accordance with their national laws') to paragraph 3 ('Such care could include foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children'). Hence, there is a right to special protection and assistance, there is a right to some form of alternative care, but there is no right to any specific modality of care placement. In this regard, the Committee RC notes that:

> A wide range of options for care and accommodation arrangements exist and are explicitly acknowledged in Article 20(3) […] When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child's age and gender, should be taken into account.[77]

Consequently, it is permitted and indeed appropriate to provide different care arrangements for different children, according to their protection needs, age, gender and so forth.[78] What is most important – and this applies regardless of the type of care arrangement – is that the placement should be identified following a best interests assessment, including soliciting the views of the child and giving those views due weight in accordance with the child's age and maturity. There are a number of soft-law guidelines on choosing alternative care arrangements in the best interests of the child.[79] Notwithstanding the individualized nature of a best interests assessment, certain general observations can be made about what is in the best interests of children when it comes to alternative care. For example, it is generally in the best interests of children

76 See, for example, the SCEP Statement of Good Practice, *supra* n. 64.

77 Committee RC, General Comment No. 6, para. 40, p. 13, *supra* n. 25. In a similar vein, the General Assembly Guidelines 2010 provide that 'States should ensure the availability of a range of alternative care options, consistent with the general principles of the present Guidelines, for emergency, short-term and long-term care.' *Supra* n. 63, para. 54.

78 Hence, the claims that are sometimes made, that children must be placed in families or that it is prohibited to place older children in adult accommodation, cannot be sustained. For example, according to the SCEP Statement of Good Practice, '[e]very separated child should have the opportunity to be placed within a family if it is in their best interests to do so. […] Separated children over 16 years of age who are not placed within families should be found appropriate residential placements and must not be treated as 'de facto' adults and placed in an adult hostel or reception center settings.' Here the gulf between best practice and the minimum requirements of the CRC is apparent. *Supra* n. 64, § D8.1.

79 See, most notably, General Assembly Guidelines 2010, *supra* n. 63, Section VI – Determination of the most appropriate form of care.

that changes of residence be kept to a minimum and that siblings be kept together. This follows from the second sentence of Article 20(3) mandating continuity in the child's upbringing and due regard to the child's ethnic, religious, cultural and linguistic background.

A further, related requirement is that, whatever the type of care arrangement identified for the child, it must serve to protect the child. This requirement derives from a schematic interpretation of Article 20 as a whole: the right to alternative care in paragraphs 2 and 3 is a functional expression of the broader right to protection (and assistance) in paragraph 1. Indeed, the term 'protection' links Article 20 with a cluster of CRC rights that relate to child protection and the prevention of abuse. Article 19(1) is particularly important in this regard, providing:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents(s), legal guardians or any other person who has the care of the child.[80]

While the guardian has an important role in overseeing the child's protection, in reality, whether the child is protected on a day to day basis will depend on the care placement allocated to the child. In this regard, any such placement must ensure that the child is protected from threats in the wider environment as well as threats that emanate from the care placement itself. As regards the latter, it is necessary that persons working in the care placement be qualified to care for children and that care arrangements be monitored and regularly reviewed.[81] This follows from the requirements of Article 3(3) CRC regarding standards and supervision of child care services. Accordingly, the Committee notes that:

> Irrespective of the care arrangements made for unaccompanied or separated children, regular supervision and assessment ought to be maintained by qualified persons in order to ensure the child's physical and psychosocial health, protection

80 Other relevant rights are established in Article 32 (right of the child to be protected from exploitation), Article 33 (right of the child to be protected against the illicit use of narcotic drugs), Article 34 (the right of the child to protection from sexual exploitation and abuse), Article 35 (the obligation to prevent the abduction of, sale of or traffic in children), Article 36 (the right of the child to protection against all other forms of exploitation) and in the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

81 The General Assembly Guidelines 2010 insist on pre-screening, training and monitoring of staff. *Supra* n. 63, paras. 113, 115 and 128 respectively. For a compelling account of what happens when states fail to ensure the protective dimension of the care placement, see Siobhan Mullally, 'Separated Children in Ireland, Responding to 'Terrible Wrongs', *International Journal of Refugee Law* 23, no. 4 (2011): 632-655.

against domestic violence or exploitation, and access to educational and vocational skills and opportunities.[82]

In summary, while Article 20(2) and (3) do not mandate any particular type of care arrangement, they do require that the child placement follows a best interests assessment. Furthermore, the care arrangement must protect the child, both from without and from within. This has implications for staff training and monitoring.

