

# **ASYLUM DECISIONS ON CHILD APPLICANTS**

## **Report on 4-Country Pilot Project**

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June 2004**

## CONTENTS

<b>1. Introduction</b>	<b>3</b>
<b>1.1 Background</b>	<b>3</b>
<b>1.2 Legal Framework</b>	<b>4</b>
<b>1.3 Methodology</b>	<b>7</b>
<b>2. Statistics and Asylum System in 4 Countries</b>	<b>9</b>
<b>2.1 Statistics</b>	<b>9</b>
<b>2.2 Asylum Law</b>	<b>11</b>
<b>2.3 Asylum Procedure</b>	<b>13</b>
<b>2.4 Special Provisions for Separated Children</b>	<b>15</b>
<b>3. Findings</b>	<b>16</b>
<b>3.1 Interviews: Questions and Line of Questioning</b>	<b>16</b>
<b>3.2 Credibility and Evidentiary Issues</b>	<b>20</b>
<b>3.3 Child-Specific Forms of Persecution</b>	<b>23</b>
<b>3.4 Imputed Political Opinion</b>	<b>31</b>
<b>3.5 Political Opinion and Activity</b>	<b>33</b>
<b>3.6 Torture, Cruel, Degrading and Inhuman Treatment of Children</b>	<b>34</b>
<b>3.7 Internal Flight Alternative</b>	<b>37</b>
<b>3.8 The Issue of Caregivers and Family Unity</b>	<b>37</b>
<b>3.9 Reference to International Standards on Children</b>	<b>39</b>
<b>4 Summary</b>	<b>40</b>
<b>4.1 Contrasts and Similarities between Countries</b>	<b>40</b>
<b>4.2 Unexpected Problems and Issues</b>	<b>43</b>
<b>4.3 Recommendations for Further Study</b>	<b>43</b>

# 1. Introduction

## 1.1 Background

Among the thousands of refugees who seek asylum in Europe each year a significant number are children who are on their own. The past few years has seen an increase in attention given to the rights and needs of these ‘separated children’. Some positive developments have taken place in terms of reception and care and some procedural aspects.<sup>1</sup> However, an area which has been largely neglected is the refugee status determination itself of child applicants. Very few studies have been made<sup>2</sup> and few countries produce official statistics and information regularly on this group of asylum-seekers. The little knowledge available indicates, however, that very, very few children are recognized as refugees in any European country and that there are few examples where child-specific persecution is taken into consideration<sup>3</sup>.

Consequently, a proposal has been made to carry out international research on the outcome of asylum applications by separated children needing refugee protection.<sup>4</sup> The project “Seeking Asylum Alone” will compare 10-12 countries in Europe, North-America and Australasia and will examine data material over the past three-four years. The main objective is to examine how effective these states are through their legal and administrative structures in protecting children in need of refugee protection. On the one hand, it will seek to document and describe current practice by answering some critical questions related to how children are treated during interviews and assessments of their claims. Are interviewers and interpreters specially trained to handle interviews with children, and how is this reflected? Is there special consideration of the fact that children are being assessed, and not adults? What are the results in terms of the actual decisions that are made on separated children? On the other hand, the objective is to find

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<sup>1</sup> Refer to eg. ”Separated Children in Europe Program”, a collaboration between UNHCR and Save the Children, website: [www.separated-children-europe-programme.org](http://www.separated-children-europe-programme.org)

<sup>2</sup>See for example, Jacqueline Bhabha: “Inconsistent State Intervention and Separated Child Asylum-Seekers”, *European Journal of Migration and Law* 3, 283 – 314 2001 “Lone Travelers: Rights, Criminalization and the Transnational Migration of Unaccompanied Children”, 7 *Roundtable University of Chicago Law School*, 269-294 2000, “Not an Adult in Miniature: Children as Refugees” 11(1) *International Journal of Refugee Law*, 84 - 125, with Wendy Young 1999; Karin Juhlen: *Barns Egna Asylskal*, Save the Children Sweden 2003 but this report focuses almost entirely on children in families; a few useful and interesting conclusions about separated children decisions in Cecilia Bailliet: ”Study of the Grey Zone between Asylum and Humanitarian Protection in Norwegian Law and Practice” University of Oslo 2003; Geir Ludvigsen’s ongoing doctoral thesis, working title “International legal protection of children in flight. An investigation of children’s right to refugee protection according to the Refugee Convention”, University of Tromsø, Norway

<sup>3</sup> Sandy Ruxton, *Separated Children Seeking Asylum in Europe: A Programme for Action*, UNHCR/Save the Children, Stockholm 2000

<sup>4</sup> Project proposal: ”Seeking Asylum Alone – The Treatment of Separated Children in Need of Refugee Protection” by Professor Jacqueline Bhabha, Harvard University 2002

examples of good practice, innovative and in line with international standards on children, which could be used in the promotion of policy improvement on child protection.

As part of this research a pilot project was designed to make a preliminary study comparing Austria, Germany, Norway and Sweden. The main aim of the pilot project is to make a first collection of comparable raw data and produce some preliminary findings in order to get a sense of issues, problems or trends in relation to both substance and method. These four countries were chosen because they all have had significant numbers of separated children seeking asylum during the period in question and they all have similar, sophisticated asylum-systems. They have applicants from a wide range of countries and a similar profile of separated children. The pilot project is funded jointly by UNHCR and the Norwegian Ministry of Local Government and Regional Development

This is a report on the findings of the pilot project and is divided into four main parts. The first part is on the background, the legal framework and methodological considerations. The second part includes the available statistics and some country-specific information on the asylum systems and legislation. The third part goes through the main findings according to theme and issue. The last part summarizes similarities and differences between the countries and ends with recommendations for a follow-up study.

## **1.2 Legal Framework**

The protection of separated refugee children is primarily enshrined in two international conventions: the 1951 UN Convention and 1967 Protocol Relating to the Status of Refugees (hereinafter ‘Refugee Convention’) and the 1989 UN Convention on the Rights of the Child (hereinafter ‘CRC’). Other international standards on children can be found in a number of international human rights instruments<sup>5</sup> and guidelines, in particular the UNHCR “Guidelines on Protection and Care” from 1994 and the UNHCR “Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum” from 1997 (hereinafter ‘UNHCR 1997 Guidelines’). UNHCR is currently working on a new set of guidelines to address, among other things, the special case of refugee status determination of children.<sup>6</sup>

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<sup>5</sup> 1966 International Covenant on Civil and Political Rights, 1966 International Covenant on Economic, Social and Cultural Rights, 1982 Convention on the Elimination of All Forms of Discrimination of Women, 1990 African Charter on the Rights and Welfare of the Child, 1998 Statute of the International Criminal Court, 1999 ILO Convention No. 192 on the Worst Forms of Child Labour, 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the 2000 UN Convention Against Transnational Organized Crime.

<sup>6</sup> Draft: “Age-Sensitive Interpretation of the Refugee Definition as Contained in Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees” - Still not finished.

The **Refugee Convention** does not distinguish between categories of people, neither related to age nor to any other characteristic. “For the purposes of the present Convention, the term “refugee” shall apply to any person who:.....”<sup>7</sup> “The same definition of a refugee applies to all individuals, regardless of their age.”<sup>8</sup> Article 22 of the **CRC** states that “States Parties shall take appropriate measure 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 the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

In addition, there are regional instruments, such as the European Convention on Human Rights (ECHR) and EU legislation. The EU is in the process of adopting a number of directives in the field of asylum and immigration, which are binding for EU states, ie. Austria, Germany and Sweden. Although Norway is not an EU member the new legislation provides significant guidance in the development of Norwegian asylum policy. These include the directives on Temporary Protection, Reception Standards and the proposal on Asylum Procedures.<sup>9</sup> However, the most relevant in this context is the Qualification Directive<sup>10</sup>, which still has not been adopted. However, the important parts relevant to children are not expected to be changed. Article 7 on “Assessment of facts and circumstances” states in 3 that “The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: .....(c) that the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicants’ personal circumstances, the acts to which he or she has been or could be exposed would amount to persecution or serious harm.” Article 11 on “Acts of persecution” in Article 2 states that “Acts of persecution, which can be qualified as such in accordance with paragraph 1, can inter alia take the form of: .....(f) acts of a gender-specific or child-specific nature.”

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<sup>7</sup> Refugee Convention, Art. 1 A

<sup>8</sup> Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR , Geneva 1992

<sup>9</sup> Council Directive on Minimum standards for giving temporary protection in the event of mass influx of displaced persons and on promoting a balance of efforts between Member State in receiving such persons and bearing the consequences thereof, 20 July 2001, Council Directive laying down minimum standards on the reception of applicants for asylum in Member States 2002, Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, 20 September 2000.

<sup>10</sup> Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, 2003

Useful guidance can also be found in a some national guidelines, handbooks or training courses, which have been developed on the handling of child applicant cases.<sup>11</sup>

According to UNHCR 1997 Guidelines, “Although the same definition of a refugee applies to all individuals regardless of their age, in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child’s stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults. Therefore, in the examination of their claims, it may be necessary to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution.”.... “The final decision should be based on a case-by-case examination of the unique combination of factors presented by each child, including the child’s personal, family and cultural background. Therefore, it is important that persons involved in the refugee status determination procedures have an understanding of the history, culture and background of the child.”<sup>12</sup> While children might be exposed to different forms of persecution, they may also suffer in different ways. The subjective fear might often be stronger than in the case of adults. Children have lower tolerance to harm and are at greater risk of suffering trauma or other effects of violence.<sup>13</sup>

These instruments and guidelines address the needs and rights of children and call for child-appropriate and child-sensitive treatment of children in the various situations that children might find themselves at different times and locations. Children have rights and needs which are similar to adults, but more importantly they have needs and rights which are specific to children because their experiences and situations are different. In this study this is my focus: how are children treated in the refugee status determination process and is this treatment child-sensitive and child-appropriate according to international standards and guidance? I have focused on how child applicants are treated in the interview; I have looked at whether child-specific persecution is acknowledged and given sufficient attention and consideration; I have looked at other child-specific aspects such as imputed political opinion as well as other reasons for persecution in relation to children; and finally I have looked at the special case of torture, cruel, inhuman and degrading treatment of children and how this is dealt with in

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<sup>11</sup> Among others: “Child Refugee Claimants: Procedural and Evidentiary Issues” Immigration and Refugee Board, Ottawa 1996; Guidelines for Children’s Asylum Claims” US Department of Justice, Washington DC, USA 1998; Guidelines for Interviewing (Separated) Minors” Directorate of Immigration Finland, Helsinki 2002

<sup>12</sup> UNHCR 1997 Guidelines, paras 8.6 and 8.10

<sup>13</sup> UNHCR Draft Guidelines: “Age-Sensitive Interpretation of the Refugee Definition as Contained in Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees” – Still not finished.

the process of refugee determination. It should be emphasized that given the limited scope and depth of this pilot project, the findings are preliminary and need further follow-up work.

### **1.3 Methodology**

As this is a small-scale pilot project, the collection of data had to be limited. Consequently, it was decided to only collect the asylum decisions on children as a start. Interviews with case-workers, other decision-makers, lawyers, guardians, children among others as well as observations of interviews are beyond the scope of such a limited project and would have to come at a later stage. The vast majority of decisions on children are on separated children, but there are a few cases of children in families, which have been included because they are relevant. This will become evident as they are brought into context.

By 'decision' is meant the actual document where the decision is stated in writing. In addition, the transcript of the interview and any comments/statements that have been made by the case-worker, lawyer, psychologist, medical doctor or anyone else in the file material have been included. The analyzed cases from Norway and Austria virtually all contain the transcripts of interviews, while not so many of the German and Swedish cases do.

The decisions were collected by travelling to the 4 countries and collecting case-files either from the authorities or through UNHCR for the period 2000-2003. For Austria, though, files from 2000 were not available. Prior to the travels formal letters applying for access to the file material were sent off from the UNHCR offices covering those countries and granted by the respective authorities. In Austria and Germany, the files could be accessed in the UNHCR offices as they keep file material. Norway and Sweden are covered by a regional UNHCR office in Stockholm, which however, does not have any case-files. Therefore, the files from Norway were accessed in the offices of the Directorate of Immigration. In Sweden the authorities preferred to select the cases and send them by mail, and in the end a total of only 35 were received. Fortunately some cases were received from a lawyer and the Save the Children Sweden "Crisis Center for Children and Young People" (hereinafter 'Crisis Center'), which gave a total of 45 cases from Sweden.

