

# **STREET CHILDREN'S ASYLUM CLAIMS IN EUROPE**

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## **ABSTRACT:**

In addition to the hazards of living on the streets, street children are subject to frequent beatings, torture, extortion and sexual abuse by police and other individuals. With their number on the rise, street children are likely to continue to suffer violations of their fundamental human rights. With a society at large that does not care and turns their back on these children, the perpetrators go unpunished for their violations.

The 1951 UN Refugee Convention offers protection to persons who are in need of help and assistance because that person has been persecuted based on his or her membership of a particular social group. The Member States of the European Union have all ratified this Convention and are bound by its provisions. The requirements as laid down in this Convention are interpreted slightly different within the Member States. The European Union is trying to overcome these difficulties by harmonising the asylum procedures.

In this paper, I will investigate whether street children should be granted refugee status under the 1951 UN Refugee Convention in Europe because of the treatment they endure in their country of origin. My argumentation will be supported by case-law from US and Canadian immigration courts where street children have already been granted refugee status on several occasions.

# STREET CHILDREN'S ASYLUM CLAIMS IN EUROPE

## 1: Introduction

*We did not sleep at all last night. That is why we are sleeping now, during the day. Night is the most dangerous for us. The police come while we are sleeping and catch you off guard, and grab and hit you. Last night, there was a large group of police in a big lorry, driving around, looking for kids. They are cleaning the streets....*

*Moses Mwangi, a street boy in Nairobi, Kenya<sup>1</sup>*

There are at least 18 million street children in India, up to 40 million in Latin America and over 100 million worldwide. Children end up on city streets because of poverty, dysfunctional families or abandonment. They are unloved and, so far as society concerned, 'disposable'<sup>2</sup>. The majority of street children are pushed onto the street by desperation and a realisation that they have nowhere else to go. The typical age of a street child varies from place to place, but in developing countries children as young as eight live completely on their own<sup>3</sup>.

Street children are part of that very large population of children who live in abject poverty and who are particularly vulnerable to abuse of their rights, both civil and economic<sup>4</sup>. Despite several international and national pieces of legislation, the rights of street children are violated on a large scale. The economic and social rights of street children are being violated in the form of lack of food and shelter, denial of education, and they are subjected to AIDS, prostitution and substance abuse. Additionally police, government, and private security forces around the world routinely harass and physically abuse street children<sup>5</sup>. This treatment violates the civil and political rights of street children. Governments in several countries do

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<sup>1</sup> Human Rights Watch, *Promises Broken: Police Abuse and Arbitrary Detention of Street Children*, at <http://www.hrw.org/campaigns/crp/promises/police.html>, last visited March 2003.

<sup>2</sup> Oneworld.net, *Street Children*, at <http://www.oneworld.net/guides/streetchildren/front.shtml>, last visited March 2003.

<sup>3</sup> World Health Organisation, *A training package on substance use, sexual and reproductive health including HIV/AIDS and STD's, Module 1: A profile of street children*, Geneva, WHO/MSD/MDP/00.14, 2000, p.2. [Hereinafter: WHO, *A Profile of street children*, 2000].

<sup>4</sup> Amnesty International, *On the streets*, March-April 1999, at <http://www.amnesty.org.uk/news/mag/mar99/cover.html>, last visited March 2003.

<sup>5</sup> Human Rights Watch, *Promises Broken: Police Abuse and Arbitrary Detention of Street Children*, at <http://www.hrw.org/campaigns/crp/promises/police.html>, last visited March 2003.

not protect these children and treat them as a blight to be eradicated rather than as children to be nurtured and protected.

In this thesis I will analyse whether street children should be granted refugee status under the UN 1951 Refugee Convention<sup>6</sup> because of the treatment they endure in their countries of origin.

I will look at the requirements laid down in the 1951 UN Refugee Convention and explore whether street children should be granted refugee status under this Convention. Case law from US and Canadian Immigration Courts granting asylum to street children shall be used to support arguments for granting asylum to street children coming to Western Europe.

The European Member States<sup>7</sup> all have national systems and have implemented regulations regarding the adjudication of asylum claims. They all apply the 1951 UN Refugee Convention but the interpretation in each country is slightly different. The phenomenon of unaccompanied child refugees is relatively new in Europe and the 1951 Convention does not deal with this issue separately. The EU Member States all have different asylum policies towards unaccompanied minors. I will explain the policy of four EU Member States, namely the United Kingdom, The Netherlands, Germany and Spain, and see how children's asylum claims are dealt with in these countries.

The European Union is trying to harmonise asylum law among its Member States. This will have significant implications for asylum claims in Western Europe. I will also explore what kind of implications this will have in the different Member States as related to street children's asylum claims.

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<sup>6</sup> United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. [Hereinafter 1951 UN Refugee Convention].

<sup>7</sup> EU Member States/Western Europe are the 15 Member States of the EU in 2003 before the accession of the

## **2: Definition of Street Children**

First of all, it is important to note that during this thesis I will use the definition of “child” as laid down in Article 1 of the United Nations Convention on the Rights of the Child<sup>8</sup>. This Article states: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”.

Before describing the situation most street children are in and whether, based on this situation, they should be granted refugee status, it is important first to define the term “street children”. Street children are those for whom the street (in the widest sense of the word, i.e. unoccupied dwellings, wasteland etc.) more than their family has become their real home, a situation in which there is no protection, supervision, or direction from responsible adults<sup>9</sup>.

Usually street children are divided into three operational categories<sup>10</sup>:

A “child **on** the street” is a child that visits his or her family regularly. The child might even return every night to sleep at home, but spends most days and some nights on the street because of poverty, overcrowding, sexual or physical abuse at home. Children on the street form the largest category.

A “child **of** the street” has no home but the street. The family may have abandoned him or her or he/she may have no family members left alive. On the streets these children seek shelter, livelihood and companionship. Most live in groups with other children on the street, find shelter in parks, or sleep under stairways or doorways. A smaller number stay in cheap flophouses that they may rent for the night with a group of other children<sup>11</sup>.

Abandoned children have severed all ties with their families. They are entirely on their own, not only for material survival but also psychologically<sup>12</sup>.

In this thesis, the term “street children” will include all three categories.

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new countries.

<sup>8</sup> United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1449 (1989), corrected at 29 I.L.M. 1340 (1990). [Hereinafter: CRC].

<sup>9</sup> Human Rights Watch, *Children of Bulgaria: Police Violence and Arbitrary Confinement*, HRW/Helsinki 1996, p.2 n.2. [Hereinafter: HRW, *Children of Bulgaria*, 1996].

<sup>10</sup> WHO, *A profile of street children*, 2000, p.2.

<sup>11</sup> M.D. Seitles, *Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Columbia, and Guatemala*, in <<16 in Public Interest Law Journal 159>>, (1997-1998), at [http://wings.buffalo.edu/law/bpilj/st\\_child.htm](http://wings.buffalo.edu/law/bpilj/st_child.htm), last visited March 2003.

<sup>12</sup> Human Rights Watch, *Police abuse and killings of street children in India*, HRW/Asia 1996, glossary, p.vii. [Hereinafter: HRW, *Police abuse and killings of street children in India*, 1996].

### **3: Street Children Worldwide**<sup>13</sup>

#### **3.1: Global Overview**

Worldwide concern for the well being of street children continues to be a significant issue for the international community, yet such concerns have not materialised into meaningful changes for the plight of these children. There are still an estimated 100 million children living on the streets. And this number is predicted to grow by the tens of millions as poverty in third world countries becomes increasingly urban-based<sup>14</sup>. Most street children are found in large, urban areas of developing countries. The problem of street children has worsened across the globe because of economic problems, political changes, civil unrest, increasing family separations and conflicts, the epidemic spread of diseases and natural disasters<sup>15</sup>. In developing countries over recent years, there have been increasing migration flows from rural to urban areas. People have moved to the large cities hoping to improve their economic situation, convinced that they can find jobs in the city. This development has increased the number of slums around big cities and the phenomenon of street children.

##### **3.1.1: Why children are on the streets**

The reasons why children live on the streets vary, but most children go onto the street to look for a better way of life. There are some common reasons around the world why children live on the streets. One of the main reasons is family problems; these problems include conflicts with parents, physical or sexual abuse, neglect or rejection. Some children are forced to leave home by their families because the family does not approve of a child's behaviour or its consequences, e.g. pregnancy, homosexuality<sup>16</sup>. Family breakdown has also been a major factor increasing the number of street children. Around the world the number of female-headed households has dramatically increased and especially in developing countries these

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<sup>13</sup> This chapter will give a short overview about the situation of street children. It will not include all the reasons why street children are on the streets and the problems and abuses they suffer as a result thereof.

<sup>14</sup> M.D. Seitles, *Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Columbia, and Guatemala*, in <<16 Public Interest Law Journal 159>>, (1997-1998), at [http://wings.buffalo.edu/law/bpilj/st\\_child.htm](http://wings.buffalo.edu/law/bpilj/st_child.htm), last visited March 2003.

<sup>15</sup> World Health Organisation, *Introduction: A training package on substance use, sexual and reproductive health including HIV/AIDS and STD's*, Geneva, WHO/MSD/MDP/00.14, 2000, p.iii. [Hereinafter: WHO, *Introduction*, 2000].

<sup>16</sup> WHO, *A profile of street children*, 2000, p.7.



women have a hard time getting by without additional support. Many street children come from female-headed households<sup>17</sup>.

The reasons why children live on the streets may vary but there is one recurring, underlying factor, namely poverty. Street children work on the street to earn some money for themselves and in some cases children work to support their families. Many children from poor families also do not have the chance to go to school or have dropped out because their parents (or the children themselves) could not afford school. In many countries schools are free, but many children cannot afford to buy uniforms, shoes and books<sup>18</sup>. These children have nothing to do during the day and have not learned any skills in order to be able to obtain a decent job, therefore in many cases they end up on the streets.

Children also go to the streets in order to find shelter. Families in the slums around big cities are forced to live in flophouses with the entire family. Children may decide to leave home to make room for younger siblings and elderly family members.

Others are on the streets because they do not have an alternative. They may have become separated from their families during civil unrest or their parents may have died from illnesses or killed during armed conflict<sup>19</sup>. Other children may have nowhere else to go when they are released from institutions such as jail or a detention centre.

### **3.1.2: Children's major occupations on the street**

On the streets children develop survival strategies, to meet their basic needs. Street children have to struggle to obtain basic things such as food, shelter and clothing. Begging is an important means of income for street children, but this is not their only attempt at earning money. A lot of children find themselves some work but most jobs are not steady. Children are also underpaid and work long hours a day just to be able to earn enough. Some of the jobs street children perform include washing cars, guarding parked automobiles, selling small goods, picking up garbage and shining shoes<sup>20</sup>. Children who do not earn enough money are forced to go through the garbage in search for food.

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<sup>17</sup> In Kenya, a country with a significant street children population, nearly one-third of Kenyan households are headed by women. In low income areas, the proportion is even higher.

<sup>18</sup> WHO, *A profile of street children*, 2000, p.11.

<sup>19</sup> Ibid., p.6.

<sup>20</sup> P. Kilbride, C. Suda, E. Njeru, *Street Children in Kenya: Voices of Children in Search of a Childhood*, Westport, Connecticut, Bergin & Garvey, 2000, p.72, 73. [Hereinafter: P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000].

Street children also become involved in petty crimes in order to survive. But in many cases adults and older youth exploit street children, forcing them to steal, distribute drugs and to prostitute themselves<sup>21</sup>. Street girls are even more vulnerable to sexual exploitation and rape. Girls living on the streets usually have less economic opportunities than boys and are given less money than boys for similar activities<sup>22</sup>. Although the majority of children living on the streets are still boys, the number of street girls is increasing<sup>23</sup>.

### **3.1.3: Problems faced by street children**

Street children face social, physical and mental problems. Street children lack basic resources to sustain a healthy living. They usually have no financial means to buy decent clothing and no money to buy food or at least not enough food to obtain a nutritious diet.

Street children live in places where they are not adequately protected from the environment and they rarely have access to facilities for hygiene and sanitation. Because of bad hygiene and sanitation street children are more vulnerable to health problems. Street children experience many common diseases such as tuberculosis, skin diseases, dental problems and parasitic problems<sup>24</sup>. Usually the children are denied access to health institutions mainly because they simply cannot afford to go to hospitals.

The stresses that street children experience make them also vulnerable to emotional problems and psychological disorders. In the first place, the situations and events that pushed these children onto the streets may have a lasting impact on their well-being. Children who have been abused do not receive any help at all. Street children have little or no parental supervision. On the streets, they are abused and exploited by adults. Street children do not receive adequate care for these conditions.

Many street children are involved in harmful use of psychoactive substances. They become addicted to drugs ranging from heroin to glue. Most street children sniff glue to make life better by dulling the hunger, by helping to forget problems, by giving them courage to

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<sup>21</sup> Amnesty International, *On the streets*, March-April 1999, at <http://www.amnesty.org.uk/news/mag/mar99/cover.html>, last visited March 2003.

<sup>22</sup> WHO, *A profile of street children*, 2000, p.3.

<sup>23</sup> Amnesty International, *On the streets*, March-April 1999, at <http://www.amnesty.org.uk/news/mag/mar99/cover.html>, last visited March 2003.