5.3.2 Phase One CEAS: compliance with the right of the child to special protection and assistance

Of all the child-rights issues that arise in the asylum process, the rights of unaccompanied minor have been most thoroughly researched and subject to policy and legislation.[83] This is due not only to the extreme vulnerability of unaccompanied minors but also to the perception that this group constitutes a 'problem' population.[84] This sub-section explores whether this scrutiny has led to a convergence between the treatment of unaccompanied minors and their rights. The relevant instruments of the CEAS are the RCD and the QD.

5.3.2.1 Identification of the child entitled to special protection and assistance

It is the child who is separated from his/her parents or primary caregivers as well as the child who is totally alone that is entitled to special protection and assistance. There must be a mechanism for the identification of such children. To what extent are these requirements met in the RCD and QD?

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82 Committee RC, General Comment No. 6, *supra* n. 25. para. 40, p. 14.

83 For recent research, see Frontex, 'Unaccompanied Minors in the Migration Process' (2010) (hereinafter 'Frontex report'); European Migration Network, 'Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study' (2010) (hereinafter, 'EMN report'); EU Agency for Fundamental Rights, 'Separated, asylum-seeking children in European Union Member States, Report' (2010); and Eurasylum, 'The Protection of the rights and special needs of irregular minors and asylum seeking children, A thematic discussion paper prepared for the EU Agency for Fundamental Rights' (2008). For policy initiatives see Communication from the Commission to the European Parliament and the Council, 'Action Plan on Unaccompanied Minors (2010-2014)', COM (2010) 213 final (hereinafter, 'Commission Action Plan on Unaccompanied Minors 2010') and 'Council Conclusions on Unaccompanied Minors' (3018th Justice and Home Affairs Council meeting, Luxembourg, 2010). As regards legislation, in the area of unaccompanied minors seeking asylum it can be observed that more provisions of the CEAS are devoted to unaccompanied minors than any other child-rights issue.

84 For example, the Frontex report opens with the following observation: 'The phenomenon of unaccompanied minors claiming asylum in the EU has become a more visible problem. The increasing extent and weight of the problem was also identified in the Frontex, 'Annual Risk Assessment (ARA) 2009.' *Ibid*, Executive summary, p. 3.

Beginning with the RCD, unaccompanied minors are defined in Article 2(h) as 'persons below the age of eighteen who arrive in the territory of the Member State unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person; it shall include minors who are left unaccompanied after they have entered the territory of Member States.' The key provision of the directive relating to the protection and assistance of unaccompanied minors is Article 19. Article 19(1) obliges Member States to 'as soon as possible take measures to ensure the necessary representation of unaccompanied minors' while Article 19(2) entitles the unaccompanied minor who makes an application for asylum to be placed in one of four care placements 'from the moment they are admitted to the territory'.

At first glance, the definition of 'unaccompanied minor' can be criticized for excluding the concept of the separated child.[85] This is because the term 'unaccompanied minor' strongly suggests a child who is not in the company of anybody, in other words, a child who is totally alone. However, on closer scrutiny, it is not clear that Article 2(h) in conjunction with Article 19 RCD does exclude the concept of the separated child. Firstly, Article 2(h) refers to the child 'unaccompanied by an adult responsible for them whether by law or by custom', a formulation that suggests a verification of the relationship between the child and the accompanying adult. Further, the child will be considered unaccompanied 'for as long as they are not effectively taken into the care of such a person', the term 'effectively' indicating an oversight process. Secondly, one of the four care placements listed in Article 19(2) is a placement with adult relatives. This implies that some unaccompanied minors at least are separated, as opposed to being totally alone. Therefore, although the RCD uses the terminology 'unaccompanied minors', on closer scrutiny it encompasses separated children too.