In the other three countries I had access to a total of around 3-400 cases from which around 100-150 cases were selected. From these cases 30-40 were selected which resulted in a total of around 150 including around 40 from Sweden. These provide the basis of the findings in this report. They have been semi-randomly selected by controlling for country of origin, gender, and type of decision in both 1<sup>st</sup> and 2<sup>nd</sup> instances. That is, cases were randomly selected from the most frequent countries of origin, by ensuring that there were a good number of female cases, a mixture of 1<sup>st</sup> and 2<sup>nd</sup> instance decisions and type of decisions.

No ‘Dublin-cases’<sup>14</sup> or readmission cases between the Nordic countries have been included, nor have cases with serious doubt about the identity, age and country-of-origin been included.

Due to the limited time and scope, in the end the focus was primarily on the 1<sup>st</sup> instance decisions, although some 2<sup>nd</sup> instance decisions have been included. There is an attempt to use case examples and quotations in a balanced manner. It should be emphasized, though, that the examples and quotations are only used to illustrate a theme, an issue or aspect. As the positive 1<sup>st</sup> instance decisions from Austria on both refugee recognition and *non-refoulement* include very little explanation and there were only 5 positive cases from Sweden, more positive cases from Germany and Norway have been used as examples.

What the statistics and data do not sufficiently reflect is the high numbers of children who disappear during the procedure and before a decision has been made. This is a considerable problem in Austria where it is estimated that around 80 percent disappear<sup>15</sup>, but also in Norway and Sweden where significant numbers disappear. The cases of disappeared children are closed and appear in the statistics as ‘closed cases’. Another complication is the issue of age assessment. As a result of age assessment in 2003 of around 50 percent of all those who stated to be under 18, it was found that around 80 percent were over 18. Similar estimations have been made in Austria<sup>16</sup>, that a high percentage is in reality over 18. The issue of children posing younger, or in some few cases older, than they are is a phenomenon in all European asylum countries. However, these issues are not believed to have any significant bearing on this study as the focus is on the substance of the asylum claim.

Another methodological problem is the fact that policy and practice on asylum decisions are changing all the time and although the data are relatively recent, changes have already happened to a certain extent. For example, in Norway there has been a significant increase in refugee recognition just the last half year and in Sweden interviews are in the process of changing significantly. Consequently, some of the preliminary findings of this study might not be quite in line with the most recent changes. This should however, be corrected in a follow-up study when it will be possible to have a more in-depth analysis and discussion including ongoing policy changes.

For the sake of comparison, I have attempted to use the same terminology regarding type of decision although they do not have the exact same definition in

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<sup>14</sup> Whereby an applicant has been sent to an EU Member State according to the “Council Regulation (EC)No 343/2003 of 18 February 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.”

<sup>15</sup> According to NGO and UNHCR Austria observations

<sup>16</sup> *ibid*



each of the four countries. Four terms are used: refugee recognition, protection on humanitarian grounds, residence on humanitarian (compassionate) grounds and rejection. Refugee recognition means that a person is considered a refugee as defined in the Refugee Convention. Humanitarian protection is used about the persons who are determined to be in need of protection based on “refugee-like” situations involving the threat to life or security.<sup>17</sup> Residence on humanitarian grounds is used about those persons who are granted residence due to special health or other compassionate considerations, such as the absence of primary care-givers in the case of separated children. Rejection means that a person has been denied refugee recognition, humanitarian protection and residence.

## 2. Statistics and Asylum System in 4 Countries

### 2.1 Statistics

There are no official statistics on separated children in Austria, although the Ministry of Interior provides estimates on the number of applications and the data from UNHCR on decisions is relatively accurate. In Germany, the Federal Office for the Recognition of Foreign Refugees only provides application data on separated asylum-seeking children under 16 years of age, subdivided into gender, age and countries of origin. Data on decisions are not available. In Sweden and Norway official statistics exist on total number of applicants and decisions by country of origin, gender, age and by type of decision.

**Decisions in Austria:** According to the information available<sup>18</sup>, there were approximately 120 1<sup>st</sup> instance decisions in 2001. Of these 3 were recognized as refugees (2 girls and 1 boy). 8 were girls, which is almost 7 percent of the total. The most common countries of origin<sup>19</sup> were Nigeria (45), Afghanistan (12), Sierra Leone (9), India (8), China (8), Bangladesh (6), Turkey (4).

In 2002 there were a total of around 200 1<sup>st</sup> instance decisions. 9 cases were females, which is 4.5 percent. There were no cases of refugee recognition, but 38 cases of humanitarian protection, which is 19.5 percent of the total. All except 5 were from Afghanistan and the other 5 were from Somalia, Mauretania, Yugoslavia, Russia and Armenia. A quite significant number (88) of applicants came from Nigeria. The majority of the rest were from Afghanistan (33), India

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<sup>17</sup> Rights derived from the ECHR, Articles 2 and 3, among others

<sup>18</sup> The data were attained by a screening of all first and second instance decisions shared with UNHCR during the reporting period. Therefore, it should be noted that the figures do not necessarily include all decided cases. Some might not have reached UNHCR or they might not have been identified in the UNHCR screening mechanism.

<sup>19</sup> These are nationalities stated by the applicants, which are not necessarily correct. There are, for example, a number of false nationalities in Austria, in particular those who claim to be from Sierra Leone.

(11), Sierra Leone (11), China (5), Senegal (5), Russia (5), Guinea (4) and Georgia (4).

During the first 9 months of 2003 there were around 350 decisions from the 1<sup>st</sup> instance, of which only 2 were recognized as refugees (ie. 0.6 percent) while 17 were granted humanitarian protection (4.8 percent). 28 of the total number of cases were female, which is 8 percent. Again a significant majority came from Nigeria (128), while other common countries of origin were India (25), Gambia (22), China (22), Georgia (19), Afghanistan (18), Sierra Leone (12), Russian Federation and Moldova (12), Guinea (11), Turkey (10).

Compilations of data have been made by UNHCR on received 2<sup>nd</sup> instance decisions from 2002 and for the first 6 months of 2003. In 2002 45 decisions were made, of which 2 were cases of females. 2 were recognized as refugees and 2 were granted protection on humanitarian grounds, which does not increase the recognition rates significantly for that year. It raises the refugee recognition from 0 to 1 percent and the *non-refoulement* (humanitarian protection) decision rate from 19.5 percent to 20.5 percent. During the first 6 months of 2003, among the cases UNHCR had received 3 were recognized as refugees and none were granted humanitarian protection. This raises the recognition rate so far in 2003 on refugee recognition from 0.6 to 1.1 percent.

**Applications in Germany:** The number of separated children seeking asylum in 2002 was 873 under 16 years of age, which was a decrease from 1075 in 2001 and 946 in 2000.<sup>20</sup> The largest groups were from Afghanistan, Vietnam, Angola, Ethiopia, Iraq, Turkey, India, Syria and China. 560 were boys (64 percent) and 313 girls (36 percent), which is a significant higher number of girls compared to the other three countries and to most other countries in Europe.

There are no official nation-wide statistics on the number of applications for the 16-17 year-olds. In Bavaria, however, the authorities counted 390 separated minors aged 16 to 18 in 2003, compared to 81 under 16, which means that the number of under 16-year olds has to be multiplied by 5.8 in that state to get the number of the 16-18-years old. If one makes the same calculation with regard to the 873 children under 16 who were registered nationwide and multiply this figure also by 5.8, the total number of separated children belonging to the 16-18 age group amounts to 5,063 in 2003, a figure which yet seems somewhat too high according to UNHCR estimates. In general, the 16/18 age-group (accompanied and unaccompanied) accounted for approximately 10% (i.e. 7,067 out of all 71,127 first applicants) in 2002.

**Decisions in Germany:** There are neither official statistics nor unofficial estimates on decisions on separated children in Germany. However, it is hoped that after the Federal Asylum Office is finished installing the new data-system official statistics can be produced.

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<sup>20</sup> Source: Federal Office for the Recognition of Foreign Refugees

**Decisions in Norway on separated children** follow the same trend as adults.<sup>21</sup> In 2000 out of 456 decisions, 3 were recognized as refugees, 148 were granted protection on humanitarian grounds, 97 were granted residence on humanitarian grounds, while 62 were rejected. In 2001 out of a total of 480 decision, 1 was granted asylum, 142 were granted protection on humanitarian grounds, 181 were allowed residence on humanitarian grounds, 116 were rejected; there were 5 Dublin cases, 17 disappeared and 12 were withdrawn. In 2002 out of a total of 649 decisions 10 were recognized as refugees, 182 were granted protection on humanitarian grounds, 162 were granted residence on humanitarian grounds, 169 were rejected; there were 53 Dublin cases, 61 disappeared and 10 withdrawn. By 1. October 2003 out of 495 decisions, 18 had been recognized as refugees, 149 had been granted protection on humanitarian grounds, 103 had been granted residence on humanitarian grounds, 162 had been rejected, 35 had been determined to be Dublin cases, 24 had disappeared and 4 had been withdrawn.

**Decisions in Sweden:** Like Norway, Sweden has a relatively low refugee recognition rate and a higher recognition of protection on humanitarian grounds. During 2002 there were 39 393 decisions from 1<sup>st</sup> and 2<sup>nd</sup> instance boards, of which a total of 482 were recognized as refugees, 6969 (ie. 17.7 percent) were recognized as “in need of protection” on humanitarian grounds and 31 122 (79 percent) were rejected. Although official statistics from Sweden on separated children decisions were not made available, it was claimed that in 2001 and 2002 most of the separated children were granted residence on humanitarian (compassionate) grounds, while in 2003 it is estimated to be around half. Most of them are granted residence on humanitarian grounds because care-givers cannot be found in the countries of origin.<sup>22</sup>

## 2.2 Asylum Law

All four countries are Parties to both the Refugee Convention and the CRC. However, Germany has made a reservation to the CRC which results in national asylum/immigration legislation taking precedence over the CRC. In practice this means that the age of legal competence in the asylum process is 16 years of age and not 18, and that consequently, 16 and 17 year-olds are treated as adults.

In **Austria** Article 1 (2) of the Asylum Law provides for the recognition of refugees according to the Refugee Convention. There are two other protection

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<sup>21</sup>Norway has in the past had an unusually low rate of refugee recognition, but relatively much higher rate of recognition on humanitarian grounds. The overall number of decisions in 2000 were 97 refugee status (ie. 1 percent of total number of applications) and 2856 (ie. 29 percent of total applications), in 2001 the number was 292 refugee status (2.2 percent) and 4036 (30.3 percent) and in 2002 it was 332 refugee status (2.2 percent) and 2958 (ie. 19.2 percent) humanitarian status.

<sup>22</sup> Information from staff member at Migration Board. Official statistics have not yet been received from Sweden.

regimes, Articles 8 and 15 of the Asylum Law by way of reference to Art. 57 of the Aliens Law, which provide for protection against *refoulement*, that is permission to stay for those persons whose rejection at the border, forcible return or deportation would be in violation of Article 2 or Article 3 of the ECHR or Protocol No. 6 thereto, concerning the abolition of the death penalty. Thus those persons are protected who risk the death sentence, cruel, inhuman or degrading treatment on grounds similar to those applicable to refugees if returned to their country of origin. Article 29 provides for temporary protection.