<sup>24</sup> WHO, *A profile of street children*, 2000, p.11, 13.

face problems and by giving them the courage to go out on the streets to beg<sup>25</sup>. Glue sniffing can cause kidney failure, irreversible brain damage and death<sup>26</sup>.

Both street girls and boys are affected by sexual and reproductive health problems. But girls are more vulnerable to physical and sexual abuse and exploitation. Common sexual and reproductive health problems include sexually transmitted diseases, HIV/AIDS, unwanted pregnancies and unsafe abortions. Pregnant street girls do not receive adequate antenatal care<sup>27</sup>.

Street children also face the possibility of physical injuries or death from violence. Some street children are hurt in fights with other street children. But most of the time police, private security forces and individuals routinely harass and abuse these children. Street children are frequently detained arbitrarily by police simply because they are homeless, or criminally charged with vague offences such as loitering, vagrancy or petty theft. They are tortured, beaten and often held for long periods in poor conditions. Girls are sometimes sexually abused, coerced into sexual acts, or raped by police<sup>28</sup>. Street children also face the threat of so-called “cleansing operations”, whereby death squads (said to comprise off duty police officers, security guards or other citizens) kill people they consider undesirable<sup>29</sup>. While hundreds of street children are murdered, tortured and beaten their assailants go unpunished<sup>30</sup>.

### 3.1.4: Stigmatisation

The public view of street children in many countries is overwhelmingly negative. The public has often supported efforts to get these children off the street, even though this may result in police round ups, or even murder<sup>31</sup>. Street children stand apart as a distinct social category both in their own minds and that of the public<sup>32</sup>. Street children are seen and treated as nuisances, criminals and general threats to society. As a result, these children are likely to be repressed and harmed rather than helped. For street children social exclusion is a fact of daily

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<sup>25</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000 p.4.

<sup>26</sup> Oneworld.net, *Street Children*, at <http://www.oneworld.net/guides/streetchildren/front.shtml>, last visited March 2003.

<sup>27</sup> WHO, *A profile of street children*, 2000, p.13.

<sup>28</sup> Human Rights Watch, *Street Children*, at <http://www.hrw.org/children/street.htm>, last visited March 2003.

<sup>29</sup> Amnesty International, *On the streets*, March-April 1999, at <http://www.amnesty.org.uk/news/mag/mar99/cover.html>, last visited March 2003.

<sup>30</sup> In section 3.2: Country Specific Conditions, I will elaborate further on the topic of physical and sexual violence against street children by the police, government, security guards and other individuals.

<sup>31</sup> Human Rights Watch, *Street Children*, at <http://www.hrw.org/children/street.htm>, last visited March 2003.

<sup>32</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000 p.xi preface.

life<sup>33</sup>. They do not have what society considers appropriate relationships with major institutions of childhood such as family, education and health<sup>34</sup>. Street children, and especially street girls, are seen as standing at the bottom of the status hierarchy.

### 3.2: Street Children: Country Specific Conditions

Historically, street children have been associated with the cities of Latin America and the Indian subcontinent<sup>35</sup>. But currently street children represent a worldwide phenomenon despite cultural differences<sup>36</sup>. Street children experience the same treatment in different developing countries. They are tortured and killed by the police or other vigilant groups, not only in Latin America, but also in Africa, Asia and Eastern Europe. Violence against street children is neither region nor religion related. In the next few pages, I will describe the situation of street children in five different countries located in different regions. These five countries are all distinct from each other, having their own culture(s) and religion(s). But these countries are certainly not the only countries where street children are abused and exploited. In every region of the world, several countries can be identified with the same policy towards street children.

#### 3.2.1: Guatemala

Between 5,000 and 6,000 street children live in Guatemala. The majority are concentrated in Guatemala City most of them being between 7 and 14 years old. Girls constitute between 20 and 30 percent of the entire street youth population<sup>37</sup>.

Most children in the streets run away because of maltreatment, beatings and the misery they encounter in their families. Many live in extreme poverty, are orphans or become pregnant<sup>38</sup>.

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<sup>33</sup> European Network for Street Children Worldwide, *Universal Declaration on Street Children*, Brussels, 28 November 2002, at [http://www.enscw.org/eng/forum\\_universal.htm](http://www.enscw.org/eng/forum_universal.htm), last visited April 2003.

<sup>34</sup> WHO, *Introduction*, 2000, p.iii.

<sup>35</sup> Amnesty International, *On the streets*, March-April 1999, at <http://www.amnesty.org.uk/news/mag/mar99/cover.html>, last visited March 2003.

<sup>36</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000, p.3.

<sup>37</sup> M. Ewer, *From the Streets to the States: Asylum Claims from Guatemalan and Honduran Street Children*, American Immigration Law Foundation, 2001, p.6, at <http://www.aifl.org/awards/dubroff/dub2001.pdf>, last visited April 2003. [Hereinafter: M. Ewer, *From the Streets to the States*, 2001].

<sup>38</sup> Casa Alianza, *Street Children in Guatemala City*, at <http://www.casa-alianza.org/EN/about/offices/guatemala/children.shtml>, last visited March 2003.

In Guatemalan society, children are considered to be property of their parents. Therefore, it is generally acceptable to physically abuse one's child. Such abuse is tolerated in the society and considered to be "strong disciplinary measures". The greatest and most severe abuse is often found in families with a low socio-economic status. When the police receive reports of domestic violence, they often do not respond nor do they take any serious action to control or prevent it<sup>39</sup>.

Street children in Guatemala often are the victims of sexual abuse. The majority of girls living in the street have been abused by a family member<sup>40</sup>. A study among 143 Guatemalan street children by the Centre of Orientation, Diagnosis, and Treatment of Sexually Transmitted Diseases and Casa Alianza<sup>41</sup> reported that 100 percent of the children interviewed had been sexually abused of whom 53 percent were abused by a family member. 64,1 % of the girls reported that the first person with whom they had sexual relations was their father or mother<sup>42</sup>.

Most Guatemalan children who end up on the streets are scared for life. Life in the streets is no better, as they are exposed to more poverty, accidents, rapes, injuries, illnesses and even murder. Many street children are sexually exploited, molested and trafficked. Street children are particularly vulnerable because they typically have very little education and if they have any job at all it is often informal and poorly paid<sup>43</sup>. Robbery, prostitution, and begging are the main sources of income for most street children. The majority of street girls prostitute themselves, usually beginning at the age of twelve<sup>44</sup>.

In Guatemala, authorities view street children as being socially undesirable and the children are targeted for violence in an effort to remove them. Streets kids continue to be at high risk of "social cleansing". The persecutors of these children are private security forces, (former) policemen, and former military members<sup>45</sup>. Attacks against street children include severe beatings, torture and mutilation, death threats, and extra-judicial executions. A total of

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<sup>39</sup> Personal affidavit from Bruce Harris, Executive Director for Latin America Programs for Covenant House (Casa Alianza), statement in US Immigration Court Proceedings, 10 March 2003. On file with the author. Over the past 13 years, Bruce Harris has interviewed and has had close contact with hundreds of Guatemalan children who were victims of domestic abuse, as well as hundreds of street children. [Hereinafter: Personal affidavit from Bruce Harris, March 2003].

<sup>40</sup> Ibid.

<sup>41</sup> Casa Alianza is an independent, non-profit organisation dedicated to the rehabilitation and defence of street children in Guatemala, Honduras, Mexico and Nicaragua.

<sup>42</sup> Casa Alianza, *Living in the streets*, at <http://www.casa-alianza.org/EN/street-children.htm>, last visited March 2003.

<sup>43</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>44</sup> Human Rights Watch, *Guatemala's Forgotten Children: Police Violence and Abuses in Detention*, HRW/Americas, 1997, at <http://www.hrw.org/hrw/reports/1997//guat1/index.htm>. [Hereinafter: HRW, *Guatemala's Forgotten Children*, 1997].

465 street children and youth under the age of 23 were murdered in Guatemala City in 2002, close to an average of 40 murders per month. The police have not sufficiently investigated approximately 60 percent of these murders in order to identify the murderer. Police or military agents are responsible for approximately 25 percent of the murders where the perpetrator has been identified. Many of the non-investigated murders are believed to have been committed by the police as well<sup>46</sup>. Police brutality, especially violence involving street children, is widespread in Guatemala<sup>47</sup>. The police have sexually assaulted hundreds of street girls<sup>48</sup>.

Street children in Guatemala are frequently arrested and imprisoned arbitrarily, sometimes for being homeless, other times for vague offences as “creating a public scandal” or “loitering”. There are no government programmes to aid street children anywhere in the country<sup>49</sup>. Once children are arrested, they may spend months in pre-adjudication detention. They do not receive a fair trial and judges ignore their due process rights. Judges order many of these children into detention facilities for their own protection. Children in protective custody are incarcerated together with juvenile offenders and are offered no meaningful rehabilitation or education, psychological treatment or vocational training<sup>50</sup>. In these centres they are crowded together under unsanitary conditions in the hands of untrained and unqualified personnel. Many boys’ centres are run by an organisation called REMAR<sup>51</sup>; in these centres children have been subjected to physical punishment and punitive isolation<sup>52</sup>.

Guatemalan society fails to protect children. A government official told Human Rights Watch that the Guatemalan society rejects street children and they would even like to see them dead<sup>53</sup>. Widespread impunity allows violence against street children to continue. In Guatemala, of the nearly 300 criminal complaints filed by Casa Alianza on behalf of street children, only a handful have resulted in prosecutions<sup>54</sup>. And there are also numerous cases of young boys and girls killed by the police who are convicted but later released<sup>55</sup>.

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<sup>45</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>46</sup> Casa Alianza, *Guatemala city child and youth murders increase 26% in February*, 25 March 2003, at <http://www.casa-alianza.org/EN/lastminute/03252003.shtml>, last visited May 2003.

<sup>47</sup> M. Ewer, *From the Streets to the States*, 2001, p.8.

<sup>48</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>49</sup> HRW, *Guatemala’s Forgotten Children*, 1997.

<sup>50</sup> *Ibid.*

<sup>51</sup> REMAR (Rehabilitación de los Marginados) is a Spanish evangelical group that works throughout Latin America and sets out to rehabilitate Spanish substance abusers and ex-convicts by sending them to work with troubled youth.

<sup>52</sup> HRW, *Guatemala’s Forgotten Children*, 1997.

<sup>53</sup> *Ibid.*

<sup>54</sup> Casa Alianza, *Street Children in Guatemala City*, at <http://www.casa-alianza.org/EN/about/offices/guatemala/children.shtml>, last visited March 2003.

### 3.2.2: Kenya

There are an estimated 25,000 street children in Nairobi alone and upwards of 40,000 nationwide<sup>56</sup>. Street boys greatly outnumber street girls. Family breakdown is the number one cause for the growing number of street children in Kenya. Family troubles at home, especially the absence of a father have proved to be a powerful push factor to the streets<sup>57</sup>. Both street boys and girls live in homes characterised by poverty and parental alcoholism. Street girls more often report that they experienced severe beatings at home. In Kenya, it is shameful for a teenage girl to be beaten by her parents. Street boys visit home more often than street girls do<sup>58</sup>. Common forms of child abuse in Kenya involve getting rid of an unwanted infant or child by abandonment. Press reports of child torture, burning, scalding, battering, prolonged confinement, and the like are not uncommon<sup>59</sup>.

On the streets, the children face harassment and abuse from the police and within the juvenile justice system for no reason other than the fact that they are street children. They are subject to frequent arrest simply because they are homeless; vagrancy is a criminal offence under Kenyan law. Police roundups are conducted with brute force and with little regard for the welfare of children, who are taunted, scolded, manhandled and beaten at the time of arrest<sup>60</sup>.

Girls in Nairobi report being sexually propositioned or coerced into having sex with police<sup>61</sup>. Pamela, a street girl from Nairobi, recounts being arrested by four policemen near the city market. They took her to a park where one policeman held her down while another policeman raped her. Pamela still sees the policeman who raped her daily, patrolling the streets<sup>62</sup>.

Aside from physical abuse, street children are also subject to extortion by police on the streets. Once arrested they are held in police lockups where they are often beaten and almost always held with adults, they are not informed of their rights and not provided with legal

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<sup>55</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>56</sup> Human Rights Watch, *Juvenile Injustice: Police abuse and detention of street children in Kenya*, HRW/Africa, 1997, p. 15. [Hereinafter: HRW, *Police abuse and detention of street children in Kenya*, 1997].

<sup>57</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000, p.5.

<sup>58</sup> Ibid., p.117.

<sup>59</sup> Ibid., p.36.

<sup>60</sup> HRW, *Police abuse and detention of street children in Kenya*, 1997, p.3.

<sup>61</sup> Ibid., p.21.

<sup>62</sup> Ibid., p.27.



counsel. The cells in which the children are held are often overcrowded, unclean, poorly ventilated, overrun with lice and vermin, and without running water<sup>63</sup>.

After their arrest the children go through a legal procedure where they do not receive a fair trial. Street children are committed to remand institutions for weeks or even months. Then eventually they usually end up in approved schools or borstal institutions. Street children frequently complain about severe physical abuse inflicted on them by personnel, the hard labour they are made to perform and the lack of food in these institutions<sup>64</sup>.