An arguably bigger problem with the Article 19 RCD is that, despite the hints at verification and oversight, it does not establish any mechanism for identifying unaccompanied minors. Since the scope of the directive is limited to persons who lodge an application for asylum, chronologically, the issue of identification is something that should be addressed in the APD.[86] However that directive also fails to establish any mechanism for identifying unaccompanied minors.[87] Thus, the issue is left entirely to the discretion of Member

85 For such criticism, see Annamaria Enenajor, 'Rethinking Vulnerability: European Asylum Policy Harmonisation and Unaccompanied Asylum Seeking Minors', *Childhoods Today* 2, no. 2 (2008) (Online Journal): 1-24.

86 Article 3 RCD provides, *inter alia*, '[t]his Directive shall apply to all third country nationals and stateless persons who make an application for asylum'.

87 Article 6 on access to the procedure simply provides at paragraph 5: 'Member States shall ensure that authorities likely to be addressed by someone who wishes to make an application for asylum are able to advise that person how and where he/she may make such an

States.[88] This lacuna in the CEAS has a knock-on effect on *when* the unaccompanied minor asylum seeker becomes entitled to special protection and assistance. Article 19(1) of the RCD establishes an obligation to appoint a representative 'as soon as possible', while Article 19(2) requires Member States to secure a care placement for unaccompanied minors who make an application for asylum 'from the moment they are admitted to the territory'. But these provisions are inconsistent with each other (an application for asylum is often predicated on having a representative and hence cannot be made the moment the unaccompanied minor is admitted to the territory)[89] and inconsistent with reality (unaccompanied minors do not always present at the border for the purposes of being admitted to the territory).

A related omission from the RCD is any reference to age assessment. Indeed the only reference to the concept of age assessment is made in Article 17(5) of the APD which provides that 'Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for asylum.' This raises the question of why age assessment is perceived as useful in the context of status determination of unaccompanied minors but not in the context of special protection and assistance for unaccompanied minors. It is hard to avoid the conclusion that it is perceived as an exclusionary rather than inclusionary tool. This impression is reinforced by the reference in Article 17(5) of the APD to medical examinations. Medical examinations cover a range of age assessment techniques, such as bone density tests, assessment of dental age and anthropometric measurements which, apart from being of scientifically dubious merit, fall foul of the Committee RC's requirement of safeguards in relation to age assessment.[90] The lack of any mechanism for identifying unaccompanied minors is inconsistent with Article 20 CRC in conjunction with Article 8(1).

As for the QD, Article 30 relating to unaccompanied minors contains similar provisions relating to the special protection and assistance of this group. The definition of 'unaccompanied minor' in Article 2(i) QD is the same as in the RCD. Article 30(1) establishes that unaccompanied minors must be appointed a guardian or representative 'as soon as possible after the granting of refugee or subsidiary protection status'. Article 30(3) provides that Member States shall ensure a care placement for the unaccompanied minor, but no reference is made to when this should be done. However, these provisions do not give

application and/or may require these authorities to forward the application to the competent authority.'

88 For a description of the different approaches of Member States, see the EMN Report, *supra* n. 83.

89 Thus Article 6(4)(b) APD permits Member States to determine in national legislation the circumstances in which an application for asylum by an unaccompanied minor has to be lodged by a representative.

90 See further, Heaven Crawley, *When is a Child Not a Child? Asylum, Age Disputes and the Process of Age Assessment* (Immigration Law Practitioners' Association, 2007).

rise to the same problem of identification as arose under the RCD, since unaccompanied minors will already have been identified (or not) under the latter.

To sum up, while both directives make provision for the special protection and assistance of unaccompanied minors, neither establishes any mechanism for identifying such children. This is problematic in the context of the RCD because clearly, if unaccompanied minors are not identified as such, they cannot benefit from the rights afforded to them under the directives.

5.3.2.2 Oversight of care and protection

Special protection and assistance for the unaccompanied minor necessitates the appointment of a guardian or adviser who acts in the best interests of the child and whose role is overseen by a higher authority. Failure to appoint a guardian or adviser may lead to a situation that amounts to inhuman or degrading treatment.