In **Germany**, according to Art. 16 a (1) of the Constitution (*Verfassung oder Grundgesetz*), "politically persecuted enjoy the right to asylum" and are thus entitled to automatically obtain a permanent residence permit. Although Art. 16 a 1 of the Constitution does not explicitly incorporate the wording of the 1951 Convention, the prerequisites of the Constitutional right have been interpreted by German courts with reference to Article 1 A (2) of the 1951 Geneva Convention. The right to asylum under Art. 16 a (1) of the Constitution is, however, subject to certain substantial restrictions as provided for in Art. 16 a (2) and Sections 27 and 28 of the Asylum Procedure Act. Accordingly, aliens who have entered Germany via a member state of the European Union or another country assumed to be "safe" by the German legislator, are excluded from the right to asylum as well as those who have already found protection in another third country. In addition, asylum cannot be granted to aliens whose fear of persecution is based solely on (political) activities which they have undertaken voluntarily during their stay in Germany.

Persons not found eligible for asylum for one of the above-mentioned reasons may nevertheless be entitled to benefit from Sec. 51 of the Aliens Act (*Ausländergesetz*). This provision regulates the (non-) return of aliens to a country where they may be subject to persecution on account of one of the 1951 Convention grounds. Aliens recognized as refugees under Sec. 51 Aliens Act are in principle entitled to all Convention rights, but contrary to those entitled to asylum, they only receive a - renewable - temporary residence permit valid for a maximum of two years and are required to fulfill certain prerequisites prior to family reunification.

Besides the named provisions, the German Aliens Act contains a set of regulations under which it is possible to grant or temporarily allow the stay of an alien who would otherwise be subject to deportation. The most important of these provisions are stipulated in Sec. 53 Aliens Act. Accordingly, an alien must not be deported to a state where, upon return,

- he/she would face an individual danger of being tortured (Sec. 53 (1) Aliens Act),
- he/she would be prosecuted for having committed a crime sanctioned with the death penalty (Sec. 53 (2) Aliens Act), or

if the deportation would contravene the provisions of the ECHR (Sec. 53 (4) Aliens Act). According to Section 53 (6) Aliens Act, the competent German

authorities can further desist from deportation if the applicant of concern would face a certain individual risk of life or limb upon return. In 1993, the Aliens Act was amended to include a special status for refugees from war or civil war situations (Sec. 32 a Aliens Act). The issuance of a temporary residence permit in accordance with Section 32 a Aliens Act provides, however, that the applicant does not file an asylum procedure or - if already initiated - withdraws the asylum application.

In **Norway** the specific relevant laws governing asylum and immigration are the Norwegian Aliens Act no. 64 of 24 June 1988 and the Aliens Decree of 21 December 1990, both amended in 1997 and 2000. The Act on Human Rights of 1999 incorporates a number of international human rights instruments, such as the ECHR. Section 16 (§ 17) of the Aliens Act refers to article 1A of the Refugee Convention. Section 15 protects against *refoulement* and also similarly protects persons who would be in danger of life and limb, or be subjected to inhuman treatment. If section 15 does not apply, one has to determine whether Section 8 would apply, which states that permission to stay may be granted if there are strong humanitarian reasons or a particular connection with Norway. Paragraph 21.1 provides for granting protection on humanitarian grounds, paragraph 21.2 provides for granting residence on humanitarian grounds due to strong compassionate considerations such as illness or lack of caregivers.

In **Sweden** the asylum procedure is governed by the Aliens Act, the Aliens Ordinance and the Legal Aid Ordinance. Chapter 3 of the Aliens Act, Section 2, contains the 1951 Convention refugee definition including language on non-state agents of persecution. Chapter 3, Section 2 refers to three categories of people, those “with special protection needs” (ie. a well-founded fear of death penalty, torture, other cruel, inhuman treatment or punishment), those who cannot return because of environmental disaster or armed conflict and those who have well-founded fear of persecution due to gender or homosexuality. Chapter 2, Section 4(5) specifies the conditions in which persons can be granted residence on humanitarian grounds, which would include the cases of children whose caregivers cannot be found in a known place.

## 2.3 Asylum Procedure

In **Austria** the Federal Asylum Agency, *Bundesasylamt* (BAA), makes the first instance administrative decision. Appeals go the second-instance Independent Federal Asylum Senate, *Unabhaengiger Bundesasylsenat* (UBAS), and in the regular procedure have to be submitted within two weeks. In general, decisions by UBAS are final, but an extraordinary complaint against a negative UBAS decision may be lodged with the Higher Administrative and/or Constitutional Court if matters of simple law or violations of Constitutional law are alleged. The Higher Administrative Court rules only if mistakes have been made due to the legal assessment, lack of competence on the part of the deciding authorities

or procedural errors or deficiencies. If this is found, the case is sent back to UBAS. The criteria for granting refugee status are listed in Article 7 of the Asylum Law, which refers to the Refugee Convention. Humanitarian protection is considered and is granted to those who cannot be returned according to the principle of *non-refoulement*. In this case a residence permit is given for a maximum of one year, which can be extended first by one year and after the second extension, for three years.

In **Germany**, decisions on asylum or refugee status lay with the Federal Office for the Recognition of Foreign Refugees. According to Sec. 14 (1) Asylum Procedure Act, any person requesting asylum is referred to the Federal Office branch assigned to the local reception center competent for receiving the alien under Sections 45, 46 Asylum Procedure Act. Actually, there are 24 initial reception centers throughout Germany. Under exceptional circumstances, applications can be made at the Federal Offices headquarters in Nuremberg, for example if the applicant is in detention, official custody, in a hospital, or a youth welfare facility (Sec. 14 (2) cf. 2 Aliens Act), or, generally, if the applicant is under 16 years of age and his/her representative is not obliged to reside in a reception centre (Sec. 14 (2) cf. 3 Aliens Act).

With respect to Art. 16 a of the Constitution and Sec. 51 Aliens Act, the decision made by the Federal Office can be positive, "simply" or "manifestly" unfounded, or "irrelevant". The decision concerning humanitarian status according to Sec. 53 Aliens Act can be either positive or negative. Against the decisions of the Federal Office, applicants can appeal before the local Administration Courts. It should, however, be noted that in a case held "manifestly unfounded" or "irrelevant" by the Federal Office appeals against the status decision of the Federal Office do not constitute a right of the applicant to stay in Germany for the duration of the procedure. To that effect, an additional request for suspension of deportation must be made before the court. The judgements of the administrative courts are, if admitted, subject to further appeal before the Higher Administration Court, whose decisions can be revised by the Federal Administration Court. However, no legal remedies except for filing a constitutional complaint are given if the administrative court has rejected the first instance claim against the Federal Office decision as "manifestly unfounded". Finally, a complaint can be filed with the Federal Constitutional Court if a personal constitutional right is allegedly breached.

In **Norway** an asylum application is handled by the Directorate of Immigration (*Utlendingsdirektoratet*, UDI) at the first instance level. Appeals first go to UDI and if UDI does not reverse its first decision, they refer it to an independent, non-political body called the Immigration Appeals Board (*Utlendingsnemda*, UNE). There is no requirement that appeals can only be submitted if there are new elements. Since the great majority of separated children are permitted to stay on humanitarian grounds, very few appeals by children end up at UNE. A decision from UNE is possible to appeal to the regular courts, but the few cases that have

been reviewed have generally respected the decisions already made in the first and second instances.

In **Sweden** the Swedish Migration Board (*Migrationsverket*) is the first instance body which assesses and makes the decision on the initial application. Appeals to these decisions may be submitted to the Aliens Appeals Board (*Utlänningsnämnden*), an independent body consisting of judges, members of Parliament and legally trained case-workers. Exceptionally, cases may be referred to the government by either the Migration Board or by the Appeals Board for review, if they involve sensitive policy issues or the relations to other countries or international organizations.

## 2.4 Special Provisions for Separated Children

In **Austria** the Aliens Law also contains some special provisions for separated children. According to Article 25 of the Asylum Law all children should be represented by a guardian from the local Youth Welfare Agency (*Jugendwohlfahrtstraeger*) to represent them in the asylum procedure. However, those children who are between 14-18 years of age may submit an asylum application in their own right if their interests cannot be defended by their legal representative in the procedure, the guardian. Article 95 of the Aliens Law provides further details for guardianship, legal representation, and age assessment of separated children.

In **Germany** aliens under 16 years of age do not have legal competence within the framework of the asylum and aliens law and therefore have to be represented by a guardian according to the Civil Code. The guardian, who is appointed by the local court, may be a youth welfare officer, an NGO representative, a relative of the child or any interested individual who is considered as reliable by the court. Asylum applications are filed by the guardian on behalf of the child. A few years ago 40 adjudicators were specially trained to act as so-called Special Commissioners for Child Refugees. The training, in which UNHCR was closely involved, included legal, psychological and practical aspects of the asylum procedure of separated children. However, due to re-organization, some of these trained adjudicators were moved to other jobs and as a result some of those dealing with child-cases presently are not specially trained.

In **Norway** all separated children are to be appointed a guardian who among many other tasks, will be present during the asylum interview. There is special guidance on the treatment of (separated) child applicants in the interview, and special training exists for those who interview and assess children's cases. Separated children are allowed to submit an asylum application in their own right. Interviews are normally conducted 2-3 weeks after the asylum application has been registered. According to the UDI Annual Plan for 2003 it is stated that applications from separated children are to be processed immediately and first

instance decision finalized latest within 12 weeks of filing the application. However, the deadline can only be respected if a guardian has been appointed.<sup>23</sup> In reality, it is estimated that it usually takes a bit longer, maybe up to six months before the first decision is made. Separated children receives free legal aid and in a new draft on legal aid the authorities will increase the number of hours of free legal aid in both first and second instances.<sup>24</sup>

**Sweden** is the only country which has included in the Aliens Act a reference to the principle of “the best interests of the child” from Article 3 of the CRC.<sup>25</sup> However, this principle has to be balanced against other interests of the state, such as regulating immigration. In Sweden there has been an ongoing debate about children’s right to apply for asylum in his/her own right or whether it has to be done by a guardian. The question has still not been fully resolved and for the time being it’s possible for a child to submit his/her own application. Case-workers have been specially trained on interviewing children and there is guidance in the interview manual. It will be replaced by the new system on interviewing and considering children’s cases, see point 3.1 below.

### **3. Findings**

#### **3.1 Interviews: Questions and Line of Questioning**

According to the UNHCR 1997 Guidelines “It is desirable that all interviews with unaccompanied children (including the interview for the determination of refugee status) should be carried out by professionally qualified and specially trained persons with appropriate knowledge of the psychological, emotional and physical development and behaviour of children”.... ”the interviews should be conducted by specially qualified and trained representatives of the refugee determination authority who will take into account the special situation of unaccompanied children, in order to carry out the refugee status assessment.”<sup>26</sup> Questions need to be simple, open-ended, straightforward and understood clearly by the child. Too complicated and long sentences should be avoided. Questions should be direct and related to children’s life-worlds and according to their level of development and maturity.

It is not possible to comment on the methods used in the interview, nor the atmosphere. In addition, detailed information on the special training of staff was not collected at this stage. However, from the data collected it is possible to say

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<sup>23</sup> According to new regulations in force as of February 2004

<sup>24</sup> Consultation procedure 02/821-85 HBO

<sup>25</sup> “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” 1989 CRC, Article 3, 1.

<sup>26</sup> UNHCR 1997 Guidelines, paras. 5.12 and 8.4



something about the types of questions asked and the line of questioning and whether these are child-sensitive or not.

All four countries apply a standard format, a list of questions or a questionnaire, which is more or less the same for children as for adults. It starts with biographical data including information about family members, then continues with the travel route, and moves on to the reasons for flight. Then follow questions about what they fear if they are returned or what they think will happen if they are returned. It was found that questionnaires or standard line of questioning was usually followed without much deviation. In Sweden often, rather than including the transcript itself, there is a thorough report of the interview. In Norway the interviews sometimes quote parts of an UDI internal memo on interviewing children<sup>27</sup>, usually three specific paragraphs. It offers guidance on how important it is to differentiate between children of different ages and maturity and it states that those children who are over 15 can be interviewed as adults if the case-worker considers this appropriate. It is also stated that the reporting format should be followed and in which cases it could be deviated from. It is emphasized that establishing the facts around family relations is important in view of future family reunification. Therefore, additional questions referring to the possible whereabouts of their parents are included.