Police in Kenya have also used deadly force against street children. There are reports that police reservists are involved in the shooting and killing of street children. The police officers are rarely charged with these murders and those who do get charged are most of the time acquitted during a trial<sup>65</sup>. Establishing police accountability is seriously hampered by the fact that children must complain directly to the police about police abuse.

In recent years, street children have fought more and more with individuals. For example, one street boy was stoned to death by hawkers for stealing a sweet. In another incident, a street boy snatched a handbag from a woman and was consequently beaten to death through mob justice<sup>66</sup>.

Also the Committee on the Rights of the Child has expressed its grave concern about incidences of police brutality, sexual abuse and exploitation and economic exploitation of street children<sup>67</sup>.

### 3.2.3: Egypt

The total number of street children in Egypt has reached almost two million children<sup>68</sup>. Most children who are living and working on the streets of Cairo and other parts of Egypt are pushed onto the streets because of severe family crisis. Family violence and the divorce or remarriage of a parent are cited as the main reasons why children leave their home. Thabit A., a ten year old boy, has been living on the street for about three years and occasionally goes

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<sup>63</sup> Ibid., p.42.

<sup>64</sup> Ibid., See p.76, 79-82, and 88-91.

<sup>65</sup> HRW, *Police abuse and detention of street children in Kenya*, 1997, p.28.

<sup>66</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000, p.88, 90.

<sup>67</sup> Committee on the Rights of the Child, Concluding observations on Kenya, CRC/C/15/Add.160, 2001, no.35 and 57.

<sup>68</sup> Save the Children, *General Egyptian Association for Child Protection: Street Child Project*, at <http://www.savethechildren.org/eg/theproject.htm>, last visited April 2003.



home but he never stays long because his father always beats him, the last time with a piece of metal<sup>69</sup>.

Egyptian police routinely arrest and detain children they consider “vulnerable to delinquency” or “vulnerable to danger”; these children have not committed any criminal offence, and in many cases the very basis for their arrest is the fact that they are begging, homeless, truants, or mentally ill. The categories “vulnerable to delinquency” and “vulnerable to danger”, ostensibly to protect vulnerable children, have become a pretext for mass arrest campaigns to clear the streets of children. There were more than 11,000 arrests of children on these charges in 2001 alone, accounting for one quarter of all arrests of children in Egypt that year<sup>70</sup>. Children “vulnerable to delinquency” in custody are especially vulnerable to extortion, beatings, and other ill-treatment by police. Police beatings are so common that most children consider the beatings as merely one stage children pass through between arrest and release<sup>71</sup>.

Police frequently use obscene and degrading language to intimidate and humiliate children in their custody. Street children are often held in overcrowded and dirty adult lockups where they face abuse by adult criminal detainees and are not provided with food, bedding, or medical care<sup>72</sup>. Street girls also face the dangers of being sexually abused by police or other detainees.

Police abuse of children is not investigated nor does the police protect the children in detention from abuses by other detainees. There is no procedure for children to complain<sup>73</sup>.

Street children are denied education because often their families cannot afford to pay for their school fees, books and uniforms. Most of the time public schools are free, but parents cannot afford the additional costs.

### **3.2.4: Bulgaria**

Street children are a relatively new social phenomenon in Bulgaria, which emerged in the late 1980's, early 1990's. There is no reliable official data for the numbers of homeless children in Bulgaria but the evaluations indicate that there are between 2500 and 4000 street children in the country. Most of the street children are of Roma origin. Most of these children are aged

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<sup>69</sup> Human Rights Watch, *Charged with being children: Egyptian police abuse of children in need of protection*, New York, HRW, vol.15, no.1 (E), February 2003, p.9. [Hereinafter: HRW, *Charged with being children*, 2003].

<sup>70</sup> Ibid., p.3.

<sup>71</sup> HRW, *Charged with being children*, 2003, p.25.

<sup>72</sup> Ibid., p.4.

<sup>73</sup> Ibid., p.5.

between 7 and 18, but the group of children aged between 3 and 7 is also notable. In the early 1990's, they appeared only in big cities, but nowadays they are in many small towns as well. Children often end up in the streets of Bulgaria because of violence in the family, negligence by parents, poverty and escape from children's institutional homes<sup>74</sup>.

Children who live and work on the streets support themselves by begging, performing odd jobs for shopkeepers, gathering waste materials from dump sites for recycling, prostitution, and theft. Many of the children are addicted to glue and liquid bronze, which they inhale from plastic bags<sup>75</sup>.

There are frequent reports of severe police brutality against street children, on the streets, at the time of arrest and particularly during interrogation sessions at police stations. The children are beaten with electric shock batons, chains, rubber hosing, boxing gloves and other instruments. During interrogations the police severely beat children as a form of intimidation and coercion<sup>76</sup>.

Yusin, a twelve-year-old boy, told Human Rights Watch: "Four policemen grabbed me and Simeon (twelve years old) on the street. At the station the officers questioned us. They tried to make us confess. One of the officers grabbed Simeon's head and smashed it down onto the table. His head started bleeding. I was slapped in the face. I was so afraid, I peed in my pants"<sup>77</sup>.

There are also reports of sexual harassment of police towards street children<sup>78</sup>. Conditions in lock-ups are grossly inadequate; children receive no food, are denied access to the bathroom, are detained with adults and are subjected to more physical abuse. Police also conduct periodic street sweeps where children are rounded up from the streets for identification checks or because a crime has been committed<sup>79</sup>. For the most part, police violence against the children goes unreported and undocumented. Problems of accountability persists and inhibits government attempts to address police abuses<sup>80</sup>.

Skinhead gangs frequently attack street children in Bulgaria. These attacks occur regularly and frequently, sometimes several times in one week. The gangs are armed with

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<sup>74</sup> European Network for Street Children Worldwide, *The Free and Democratic Bulgaria Foundation: Street Children in Bulgaria*, at [http://www.enscw.org/eng/satellite/satellite\\_detail.asp?ID=3&TYP=CTY](http://www.enscw.org/eng/satellite/satellite_detail.asp?ID=3&TYP=CTY), last visited April 2003.

<sup>75</sup> HRW, *Children of Bulgaria*, 1996, p.3.

<sup>76</sup> *Ibid.*, p.20 and 25.

<sup>77</sup> *Ibid.*, p.28.

<sup>78</sup> *Ibid.*, p.17.

<sup>79</sup> *Ibid.*, p.24.

<sup>80</sup> US Department of State, Bureau of Democracy, Human Rights, and Labour, *Bulgaria: Country Reports on Human Rights Practices 2002*, (March 2003), at <http://www.state.gov/9/drl/rls/hrrpt/2002/18358pf.htm>, last visited May 2003.

chains, knives, bats, heavy steel capped boots and gas guns or sprays. The attacks are mostly directed against Roma children; racial animus appears to be the clear motivation for the attacks. Despite the regularity and frequency of the attacks, children receive little assistance from police; the attacks go unaddressed<sup>81</sup>. During its survey, Human Rights Watch was unable to find information on a single criminal prosecution of skinheads for attacks against street children<sup>82</sup>.

Under Bulgarian law, children as young as eight may be confined in Labour Education Schools<sup>83</sup> through non-judicial proceedings for offences as minor as vagrancy or simply being “uncontrollable”. It is estimated that Roma children comprise approximately 50 percent of the total Labour Education School population, most of who have roamed the streets before. Widespread physical abuse of children by staff in these schools has been reported. Other forms of punishment in these schools include confinement in an “isolator”, head shavings, reduction in diet, imposition of work chores and deprivations to receive correspondence. Children who try to complain about abuses to outsiders may be severely punished<sup>84</sup>.

Street children are viewed by police and private citizens as criminals. Their Roma identity further reinforces this image; Roma are often perceived by the Bulgarian public to be a criminal element of society<sup>85</sup>.

### **3.2.5: India**

India has the largest population of street children in the world. At least 18 million children live or work on the streets of urban India. Children in India end up on the streets for the same reasons as the children in the other countries described above. The children are simply abandoned by their parents; they decided to leave home because of problems at home (for instance physical or sexual abuse) or because of poverty<sup>86</sup>.

Indian street children are routinely detained illegally, beaten and tortured and sometimes killed by the police. Police abuse of street children is symptomatic of three problems: the increasing population of street children, the perception of street children as

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<sup>81</sup> HRW, *Children of Bulgaria*, 1996, p.32, 33.

<sup>82</sup> Ibid., p.35

<sup>83</sup> Labour Education Schools are the Bulgarian equivalent of juvenile reform institutions.

<sup>84</sup> HRW, *Children of Bulgaria*, 1996, p.5-7.

<sup>85</sup> Ibid., p.3.

<sup>86</sup> SKCV Children's Trust, A study by N.S. Manihara: *Street Children in India*, at <http://www.skcv.com/street20%children%20in%20india.htm>, last visited April 2003.

criminals, and the lawlessness of police<sup>87</sup>. Under the Indian Penal Code, anyone over the age of twelve is considered an adult and the law makes it also possible to treat children as young as seven as adults before the law<sup>88</sup>. The Committee on the Rights of the Child has criticised countries that have set the age of criminal responsibility too low<sup>89</sup>.

Torture, usually in the form of severe beatings with fists, lathis<sup>90</sup>, or other instruments, and kicking is a common feature of police treatment of street children. Beatings themselves are used extensively as a means of investigation, punishment, retribution or a method of crime prevention. Children in remand homes have died as a result of severe beatings and other forms of torture. Fourteen-year-old Hira was severely beaten because he forgot to clean a teacher's room in one of India's remand homes. He was stripped down to the waist, made to lie on the floor and his body was oiled. Then he was beaten with a stick until he fell unconscious<sup>91</sup>.

Police also torture potential witnesses, accomplices, or people who were near a crime scene. There are also reports of beatings against parents who are waiting at the police station for their children and NGO-workers<sup>92</sup>.

Also the Committee on the Rights of the Child has expressed its concern about the numerous reports of routine ill-treatment, corporal punishment, torture and sexual abuse of children in detention facilities, and alleged instances of killings of children living and/or working on the streets by law enforcement officials<sup>93</sup>.

Police enjoy impunity for the torture and killing of street children. The impunity is derived from the failure to investigate and prosecute crimes. Generally, the state orders an investigation only after media coverage or public protests. But even when an investigation is ordered, it is done by the police themselves, in some cases, by members of the same department<sup>94</sup>.

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<sup>87</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.7.

<sup>88</sup> Ibid., p.2.

<sup>89</sup> Committee on the Rights of the Child, Concluding Observations on Nepal, principal subjects of concern no.24 CRC/C/15/add.57, 7 June 1996, and;

Committee on the Rights of the Child, Report on the 14th session, Concluding Observations on Syrian Arab Republic, principal subjects of concern no.201, CRC/C/62, 3 March 1997

<sup>90</sup> Lathi is a police baton, frequently carried by Indian police. It is approximately one meter in length, two to five centimetres in diameter, and usually made of wood.

<sup>91</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.28

<sup>92</sup> Ibid., p.36, 96-102.

<sup>93</sup> Committee on the Rights of the Child, Concluding Observations on India, CRC/C/15/Add.115, February 2000, no.38.

## **4: The Human Rights of Street Children**

It is important to look at the protection international instruments offer street children. Many States have signed and ratified several of these international instruments, so they have made a commitment to respect and enhance fundamental human rights. But despite the commitments made by governments the human rights of street children are being violated on a large scale around the world. However, these instruments can be used to address governments and compel states to account for their failure to protect children. In order to do that, it is important to be aware of the responsibilities that a State has in each area and any special duties it has in respect to children.

### **4.1: International Protection**

The most important instrument with respect to children's rights is the United Nations Convention on the Rights of the Child (CRC). The CRC is the most widely ratified human rights convention in history and covers all the fundamental rights of the child, civil and political rights as well as economic, social and cultural rights. The CRC makes no specific mention of street children but the Preamble states that children living in exceptionally difficult conditions need special consideration.

The CRC is undoubtedly a major breakthrough in the protection of children's rights but it also important to look at other international instruments. Rights that are included in other treaties apply equally to children as well as adults. And some of these treaties have individual complaint procedures and/or stronger monitoring procedures<sup>95</sup>.

#### **4.1.1: Right to protection and assistance for families**

One of the main reasons why children end up on the streets is because of problems at home. Children are physically or sexually abused, neglected, maltreated or exploited within their family environment<sup>96</sup>. Under Article 19(1) of the CRC, States have the obligation to protect a child from all forms of physical or mental violence, injury or abuse, neglect or negligent

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<sup>94</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.67-69.

<sup>95</sup> I. Byrne, *The Human Rights of Street and Working Children: A practical manual for advocates*, London, Intermediate Technology Publications 1998, p.27. [Hereinafter: I. Byrne, *The Human Rights of Street and Working Children*, 1998].

<sup>96</sup> See chapter 3 of this paper.

treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. This means there should be effective procedures for the establishment of social programmes to provide the necessary support for the child in the country, as well as other forms of prevention, reporting, investigation, treatment and follow-up of instances of child maltreatment<sup>97</sup>. Also Article 10 of the United Nations Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>98</sup> affords this protection to children<sup>99</sup>.

In many countries, domestic violence is considered to be a private affair<sup>100</sup> and parents have the right to “correct” the behaviour of their child. Children in these countries do not receive any support/help from the police or any other government authority<sup>101</sup>, which constitute a clear violation of international law.