The first thing to note is that both the RCD and the QD oblige Member States to appoint a guardian or representative to the unaccompanied minor. Consequently, there is no question of a possible violation of Article 3 ECHR. The issues raised by the guardianship provisions of the directives are more nuanced, relating to the quality of the arrangements envisaged.

As regards the RCD, Article 19(1) provides that 'Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organization which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities'. The difficulty with this provision is that it is drafted at such a broad level of generality that it is unclear who the representative is or what his/her role involves.

Thus, as regards the identity of the representative, it can be observed that there is potentially a big difference between being represented by a legal guardian and by an artificial entity (i.e. an organization). Given the lack of common ground between the two, it follows that the meaning of 'any other appropriate representation' is unclear. Unsurprisingly, in view of the ambiguity about the identity of the representative, no criteria are laid down about the necessary qualifications of the representative. However, the reference in Article 19(1) to 'regular assessments by the appropriate authorities' mitigates this omission somewhat.

As for the role of the representative, while it is possible to deduce from the reference in Article 19(1) RCD to an organization for the care and well-being of minors that the guardian/representative's role relates to the care and well-being of minors, there is no more detailed guidance on the role of the guardian/representative in the specific context of the RCD. Indeed, State practice indicates a marked lack of harmonization between Member States

on the issue of the guardian/representative.[91] The lack of clarity about the role of the representative is evident in the Commission evaluation of the RCD, which confuses the representative with a legal representative.[92] While unaccompanied minors are *also* entitled to a legal representative during the asylum process (as outlined in Chapter 4), this is separate from the right to a guardian or adviser. Consequently, although the RCD provides for the appointment of a representative, it is ambiguous about the identity, qualifications and role of the representative.

As for the QD, Article 30 provides that the representation must be by legal guardianship, by an organization responsible for the care and well-being of minors 'or by any other appropriate representation *including that based on legislation or Court order.*'[93] The italicized provision, which does not appear in the corresponding provision of the RCD, establishes that the representative may be appointed in a more formal manner. It is submitted that this is an appropriate reflection of the fact that the unaccompanied minor is now a beneficiary of international protection who is entitled to a durable solution. Although the QD does not supply any guidance about the qualifications of the representative, Article 30(2) does clarify the role of the representative, providing that 'Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.' Put differently, the representative's role is to ensure that the minor benefits from all the rights to which he is entitled under the directive.

In sum, both the RCD and the QD quite correctly mandate the appointment of a representative to the unaccompanied minor. However, the RCD, in particular, is ambiguous about the representative and silent on his/her proper role as an over-seer of the child's care and protection.

5.3.2.3 The provision of alternative care

Although Article 20(2) and (3) CRC do not mandate any particular type of care arrangement, they do require that the child placement follow a best interests assessment, while the various protection rights in the Convention require that

91 For example, in its report into separated children seeking asylum in the EU, the Fundamental Rights Agency found that 'most of the children interviewed were not fully aware of whether they had a guardian, who that person was or which responsibilities were attached to the guardianship function.' Fundamental Rights Agency, *supra* n. 83, p.33. See further, Defence for Children International-ECPAT The Netherlands, 'Core Standards for Guardians of Separated Children in Europe: Goals for Guardians and Authorities' (2011).

92 'Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers', COM (2007) 745 final, § 3.5.2, p.9. Hereinafter, 'Commission evaluation of the RCD'.

93 Emphasis added.

the placement serve to protect the child. This necessitates staff training and monitoring. How do the relevant provisions of the RCD and the QD measure up in this regard?

As regards the RCD, Article 19(2) and (4) are the relevant provisions. Article 19(4) states that

> '[t]hose working with unaccompanied minors shall have had or receive appropriate training concerning their needs, and shall be bound by the confidentiality principle as defined in the national law, in relation to any information they obtain in the course of their work.'