**Simple/difficult questions:** It was found that often difficult questions were posed, questions that would even be quite difficult for adults were asked of children. For example, a child would be asked a question which is more or less a rephrasing of the Refugee Convention text definition of a refugee: “have you left your country because you have been persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion?”<sup>28</sup> A question like this is difficult for an adult, let alone a child. Similarly, to ask a child what will happen to them if they are returned home or what they fear upon return might be, depending on age and maturity, is inappropriate or too difficult. They might not have enough information or understanding of the situation in their home country. Other typical questions which might be too difficult, taking level of education and development into account, are a series of questions which are asked to establish credibility. For example: “What’s the name of the president in zz (country)? -- Since when has he been president? -- Which parties are represented in parliament at the moment? -- Could you name the provinces which border on the capital city? --- Could you describe the flag? –Could you provide the names of the daily newspapers of zz? What is the acronym of the state TV of zz? -- Could you name the coastal cities of zz?”<sup>29</sup> and so on.

**Open-ended or closed questioning:** Although the general impression is that the questionnaire with the more detailed questions is followed, there are also examples from all countries of more open-ended questioning where the children

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<sup>27</sup> Utkast til en intern melding (IM) om gjennomføring av asylintervjuer UDI

<sup>28</sup> Found frequently in cases from all four countries.

<sup>29</sup> Case from Austria

are given the opportunity to talk more freely. For example, there are several cases from Austria where the child tells her/his story in one long monologue and then asked more concrete questions about the more important aspects. “Could you describe freely all your motives for leaving the country? Could you tell us all of the reasons you have for your movements.” There are similar examples from the other three countries where the child has been able to “tell the story”.

However, there are many examples of the short and closed questions, which are not very conducive to getting sufficient information from children, nor do they necessarily create a good interview atmosphere. For example, in one interview in Norway of a girl from Somalia, she is asked lots of short and leading questions: “Have you been subjected to abuse? Yes —Which month did it happen? In May zz(year). -- What was it that happened? I was raped. -- Did it happen during the day or during the evening? -- In the evening. Did both of them rape you? Yes. -- Did they hit you, too? -- Yes. -- They hit you too? -- Yes, with the fist. -- Who dressed the wound? -- They did it at the drugstore. -- Did you go to zz(country) the same day as the rape took place? -- No, I...” The short and detailed, closed questioning seems mechanistic, insensitive and not very helpful to the situation.

**Neglected sources of information:** The case material also shows that statements that might lead to important information, are not followed up. For example, in a case from Austria, a boy had been in the hospital as a result of self-inflicted wounds. However, the fact that he had wounded himself quite badly, was not queried or mentioned during the whole interview, while it might have been a ‘way in’ to some important information. In another case from Norway a girl from Congo who claimed to have been raped and tortured in police custody showed clear signs of suffering. It is noted in the interview that “the applicant has nerves. Tears stream continuously and she has a headache. She has severe pains during her period.” However, the interview notes give sparse information about this incidence and her situation in general. It would be important to get more information both about the situation surrounding what she experienced before flight and her mental and physical state at present.

There are, however, examples of interviewers picking up on important details. For example, in a case from Austria a girl from China says that the Chinese smuggler/trafficker who arranged her trip wanted to have sex with her, upon which the interviewer followed up with the question: “Did you leave your home country at your own will, or was the proposal for sexual services the reason for your departure?-- No, I left on my own accord and these circumstances did not have anything to do with my departure.”

**Child-oriented and child-sensitive questioning:** There are not many examples of questions which are ‘child-oriented’, that is questions which are more oriented towards children’s experiences and knowledge. However, there are some. For example in a case from Germany when a boy from Angola could not answer what were the names of the parties fighting each other in the war, the interviewer asked

whether they had a national football team, whereupon the boy became more talkative. Talking about the everyday things in a child's life and typical interests of children is often an effective way to encourage children to talk.

There is another good example from Germany where the interviewer is especially sensitive to the fact that the asylum applicant is a girl and a child who has experienced traumatic situations. A 15-year-old girl from Sri Lanka was abducted by soldiers, raped and otherwise severely abused. The interviewer stopped the interview when it was obvious that the claimant had serious problems answering the questions about why she had left Sri Lanka. "At this point the interview was interrupted. It was obvious that the applicant had great difficulties to talk about these incidences. She was allowed to continue the interview with a woman. The guardian, however, asked if it would be possible to continue in a later interview."

In a case from Sweden a child from Chechnya was asked about the relationship to his parents and they talked about that. "You have had a good relationship to your parents. Your father is the person whom you are closest to and you are worried because you do not know where he is." The circumstances around his parents and family were discussed at length, his physical and mental condition (he is HIV and Hepatitis B positive) as well as his flight and travel route. Then towards the end of the interview, the case-worker asks him about a dream he had had and whether they could discuss it. "...and he replies yes, but I don't understand it. The caseworker replies that doesn't matter, we can help each other to see if we can interpret it? Xy says that he thinks it's a bit sensitive to tell about it, he is a bit embarrassed and says that he has not told the whole dream to his lawyer." He continued to tell about the dream and they discussed it. In urging the boy to tell about his dream the caseworker was trying to create trust and understanding between them.

**New Developments in Sweden:** Last year the Migration Board introduced a new interview format for children.<sup>30</sup> The reason for the change of interview method was to improve the assessment of children's need for protection and the communication with them. The Board started a cooperation with an expert<sup>31</sup> who had, among other things, trained police and social workers in how to talk to and interview children who were victims of abuse. In cooperation with the Board she developed an interview and assessment method and at the beginning of 2003 the first group of staff members started a training course which lasted one year. The 15 participants met twice per month and during the training used actual cases for practice. The training included theoretical framework, child psychology, cultural perspectives, interpretation and assessment of children's testimonies and statements. The role of the interpreter is also in focus, but has become a separate research project. The main principles of the new method is to have as many open questions as possible and avoid leading questions and comments. The common

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<sup>30</sup> although all of the cases for this study follow the old format and it should be born in mind that the comments on Sweden do not take the new changes into consideration.

<sup>31</sup> Ann-Christin Cederberg, who among other things, has written the book: "Barn – intervjuer", Liber 2000

phrase is “tell me....why you left your home.....how you and your family lived.....how your life is in Sweden... what you think about your future.....etc”. The aim is to go more directly to the reason for flight rather than going through the other questions first. Furthermore, the child becomes the center of the interview and controls it more than before, as they are not interrupted so often by the guardian and legal advisor. It is believed that most of the essential information will come out in the testimony and that more detailed information still lacking will be asked for underway or afterwards. This method reduces the repetition which tends to happen with the questionnaires and the experience so far, is that less time is needed on the interviews than before.

In general, it was found that the type of questions and line of questioning were not specially geared towards children. Questions need to be more simple, open-ended and more flexibility should be shown so that children can ‘tell their story’ without much interruption and so that important pieces of information can be pursued. There should be more questions related to children’s different realities which help them talk and feel more relaxed.

### **3.2 Credibility and Evidentiary Issues**

Assessing the credibility of an asylum claim is crucial, but even more so in the case of children. In the cases of children, it is not only essential to establish credibility for the sake of the refugee status determination, but to make a long-term decision for all children which is in the “best interest of the child”, whether or not they have a refugee claim. It is therefore essential to get as close as possible to the ‘true story’ of the child. Establishing credibility in the cases of children might be very difficult. On the one hand, the children are often told by parents and/or smugglers (or traffickers) to tell a certain story which they believe is the best for the child to tell but not necessarily the truth. On the other hand, it is the nature of children, depending on their age and stage of development, not to be fully aware of the circumstances and what is important information. Children most likely have multiple reasons for leaving their countries and they do not necessarily tell the most refugee-relevant reasons. For the child the wish to go to school or find work might be the most important and most present in his/her mind. This does not necessarily mean that he/she does not need protection as a refugee. Furthermore, children do not necessarily tell consistent and straightforward stories. They might make statements which they have been told to say; they might tell lies which to them are not necessarily a lie. The behavior and demeanor of a child is often a reflection of culture, trauma and circumstance rather than credibility. In general, the burden of proof should be exercised flexibly and liberally, and this is particularly important in the case of children as is the principle of giving them the benefit of the doubt.<sup>32</sup>

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<sup>32</sup> UNHCR Handbook, paragraphs 196-219

## **Behavior and Demeanor**

Several cases show how a certain behavior or demeanor is used against the applicant. For example, in an Austrian case the following was concluded: “Since you, however, seemed little affected by your past experiences and were not able to give details about it, the authorities were led to the conclusion that your entire testimony is an unbelievable construction.” The behavior and demeanor of the boy was used against him as he did not seem to be affected by the particular (bad) events in his past. It was also used against him that he was not able and willing to give details to substantiate his story. This led the authorities to believe it was an untrue, constructed story. This may be the case. However, the fact that the boy showed no emotions or behavior in connection with his past experiences does not necessarily mean that he is lying. There may be valid reasons why a child cannot provide details. He might not understand why details are asked for, he might have suppressed or ‘forgotten’ them if they have to do with traumatic experiences.

In another case from Germany the fact that a boy disappeared before the decision was made became critical among other things, in his case. “It can be expected from an asylum-seeker that he pursues the asylum procedure thoroughly; in particular he should show that he has a self-interest in the desired decision of the Federal Office to get protection, ie. he will pursue this objective during the whole process of the asylum procedure...” The fact that this boy disappeared was regarded as disinterest by the boy according to Section 33 of the Asylum Procedure Law which obliges the applicant to ‘pursue his/her application’. In the case of adults, this might be a reasonable line of argument, but for children/youth not necessarily. Children disappear for a variety of reasons. They disappear to move on to another country where they might have family or relatives or have been instructed to go. Some disappear because they get caught up with traffickers or other criminals. They might be coerced or forced to leave or they might leave because they are afraid.

## **Contradictions – Inconsistencies - Lies**

Contradictions, inconsistencies and even lies in children’s testimonies should be treated in a more flexible and open manner than in the case of adults. However, there are many examples from all four countries which illustrate that this is not done. In a case from Austria, the following was stated in the case of a boy from Turkey: “At the first interview you testified that ‘due to the political situation in Turkey there are great economic problems. I had no work and we were hungry. Therefore I fled.’ Today you do not mention these reasons at all. Could you explain this? --- There were Arabic interpreters. There I was not specifically asked about political problems. --- Now, which version represents the truth?” The fact that the boy did not mention the same reason for flight in the second interview is not necessarily a contradiction. His response may be a typical

reaction of a child: he was not asked specifically about the political situation, so he did not say anything about that.

In a case from Norway a boy on two separate occasions gave different information on the number of months of reporting duty to a military base (5 months and 6 months). This was found contradictory and inconsistent and did have a bearing, among other things, on the decision to reject him.

In another case a child says he was recruited by the SPLA and the interviewer does not believe him: “How can you explain that according to the background information the Southern Sudan People Liberation Army is not involved in forced recruitment of children’ -- ‘But it happens!’” Generally, the cases in this study show that the case-workers do good and thorough country-specific research. However, in this case the case-worker finds a boy not credible based on wrong factual information about a ‘child-specific’ situation. It is well-known<sup>33</sup> that over the years thousands of South-Sudanese boys have been (forcibly) recruited to SPLA, that many of them ended up in UNHCR-supported refugee camps in Ethiopia and Kenya, and that some subsequently resettled in the United States.

### **Mixed Motives for Flight**

Typical of separated children is that they often have mixed motives or several reasons for flight, that is, fear of persecution combined with economic and educational incentives<sup>34</sup>. Children normally wish to (continue to) go to school, they would like to have a job and earn money, they would like to have better living conditions, some need special health-care, among other things. However, it does not mean that they do not have refugee reasons for leaving their countries as well. For example in a case from Austria the following statements were made regarding a boy from a West African country: “In your asylum application from zz(date) the following reasons are stated: in order to have a safe life, my main problem was, that I would like to continue to go to school. Due to the war my parents were killed. I have nobody who can help me further with my education.-- - You have traveled to a neighboring country, because there were so many displaced people there, you moved on. --- Yes, the statements are correct, we passed Guinea by boat, we only passed by. -- Your statements from zz (date) contradict, however, your statements today. What do you have to say to that?” Although the boy expressed a wish to continue to go to school it should not be excluded that he might be fleeing persecution as well.