#### 4.1.2: Right to an adequate standard of living

Poverty is one of the biggest problems faced by street children. Children end up on the streets because their parent(s)/guardian(s) cannot properly support them with food, clothing and housing. On the streets they look for ways to earn some money for themselves or in order to support their family. But life on the streets is not much better; they have to struggle to get food, clothing and shelter every day<sup>102</sup>.

According to Article 27(1) of the CRC and Article 11(1) of the ICESCR every child has the right to a decent standard of living. States have the obligation, within their means, to assist parents to implement this right. A decent standard of living, particularly, includes providing people and children with food, clothing and housing and decent health care<sup>103</sup>.

Article 24(2) of the CRC also specifically states that one crucial way of combating disease and malnutrition is to provide adequate nutritious foods and clean drinking water. For pregnant street girls this right is specifically important because for them malnutrition is a particular danger as they are already weakened by their condition. The marginalisation of

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<sup>97</sup> Article 19(2) CRC.

<sup>98</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Session, Supp. No. 16, U.N. doc A/6316 (1966). [Hereinafter: ICESCR].

<sup>99</sup> A. McChesney, *Promoting and Defending Economic, Social and Cultural Rights: A Handbook*, Washington, AAAS Distribution Centre 2000, Chapter 8: Violations of specific convention rights.

<sup>100</sup> Committee on Economic, Social and Cultural Rights, Concludes Day of General Discussion, press release, 28<sup>th</sup> session, May 2002.

<sup>101</sup> United Nations Population Fund, *The Culture of Silence, Violence against Girls and Women: An Introduction*, at <http://www.unfpa.org/intercenter/violence/intro.htm>, last visited May 2003.

<sup>102</sup> See chapter 3 of this paper.

<sup>103</sup> Article 27(2) CRC, Article 11(1) ICESCR, Article 25 UNDHR.

street children also limits their access to even the most basic health services<sup>104</sup>. States should provide street children with these basic fundamental rights for, as these rights are crucial for their survival.

#### 4.1.3: Education

A lot of street children have either never received an education or have dropped out on an early age. The Committee on Economic, Social and Cultural Rights has stated, “Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”<sup>105</sup>.

Both Article 28 of the CRC and Article 13 and 14 of the ICESCR recognise the right to education and specifically that primary education shall be available free to all. Although in many countries parents do not have to pay school fees at the primary level, they can simply not afford things such as books, uniforms and shoes forcing them to pull their children out of school<sup>106</sup>. The right to education is expressly formulated so as to ensure the availability of primary education without charge to the child, parents or guardians. Indirect costs, such as the obligation to wear a relatively expensive school uniform, constitute disincentives to the enjoyment of the right and may jeopardize its realization<sup>107</sup>. States also have to take measures to encourage regular attendance at schools and the reduction of drop-out rates<sup>108</sup> and the payment of uniforms, books etc. is an important reason, together with the fact that a lot of children in developing countries have to work to survive, why children have to drop-out of school<sup>109</sup>.

Children in detention, including street children, are frequently denied access to education while in the state’s custody. Even the few who do have access rarely receive an appropriate education<sup>110</sup>. This is also a violation of children’s right to education<sup>111</sup>.

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<sup>104</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.10.

<sup>105</sup> Committee on Economic, Social and Cultural Rights, General Comment 13: Right to Education, paragraph 1, E/C.12/1999/10, December 1999.

<sup>106</sup> WHO, *A Profile of street children*, 2000, p.11.

<sup>107</sup> Committee on Economic, Social and Cultural Rights, General Comment 11: Plans of action for primary education, paragraph 7, E/C.12/1999/4, May 1999.

<sup>108</sup> Article 28(1)(e) CRC.

<sup>109</sup> See chapter 3 of this paper.

<sup>110</sup> Human Rights Watch, *Promises Broken: Education*, at <http://www.hrw.org/campaigns/crp/promises/education.html>, last visited May 2003.

<sup>111</sup> Paragraphs 15, 38-47 of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty,



#### 4.1.4: Right to life

The right to life is the most basic right of all which is the precondition for the enjoyment of all others. In many provisions this right is described as an inherent right, which cannot be derogated from in any circumstances<sup>112</sup>. Because of its fundamental nature, this right is widely protected in many of the major international human rights treaties and in all of the regional instruments<sup>113</sup>.

Street children's right to life is mostly threatened by violent acts committed by the State and its agents in the form of extra-judicial executions and disappearances. But governments also violate the right to life of street children by not protecting them against violent acts committed by private security guards and other private individuals<sup>114</sup>.

Other equally serious threats to the right to life of street children can take the form of omissions, which fail to protect certain basic economic and social rights, resulting in poverty, malnutrition, lack of decent health care and lack of adequate shelter<sup>115</sup>. States, who do not adopt an integrated approach to providing enjoyment of certain fundamental economic and social rights, violate the right to life in the form of neglect<sup>116</sup>.

#### 4.1.5: Freedom from torture

Many instances of police abuse, extortion and acquiescence in abuse by other detainees in police lock-ups against street children constitute cruel, inhuman or degrading treatment; in some instances this ill-treatment rises to the level of torture. Police or other state agents<sup>117</sup> use of electric shocks and beatings with whips, hoses, or other implements that cause children

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adopted Dec. 14, 1990, G.A. Res. 45/113, U.N. GAOR, 45<sup>th</sup> Sess., Supp. No. 49A, at 205, U.N. Doc. A/RES/45/113 (1990). [Hereinafter: JDL-Rules].

<sup>112</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.9.

<sup>113</sup> See Article 6 CRC, Article 6 International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171, reprinted in I.L.M. 368 (1967), [Hereinafter: ICCPR], Article 4 African Charter on Human and People's Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in 21 I.L.M. 58 (1982), [Hereinafter: AfCHR], Article 4 American Convention on Human Rights, opened for signature Nov. 22, 1969, 114 U.N.T.S. 123, O.A.S.T.S. No. 36, reprinted in 9 I.L.M. 673 (1970), [Hereinafter: AmCHR], Article 2 European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5, [Hereinafter: ECHR].

<sup>114</sup> See chapter 3 of this paper, which describes violent abuses committed against street children by police officers, private security guards and other individuals.

<sup>115</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.9.

<sup>116</sup> Ibid., p.11.

<sup>117</sup> For example personnel working in institutions for children such as remand institutions, approved schools, borstal institutions and labour education schools.



severe pain or suffering and are intended to punish or intimidate street children constitute torture<sup>118</sup>.

The right not to be tortured or suffer cruel, inhumane or degrading treatment is a fundamental freedom that has been laid down in all the main general treaties<sup>119</sup>. The prohibition of torture can be considered customary international law, binding on all nations regardless of whether they are parties to the Convention against Torture<sup>120</sup>. For many countries torture still remains a routine, sometimes systematic, practice which is often the first recourse for police and security forces who deal with street children<sup>121</sup>.

#### 4.1.6: Commercial/Economic Exploitation

The situation of street children in many countries is such that they have no recourse but to engage in some form of work. Instead of completely banning all forms of work for children, efforts must be made to ensure that children are not exploited or placed at risk<sup>122</sup>. This is reflected in Article 10(3) of the ICESCR and Article 32 of the CRC which recognises the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. It is the task of governments to take legislative, administrative, social and educational measures to ensure the implementation of this right<sup>123</sup>.

Governments must also ensure children's right to rest and leisure and to engage in play and recreational activities<sup>124</sup>. This means that government must take actions to ensure that children are not involved in full-time work or that they are not working too long hours which is still the case for many street children<sup>125</sup>.

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<sup>118</sup> HRW, *Charged with being children*, 2003, p.53.

<sup>119</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, [Hereinafter: CAT], Article 37(a) CRC, Article 7 ICCPR, Article 5 AfCHR, Article 5(2) AmCHR, Article 3 ECHR.

<sup>120</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.91.

<sup>121</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.12. See also Chapter 2 of this paper.

<sup>122</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.15.

<sup>123</sup> Article 32(2) CRC.

<sup>124</sup> Article 31(1) CRC.

<sup>125</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000, p.73.

#### 4.1.7: Sexual Exploitation

Children around the world are sexually abused and exploited in ways that can cause permanent physical and psychological harm. A lot of street children have been sexual abused in their family environment. Once on the street, police demands sexual services from street children, threatening them with arrest if they do not comply. In detention and correctional facilities, street children may be sexually abused by staff or are not protected from sexual abuse by other inmates<sup>126</sup>.

In order to survive, street children, mostly girls, are involved in prostitution. Most of the time these children are forced to prostitute themselves or are sexual exploited by adults<sup>127</sup>. Article 34 and 35 of the CRC addresses this issue; governments have to undertake action in order to protect children from all forms of sexual exploitation and sexual abuse, such as the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices and the trafficking of children. Under the CRC, an Optional Protocol<sup>128</sup> has been adopted on the sale of children, child prostitution and child pornography, which can serve as an additional strong instrument for the protection of street children against sexual abuse and exploitation.

#### 4.1.8: Juvenile Justice

The CRC also mentions juvenile justice rules. Street children are often arbitrarily arrested and detained and as a result of their precarious and dangerous situations, street children are often involved in petty crimes and come into contact with the juvenile justice system of a country<sup>129</sup>.

Many street children are regularly held without charge or on the basis of vague offences<sup>130</sup>, often in terrible conditions, as a means of “cleaning” them off the streets. Even if

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<sup>126</sup> Human Rights Watch, *Promises Broken: Sexual Abuse and Exploitation*, at <http://www.hrw.org/campaigns/crp/promises/abuse.html>, last visited May 2003.

<sup>127</sup> See section 3.1.2 of this paper.

<sup>128</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature May 25, 2000, G.A. Res. A/54/263 (Annex II), U.N. GAOR, 54<sup>th</sup> Sess., Supp. No. 49, Vol. III, at 6, U.N. Doc. A/RES/54/4 (2000), reprinted in 39 I.L.M. 1285 (2000).

<sup>129</sup> See chapter 3 of this paper.

<sup>130</sup> For example “being uncontrollable or incorrigible”, “vulnerable to delinquency”, “creating a public scandal” or simply because they live on the streets.

they are found guilty of crimes such as stealing or drug abuse and imprisoned, the standards of their detention almost always fall well below that laid down in international guidelines<sup>131</sup>. Arbitrary and illegal arrests and detention are forbidden by two basic international agreements namely the ICCPR and the CRC<sup>132</sup>. Juvenile justice systems in a country must also ensure that the arrest, detention or imprisonment of a child is used as a means of last resort and for the shortest appropriate period of time<sup>133</sup>. Street children still often stay in police lockups for days, weeks, sometimes even months without having the legality of their detention reviewed (promptly) by judicial or other authorities<sup>134</sup>. In case of street children pre-trial detention is usually used as the first alternative because street children are unable to supply an address and will not be able to meet any bail payment<sup>135</sup>. States usually do not even seek to provide any other alternatives, which is a breach of the ‘last resort’ clause of Art.37 (b) of the CRC<sup>136</sup>.

Despite the directive of Article 37(c) of the CRC that “every child deprived of liberty shall be separated from adults”, street children continue to be held with adults in many parts of the world<sup>137</sup>.

Articles 10(2)(b) and 14 of the ICCPR do offer some safeguards for children who are subject to the criminal justice system but it was not until Article 40 of the CRC that there was recognition that children require special protection due to their particularly vulnerability. This is even more the case as regards street children who in most countries are viewed with suspicion and hostility by the authorities and who because of their lack of education are in an even weaker position than other children<sup>138</sup>.

Article 40 of the CRC seeks to ensure that courts take into account the situation of the child when determining the case to make sure the child receives a fair trial in accordance with her or his sense of dignity and worth. Without legal representation, and without the presence of a parent or legal guardian, street children are subjected to brief hearings on their case without being allowed to speak whereby they may be deprived of their liberty and committed

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<sup>131</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.13.

<sup>132</sup> Article 9 and 10 ICCPR, Article 37 CRC.

<sup>133</sup> Article 37(b) CRC.

<sup>134</sup> HRW, *Police abuse and detention of street children in Kenya*, 1997, p.34. See also other HRW-reports of Egypt, Guatemala, Bulgaria and India.

<sup>135</sup> G. van Bueren, *The International Law on the Rights of the Child*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, vol.35, 1995, p.210. [Hereinafter: G. van Bueren, *The International Law on the Rights of the Child*, 1995]

<sup>136</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.13.

<sup>137</sup> Human Rights Watch, *Children's Rights: Juvenile Justice*, World Report 1999, at <http://www.hrw.org/worldreport99/children/child3.html>, last visited April 2003.

<sup>138</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.14.

for years to juvenile correctional institutions or even adult prisons<sup>139</sup>. Measures for dealing with children without resorting to judicial proceedings must also be undertaken in full compliance with and in full respect of human rights and legal safeguards<sup>140</sup>. This is an important provision because for example in Bulgaria, children as young as eight may be confined in Labour Education Schools through non-judicial proceedings<sup>141</sup>.

The cells in which street children are held are often overcrowded, unclean, poorly ventilated, overrun with lice and vermin, and without running water and children do not receive (enough) food. This kind of treatment violates several international standards<sup>142</sup>.

In many countries the juvenile justice system falls well below the minimum standards laid down in several international instruments.