Article 19(2) provides:

> Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed:
> a) With adult relatives;
> b) With a foster family;
> c) In accommodation centres with special provision for minors;
> d) In other accommodation suitable for minors.
> Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

The range of care placements for unaccompanied minors in Article 19(2), together with the references in the second sub-paragraph to various aspects of a best interests assessment (i.e. siblings kept together, changes of residence limited to a minimum) correspond broadly with Article 20(2) and (3) CRC. However, the optional derogation whereby Member States can opt to place minors aged 16 or over in accommodation centres for adult asylum seekers has elicited much criticism from NGOs and academic commentators on principle, although in practice, only three Member States use the derogation.[94] Nevertheless, it is submitted that the derogation is not *necessarily* contrary to

94 For NGO criticism see, for example, ECRE, 'Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Reception Conditions Directive (COM (2011) 320 final)' (2011), 25. For academic criticism see, Eva Zschirnt, 'Does Migration Status Trump the Best Interests of the child? Unaccompanied Minors in the EU Asylum System', *Journal of Immigration Asylum and Nationality Law* 25, no. 1 (2011): 34-55. Zschirnt argues at p. 46 that the derogation provision 'still conflicts with the CRC's provision that children should be separated from adults in their accommodation.' However, while there is a provision in the CRC that the child should be separated from adults in *detention* (Article 37(c)), there is no obligation in the CRC to separate children from adults in accommodation generally.

the requirements of Article 20 CRC and other relevant protection articles of the Convention, provided it is applied subject to a best interests assessment. Article 18 of the directive (Minors) looks promising in this regard, stipulating that '[t]he best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors'. Since the derogation provision undisputedly involves minors, it follows that the best interests of the child must be a primary factor in deciding whether or not to apply the provision to any given minor.

Less positively, however, Article 19(2) RCD is weak on the protective function of the care placement. The lack of any reference to child protection is unfortunate, especially in light of the well established trend across the EU of disappearances of unaccompanied minors from care.[95] Furthermore, Article 19(2) is silent on the requirement that alternative care be subject to regular supervision and assessment. Article 19(1) relating to representation of unaccompanied minors does provide that 'regular assessments shall be made by the appropriate authorities', but these assessments are *of* the representative; they are not assessments of the care placement *by* the representative – a point not fully understood in the evaluation process.[96] In fact, there is nothing in the text of Article 19(1) to suggest that the representative is empowered to exercise a supervisory role over the care placement, to challenge the quality of care provided in the placement or, if necessary, to remove the child from that placement and secure for him/her an alternative placement. There is a requirement in Article 19(4) RCD that persons 'working with unaccompanied minors shall have had or receive appropriate training concerning their needs'. While this is an important acknowledgement of the need for suitably qualified staff, the fact that the training could be a one-off or take place after appointment casts doubt on the seriousness of this provision.

As regards the QD, Article 30(3) contains the same list of possible placements that are outlined in the RCD but with an explicit obligation to take the views of the child into account in accordance with age and maturity and without any derogation provision in respect of over 16s. Like the RCD, Article

95 All recent reports and policy documents on unaccompanied minors report on this phenomenon. *Supra* n. 83. The Committee RC has expressed its concern in its concluding observations to Nordic countries, in particular, at the disappearance of unaccompanied minors from care. See Committee RC, Concluding Observations to Denmark in 2011, U.N. Doc. CRC/C/DNK/CO/4, para 58; to Norway in 2010, U.N. Doc. CRC/C/NOR/CO/4, para. 50; to Norway in 2005, U.N. Doc. CRC/C/15/Add.262, para. 41; and to Sweden in 2005, U.N. Doc. CRC/C/15/Add.248, § 7.

96 For example, the Odysseus Report, which fed into the Commission's evaluation of the RCD, states: 'It has not been possible to gather sufficient information concerning the question of finding out whether enough monitoring is effected by legal guardians in conformity with the requirements of Article 19(1) of the Directive'. Academic Network for Legal Studies on Immigration and Asylum in Europe, 'Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers in the EU Member States' (2006), 83.

30(4) iterates the desirability of keeping siblings together, subject to the best interests of the child and his or her age and degree of maturity, and of limiting changes of residence to a minimum. This is all consistent with the requirements of the CRC. However, like the RCD, the QD makes no reference to the child protection in the context of the care placement and contains the same weak provision on training for those working with unaccompanied minors.[97]

In short, while the RCD and QD provide for a range of care placements for unaccompanied minors and contain provisions that implicitly relate to the best interests of the child, both directives fail to articulate the protective function of the care placement. This is unsatisfactory in view of the well known dangers that care placements pose for unaccompanied minors.