The case material shows that child-appropriate treatment with regard to these credibility aspects seems to be applied only on an exceptional basis. If they are too vague and do not give enough detail in telling the story, this is used against

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<sup>33</sup> Various UNHCR documents and newspaper articles, mainly American, reported on in SCEPNewsletters in 2001 and 2002

<sup>34</sup> Bailliet, Cecilia ”Study of the Grey Zone between Asylum and Humanitarian Protection in Norwegian Law and Practice” University of Oslo, 2003

them. If they give a ‘non-refugee’ reason for fleeing the country it is used against them. If they disappear it is used against them. If they tell ‘lies’ it is used against them. If they are inconsistent or contradictory in their statements it is used against them. Many interviewers are eager to focus on contradictions and spend some time around such questioning. They are asked the same ‘trick’ questions as adults and contradictions might be given significant weight in such assessments. It seems that too often when the credibility is found weak, it is not followed up on and getting to the bottom of the story is not prioritized.

It should be noted, though, that in Norway case-workers have recently been instructed to “decrease the control-level”<sup>35</sup>, that credibility in the cases of children should be treated in a more flexible manner. Evidence seems to be more of a focus in Sweden than in the other three countries, and it seems that children are not treated any differently from adults in that respect.

### **3.3 Child-specific Forms of Persecution**

According to the UNHCR 1997 Guidelines there are certain violations of human rights which children experience because they are children; they are child-specific. “It should be further borne in mind that, under the Convention on the Rights of the Child, children are recognized certain specific human rights, and that the manner in which those rights may be violated as well as the nature of such violations may be different from those that may occur in the case of adults. Certain policies and practices constituting gross violations of specific rights of the child may, under certain circumstances, lead to situations that fall within the scope of the Refugee Convention. Examples of such policies and practices are the recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking of children for prostitution and sexual exploitation and the practice of female genital mutilation.”<sup>36</sup> The following includes examples of child-specific forms of persecution found in the case-material, but it is not an exhaustive list.

#### **Forced Marriage**

There are not many cases of forced marriage in the material. However, interestingly out of the 26 cases of refugee recognition in Norway 9 of them are cases of forced marriage, well-founded fear of being forcibly married upon return and/or being subjected to cruel, inhuman, degrading treatment upon return. The Norwegian cases include 3 from Ethiopia, 2 from Somalia, 2 from Afghanistan, 1 from Iran and 1 from Pakistan. Most of them involve young girls fleeing arranged marriages with older men and being abused and threatened by the family and community as a result. One case is different as it involves a boy from

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<sup>35</sup> This change of policy referred to in a case from Norway.

<sup>36</sup> UNHR Guidelines, paragraph 8.7 page 10

Afghanistan who fears being killed or severely abused by the family of his girlfriend, who had been forcibly married to an older man and ran away with the applicant. There are some similar cases from Germany who were granted either refugee status or humanitarian protection. One involves a girl from Afghanistan who fled because she did not want to marry a 65-year-old and she feared getting killed by local Taliban for refusing the marriage.

### **Worst Forms of Child Labor<sup>37</sup>**

There are not many cases where information appears about worst forms of child labor, but some of the child soldier cases also involve forced or slave labor. There are a couple of cases from Norway in which girls who suffered from a worst form of child labor were recognized as refugees. In one case a Somalian girl was abducted by soldiers and kept for two years imprisoned in a military camp where she, together with other abducted girls, had to cook and work for the soldiers. They cooked for them, cleaned for them, were sex slaves, were forced to donate blood, among other things. In the other case, a girl from Ethiopia was sent to Dubai as a domestic servant and was severely abused, exploited and denied freedom of movement. There are also examples of such information on forced or slave labor being ignored or not taken into consideration in the assessment, such as the case of a boy from Mauritania<sup>38</sup> where he in the course of his testimony says: “xy (name) was the owner of the farm, I was his slave, I don’t know whether my family sold me”. However, there were no further questions, such as what kind of work he did, how he was treated, how many others were working there, whether he got a salary, whether he was free to come and go as he wanted, etc. When the boy again mentioned it a bit later in the interview, the interviewer asked: “What happened to you, does it happen to other compatriots, is keeping slaves common in Mauritania?” After an affirmative reply from the boy it was not mentioned again. This boy was not assumed to be in danger of persecution upon return.

### **Street Children**

In the case of street children, there are very few cases and few containing any such information. There are no known cases of refugee recognition although some have been granted protection on humanitarian grounds. For example, there is a case from Germany of an Angolan street-child where the case-worker actually points out the child-specific circumstance and thus makes a difference between an adult and a child assessment. The following was argued: “In the present circumstances an adult could actually succeed in reaching safe and NGO-assisted territory upon arrival in Angola. For minors without sufficient family resources it is realistic to assume that in cases of return to Angola they would be exposed to the most serious danger of life and limb, which would seem to make the return

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<sup>37</sup> Refer to the International Labor Organization (ILO) Convention No. 192 on the Worst Forms of Child Labour 1999

<sup>38</sup> Case from Norway



there untenable at present..... In Angola it is generally dangerous for persons who are under-aged and those who have lost their family. That is, on account of the consequences of war it is not likely to find relatives without assistance....”

However, it seems that more often such information and circumstances are either ignored or not taken seriously. In another similar case, a street-child was rejected because it was considered that he could survive in the capital of Luanda. The decision contains long and excellent passages on the political situation in Angola but little on the actual situation of street-children in Luanda and the real risks that the boy might face upon return. In another German case of a boy from Gueckedou, Guinea who reported he fled from severe deprivation and had no place to live and nothing to eat it should be important to investigate further whether he was actually a street-child and what kind of situation in that case he would be returning to. However, the case material did not indicate any such consideration and he was rejected. In a similar case a 15-year old boy from Chechnya reported having lived on the streets and having no relatives or nothing to return to. This was not considered and instead descriptions of the general situation in Russia were given as one of the reasons to reject the child. In a case from Norway a boy from Mongolia said he was living in the streets. It was not reacted upon and was not mentioned in the comments and notes by the case-workers. It is one of the few cases of rejection in Norway and he was rejected on the grounds that there were no persecutory elements and that he did have caregivers he could be returned to because his mother and (abusive) father were alive. This might have been the case; however, a more thorough investigation might have been made of what kind of situation he was returning to and what the risks were of ending up on the streets again.

### **Child Soldiers**

In Germany quite a number of children recognized as refugees are cases from Afghanistan where reference is also made to a (possible ) forced recruitment by the Taliban. There are two cases from Norway of refugee recognition. One of the cases includes child-specific information about the country of origin as well as a child-sensitive consideration in making the decision. It involves the abduction of a boy who was held for two years by the LTTE. “Forced recruitment by LTTE still continues to a great extent in LTTE-controlled areas in Sri Lanka. Children continue to be abducted in the same manner as described by the applicant. Despite the truce I agree that the applicant can fear reprisals from LTTE and government forces. Here it is necessary to point out that the subjective fear of a child will probably be even greater. I think that this is a clear example that asylum can be granted to a separated child who has been forcibly recruited.” There is another similar case from Germany where a former child soldier from Sri Lanka was recognized upon appeal. He had also been abducted by LTTE and kept in a military training camp for 5 months, followed by a series of events in which he was severely abused and exploited.

There are also several cases from Austria and Germany of child-soldiers being granted humanitarian protection, while these cases seem to be rare in Norway and Sweden. Most of the cases seem to be cases where boys have already been soldiers or where the children are found to have a well-founded fear of being recruited or of suffering reprisals for their previous activities as a soldier. For example, there are two similar German cases of children from Angola. In the one case a 16-year old boy was recruited by MPLA when he was 10 years old and stated with reference to a country-situation report that “the situation for returning women or children on their own is life-threatening.” In the other case a girl the year before was abducted along with the other children in her village by the rebel movement, repeatedly raped and was forced to work for the soldiers. This is another good example of a child- and gender-sensitive case-worker. “On account of the age of the applicant it has to be assumed that according to the available information of the general situation in Angola that the applicant would be at great risk of gross violations of human rights if returned. Due to lack of any social security it is to be assumed that the applicant if returned would be threatened by abuse and even murder due to her gender and age.” In another case a girl from Sierra Leone who was suffering from a complex post-traumatic stress disorder (PTSD) would not be able to get necessary treatment upon return. The PTSD was a result of horrible experiences as a child soldier after first being abducted by RUF, then held as a sex slave and forced to cook and work for the soldiers as well as forced to kill and torture people. She was suffering greatly from these experiences. In the reason for the decision it was stated that “This is especially relevant since the applicant is a minor who has credibly testified not only to have experienced herself great abuses but also to have been forced to take part in atrocities and as a result is suffering from a severe trauma.”

The following reasoning in a case from Norway about a 15-year-old child soldier from Burundi is not unusual<sup>39</sup>: “The applicant has, as a prisoner of a guerilla group, been subjected to incidents which must be characterized as grave, including imprisonment, widespread use of coercion and abuse. These are abuses that appear especially severe when taking into consideration the young age of the applicant. These are, however, incidents which cannot be characterized as persecution in the meaning of the law and the Convention. The experiences of the applicant are not covered by the conditions of the Convention. These are incidents which must be characterized as war-time events”. In another similar case from Norway the case-worker shows through the comments that he is fully aware of the abuse the child has suffered and that he might face different types of retribution, reactions and problems upon return. The caseworker nevertheless claims that according to Norwegian policy and practice child soldiers are not refugees and consequently the applicant is granted protection on humanitarian grounds.

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<sup>39</sup> According to UDI comments this policy has now changed and such a case could be granted refugee status.

The same seems to be the case in Sweden. There is no indication that recruitment into armies is taken into account when assessing refugee status. For example, a boy from Iraq who, among other things resisted recruitment to the army in 2001 and as a result felt threatened by the regime, is acknowledged by the decision-maker, however: “You have according to your own testimony not been politically active. According to your story you have not been exposed to coercion during the attempt to recruit you to the Fidayeen Saddam and you have managed to resist without repercussions. You have not made credible that the compulsory military service or your refusal to the draft would amount to danger of your life or lead to harassment to such an extent that you would be considered a refugee according to chapter 3 paragraph 2 of the Aliens Law. Since there actually has been no order of deportation nor any attempt at deporting your family your worry that your family will be deported must be considered exaggerated. According to the above the Migration Board finds that you have not made credible that the Iraqi regime would have such an interest in you that they should subject you to harassment upon a possible return.” One of the decisive points here is that the boy was not himself politically active, that imputed political opinion is not taken into consideration. Furthermore, it seems that the case-worker makes a distinction between forced and voluntary recruitment,<sup>40</sup> and since he was not forced it was not considered as serious. The comments about the worries of the child being exaggerated is an indication that he is treated more like an adult than a child. In another similar case of a boy from Iraq who fears recruitment into the army under Saddam Hussein is also not considered for refugee status. In yet another case from Sweden a girl from Congo whose parents were killed by government soldiers as they were suspected of belonging to rebel forces and who among other things, feared (forced) recruitment by the rebels is not taken seriously in the consideration of refugee status. These three children, however, were considered in need of protection on humanitarian grounds.

## **Trafficking**

Over the past few years trafficking, especially in women and children, has become an increasing problem in Western Europe. Although it is difficult to get statistics and exact information, it is evident that asylum-seekers sometimes become victims of trafficking. The recent international legislation related to trafficking<sup>41</sup> are important steps to combat this crime and serious human rights violation.

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<sup>40</sup> According to international standards the distinction between forced and voluntary recruitment is not relevant in this context. See eg. UN Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000 and Isobel McConnan/Sarah Uppard: “Children Not Soldiers”, ECHO/Save the Children 2001

<sup>41</sup>Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the 2000 UN Convention Against Transnational Organized Crime, 2000

There are not many cases at all that either contain information or indications of such human rights abuses, let alone cases where refugee or humanitarian protection was granted. However, there are some cases which illustrate that trafficking is acknowledged or not considered as relevant to the refugee definition.