#### **4.1.9: Social Exclusion/Discrimination**

Neglect by the community means that street children are exploited through their lack of equal access to public services and the opportunity to participate fully in society. This social exclusion is recognised explicitly by Article 10(3) of the ICESCR and implicitly by Article 36 of the CRC. This is also a violation of Article 2 of the CRC in which is stated that children should be able to enjoy their rights without discrimination. Street children are denied access to the most basic needs such as health care, education and clean drinking water. Government must take measures to ensure that children are protected against all forms of discrimination but in most countries government officials only exclude street children even more by arbitrarily detaining them and by publicly beating and humiliating them.

In Bulgaria street children suffer from racially motivated attacks against them by skinhead gangs because of their Roma identity. The Bulgarian government has not protected these children from discrimination based on ethnicity<sup>143</sup>. Street girls suffer from discrimination, because they have less economic opportunities and are perceived to stand at the bottom of the social hierarchy, even under street boys<sup>144</sup>.

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<sup>139</sup> HRW, *Police abuse and detention of street children in Kenya*, 1997, p.48. See also other HRW-reports.

<sup>140</sup> Article 40(3)(b) CRC.

<sup>141</sup> HRW, *Children of Bulgaria*, 1996, p.36.

<sup>142</sup> Article 37 CRC and the JDL-rules.

<sup>143</sup> See section 3.2.4 of this paper.

## 4.2: Mechanisms under International Law for the protection of street children

States violate the rights of street children on a large scale. It is not only important to identify the violations, but there must also be mechanisms to address States and hold them responsible for the violations. All the major international human rights conventions and treaties under the UN have established monitoring powers. Some instruments have even established a stronger mechanism in the form of an individual complaint procedure<sup>145</sup>.

### 4.2.1: Monitoring

All the major international instruments provide for mechanisms to monitor the implementation of rights enshrined in the applicable convention or treaty by States Parties. I will briefly describe the procedure under the CRC, as this is the most important international instrument when it comes to the protection of children, but similar procedures have been implemented under the ICCPR, ICESCR, CAT and the International Convention on the Elimination of All Forms of Racial Discrimination<sup>146</sup>.

As with all the main international treaties, a committee has been established to monitor state progress in the implementation of the rights enshrined in the Convention<sup>147</sup>. The Committee on the Rights of the Child consists of ten experts who serve in an independent, personal capacity. The main tasks of the Committee is to receive state reports on how they are implementing the CRC (Art.44), to devise and recommend innovative methods of implementation (Art.42), to provide technical advice and assistance (Art.45) and to make specific recommendations and to commission studies to be carried out by the Secretary General (Art.44, 45). States reports must show that rights are being enforced on behalf of all children without discrimination<sup>148</sup>. Under Article 45 of the CRC, non-governmental organisations (NGO's) are allowed to submit reports at the same time as States Parties for consideration by the Committee<sup>149</sup>. The Committee examines the report, meets in sessions to

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<sup>144</sup> P. Killbride, C. Suda, E. Njeru, *Street Children in Kenya*, 2000, p.123.

<sup>145</sup> See section 4.2.2 of this paper.

<sup>146</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195. [Hereinafter: CERD].

<sup>147</sup> The Committee on the Rights of the Child has been established under Article 43(1) CRC.

<sup>148</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.29.

<sup>149</sup> Under Article 45 of the CRC it has been agreed that the Committee has the ability to receive information from "competent bodies" includes NGOs.

pose questions to government representatives, and issues comments on the information in the report and makes recommendations to the state concerned that are published by the UN<sup>150</sup>.

#### **4.2.2: Individual Complaint Procedure**

Under the Optional Protocol to the ICCPR, Article 14 of the CERD, and Article 22 of the CAT, the committees are empowered on an optional basis to deal with complaints lodged by individuals alleging violations of their rights by a State Party. The complaints procedure is of a quasi-judicial nature, as opportunities are given to both sides to present evidence. If a friendly settlement cannot be reached, a decision is made on the basis of the evidence. Individuals of all ages can petition the committee, providing that at the time of the alleged violation they were in the territory or jurisdiction of a State Party, which has accepted the competence of the Committee to receive individual communications<sup>151</sup>.

The Committee against Torture can also receive information from any concerned person, or group of persons (including NGO's) on the systematic practise of torture being carried out within a State. Upon receiving such information relating to systematic torture the Committee can initiate its own on-site investigation<sup>152</sup>.

#### **4.3: Regional Human Rights Systems**

The rights of street children are also protected under three major regional human rights systems, namely the African, Inter-American and European system. The rights mentioned under section 4.1 of this paper are also protected under the three regional systems. Some of the mechanisms for the protection of persons under the regional systems are stronger than under the international human rights instruments and therefore important tools for the protection of street children in specific parts of the world.

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<sup>150</sup> J. Fitzpatrick, *Human Rights Protection for Refugees, Asylum-seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures*, New York, Transnational Publishers 2002, p.124.  
[Hereinafter: J. Fitzpatrick, *Human Rights Protection for Refugees, Asylum-seekers, and Internally Displaced Persons*, 2002].

<sup>151</sup> G. van Bueren, *The International Law on the Rights of the Child*, 1995, p.386.

#### 4.3.1: African Human Rights System

The two main instruments under the African system are the African Charter on Human and People's Rights (AfCHR) and the African Charter on the Rights and Welfare of the Child<sup>153</sup>. Under the Commission on Human and People's Rights and the Committee established under the AfCRWC, States must submit periodic reports. But more importantly they can both receive individual, NGO and group complaints<sup>154</sup>. This means that under the AfCRWC children are able to petition the Committee relating to civil and political rights as well as economic, social and cultural rights. Under the international UN mechanisms there is not yet a possibility to petition complaints on the grounds of a violation of economic, social and cultural rights. This can mean a major step forward for street children whose economic and social rights are being violated on a large scale in Africa<sup>155</sup>.

#### 4.3.2: Inter-American Human Rights System

In the Americas, the protection of street children may be promoted through the mechanisms of the Organisation of American States (OAS) and its organs, in particular the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights. The two most important instruments under the OAS are the American Declaration of the Rights and Duties of Man<sup>156</sup> and the American Convention on Human Rights. The American Declaration applies to States, which are not parties to the American Convention. The AmCHR focuses primarily on civil and political rights but the Protocol of San Salvador<sup>157</sup> has been added to the AmCHR and covers economic, social and cultural rights.

The Inter-American Commission, a charter organ of the OAS and a treaty body of the AmCHR, was formally established in 1960. Historically, the Commission has carried out its mission of promoting and protecting human rights primarily through the preparation of

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<sup>152</sup> Article 20 CAT.

<sup>153</sup> African Charter on the Rights and Welfare of the Child, adopted July 1990, OAU Doc. CAB/LEG/153/Rev.2 (1990). [Hereinafter: AfCRWC].

<sup>154</sup> Article 55 AfCHR and Article 44 AfCRWC.

<sup>155</sup> See section 3.2.2 and section 3.2.3 of this paper.

<sup>156</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, 1948, OEA/ser. L./V./I.4 Rev. (1965). [Hereinafter: American Declaration].

<sup>157</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), opened for signature Nov. 17, 1988, O.A.S. T.S. No. 69, Reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev.7 (Jan. 2002).



country reports on the human rights conditions within a country, usually published following on-site visits and hearings in the country in question<sup>158</sup>. But the Commission is also responsible for the examination of individual complaints which can be filed by an individual, a group of individuals or an NGO which has legal recognition in an OAS state<sup>159</sup>. When adjudicating the examination of a complaint filed, the Commission can either publish its final report or submit the case to the Inter-American Court, but the State concerned must have explicitly accepted the jurisdiction of the Court<sup>160</sup>. The Court can make final, legally binding decisions. Petitioners have no right to petition the Court directly.

In December 1999, the Inter-American Court set a precedent for the protection of street children by finding the State of Guatemala responsible for the torture and murder of five street children<sup>161</sup>. Four of these children were brutally tortured prior to their execution. Their eyes were burned out, their tongues and ears were severed, and some had boiling liquid poured over their bodies. After, they had all been shot through the head. A fifth kid had been fatally shot in the same geographic location. Two of the killers were two members of the Guatemalan National Police<sup>162</sup>. The Inter-American Court charged Guatemala with violating Article 1, 4, 7, 8, 19 and 25 AmCHR. As State agents perpetrated the five homicides, the Court concluded that they may be attributed to the State and the State failed to investigate the alleged facts, to punish the perpetrators and to provide legal mechanism that allow for indemnification<sup>163</sup>. The Court also held that in Guatemala there was a common pattern of illegal acts perpetrated by State security agents against street children<sup>164</sup>.

#### 4.3.3: European Human Rights System

It is important to look at the European system as well, because the conventions and treaties under this system extends to many Central and Eastern European countries where violations against street children are a significant problem<sup>165</sup>.

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<sup>158</sup> J. Fitzpatrick, *Human Rights Protection for Refugees, Asylum-seekers, and Internally Displaced Persons*, 2002, p.440.

<sup>159</sup> Article 44 AmCHR.

<sup>160</sup> Article 51 AmCHR.

<sup>161</sup> Inter-American Court on Human Rights, *Villagran Morales et al. Case (the Street Children Case)*, Judgment of 19 November 1999, Inter-Am. Ct. H.R. (Ser.C), No. 63 (1999). [Hereinafter: IACtHR, Villagran Morales case].

<sup>162</sup> Casa Alianza, *State Violence Against Children*, at <http://www.casa-alianza.org/EN/human-rights/violations/state-violence/torture.shtml>, last visited April 2003.

<sup>163</sup> IACtHR, Villagran Morales case, paragraphs 143, 112, 199-238.

<sup>164</sup> Ibid., paragraph 79.

<sup>165</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.63.



The most important convention under the European system with a strong mechanism is the ECHR, unfortunately, the ECHR only deals with civil and political rights. Worth mentioning are the European Social Charter<sup>166</sup>, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>167</sup> and the European Convention on the Exercise of Children's Rights<sup>168</sup>. Unfortunately, the ECECR has been criticised both for its lack of new substantive provisions and for its potentially weak implementation machinery<sup>169</sup>.

The ESC protects economic, social and cultural rights. The Charter requires its members to submit reports on the application of the provisions accepted. Perhaps the most important Charter development of recent years is the establishment of a collective complaints mechanism, which entered into force in January 1998. Although it does not allow for individual complaints, it does permit certain categories of organisations to bring complaints against parties to the Protocol<sup>170</sup>.

The ECPT does not provide for an individual complaint mechanism nor are States required to submit periodic reports. Instead, members of the European Committee base protection for detainees on a system of on-site visits for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>171</sup>.

Under the ECHR any individual, non-governmental organisation or group of individuals can lodge a complaint claiming to be a victim of a violation by one of the States Parties of the rights set forth in the ECHR before the European Court of Human Rights (ECtHR)<sup>172</sup>. The Court can make final and legally binding judgments whereby it has the power to award compensation to victims where it has found their rights have been violated<sup>173</sup>.

The European instruments mentioned above are all part of the intergovernmental organisation called the Council of Europe<sup>174</sup>. The European Union (EU) issued on October 2000 the final draft of the EU's Charter of Fundamental Rights<sup>175</sup>. The difference between the reach of the European Convention and the EU Charter rights will be the number of States

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<sup>166</sup> European Social Charter, adopted Oct. 18, 1961, Eur. T.S. No. 35, reprinted in 3 Weston & Carlson III.B.4. [Hereinafter: ESC].

<sup>167</sup> European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, adopted Nov. 26, 1987, Eur. T.S. No. 126, reprinted in 3 Weston & Carlson III.K.4. [Hereinafter: ECPT].

<sup>168</sup> European Convention on the Exercise of Children's Rights, Jan. 1, 1996, Europ. T.S. 160.

<sup>169</sup> I. Byrne, *The Human Rights of Street and Working Children*, 1998, p.64.

<sup>170</sup> J. Fitzpatrick, *Human Rights Protection for Refugees, Asylum-seekers, and Internally Displaced Persons*, 2002, p.422.

<sup>171</sup> Article 2 and 7 ECPT.

<sup>172</sup> Article 34 ECHR.

<sup>173</sup> Article 41 and 44 ECHR.

<sup>174</sup> For more information on the Council of Europe go to <http://www.coe.int>.

bound by their precepts, since the ECHR applies to 41 European States, whereas the Charter will at first apply to 15. But from 2004 onwards Central and Eastern European countries will be joining the EU expanding the total amount of countries bound by the Charter.

#### **4.4: International Protection for Refugee Children**

All the instruments and mechanisms mentioned above can be very helpful for the protection of street children. But still the gross human rights violations against street children all over the world continue to exist. Under the monitoring and reporting mechanism, committees can only make recommendations for States to follow and implement; their decisions are not legally binding upon States. The individual petitioning system is also not without weaknesses. On the whole the petitioning system has developed as a measure to remedy violations once they have occurred and has been ineffective in preventing violations. It is only rarely that the petitioning system prevents a violation happening to a future victim. Another principal weakness is the length of time which is taken to reach a final decision<sup>176</sup>. For example the violations in the Street Children Case before the ACtHR occurred in 1990; the judgment of the Court was issued in 1999. Statistics have indicated that Guatemala continued to actively participate in the violence against street children during the nine to ten years it took to render a judgment but also after the final judgment<sup>177</sup>.