5.3.3 Phase Two CEAS: prospects for enhanced compliance

5.3.3.1 Identification of the child entitled to special protection and assistance

Although identification of the unaccompanied minor does not arise in the context of the QD, the lack of an identification mechanism is problematic in the context of the RCD. In this regard, the proposed recast RCD introduces no new mechanism for the identification of such children. There is, however, a new article relating to the identification of the special reception needs of vulnerable persons, but this is of little assistance in the context of unaccompanied minors (notwithstanding that it includes unaccompanied minors in its illustrative list of vulnerable persons) because it provides that identification mechanisms 'shall be initiated within a reasonable time *after* an application for international protection is made.'[98] Obviously, it is necessary to identify the unaccompanied minor before that point or conceivably an application for international protection will not be made. An enhanced provision of the proposed recast APD relating to the identification of applicants in need of special procedural guarantees is also of little benefit because it simply refers back to the identification mechanism in the RCD.[99]

The failure to introduce a mechanism for the identification of unaccompanied minors is puzzling. It is acknowledged in the Commission's Action Plan on Unaccompanied Minors that, 'EU legislation does not provide for the appointment of a representative from the moment an unaccompanied minor is detected by the authorities, namely before the relevant instruments [e.g.

97 Article 30(6).

98 Article 22. Emphasis added.

99 Article 24(1) of the proposed recast APD provides: 'Member States shall ensure that applicants in need of special procedural guarantees are identified in due time. To that end, Member States may use the mechanism provided for the in the [RCD].'

the RCD] are triggered.'[100] It is further stated that, '[w]henever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimization. From the first encounter, attention to protection is paramount, as is early profiling of the type of minor […].'[101] However, when it comes to legislative action, the action plan simply states that:

> The EU should adopt higher standards of protection for unaccompanied minors by completing negotiations on the revision of the asylum acquis […]. The Commission will ensure that EU legislation is correctly implemented and, on the basis of an impact assessment, evaluate whether it is necessary to introduce targeted amendments or a special instrument setting down common standards on reception and assistance for all unaccompanied minors […].[102]

While it may well be the case that a special instrument governing all unaccompanied minors (those seeking international protection and otherwise) is needed – an issue that is beyond the scope of the present work – it is unclear why, in the meantime, phase two CEAS is not used to improve the position of unaccompanied minors at the identification stage. The reference to the revision of the asylum *acquis* is misleading in this regard.

In sum, neither the proposed recast RCD nor the proposed recast APD contains any new mechanism for the identification of unaccompanied minors. The omission constitutes a significant practical barrier to the enjoyment by unaccompanied minors of applicable rights.

5.3.3.2 Oversight of care and protection

On a more positive note, a considerable improvement is made to the provisions of the RCD relating to the representative. A new paragraph in the article on definitions supplies a definition of a representative as follows:

> '[R]epresentative' means a person or organization appointed by the competent bodies to act as a legal guardian in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the child's best interests and exercising legal capacity for the minor where necessary. Where an organization acts as a representative, it shall appoint a person responsible for carrying out the duties of the legal guardian in respect of the minor, in accordance with this Directive.[103]

100 European Commission, *supra* n. 83, § 4.1, p. 9.
101 *Ibid*.
102 *Ibid*, pp. 9 & 10.
103 Article 2(j).

Furthermore, the first paragraph of the article relating to unaccompanied minors (now Article 24) is significantly amended and now reads:

> Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him/her to benefit from the rights and comply with the obligations provided for in this Directive. The representative shall have the necessary expertise in the field of childcare and shall perform his/her duties in accordance with the principle of the best interests of the child […].

Together, these two provisions address the concern outlined earlier that the identity, qualifications and role of the representative are not adequately delineated.

Inconsistently, no similar changes relating to the representative were proposed by the Commission for the recast QD and hence there is no definition of 'representative' in the recast QD and no similar description of his/her role.