There are several cases in Germany where children have been or seem to have been trafficked. There is, for example, a case from 2000 of an Iraqi girl who was trafficked, but managed to escape after arrival in Germany. “She was abducted to Germany, in Dortmund she succeeded in fleeing from them. She cannot be returned to Iraq because her father fled due to his anti-regime activities and her life is threatened because of him.” She was granted protection on humanitarian grounds.

There are a couple of trafficking cases in Norway which were recognized as refugees. One is a case of a girl from Uganda who was first abducted and abused by a rebel movement and then was exploited by her “helper” who took her to Norway and tried to force her into prostitution to “repay” him. She managed to escape and reported him to the police. In another interesting case an Afghan boy was recognized as a refugee because he had a well-founded fear of being abducted by pedophiles for sexual exploitation in an area where this according to reports, happened to young boys.

There are a number of Nigerian cases in Austria and Vietnamese cases in Germany, some of which one might suspect are connected to trafficking, but where the decision documents contain little information. Nigerian children, girls in particular, have been known to have been trafficked to other countries in Europe, such as Belgium, the Netherlands, the UK and Ireland and therefore one should suspect that this might be the case also in Austria. In Germany there has been a significant increase of Vietnamese children seeking asylum recently and some have been found to work in restaurants or other work-places in forced-labor-like condition. Most of these cases have been decided to be manifestly unfounded. There are also many child applicants from Nigeria in Germany and the following case of trafficking resulted in protection on humanitarian grounds. “When she was 13 years old, her aunt wanted to force her to be circumcized and marry a 35-year-old man. When she refused she fled to her girl friend, who introduced her to a man who took her to Europe. The man took her to the Netherlands, where he in a voodoo ceremony severely injured her as well as forced her into prostitution. In July 2001 she came to Germany.... A General Practitioner identified numerous scars on breasts, back and arms, and in addition a child psychiatrist diagnosed her with post-traumatic stress disorder.”

In Norway there is still little information about trafficking and no cases in this material, however, a new government policy paper on trafficking<sup>42</sup> advises that proper consideration should be given to victims of trafficking in the asylum

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<sup>42</sup> *Handlingsplan mot handel med kvinner og barn*, Norwegian Ministry of Justice 2003

procedure. In Sweden it was reported that girls from Somalia and Roma girls from Eastern Europe were involved in prostitution and probably trafficking. However, these girls have not applied for asylum and therefore do not appear in the material.

### **Prostitution, Sexual Violence and Exploitation**

Closely related to trafficking is prostitution and other types of sexual violence and exploitation. These phenomena are also difficult to reveal because of the taboo nature and that both perpetrators and victims have their own various reasons to keep it secret and hidden. However, forced prostitution, child pornography, sexual exploitation are serious human rights violations amounting to torture, and/or cruel, inhuman or degrading treatment.

As in the case of trafficking, there are relatively few such cases. There are some from Germany and Austria, and not many at all from Norway and Sweden. Some of the cases that involve sexual violence have been included below in Chapter 3.8 on torture, cruel, inhuman and degrading treatment. However, it is difficult to find any cases which have been granted refugee status or humanitarian protection where prostitution, sexual violence or exploitation is the main source of persecution.

The following two cases from Germany seem to be more typical. A girl from Chechnya, who had been abused by soldiers several times when they raided their house, fled for fear of being abducted and was held as a sex-slave by the soldiers, which she claimed frequently happened to girls. In the decision document there was no indication that this fear had been considered and she was rejected. A 16-year old girl with a baby who came from the streets in Luanda where she had to survive as a prostitute, was rejected as it was believed she was not in danger of being persecuted on the streets of Luanda and that she could seek help from international humanitarian agencies. The girl herself feared that she would end up in prostitution again upon return. Special in this case is the baby and there was no indication that the best interests of the baby had been adequately considered. It would have been appropriate first of all to consider the situation of the baby in the event of return, and the situation of street children and prostitutes in general in Luanda.

### **Female Genital Mutilation**

In several European countries, such as Germany, Austria, France, the Netherlands, female genital mutilation (FGM) has during recent years received attention in relation to refugee status determination. It has been considered as gender-specific persecution, but as most of the cases of FGM happen to girl children it should also be considered in light of being a child-specific persecution. In Germany, a quite considerable number of women and their small children as

well as separated girls have been recognized as refugees based on fear of FGM.<sup>43</sup> Yet, the latter apparently face greater difficulties in leaving their home country alone when threatened with such an impending human rights violation. Among the handful of cases included in this study three of them were recognized as refugees and two were granted protection on humanitarian grounds. For example, in one case a 15-year old girl was granted protection against return on the grounds that she would risk FGM upon return to her community. “The applicant has credibly testified that she is threatened by a forced circumcision in Cameroon. She is therefore threatened by cruel, inhuman and degrading treatment if returned to her home country. In addition, there are no other internal flight alternatives for the 15 year-old than to the return to her family. There she will most likely become a victim of forced circumcision.” In 2002 there was a ground-breaking second instance decision in Austria whereby the first person was recognized as a refugee for fear of being subjected to FGM. This was the case of an adult woman and since then at least one Somali girl and one Ethiopian baby, both accompanied, have been recognized as refugees by the second instance. There were no cases of FGM in the material from Norway and Sweden, however there are apparently a few more recent cases.

### **Domestic Violence**

It is difficult to find any cases involving domestic violence and there are no cases from any of the countries where domestic violence has been considered in terms of the Refugee Convention. There are a few stories that possibly could be seen in this light, but there is too little information to really consider them. However, there is an interesting case from Austria in which a boy from Yugoslavia was granted humanitarian protection based on, among other things, domestic violence. He never knew his father and when he was around 7-8 after his grandparents had died his mother became depressed, an alcoholic, sold their apartment, lost her job and also started to abuse him. During the Bosnian war she remarried a man who had taken part in the war, belonged to a (the) mafia and who started to regularly sexually and otherwise severely abuse the applicant. He also threatened to kill him several times. Then the stepfather left to take part in the Kosovo war. The story continues, but eventually the boy ended up in Austria and applied for asylum. This is a very grave case of domestic violence in which the boy had suffered cruel, inhuman and degrading treatment over a long time by the two persons who as his primary caregivers were supposed to be his main source of protection. There was nobody else he could return to and he still feared being killed and severely abused by his stepfather.

There are several cases in which domestic abuse seems to be ignored or is not considered. For example, there is a case from Norway where a boy from Mongolia fled because his adoptive parents did not want to take him along when they moved out of the country. In the interview he said that his father hit him

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<sup>43</sup> The recognition rate of separated girls is, according to UNHCR Germany, even higher than in the cases of adults or infants.

when he drank, but there were no further questions about this. In this case as well, it would have been appropriate to know the full situation about a possible domestic violence situation. The boy was not considered in need of refugee or humanitarian protection, but granted residence on humanitarian grounds because care-givers were not known and because it was an ‘old’ case (ie. 1 year old).

### 3.4 Imputed Political Opinion

According to the UNHCR 1997 Guidelines “It is also important to take into account the circumstances of the family members as this may be central to a child’s refugee claim. Principles of confidentiality should not be compromised in this regard. While the child may have personal fear or have experienced persecution, more often s/he may fear or have been affected by other discriminatory or persecutory measures affecting the entire family. Children often do not leave their country of origin on their own initiative. They are often sent out by their parents or principal caregivers. ‘If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of their own well-founded fear of persecution, the child him/herself may be presumed to have such a fear.’ If the will of the parents cannot be ascertained or if such will is in doubt, then a decision will have to be made regarding the well-foundedness of the child’s fear on the basis of all known circumstances.”<sup>44</sup>

There are many examples of imputed political opinion from all four countries, and the outcomes of the decisions vary. There are a number of cases where imputedness is not recognized; it is not recognized that children may have a well-founded fear of persecution based on parents’ (well-founded fear of ) persecution.

In Austria there are several cases of humanitarian protection on account of imputed political opinion. There is, for example, a case of a Chechen boy, who fled for fear of abduction by the Government forces due to his father’s activities. There are also two cases which were granted humanitarian protection on appeal. One was a case of an Angolan boy whose father had been a UNITA soldier and consequently both parents were killed by MPLA. It was recognized that children of killed UNITA soldiers were often killed themselves and that this boy risked being murdered if returned. However, there are several cases from Nigeria of imputed political opinion, which were rejected, where children claim to flee for reasons that their parents are active politically in conflict between Christians and Muslims, or members of political parties agitating against the government. There are also some cases from Ethiopia and Eritrea where the children claim to be in danger of persecution on account of parents’ active membership in opposition parties (such as OLF in Ethiopia) or having mixed-marriage parents (one parent from Ethiopia and one parent from Eritrea), which have been rejected.

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<sup>44</sup> UNHCR 1997 Guidelines, paras 8.8 and 8.9

Also in Germany there are many cases of imputed political opinion. For example, children from Angola whose parents have been active in UNITA, children whose parents are active Falun Gong members, many from Ethiopia and Eritrea who either have active parents or have parents of mixed marriage. Most often these cases were rejected. Several other cases are, however, positive. There are some cases of children from Turkey who because of their parents' affiliation and activities in PKK are in danger and flee. There is, for example, a case of an Algerian 15-year-old girl who had witnessed her parents being killed. The girl had no idea why, who the killers were, what the parents were involved in; she only knew that a neighbor woman also had been killed. She did not know the elderly man who came to take her to Germany; she didn't know why and where she was going. She was granted temporary residence on humanitarian grounds. This case was a bit unusual because the girl was so ignorant of the events and circumstances surrounding her. In many, many other cases the children are rejected. For example, a girl from Angola told the story about her father, a major in a rebel movement who refused to join the government army and was killed, and therefore they fled from their hometown. However, the harassment and abuse continued in the new place and her aunt was killed and uncle abducted. Then she was sent out of the country. She was rejected based on the argument that she was neither a militant member of the rebel group nor otherwise politically active in such a way that would put her in danger in the event of a return. It seems that in this case the imputed political opinion was not taken into consideration and that her gender and young age was not taken sufficiently into consideration.

In Norway there are many similar cases of imputed political opinion, such as a number (of girls in particular) from Ethiopia or Eritrea, Chinese children whose parents are members of Falun Gong, a case from Iraq. None of them are recognized as refugees but are recognized in need of protection on humanitarian grounds. From the comments it is clear that imputed political opinion is not taken into consideration when considering refugee status. For example, "the applicant has not herself been politically active. She was released after 6 days' imprisonment. Of the opinion that the stated does not give grounds for asylum". She had been imprisoned, interrogated, raped, among other things, because of the father's membership in OLF in Ethiopia. In another similar case a girl was also imprisoned, raped and abused on account of brothers' activity in OLF. The comments were similar: "The applicant has been imprisoned and while imprisoned suffered abuse. The imprisonment happened due to her brother's alleged membership of OLF; the applicant herself has not been a member of the OLF, the applicant has herself not been politically active. She therefore does not fall in under any of the reasons of the Convention." In the case from Iraq, there was a similar conclusion: "It is worth underlining that it was the father who tore up the picture of Saddam Hussein. The persecution therefore applies to the father, not the applicant... Conclusions: asylum denied, but humanitarian protection granted because the applicant is under 18 and from Southern Iraq."



There is one case from Sweden where a boy from Kongo was actually recognized as a refugee because of his uncle's political affiliation and activity, as well as his ethnic background. "The Migration Board finds that xy (name) because of his ethnic affiliation to zz (ethnic group) and his uncle risks persecution according to chapter 3 § 2 of the Aliens Law. " In many other cases from Sweden, though, imputed political opinion is not acknowledged or seriously considered for refugee recognition. There is, for example, the case of a girl from Iraq where the fact that a close relative of the person who killed her father for political reasons started harassing her was not taken into consideration in terms of imputedness. There are also the two cases from Kazakhstan in chapter 3.8 below. The statement "you have not yourself been politically active in your home country" appears to be quite common in the Swedish and Norwegian cases.

In all countries, children of parents who are active members of Falun Gong are not considered in danger of persecution pre- or post-flight. The following statement from a Norwegian case could be typical for any of the four countries: "The fact that the applicant's parents supposedly are members of Falun Gong does not imply any future danger of persecution."