Despite the weaknesses of the different mechanism it is still useful to access them for the protection of street children, mainly because it will help make them more effective. But because of the weaknesses, it is also very important to find other ways of protecting street children. Children seeking assistance in other countries should be helped. Article 22 of the CRC affords protection to any child who is seeking refugee status. Refugee children, whether unaccompanied<sup>178</sup> or accompanied, should receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the CRC and in other international human rights or humanitarian instruments. Also the 1951 UN Refugee Convention states that refugees should be assured the widest possible exercise of fundamental rights and freedoms<sup>179</sup>.

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<sup>175</sup> It is as yet unclear what the legal effect of the Charter will be.

<sup>176</sup> G. van Bueren, *The International Law on the Rights of the Child*, 1995, p.378-379.

<sup>177</sup> Casa Alianza, *State Violence Against Children*, at <http://www.casa-alianza.org/EN/human-rights/violations/state-violence/torture.shtml>, last visited April 2003.

<sup>178</sup> For more information on unaccompanied child refugees see chapter 6 of this paper.

## **5: Requirements under the 1951 UN Refugee Convention**

Refugee status, on the universal level, is governed by the 1951 UN Refugee Convention and the 1967 Protocol relating to the Status of Refugees<sup>180</sup>. The 1951 UN Refugee Convention was limited to protecting mainly European refugees in the aftermath of World War II, but the 1967 Refugee Protocol expanded the scope of the 1951 UN Refugee Convention as the problem of displacement spread around the world. The 1967 Refugee Protocol removes the geographical and time limitations written into the original Refugee Convention<sup>181</sup>.

Article 1 of the 1951 UN Refugee Convention defines a refugee as “A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution”.

The 1951 UN Refugee Convention and the 1967 Refugee Protocol define a refugee regardless of age, and make no special provision for the status of refugee children<sup>182</sup>. A street child will be required to provide evidence of his or her well-founded fear of persecution on the basis of one of the five enumerated grounds<sup>183</sup>. The child must also be deemed to be credible by the adjudicator and the facts must demonstrate a lack of effective protection within the child’s home country by presenting evidence that the home country is either unwilling or unable to control the persecutors<sup>184</sup>. In the next section of this paper, I will discuss the most important and potentially problematic issues in relation to a street child’s asylum claim.

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<sup>179</sup> Preamble of the 1951 UN Refugee Convention.

<sup>180</sup> United Nations Protocol relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. [Hereinafter: 1967 Refugee Protocol ].

<sup>181</sup> UNHCR, *The 1951 Refugee Convention: Questions & Answers*, available on the UNHCR website [www.unhcr.ch](http://www.unhcr.ch), last visited May 2003.

<sup>182</sup> Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/1P/4/Eng/REV.2, Reedited Geneva, January 1992, p.50. [Hereinafter: UNHCR, *Handbook determining Refugee Status*].

<sup>183</sup> Article 1, 1951 UN Refugee Convention. The five enumerated grounds are race, religion, nationality, membership of a particular social group and political opinion.

<sup>184</sup> M. Ewer, *From the Streets to the States*, 2001, p.22.

## 5.1: Well-founded Fear

According to the UNHCR Handbook determining Refugee Status the term “well-founded fear” contains a subjective and an objective element. Fear is subjective, therefore the determination of refugee status will primarily require an evaluation of the applicant’s statements rather than a judgment on the situation prevailing in his or her country of origin<sup>185</sup>. But to the element of fear, the qualification of well-founded is added, so it is necessary to evaluate the statements made by the applicant.

The Commission of the European Union has made proposals and guidelines for the harmonisation of the Member States’ asylum policies. According to one proposal an applicant’s fear is well-founded if it is objectively established that there is a reasonable likelihood of the fear being realised after the applicant is returned to the country of origin<sup>186</sup>. The existence of persecution<sup>187</sup> in the past may be an element of proof in evaluating the risk of future persecution<sup>188</sup>.

Member States must take into account all the relevant facts as they relate to the country of origin at the time of taking a decision on the application and they must take into account the individual position and personal circumstances of the applicant<sup>189</sup>.

The term “well-founded fear” consists of two elements which are related to the conditions of the applicants country and the state of mind of the applicant; therefore whether this condition is fulfilled is decided on a case by case basis. But the Proposal for a Council Directive on minimum standards for status of refugees has laid down special rules which has to be taken into account when dealing with an application made by a child. These guidelines are very useful for street children’s asylum claims. So are EU Member States required to take into account the age and maturity of the child and his or her stage of development, the fact that children may manifest their fears differently from adults, the fact that children have limited knowledge of conditions in their country of origin and States must be aware of the

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<sup>185</sup> UNHCR, *Handbook determining Refugee Status*, p.11.

<sup>186</sup> European Union Commission, *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*, COM/2001/0510 final-CNS 2001/0207, Official Journal C 051 E, 26/02/2002, Chapter I, Article 7(b). [Hereinafter: Proposal for a Council Directive on minimum standards for status as refugees].

<sup>187</sup> For a definition on persecution, see section 5.3 of this paper.

<sup>188</sup> Proposal for a Council Directive on minimum standards for status as refugees, Chapter I, Article 7(c).

<sup>189</sup> Ibid, Chapter I, Article 7.

existence of child specific forms of persecution<sup>190</sup>. A street child will have to prove that his or her fear is subjectively genuine and objectively reasonable.

## 5.2: Particular Social Group

An asylum applicant has the burden to prove persecution on account of one of the five enumerated grounds listed in the 1951 UN Refugee Convention. The particular social group is the most likely category into which street children will fit, since they are persecuted on impermissible status related grounds<sup>191</sup>.

A “particular social group” normally comprises persons of similar background, habits or social status. “Membership of such a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because of the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies”<sup>192</sup>. Highly relevant are the attitude towards the social group of other groups in the same society and, in particular, the treatment accorded to it by State authorities<sup>193</sup>.

In recent guidelines issued to complement the UNHCR Handbook determining refugee status, the UNHCR has commented further on this ground, defining particular social group as follows: “A group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to their identity, conscience or the exercise of human rights”<sup>194</sup>.

Street children all around the world lead similar lifestyles. They share the same habits of surviving on the streets by begging, working sporadically and engaging in petty crimes<sup>195</sup>. The children find shelter in parks, or sleep under stairways or doorways. Street children mostly live together in groups; they search out other similarly situated children to form social groups which serve as substitute families. Street children have no home of their own, nor do they receive protection, supervision or direction from responsible adults.

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<sup>190</sup> Ibid, Chapter I, Article 7(d).

<sup>191</sup> M. Ewer, *From the Streets to the States*, 2001, p.23.

<sup>192</sup> UNHCR, *Handbook determining Refugee Status*, p.19.

<sup>193</sup> G.S. Goodwin-Gill, *The Refugee in International Law*, Oxford University Press, 1996, p.47. [Hereinafter G.S. Goodwin-Gill, *The Refugee in International Law*, 1996].

<sup>194</sup> UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention, and/or its 1967 Protocol Relating to the Status of Refugees*, Geneva, May 7, 2002, §11, available at [www.unhcr.ch](http://www.unhcr.ch), last visited June 2003.

<sup>195</sup> M. Ewer, *From the Streets to the States*, 2001, p.24.

Street children also share a similar background. Most children are pushed onto the streets because they are physically and/or sexually abused in their family homes, they are abandoned or because of poverty they had no other choice than to live on the streets<sup>196</sup>.

Street children stand at the bottom of the status hierarchy; the public view of street children in many countries is overwhelmingly negative. Government authorities treat street children substantially worse than they treat other more privileged members of society. The very existence of these children is perceived to be an obstacle to the governmental policies of eliminating crime and poverty<sup>197</sup>. Governments in different countries try to solve the problem of street children through arbitrary detention, violence and even murder.

People consider street children to be a social blight, and, as such, have no value to society. As a result, these children are regularly victimized; their persecution and mistreatment are condoned which often has the end result of encouraging people to physically attack homeless children<sup>198</sup>. The death squads and uniformed killers of children feel that they are doing society a favour by killing street children<sup>199</sup>. Additionally, many street children are sexually exploited, molested, and trafficked<sup>200</sup>.

According to the Proposal for a Council Directive relating to the status of refugees the term “particular social group” was deliberately drafted in an open way and needs to be interpreted in a broad and inclusive manner<sup>201</sup>. Whatever the characteristic that defines the group, it must be one that the members of the group cannot change<sup>202</sup>. Street children are not in a position to change the unfortunate characteristics for which they are persecuted: homelessness, poverty and a lack of familial support<sup>203</sup>. They also do not receive any support or protection from their government. Authorities continue to allow perpetrators of human right abuses against street children virtual impunity. Most human rights violators are not prosecuted or the trials are dismissed.

In the US and Canada, street children have already been granted asylum based on their membership in a particular social group. Descriptions such as abandoned street children<sup>204</sup>, children who are not able to live at home with their family primarily due to abuse, but also

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<sup>196</sup> See section 3.1.1 of this paper.

<sup>197</sup> M. Ewer, *From the Streets to the States*, 2001, p.24.

<sup>198</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>199</sup> Personal affidavit from Bruce Harris, February 2003.

<sup>200</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>201</sup> Proposal for a Council Directive on minimum standards for status as refugees, Chapter III, Article 12(d).

<sup>202</sup> J-Y Carlier, D. Vanheule, K. Hullmann, C.P. Galiano, *Who is a refugee? A Comparative Case Law Study*, The Hague, Kluwer Law International, 1997, p.713. [Hereinafter: J-Y Carlier, *Who is a refugee*, 1997].

<sup>203</sup> M. Ewer, *From the Streets to the States*, 2001, p.25.

<sup>204</sup> In the Matter of Brus Wilson, Axx-xxx-xxx, (Falls Church, Virginia, 11 June 2001), (abandoned street children). Unpublished, on file with author.

because of abandonment and other reasons<sup>205</sup> and even impoverished children<sup>206</sup> have been accepted to fall under the term “particular social group”. These descriptions can also be used in European asylum cases. Street children are indeed abandoned by their parents, government authorities and the society and they are not able to live with their family for several reasons. Abandoned street children include children who have been left alone by their parents but it also includes children who are sexually and/or physically abused at home and children who are driven towards the streets because their parents cannot take care of them mainly because of their impoverished situation.

Other possible alternatives for a particular social group can be “children who beg and live on the streets” or “street children who are targeted by police and other individuals”. Street girls face even more hardship on the streets because they are sexually more vulnerable. They fear being raped or in order to survive they prostitute themselves. “Street children who are (sexually) exploited by adults” can be another description for a particular social group for these children.

However advocates helping street children with their asylum claims, must approach this issue carefully. If the class is defined too narrowly, it is likely to be seen as drawn simply for the purposes of the claim and not because it reflects a group cognisable in the society at large<sup>207</sup>. The class should however not be defined too broadly; adjudicators might conclude that the group does not stand apart from society. For example, “children” are not likely to be recognised as a particular social group because the group comprises of too many individuals. In this broadly defined group of “children”, street children comprise just a small part of this group so only a few members are likely to be subjected to persecution.

In an asylum claim based on membership of a particular social group, more has to be established than the mere fact that this particular social group exists. The applicant must qualify as a member of that particular social group and the applicant must demonstrate that

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<sup>205</sup> In the Matter of Aurelio Mauricio, Axx-xxx-xxx, (Phoenix, Arizona, November 28, 2001), (children who are not able to live at home with their family primarily due to abuse, but also because of abandonment and other reasons).

Other important decisions in the US are: In the Matter of Juan, Axx-xxx-xxx, (Harlingen, Texas, March 12, 1998), (minors without resources who have been abused by a custodial parent/guardian); in the Matter of Josue Enrique, Axx-xxx-xxx, (June 19, 2002), (abandoned Honduran street children); in the Matter of Rene, Axx-xxx-xxx, (Phoenix, Arizona, October 31, 2002), (abandoned street children). All these cases are unpublished and on file with author.

<sup>206</sup> In the Matter of: J.D.J., A95-00633, (Ottawa, Ontario, January 28, 1998), (impoverished children).

Other important Canadian cases are: In the Matter of B.(O.I.), V91-00008, (Vancouver, British Columbia, July 7, 1992), (abandoned children living on the streets and in the dumps of Guatemala); in the Matter of M.Z.J., V97-03500, (Toronto, Ontario, May 31, 1999), (children). On file with author.

<sup>207</sup> T., A. Aleinikoff, *Membership in a Particular Social Group: Analyses and Proposed Conclusions*, background paper for the San Remo Expert Roundtable, organised by the UNHCR and the International



she or he is targeted for persecution on account of membership in this group. Lastly, the applicant must show that special circumstances beyond mere membership in the particular social group exist which warrant a grant of asylum<sup>208</sup>. In the case of street children this can be satisfied by showing that a child has been targeted by police officers or other individuals precisely because they are members of a particular social group.

### 5.3: Persecution

There is no universally accepted definition of “persecution”. However, it is generally agreed that, in order, to constitute persecution within the meaning of Article 1 of the 1951 UN Refugee Convention, acts suffered or feared must be sufficiently serious, by their nature or their repetition<sup>209</sup>. A threat to life or freedom on account of one of the five enumerated grounds listed in the 1951 UN Refugee Convention, may constitute persecution. Other serious violations of human rights, for the same reasons, would also constitute persecution<sup>210</sup>. Street children are exposed on a daily basis to violent attacks, torture, arbitrary detention and cleansing operations are directed against them. These are serious violations of a street child’s right to life and freedom. Other fundamental human rights of these children are also violated, such as their right to education and their right to an adequate standard of living. Street children are also economically and sexually exploited<sup>211</sup>. Violence against street children reveals a pattern of systematic infliction of punishment. The form and nature of that punishment is certainly serious enough to be considered persecution, since most times it is characterised by the gravest forms of physical abuse, including torture, beatings and extra-judicial killings<sup>212</sup>.