5.3.3.3 The provision of alternative care

Article 19(2) RCD has attracted criticism because it authorizes Member States to derogate from the obligation to accommodate unaccompanied minors over the age of 16 separately from adults. However, it was considered that, providing the derogation provision is subject to a best interests assessment (as it seems to be under Article 18 of the directive) the derogation is unproblematic. The real difficulty with the RCD – one that is also apparent in the QD – is the lack of any reference to the protective function of the care placement. The proposed recast RCD, in particular, envisages some significant changes in this regard.

Article 24(2) of the proposed recast RCD on unaccompanied minors provides that the derogation from the obligation to secure a child placement for over 16s can only be used 'if it is in their best interests, as prescribed in Article 23(2)'. Thus the derogation provision is expressly subject to a best interests assessment. Article 23(2), in turn, provides that in assessing the best interests of the child, due account must be taken of, *inter alia*, safety and security considerations. This goes some way towards integrating a protective dimension into the care placement. Unfortunately, there is still no reference to the need for supervision and monitoring of the care placement. A slight improvement is, however, made to the provision requiring training of staff working with unaccompanied minors. Such staff must have had 'and shall continue to receive' appropriate training concerning the needs of unaccompanied minors – a recognition of the need for previous *and* on-going training.

The recast QD makes no reference to the protective dimension of the care placement. However, an identically worded provision to Article 23(2) of the proposed recast RCD on assessing the best interests of the child appears in a

recital to the QD.[104] Like the proposed recast RCD, there is still no reference to supervision or monitoring of the care placement but the training provision is amended in the recast QD to include an on-going dimension.[105]

In sum, the proposed recast RCD and recast QD take some steps towards strengthening the protective dimension of the care placement, although both stop short of an explicit acknowledgement of the need for protection in care or of establishing an oversight mechanism.

5.4 Synthesis of findings

This chapter dealt with two rights: the right of the child to family unity and the right of the child without family to special protection and assistance by the state. In the case of the former, the normative content of the right was delineated along three lines: the concept of derived rights, the prohibition on separating a child from his/her parents against their will and the right of the child to family reunification. The question for resolution was whether the relevant CEAS legislation complies with these dimensions of the right. Taking the Phase One instruments first, it emerged that compliance varies according to instrument. However, allowing for variations between instruments, it was found that the instruments generally acknowledge the major attributes of the right to family unity. However, they curtail the scope of the family unity provisions by defining the child and/or the family in a rigidly narrow way. This is compounded by differential treatment of beneficiaries of subsidiary protection and by expressly or impliedly permitting aspects of the right to family unity to be derogated from. In Phase Two, the definition of the child and the family is broadened somewhat, with the result that there is a modest gain in terms of who benefits from the rights associated with family unity. Moreover, the differential treatment of beneficiaries of subsidiary protection is removed in respect of derived rights, although not in respect of the right to family reunification, and the right to family unity is less amenable to express or implied limitations generally. Therefore, Phase Two CEAS constitutes a qualified improvement on Phase One in terms of the right of the child to family unity.

As regards the right of the child without family to special protection and assistance, it was found that this right comprises three essential elements: the right of the unaccompanied or separated child to be identified as such, to be appointed a guardian or adviser to oversee the child's best interests and to be provided with alternative care. The second two elements are provided for in the Phase One instruments but not the first, with the result that the unaccompanied or separated child may not get to benefit from the rights to which

104 Recital 18.
105 Article 31(6).

he/she is entitled under the instruments. Furthermore, the provisions of the instruments relating to the guardian or representative lack the specificity necessary to communicate the role and essential attributes of that person. Finally, while the instruments outline a range of care placements for unaccompanied minors, they fail to make clear that the central role of the placement is to protect the child. Consequently, the existence of detailed provisions relating to the protection and care of unaccompanied minors in Phase One CEAS belies the fact that the standards they contain do not conform to international standards. Some improvements were discerned in Phase Two. Notably, the provisions of the instruments relating to the role and qualities of the guardian are much improved and the protective dimension of the care placement is indirectly strengthened, although still no explicit reference is made to protection in the context of care. However, these improvements are undermined by a continued failure in Phase Two to establish a mechanism for the identification of the unaccompanied or separated child. In sum, Phase Two CEAS constitutes a modest improvement on Phase One in terms of the right of the child without family to special protection and assistance.