### **3.5 Political Opinion and Activity**

Like adults, children might be persecuted for reasons of political opinion and activity. However, there is evidence that some case-workers, judges or other decision-makers do not believe that children could have their own political opinion or partake in political activity independently. The cases in this study reflect both assumptions, and they show that even if children are acknowledged as victims of persecution due to their own political opinion, they are most often treated like adults and not like children. That is, the heightened risk and vulnerability of children compared to adults does not seem to be taken into account.

The Swedish cases reflect that there is generally a high level of child-sensitivity but not always. Child-sensitivity is well exemplified in a case where an Afghan boy, who had been politically active and persecuted as a result, was recognized as a refugee on appeal. "There is, however, no reason to question his testimony that he is of zz (ethnic group), that he has made and distributed zz(regime)-critical pamphlets, and that part of his family has been opposing the government actively which xy (name) has been punished for. In summary the Board finds that xy has left his home country because of a well-founded fear of persecution covered in ch. 3 § 2". However, in another case of a boy from Syria there was quite a different reasoning: "From the answers you gave at the hearing on zz (date) about why you are a member of the communist party it does not appear that your alleged political activity is based on a political belief, but rather based more on the influence of your uncle." Needless to say, whether he has been influenced by his uncle or any other person is not relevant; quite the contrary, in the case of a child/youth it is

typical that they are easily influenced by parents, siblings, relatives, friends and therefore more easily become victims and targets in dangerous circumstances.

There are many cases from Norway where political activity is recognized also in the cases of children, but not really when considering refugee recognition. Only one of the 26 cases of refugee recognition involved political activity.

A case from Austria describes a case where the political activity of a child is not believed: “You have testified that you together with your friend, zy(name), have written and distributed pamphlets against the regime. The response to that is that this statement with reference to your young age – you are 15 years old – is not credible. It is not plausible that you at an age of 15 years together with your friend – who is the same age as you – independently and on your own account - wrote and distributed pamphlets in mail-boxes up to three times a month and that you ie. and your friend have driven around in a car in your town to distribute these pamphlets.” There is another case from Germany where a girl is not believed to have been politically active because of her age, among other things. “That the zz (country) authorities would or should consider her as a serious political opponent who should be fought against with all means, is on account of her age alone highly unlikely.”

### **3.6 Torture, Cruel, Degrading and Inhuman Treatment of Children**

Article 37 of the CRC states that “No children shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment,” and Article 39 that “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”<sup>45</sup> Information about torture, cruel, inhuman and degrading treatment of children as well as the possibility for their physical and psychological recovery and social reintegration should be an important and integral part of a refugee status determination.

There are only a few cases in the material, and it seems that in all four countries the especially vulnerable situation of children who are subjected to torture or other cruel, degrading and inhuman treatment is not taken sufficiently into consideration nor their right to recovery and social reintegration.

In Sweden, however, there is a special case where the case-worker herself makes a political statement about such cases in the decision she made on a 17 year-old girl from Bosnia. The girl had experienced all the horrors of the Bosnian war and

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<sup>45</sup> 1989 UN Convention on the Rights of the Child, Articles 37 and 39

been the victim herself of atrocities. In Sweden she was receiving psychological treatment for “massive traumatization” since the age of 7 and the case-worker discussed at length her physical and mental state and capacity to cope. Then she says: “xx seems to fill the criteria for asylum here and she is furthermore in need of protection. Even if the Government has produced guidelines about the normalization process in Bosnia xx has personally been greatly affected by persecution. An asylum application should be assessed by subjective criteria. The Migration Board should to a greater extent than up to now ascribe grave violations like group rape due to ethnicity to other than compassionate grounds for residence. Maria Bexelius has shown how seldom raped women are recognized as refugees or otherwise in need of protection. The threshold for refugee recognition or need for protection should be lowered for children like xx.” The girl was granted humanitarian protection, but there are several other examples where such incidences and circumstances are not decisive in granting asylum or humanitarian protection.

In Sweden there is a set-up where the Swedish Save the Children Crisis Center reports regularly to the Migration Board by sending them psychological assessments on children they are treating. According to the experience of the staff members, it seems that these assessments are actually taken into consideration at the level of humanitarian protection, but has never been determining in considering refugee status. Apparently, there were no known cases of children in their treatment who had been recognized as a refugee. Most of the children treated at the Crisis Center have been children in families, but some have also been separated children. Six cases from the Center are included in this study, all of whom had psychological evaluations detailing severe conditions as a result of serious abuse, harassment, torture, cruel and inhuman treatment of themselves and their parents or other family members and their need for long-term and intensive treatment. All of these cases were rejected in the first instance, while two of them were granted residence on humanitarian grounds upon appeal. The reasons for rejection were mainly due to the fact that they were from countries (Kazakhstan, Uzbekistan, Bangladesh) which were deemed as ‘generally safe’, that they were believed not in danger of being tortured or persecuted upon return, and that the children would be able to get adequate treatment for their condition upon return. While questioning the assumption that there was no risk of persecution upon return is beyond the scope of this study, there is reason to question whether the assumption that the children would receive adequate treatment and care was made on a sound basis. In at least two of the cases the parents were, due to their own severe psychological condition, not able to give adequate care and protection of their own sick children. “The testimony about the daughter says according to the Board nothing about what caused her psychological condition and she can according to the Board’s assessment get adequate treatment in her home country.....The health condition of the daughter cannot be the only reason for permission to stay.” It is questionable whether these children would actually receive adequate treatment to facilitate physical and psychological repair and social integration in the country of return. It seems that

the experience of trauma and the severe mental condition that these children have experienced **as children** and their need and right to recovery and reintegration is not taken sufficiently into consideration.

In Norway there are some similar cases. In the case of a boy from Sri Lanka the fact that he was tortured for 5 days in prison and harassed over time because he was mistakenly considered to be a member of LTTE by the government, was not taken into consideration in the final decision. He was granted protection on humanitarian ground because he was a child. This is also the case of an Ethiopian boy who was tortured and had lost both parents. It was commented in the interview transcript that “He is suffering much grief. First it was grief he could not get over at his mother’s death. Then his father was torn away. He has nothing left. He was tortured and often dreams about the torture situation, and he cannot sleep and suffers from headaches. He thinks a lot about it and cannot get it out of his head. Sometimes he fears he is going crazy or losing control. He is alone. The applicant was urged to contact a doctor to talk about his problems. The applicant says that this is his problem, the thoughts haunt him constantly. It doesn’t help much to talk to others about it.” A psychological report might have been helpful here, but was not done or at least not included in the decision. From the notes and the decision itself, it seems that the torture and previous experiences and present mental condition were not taken into consideration in the final assessment of the case. He was granted residence on humanitarian grounds because he was a child without care-givers in a known place.

There are also several cases from Germany which contain information that children have been subjected to cruel, degrading and inhuman treatment. Some have been granted humanitarian protection, though many have been rejected. In some of these cases it might seem from the decisions that the incidents of torture and the consequences in terms of psychological problems have not been sufficiently explored. However, a 15-year old boy from Sierra Leone, who was abducted by a rebel army and forced to perform atrocities, such as burning villages, cutting off limbs, killing civilians, and was suffering from complex PTSD, was granted humanitarian protection due to his treatment needs, the fact that he as a separated child without any family and with his specific history would have problems surviving if returned. “However, it is assumed that a returning separated child, the possibility for reintegration in a town and family community is hardly possible any longer. He himself has convinced the case-worker of the incredible atrocities which the zz (rebel army) took part in and it will be very difficult to ensure a safe life there. In addition, and further aggravating the situation the applicant is suffering from a complex post-traumatic stress syndrome” which he needs treatment for and which according to the psychological assessment cannot be found in Sierra Leone.

### 3.7 Internal Flight Alternative

According to UNHCR Guidelines on internal flight alternative<sup>46</sup>, in assessing an internal flight alternative the claimant should be able to lead a relatively normal life without facing undue hardship. To lead a relatively normal life for a child would normally involve living with parents or other primary caregivers. Therefore, unless there are caregivers willing and able to take care of the child in the area under consideration, internal flight alternative should not be considered for separated children. In all countries,<sup>47</sup> however, the fact that a difference should be made between children and adults when considering internal flight alternative does not seem to be fully acknowledged. In several cases children are asked themselves whether they have any other place to go in their home countries. In the end, though, the existence of an internal flight alternative does not seem to be crucial to the decisions in many cases at all.

In Austria separated children are sometimes asked questions regarding the possibility to stay in a different city or area of the country, for example questions like: “Why have you not moved to another place in zz (name of country) or “It was always possible to move to another part of the country, especially the bigger cities? What do you say to that?” or “Could you possibly live in a different part of zz (country)?” In Norway it is also referred to both in questioning and in some decisions. For example, in one decision, the note by the case-worker said: “Agree that the internal flight alternative can be applied to the applicant’s problems with LTTE”. In Germany sometimes internal flight alternative is used as a reason for rejection, among other reasons. For example in a case of a boy from Kashmir (still only 15 years of age when he submitted his application), the following was used as one of the arguments to reject him: “If the applicant from Kashmir still feels persecuted on account of his background from the state of Jammu and Kashmir, then he had and still has the possibility to move to other places in India where there is no violent conflict between Indian security forces and militant separatists. An internal flight alternative can always be approved of if the asylum-seeker is safe from political persecution in these areas and that he is not threatened by any other dangers....”

### 3.8 The Issue of Caregivers and Family Unity

In cases where it is found that the child does not qualify for asylum, according to the UNHCR 1997 Guidelines “an assessment of the solution that is in the best interests of the child should follow as soon as practicable.” .... “In identifying a solution, all circumstances should be taken into consideration. As a guiding concept, principles of family reunification and best interests are usually compatible. Thus, reunification with parents will generally be in the best interests

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<sup>46</sup> “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR 2003

<sup>47</sup> There is little information about this in Swedish cases, though.

of the child. However, where best interests of family reunification principles are incompatible, the best interests of the child should take precedence.”<sup>48</sup> Furthermore, a child should not be returned to the country of origin if there is no suitable caregiver willing and able to care for him/her.<sup>49</sup>

In Norway and Sweden a large number of separated children are granted residence on humanitarian grounds only because caregivers are not known or cannot be found in the country of origin. “The applicant is a minor and does not have caregivers in a known place....she says that the mother is there – but does not say where.....Residence on humanitarian grounds is granted, ref. practice in cases where no information exists of caregivers in a known place, as in this case”<sup>50</sup>. In the case of a girl from Iraq, it was concluded that “The best for xy(name) according to the Migration Board should be to reunify with her father in her home country. This is, however, at present not possible since contact with her father has not been established.” The question remains, though, whether the tracing efforts of her father were exhausted. In some cases the caregivers are sought through tracing efforts but in many other cases tracing is not done for various reasons, such as lack of resources, time, enough information from the applicant, uncertain identity of the applicant.

Although in many of these cases from Norway and Sweden tracing care-givers has been thoroughly done, there is no doubt that in a number of other cases finding suitable caregivers has not been attempted, fully exhausted or the suitability is too narrowly defined. For example, in a case from Norway of a boy from Niger an aunt was not found to be suitable or expected to care for her nephew: “In my opinion it cannot be expected that the applicant’s aunts should take the parental responsibility for the applicant, since they have not earlier been responsible for the applicant nor has the applicant lived with them before.” This appears to be an ethnocentric statement and not based on the culture the boy comes from in which the extended family members play a bigger role in the lives of children. In addition, in such cases, a certain element of common sense should be applied as to what would be in the child’s best interests. Unless the aunts are believed to be abusive of the boy, it is in the best interests of any child to be with his aunts rather than with other stranger(s) in a foreign country. According to UNHCR, a suitable caregiver could either be a family member, a relative, other adult, government agency or child-care agency.<sup>51</sup>

In another case from Norway a 10-year old girl from Sri Lanka whose parents apparently were alive, was granted residence on humanitarian grounds for the following reasons: that the case was getting old<sup>52</sup>, the fact that she was a minor and that she did not have caregivers in safe government-controlled areas of the

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<sup>48</sup> UNHCR 1997 Guidelines paragraphs 9.2 and 9.8

<sup>49</sup> *ibid*, paragraph 9.4

<sup>50</sup> Case from Norway.