Persecution must be distinguished from prosecution. Persons fleeing from prosecution are normally not refugees<sup>213</sup>. A lot of street children have been forced into either committing crimes or are associated with those who commit crimes. But in the case of street children the treatment they receive is clearly persecution and not prosecution.

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Institute of Humanitarian Law, sep 2001.

<sup>208</sup> M. Ewer, *From the Streets to the States*, 2001, p.27

<sup>209</sup> Council of the European Union, *Joint Position on the harmonised application of the definition of the term refugee in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees*, 96/196/JHA, Official Journal L 063, 13/03/1996, Paragraph 4. [Hereinafter: EU Joint Position on the harmonised application of the definition of refugee].

<sup>210</sup> UNHCR, *Handbook determining Refugee Status*, p.14.

<sup>211</sup> See section 4.1 of this paper for more on human rights violations of street children’s rights.

<sup>212</sup> Immigration and Refugee Board of Canada, In the Matter of B.(O.I.), V91-00008, (Vancouver, British Colombia, July 7, 1992). On file with author.

<sup>213</sup> UNHCR, *Handbook determining Refugee Status*, p.15.



Many street children are detained arbitrarily based on offences such as truancy, running away from home, or being incorrigible<sup>214</sup>. Their liberty is merely taken away from them because of their economic and social disadvantaged status as poor homeless youth lacking familial and financial support<sup>215</sup>. Rounding up and locking up street children is viewed as a way to keep the population in check and to clean up the streets, particularly at times of international conferences or during holiday seasons, when national and international attention is focused on a city<sup>216</sup>. Most of the time, these children are not even formally charged with an offence while they do spend days or weeks in police lockups. So such status offences<sup>217</sup> are used to remove, or socially cleanse the youth from the streets rather than to punish them for a crime that has actually been committed<sup>218</sup>. Other times street children are arrested and detained because a crime has occurred in the area where they live and work or the police use the detention as a way to extort money from the children or their parents. Usually, extortion is an integral part of the processes that perpetuate illegal detention and custodial violence<sup>219</sup>.

Even in cases in which street children have indeed committed petty crimes such as theft, the punishment they receive is often disproportionately severe. The pre-trial detention and the “questioning” of these children is often accompanied with severe beatings, sexual violence and extortion<sup>220</sup>. In a street child’s asylum case the distinction between prosecution and persecution will hopefully not be an issue.

Another important issue which needs to be addressed are the agents of the persecution, the persons who commit these violations against street children. In the case of street children, three different persecutors can be identified; children’s parents, state actors (for example police, military) and other individuals who attack and exploit street children. Children’s parents and other individuals are so-called non-state agents of persecution.

Persecution is generally the act of a State organ; this includes the central State, federal states, regional and local authorities but also parties or organisations controlling the State<sup>221</sup>. In the case of street children it is obvious that the persecution also comes from state actors. Street children are beaten, tortured, humiliated, sexual abused, extorted and arbitrarily

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<sup>214</sup> HRW, *Police abuse and detention of street children in Kenya*, 1997, p.4.

<sup>215</sup> M. Ewer, *From the Streets to the States*, 2001, p.30.

<sup>216</sup> HRW, *Police abuse and detention of street children in Kenya*, 1997, p.34.

<sup>217</sup> Status offences are acts that would not be offences if committed by an adult.

<sup>218</sup> M. Ewer, *From the Streets to the States*, 2001, p.30.

<sup>219</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.50.

<sup>220</sup> See chapter 3 of this paper.

detained by police officers<sup>222</sup>. These police officers are not punished for their behaviour; there is an overall impunity for violations against street children. Most of the time, the children cannot effectively make use of the justice systems in their country. Many countries either do not have complaint procedures street children can use or they must complain directly to the police about police abuse.

The vast majority of the EU Member States and other global actors affirm that the fear of persecution may also be well-founded where the risk of it emanates not only from the State but also from non-state actors where the State is unable or unwilling to provide effective protection<sup>223</sup>.

For many street children their parents or other family members are the first agents of persecution for them. One of the main reasons why children end up on the streets is because they have experienced sexual, physical abuse and maltreatment at home or they are exploited within their family environment. In many countries, domestic violence is considered to be a private affair<sup>224</sup> and parents have the right to “correct” the behaviour of their child. Children in these countries do not receive any support/help from the police or any other government authority<sup>225</sup>. These countries also do not provide for social programmes and shelters for abused children. The police force is, many times, ineffective in preventing domestic abuse. Police officers receive little or no training, and generally have only a very limited education in how to deal with cases of domestic violence. Especially in rural areas it is very likely that there are a few, if any, trained police officers that can effectively monitor and regulate child abuse. There are also police officers who are themselves involved in violence against children<sup>226</sup>. In these cases the State is clearly not willing to help abused children.

Once on the streets, children do not only face abuse at the hands of the police; there are more and more individuals, such as private security guards, who violently attack street children. Private citizens also enjoy impunity. The police sees the street children as a nuisance they have to get rid off. In Bulgaria where street children are attacked frequently and regularly by skinhead gangs, the police offers little protection<sup>227</sup>. When children tried to complain to the police about the attacks, the police responded with indifference, disbelief, or suspicion as to

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<sup>221</sup> EU Joint Position on the harmonised application of the definition of refugee, paragraph 5.1.

<sup>222</sup> See chapter 3 of this paper.

<sup>223</sup> Proposal for a Council Directive on minimum standards for status as refugees, Chapter 2, Article 9.

<sup>224</sup> Committee on Economic, Social and Cultural Rights, Concludes Day of General Discussion, press release, 28<sup>th</sup> session, May 2002.

<sup>225</sup> United Nations Population Fund, *The Culture of Silence, Violence against Girls and Women: An Introduction*, at <http://www.unfpa.org/intercenter/violence/intro.htm>, last visited May 2003.

<sup>226</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>227</sup> HRW, *Children of Bulgaria*, 1996, p.32, 33.

why the attack occurred. During a survey, Human Rights Watch was unable to find information on a single criminal prosecution of skinheads for attacks against street children<sup>228</sup>.

But also in other countries, private citizens enjoy impunity for the violent attacks on street children. For example, in Guatemala, of the nearly 300 criminal complaints filed by Casa Alianza on behalf of street children, only a handful have resulted in prosecutions<sup>229</sup>. And there are also numerous cases of young boys and girls killed by the police who are convicted but later released<sup>230</sup>.

So-called cleansing operations are conducted mainly by former or off-duty police officers and military members and private security forces. So these death squads have a clear link with the government. Governments in these countries are obviously unwilling to protect street children, they even encourage violence against these children.

In the case of street children, it is almost always the case that a State is unwilling to protect these children. But there can also be cases where a government is unable to protect and help street children, for example during a civil war. The EU Member States apply different standards in cases where the government is unable to protect persons, especially when there is no effective government at all. In a street child's asylum claim where the government is unable to protect the child it is important to keep in mind the different asylum procedures in the EU Member States<sup>231</sup>.

The government agency in charge of immigration and asylum matters in a country is likely to call attention to the improvements a government is trying to make and by pointing out that the country has signed several international treaties. The violence against street children is not something new. In several countries the pattern of violence has been going on for years. States have been evidently reluctant to change the situation for street children.

The Inter-American Court of Human Rights has condemned the government of Guatemala in the Villagran Morales case but during the trial and since the decision not much has changed for street children in Guatemala<sup>232</sup>. Also the Committee for the Rights of the

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<sup>228</sup> Ibid, p.34, 35.

<sup>229</sup> Casa Alianza, *Street Children in Guatemala City*,

<sup>230</sup> Personal affidavit from Bruce Harris, March 2003.

<sup>231</sup> For more information about this issue, see chapter 6 of this paper. See also B. Vermeulen, T. Spijkerboer, K. Zwaan, R. Fernhout, *Persecution by Third Parties*, University of Nijmegen, Centre for Migration Law, Nijmegen, May 1998.

<sup>232</sup> Casa Alianza, *State Violence Against Children*, at <http://www.casa-alianza.org/EN/human-rights/violations/state-violence/torture.shtml>, last visited April 2003.

Child has over the years condemned several countries for the mistreatment street children endure in their country<sup>233</sup>.

#### 5.4: Internal Flight Alternative

The fear of being persecuted does not always extend to the whole territory of the country of nationality<sup>234</sup>. According to the Proposal for a Council Directive on minimum standards for status as refugees, international protection from harm is only required as a secondary alternative to domestic protection. This means that Member States are allowed to reject applications for international protection if it can be established that effective protection is available in at least part of the country of origin to which the applicant can reasonably be returned<sup>235</sup>.

The proposal for a Council Directive also indicates that “because a national government is presumed to be entitled to act throughout the whole of the national territory, there is a strong presumption against finding internal protection to be available if the agent of persecution is, or is sponsored by, the national government”<sup>236</sup>. But advocates must keep in mind that not all Member States have accepted this, for example in Germany the exception of internal flight alternative can be applied irrespective of the agent of persecution<sup>237</sup>.

The persecution street children suffer is nation-wide. Police brutality, especially that violence which involves street children, is widespread in Guatemala<sup>238</sup>. The illegal detention of street children is common in every part of India<sup>239</sup>. In Egypt the problem faced by street children is not limited to Cairo but persists in other urban areas<sup>240</sup>. Other surveys conducted by Human Rights Watch revealed the same pattern of violence in several cities<sup>241</sup>. Police and other private citizens generally view street children as vagrants and criminals. Chapter three of this paper has provided evidence that this view is shared among different countries and cultures.

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<sup>233</sup> See for example: Committee on the Rights of the Child, Concluding observations on Kenya, CRC/C/15/Add.160, 2001, no.35 and 57, and, Committee on the Rights of the Child, Concluding Observations on India, CRC/C/15/Add.115, February 2000, no.38.

<sup>234</sup> UNHCR, *Handbook determining Refugee Status*, p.21.

<sup>235</sup> Proposal for a Council Directive on minimum standards for status as refugees, Chapter II, Article 10.

<sup>236</sup> Ibid.

<sup>237</sup> For more information see Chapter 4 of this paper.

<sup>238</sup> M. Ewer, *From the Streets to the States*, 2001, p.8.

<sup>239</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.15.

<sup>240</sup> HRW, *Charged with being children*, 2003, p.4.

<sup>241</sup> HRW, *Children of Bulgaria*, 1996, p.1, and, HRW, *Police abuse and detention of street children in Kenya*, 1997, p.1.

Street children also have no family they can rely on. Children are pushed onto the streets because of abandonment, sexual and physical abuse and poverty. Their parents are not fit to take care of them. Abandoned children obviously have no parents they can return to and children who have faced sexually and physical abuse at home can also not return to their family. There are street children who sometimes visit their family or who return to sleep at home. But the parents of these children cannot take care or supervise their children properly. These parents have not been able to keep their children off the streets and they cannot protect their children from the dangers they face on the streets. A lack of resources by their family will force these children back onto the streets.

In many countries, organisations are helping street children. These organisations are usually small scale and cannot provide effective protection for street children. Efforts by organisations cannot be considered strong enough to actually eliminate or prevent police abuses against street children, and are no substitute for institutional and statutory measures aimed at stopping abuses and eliminating impunity<sup>242</sup>. It is impossible for the organisations to fully protect all the children, nor are these organisations ultimately responsible for the protection of street children, the governments are.

Most street children can be found in the big cities of a country; it is more an urban problem. When assessing whether a child has an internal flight alternative, the age of the child and the feasibility of internal relocation must be taken into account. Street children usually have no family members upon whom they can rely nor do they have the resources to travel elsewhere in the country and start a new life. Also because of street children's survival habits and occupations on the streets, it would for them be impossible to survive in rural areas.

Street children do not have an internal flight alternative; their persecution is country-wide and besides that they would not be able to survive in rural areas.

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<sup>242</sup> HRW, *Police abuse and killings of street children in India*, 1996, p.66.

## **6: Asylum Procedures in the EU**

All the EU Member States have ratified the 1951 UN Refugee Convention and the 1967 Protocol relating to the Status of Refugees. In the previous chapter I have described the most important requirements street children have to fulfil in order to be granted asylum under the 1951 UN Refugee Convention and how they are complied with by street children. But it is very important to be aware of the fact that not all EU Member States interpret the requirements under the 1951 UN Refugee Convention in the same manner. Within the EU they are trying to harmonise the asylum procedures of the EU Member States but this process is still developing and is certainly not finished yet.

Because of the specific situation street children are in, they will arrive in Europe without their parents, legal guardian or other relative. They will be considered to be an unaccompanied child refugee. The UNHCR gives the following definition of an unaccompanied child: “An unaccompanied child is a person who is under the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier and who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so”<sup>243</sup>. The term “separated children” is also widely used and defined as “children under eighteen years of age who are separated from both parents or from their previous legal or customary primary caregivers”<sup>244</sup>. In the European context both terms are used and interchangeable<sup>245</sup>.