<sup>51</sup> UNHCR 1997 Guidelines paragraph 9.4

<sup>52</sup> The case was 10 months old.

country. However, the whereabouts of the parents had not been verified, nor had they been contacted about their daughter's situation. If the parents had been willing and able, it might have been in the girl's best interest to reunite with her parents and this option should at least have been explored. If there was no possibility with the parents, tracing of other family members and relatives should have been considered. In the comments the caseworker stated: "My opinion is nevertheless that the case is so old, and the applicant so young that we should just grant (residence). It is of course possible that we could have gotten in contact with the parents, and if they had been willing to have the applicant sent home it would not matter whether or not she came from unsafe areas. We should rather work even more actively with this in new cases, and let this case go."

In Germany sometimes children are granted temporary protection from return under Section 53 (6) (i) of the Aliens Act due to their particular vulnerability in the case of return. These decisions are based on an impending danger to life and limb, for example if subsistence is not guaranteed, if they would not be able to survive without family or relatives, or there were no orphanages or other similar institutions available.<sup>53</sup>

The option which has been chosen in Norway and Sweden on a large scale, to grant so many children residence on humanitarian grounds only due to no caregivers in country of return is problematic. No doubt, it is the best option in some cases, while in other cases it may not be. It may be chosen as an easy way out of a very difficult dilemma; it may lead to handling the case less thoroughly and vigilantly; it may be a way to avoid the hassle of family tracing and reunification; and in the end it may reinforce an ethnocentric prejudice that the child is better off in Norway and Sweden rather than home with their parents or relatives.

### **3.9 Reference to International Standards on Children**

All of the countries refer in their decisions to the relevant paragraphs and chapters of the national asylum/aliens laws. However, only Sweden makes regular and frequent reference in case decisions to international standards, the CRC and Article 3 on the principle of the 'best interests of the child',<sup>54</sup> in particular. Often there is only brief mention to the CRC and sometimes Article 3, but sometimes it's more extensive, as in the following case. "According to Ch. 1 § 2 of the Aliens Law it is stated that in cases of children special consideration shall be taken of the best interests of the child as well as the development and needs of the child. According to Article 2 of the CRC all children have the same rights and same worth and none shall be discriminated against. According to Article 3 of the CRC the best interests of the child shall be a primary consideration. According to Article 6 of the CRC each child has the right to life and development. In a

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<sup>53</sup> UNHCR Nuremberg

<sup>54</sup> See footnote 21.

summary assessment of the circumstances of the case the Migration Board finds that the circumstances of the case.....”

## 4 Summary

### 4.1 Contrasts and Similarities between Countries

- The available statistics and information show that in all four countries separated children are recognized as refugees at a (significantly) lower rate than the general asylum-seeking population.<sup>55</sup> The statistical information together with the preliminary findings on how children are assessed suggest that children are discriminated against compared to adults in relation to refugee recognition. Likely explanations could be that child-specific persecution as well as imputed opinion, torture of children, among other things is not taken sufficiently into account. It is also possible that there is a real difference and therefore this issue needs to be studied more indepth.
- Furthermore, the statistics from Norway and Austria indicate a higher refugee recognition rate of girls than of boys. Given that the large majority of applicants are boys, a gender difference would be significant and therefore needs further study. It would be important to document what is the trend in all four countries and the reasons for possibly a gender difference in recognition.
- In contrast to refugee recognition, granting of protection and residence on humanitarian grounds happens to a much greater extent, particularly in Norway and Sweden. Norway rejects very few cases at all, and thus has a significantly higher rate of recognition on humanitarian grounds than the other countries. The data from all countries, however, indicate that there are some strong cases for refugee status, but where humanitarian protection has been granted instead. Further study is needed into the reasons for why this might be and what kind of conclusions might be drawn.
- While the Norwegian, Swedish and to some extent German cases often contain explanations and reasoning behind refugee recognitions, it is difficult to study the positive first instance decisions in Austria based only on the actual decision and interview because there is no individual background information in the decision itself. These cases would need to be supplemented with interview information.

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<sup>55</sup> This cannot be confirmed for Sweden as the statistics on separated children is not available. However, UNHCR statistics from Austria and Norway confirm this trend as does information from UNHCR regarding Germany.



- The other decisions often have long and thorough explanations including some excellent country-specific information on the history, political situation, economic conditions, religion, conflicts, and so on. However, there is very little or no child-specific information taken into consideration from countries of origin on the situation of children, child rights, such as the prevalence of child soldiers, the situation of street children in the big cities, whether FGM, arranged marriage takes place, the situation of slave or forced labor among children, and so on.
- Questions and line of questioning is more or less the same in the four countries although there seems to be more of an adversarial approach in Austria than the other three countries. In Sweden there seems to be more emphasis on evidence than in the other three countries. International standards and guidance on how to treat children is not sufficiently integrated into interviews. However, Sweden has recently made a significant policy change with its new interviewing technique and method for children. That is, they put emphasis on open, few and easy questions and on the method of narration, telling the story, which is more child-friendly and conducive to eliciting the relevant information from children.
- It seems that establishing credibility is not sufficiently child-sensitive although there are some variations between the countries. Norway has recently adopted a flexible approach where credibility should not be so significant in the cases of children. However, giving allowances for contradictions, inconsistencies, lies, lack of detail, disappearance, lack of knowledge, and so on, in the cases of children, does not seem to be an accepted practice in any country as yet.
- There are no indications in any of the four countries that there is sufficient knowledge and awareness among the case-workers and decision-makers of child-specific persecution, children's lives, psychology and development. However, there are a number of cases which do demonstrate child-sensitivity and awareness and as such serve as good examples. In addition, it should be recognized that some of these types of persecution and circumstances are difficult to get information about as they are either treated as taboos linked to feelings of shame, blame, anxiety, anger and so on and/or they are linked to crime. Child-specific persecution does not seem to be sufficiently considered, either due to little knowledge or because a policy and practice is lacking in this area.
- Similarly, there does not seem to be sufficient awareness and consideration of the fact that children can suffer persecution as a result of the political actions and opinions of their parents/relatives, that is imputed political opinion.

- Persecution of children due to their own political opinions seems to be acknowledged, although there are case-workers and decision-makers who do not believe that children are capable of such actions due to their young age.
- All countries offer training to case-workers on interviewing and assessing child asylum applicants, but the data material for this study did not include information this training except for the new training in Sweden. A follow-up study should include more in-depth information about the type of training which is offered, how long it lasts, who has designed it, who runs it, who undergoes the training, and so on.
- There is no systematic approach to the issue of family tracing and reunification in any of the four countries. Criteria for ‘best interests’ decisions on family reunification have not been established and it has not been well integrated into the refugee status determination in any of the countries. In Norway and Sweden cases where caregivers cannot be found are given residence permits on humanitarian grounds, which may be the best solution, but not necessarily so.
- There seems to be no special consideration of children who have been victims of torture, cruel, inhuman and degrading treatment. There might be a number of hidden cases, as children do not always disclose this kind of information easily and such information needs to be elicited in a specially sensitive manner from children.
- In all four countries psychological reports are sometimes included in the assessment of a case, and in Sweden the Crisis Center regularly submits reports on all their asylum-seekers to the Migration Board. It would be important to find the extent to which psychological assessments, treatments and reporting are included in the refugee status determination in the other three countries.
- All countries apply the notion of internal flight alternative, but it does not seem to be significant to decisions. More information and policy discussion is needed on internal flight alternative in relation to children.
- Only Sweden has included reference to the CRC in its legislation and makes frequent reference to international standards in the decisions, especially the CRC and Article 3 on the principle of the best interests of the child.
- Although the question of how some cases come into the asylum system and others do not, admissibility, was not part of this study, it is important to note that all countries do subject children either to admissibility procedures or assessments. This is in contravention to UNHCR guidelines and should therefore be part of a further investigation.

- **In conclusion:** There are some good examples from all four countries of child-sensitive treatment of children in the interviews, assessments and decisions on child asylum applicants. However, the main impression is that international human rights standards related to children are not taken sufficiently into account, are ignored or repudiated in refugee determination of children.

## 4.2 Unexpected Problems and Issues

- The difficulty in getting access to sufficient case material in Sweden was unexpected, especially since Sweden has come so far in the implementation of international standards on child rights and has many good case examples. A combination of internal organizational aspects at the Migration Board and very strictly interpreted privacy laws are assumed to be the main reasons. The four countries have similar legislation, but in this case Sweden was stricter in its interpretation. If there is a follow-up study, it would be necessary to first find out whether it will be possible to get access to more cases from Sweden.
- Age assessments and disappearances disturb the accuracy of official statistics in Norway and Sweden and the estimates in Austria and Germany. That is, numbers need to be corrected because of the large numbers of applicants who are believed to actually be over 18 years of age and the relatively large numbers who disappear. In relation to this study cases with an expressed doubt about age were not selected, and most of them were identified as ‘separated children’<sup>56</sup> and therefore it is not believed to have any significant bearing on the preliminary findings. However, in view of any follow-up study(ies) it is important to be aware of these issues and make necessary corrections and adjustments.
- One important issue is the positive decisions which do not contain explanation, especially when one of the main objectives of the study is to find good examples. In a comparative study like this it creates an imbalance in the examples from each individual country.

## 4.3 Recommendations for Further Study

Further and more in-depth analysis of the material as well as additional information is needed. Therefore, at this point, the main recommendation is to continue on from the pilot project with a follow-up study to complement and verify the preliminary findings. It will continue to be part of the larger international research project and will be coordinated with the other research activities on the project. The following recommendations are made:

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<sup>56</sup> Except for 16-17 year olds in Germany.

- The main **objectives** should remain more or less the same, that is to investigate whether children are treated according to international standards in the refugee status determination procedure, to find good examples of interesting and innovative decisions, and make recommendations on how to change policies and practices to enhance the protection of children.
- The **data** should include the already collected material as well as the collection of more cases from Sweden, if possible. More in-depth analysis should be done of these cases and more cases should be considered. This should be supplemented with interviews and observations. Interviews should be made with children, case-workers, lawyers who have represented separated children, decision- and policy-makers as well as representatives from UNHCR and involved NGOs from each country. If possible, observations should be made of interviews in each country. The new system in Sweden should receive special attention. Visits should also be made to centers or agencies for psychiatric/psychological treatment of children. In Austria, and to a certain extent in Germany, there needs to be a special focus, among other things on the positive decisions and the reasoning and arguments behind them.
- In addition to **the issues and themes** already in focus, the following questions have come up and should be looked into:
  - the reasons for certain ‘trends’ of movement, such as the recent group of Vietnamese children going to Germany; the large group of children from Nigeria to Austria; the high number of Somalian children to Sweden and Norway; the relatively large group of Ethiopian and Eritrean girls to Norway
  - whether children based on gender or nationality might be discriminated against in terms of refugee recognition and humanitarian protection?
  - possible explanations for why refugee status is refused in strong cases and humanitarian protection granted instead
  - a special focus on cases which involve human rights violations which are taboo and hidden, such as trafficking, domestic violence, sexual violence, slave/forced labor as well as cases where children have been severely traumatized
  - whether there are any differences in the decision-making over time and between first and second instances
  - the atmosphere and methods used during the interview of the child (from observations and interviews)
  - the length of interview, the number of interviews and the average time it takes to have first and second instance decisions
  - how the principle of the ‘best interests of the child’ is interpreted and applied
  - the extent to which information is available and considered on the situation of children and child rights in the country of origin
  - the issue of admissibility, study further how and to what extent these countries apply admissibility procedures or assessments to children
  - who decides when and how decisions are published and what are the barriers to wider dissemination of findings
  - more country-specific comments and summaries as well as comparisons

- include some key procedural aspects, such as appointment of guardian, legal advice, age assessment, etc.
- The **outcome** of the study should be a more comprehensive and analytical report including general recommendations as well as some specific recommendations for each country. In addition, some good examples should be identified which could be circulated.