In the next section of this paper, I will describe the asylum procedure of four EU Member States with particular focus on their interpretation of the requirements laid down in the 1951 UN Refugee Convention. Furthermore I will describe what kind of policy they have towards unaccompanied minors<sup>246</sup>.

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<sup>243</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with unaccompanied children seeking asylum*, Geneva, February 1997, available at [www.unhcr.ch](http://www.unhcr.ch), last visited June 2003.

<sup>244</sup> Separated Children in Europe Programme, *Statement of Good Practice*, second edition, October 2000, p.3, at <http://www.separated-children-europe-programme.org/Global/English/StatementGoodPract.htm>, last visited June 2003.

<sup>245</sup> Also in this thesis I will use both terms and they are interchangeable.

<sup>246</sup> Hereinafter I will use the abbreviation UAM for unaccompanied minors.

## 6.1: The United Kingdom

### 6.1.1: Background information on the asylum procedure in the UK

In absolute terms, the UK was the largest asylum-seeker receiving country in the industrialised world in 2002, accounting for 19 per cent of all asylum claims lodged during 2002<sup>247</sup>. In Europe, the share of United Kingdom in receiving new asylum applications increased from 19 per cent in 2001 to 24 percent in 2002. Of all claims lodged in the 15 countries of the EU in 2002, the UK received 29 per cent<sup>248</sup>. The numbers of asylum seekers arriving in the UK inevitably reflects the international situation at any one time. In 2002, the highest number of asylum applications came from nationals of Iraq, Zimbabwe, Afghanistan, Somalia and China<sup>249</sup>.

The Immigration and Nationality Directorate (IND) of the Home Office is responsible for all decisions relating to asylum claims, whether made on arrival or after entry into the country, including the granting of refugee status. Asylum seekers can file their application either with an immigration service at a port or with the screening unit of the IND in London<sup>250</sup>.

In the UK, two kind of statuses may be granted in the asylum procedure. First of all, applicants can be granted refugee status according to the 1951 UN Refugee Convention and the 1967 Protocol relating to the status of refugees. Applicants granted asylum are given indefinite leave to remain, i.e. settlement. Applicants can also be granted Exceptional Leave to Remain (ELR) or Exceptional Leave to Enter (ELE). ELR or ELE is granted to asylum seekers who, despite failing to meet the strict definition of refugees, are allowed to stay temporarily in the country for a definitive period due to compassionate or humanitarian reasons. Those with ELR or ELE status may apply for settlement after four years<sup>251</sup>.

A number of cases may be certified and heard under the fast track procedure, such as where the asylum seeker's application is manifestly unfounded, where the circumstances

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<sup>247</sup> Nineteen per cent means a total of 110,700 applications in the year 2002.

<sup>248</sup> UNHCR, *Asylum Applications lodged in Industrialized Countries: Levels and Trends, 2000-2002*, Geneva, March 2003, p.3,4, available at [www.unhcr.ch](http://www.unhcr.ch), last visited June 2003. The above mentioned ranking are all based on absolute numbers of asylum claims.

<sup>249</sup> Ibid, p.20.

<sup>250</sup> U.S. Committee for Refugees, *World Refugee Survey 2003: United Kingdom*, June 2003, at [http://www.refugees.org/world/countryindex/united\\_kingdom.cfm](http://www.refugees.org/world/countryindex/united_kingdom.cfm), last visited June 2003.

<sup>251</sup> European Community, Study carried out by PLS RAMBOLL Management on behalf of the European Commission Directorate General for Justice and Home Affairs, *Country Profile: United Kingdom*, 2001, p.6, at [http://europa.eu.int/comm/justice\\_home/doc\\_centre/asylum/seekers/doc/uk\\_final\\_en.pdf](http://europa.eu.int/comm/justice_home/doc_centre/asylum/seekers/doc/uk_final_en.pdf), last visited June 2003. [Hereinafter: EC, *Country Profile: United Kingdom*, 2001].



giving rise to the fear of persecution no longer exist, or where the asylum seeker arrives from a safe third country<sup>252</sup> or a designated safe third country. Applications cannot be certified if the evidence indicates a reasonable likelihood that the applicant has been tortured<sup>253</sup>.

The UK applies so-called “whitelists” of safe countries of origin. These are lists, drawn up by the government which say which countries are safe, and therefore cannot produce any genuine refugees. A few examples of countries who are on the “whitelist” are Bangladesh, Bolivia, Brazil, Sri Lanka, Ukraine<sup>254</sup> and the ten new EU accession countries<sup>255</sup>.

Rejected asylum applications, except those who are rejected on safe-third-country grounds, have the right to appeal their denials in the UK in several stages.

Immigration officers have the power to detain persons arriving at ports of entry. No judicial review of detention takes place. The UK detains more asylum seekers than any other European state, more than 9,000 per year. Asylum seekers can be detained at any time, for any reason and with no time limits<sup>256</sup>.

#### **6.1.2: Interpretation of the requirements under the 1951 UN Refugee Convention in the UK**

As mentioned above, refugee status in the UK is linked to the 1951 UN Refugee Convention and the 1967 Protocol relating to the status of refugees. It is important to make sure that a street child is granted refugee status because then the child can certainly stay in the UK. In the next section, I will analyse the interpretation the UK has given to the most important requirements.

##### *Well-founded fear*

In the UK the requirement of well-founded fear has two aspects: subjectively, it must be established that the applicant has a fear of the kind specified and objectively, whether the fear is well-founded. The House of Lords has emphasised the necessity of objective elements. The question is what might happen to the applicant if he or she were to return to the country of nationality. The actual affairs in the country is of importance to determine whether the

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<sup>252</sup> For more information on the concept of “safe third country”, see the Dublin Convention: Convention determining the State Responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities, June 15, 1990, 30 ILM 425 (1991).

<sup>253</sup> EC, *Country Profile: United Kingdom*, 2001, p.13, 14.

<sup>254</sup> A. Travis, *Outcry as asylum “whitelist” extended*, The Guardian, Wednesday June 18, 2003.

<sup>255</sup> The ten EU accession countries are Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, and Slovenia.

<sup>256</sup> British Refugee Council, *Who is a refugee?*, at <http://www.refugeecouncil.org.uk/infocentre/faqs/faqs001.htm>, last visited June 2003.



applicant will be persecuted when returned to his/her country. “The requirement of well-founded fear means that there has to be demonstrated a reasonable degree of likelihood that he will be persecuted for a Convention reason if returned to his own country<sup>257</sup>.”

Persecution in the past is an objective element that has to be taken into account by the Secretary of State<sup>258</sup>. Changes in the country of origin since the application for asylum will equally be taken into consideration to determine the refugee claim.

A claimant must also bring evidence on a personal level to suggest that the appellant has been singled out by the persecutor(s). The claimant’s personal behaviour and state of mind are taken into account<sup>259</sup>. This is important for children’s asylum claims because children are more vulnerable and they may establish fear in a different manner than adults.

For a street child’s asylum claim, it is actually a positive aspect that the emphasis in the UK is on the objective elements of well-founded fear just because children might not be mature enough to establish well-founded fear in the same way as adults. Evidence supporting the objective elements can be based on reports from organisations such as Human Rights Watch or Amnesty International. These country reports can support the evidence that a street child will face persecution when returned to his or her country of nationality.

#### Membership of a particular social group

In several cases dealing with the issue of membership of a particular social group, courts have made reference to case-law from other countries, in particularly case-law from the US<sup>260</sup>. In these cases the phrase ‘persecution on account of membership in a particular social group’ has been interpreted to mean “persecution that is directed toward an individual who is a member of a group of persons all of who share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour or kinship ties, or in some circumstances it might be shared past experience. The particular kind of characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the characteristic that defines the group, it must be one that the members

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<sup>257</sup> R. v. Secretary of State for the Home Department, Ex parte Sivakumaran, [1988], A.C. 958 at 993 (H.L.).

<sup>258</sup> J-Y Carlier, *Who is a refugee*, 1997, p.576.

<sup>259</sup> Ibid, p.583, 584.

<sup>260</sup> See for example Secretary of State for the Home Department v. Patrick Kwame Otchere, [1988], Imm. A.R. 21 at 26 (I.A.T.), and Islam v. Secretary of State for the Home Department and R. v. Immigration Appeal Tribunal and Secretary of State for the Home Department ex parte Shah, [1999] 2 W.L.R. 1015; [1999] INLR 144.

of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences”<sup>261</sup>.

The interpretation given of membership of a particular social group by courts in the UK closely resembles the definition given by UNHCR<sup>262</sup>.

### Agents of persecution

In the UK, persecution is normally related to action by the authorities of a country. In the case of persecution by State agents, the question to be addressed is whether the authorities condone the actions of these officers and whether the authorities are taking effective steps to prevent and overcome such unlawful behaviour<sup>263</sup>.

It is also accepted that, in some circumstances, agents of persecution may be groups or elements within the applicants country of nationality, other than the authorities. Persecution by non-state actors is accepted when the applicant can provide evidence that the persecution is tolerated by the authorities or that the authorities refuse, or prove unable, to offer effective protection<sup>264</sup>. Also in the event of persecution by third parties, the applicant must demonstrate that the persecution is based on one of the five grounds mentioned in the 1951 UN Refugee Convention.

In a recent case of the Immigration Appeals Tribunal the following test was laid down: “The real question is not whether the State authorities are doing the best they can in all the circumstances, but whether viewed objectively the domestic protection offered by or available from the State to the appellant is or is not reasonably likely to prevent persecution”<sup>265</sup>. So in the UK persecution by non-state actors is also accepted in the case where there is a breakdown of governmental authority or where there is no State or quasi-state.

So in the UK, persecution can be direct State persecution, indirect State persecution or quasi-State persecution, or persecution by others provided that the claimant cannot get effective protection.

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<sup>261</sup> Secretary of State for the Home Department v. Patrick Kwame Otchere, [1988], Imm. A.R. 21 at 26 (I.A.T.).

<sup>262</sup> See section 5.2 of this paper.

<sup>263</sup> J-Y Carlier, *Who is a refugee*, 1997, p.598.

<sup>264</sup> B. Vermeulen, T. Spijkerboer, K. Zwaan, R. Fernhout, *Persecution by Third Parties*, University of Nijmegen, Centre for Migration Law, Nijmegen, May 1998, p.70. [Hereinafter: B. Vermeulen, *Persecution by Third Parties*, 1998].

### Internal flight alternative

If an asylum claimant has a reasonable internal flight alternative in his or her country of origin, the claim can be refused in the UK. A reasonable internal flight alternative means that the applicant must have no well-founded fear of being persecuted in the alternative area and the applicant must be able to live in the area under reasonable circumstances. In the UK the internal flight alternative is only relevant when the persecutor is a third party unless it can be shown that the State's mandate or control does not run to the whole of the territory<sup>266</sup>.

### **6.1.3: Unaccompanied Child Refugees in the UK**

Over half of the world's refugees are children. Children are even more vulnerable, especially when the children are not accompanied by responsible adults. A minimum of 25,000 separated children applied for asylum in Europe in 1999, and the numbers have increased considerably in most countries in the last two, three years, especially in Western Europe<sup>267</sup>.

The UK has unfortunately made a reservation to Article 22 of the CRC<sup>268</sup>: "The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the UK of those who do not have the right under the law of the UK to enter and remain in the UK, and to the acquisition and possession of citizenship, as it may deem necessary from time to time"<sup>269</sup>. This reservation has impact on refugee children coming to the UK. This is especially problematic because the UK receives many UAMs each year. In 2000, 2,733 asylum claims were lodged by UAMs in the UK. The main countries of origin of these children were Sri Lanka, Angola and the Former Republic of Yugoslavia<sup>270</sup>.

In the UK, all minors can apply for asylum themselves despite their age. Immigration officials will hand the children over to social services, who have a duty of care for anyone under 18. Immigration officers will determine an applicant's age on the spot on the basis of how a child looks or behaves. Where there is a dispute about the age of an asylum seeker, the

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<sup>265</sup> Ibid, p.20.

<sup>266</sup> B. Vermeulen, *Persecution by Third Parties*, 1998, p.22.

<sup>267</sup> J. Bhabha, *Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers*, in <<European Journal of Migration and Law 3>>, 2001, p. 283-314.

<sup>268</sup> Article 22 of the CRC stipulates that "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee, 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".

<sup>269</sup> UN High Commissioner for Human Rights, CRC Reservation made by United Kingdom of Great Britain and Northern Ireland, available at <http://www.unhcr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>, last visited June 2003.

<sup>270</sup> UNHCR, *Trends in Unaccompanied and Separated Children seeking Asylum in Europe, 2000*, Geneva,

Secretary of State may enquire into, and decide, the age of that person. Such a determination of age can be challenged by way of judicial review<sup>271</sup>.

Relatively few separated children applying for asylum are awarded refugee status, but instead they are awarded Exceptional Leave to Remain in the UK, usually up to the age of 18<sup>272</sup>. There is no guardian appointed to separated children, but the Refugee Council has a panel of advisors to assist children making asylum claims, and immigration officials should always refer children to this service. Unfortunately, this system is now under severe pressure because the numbers of children have increased and the funding for the service is inadequate<sup>273</sup>.

Unaccompanied minors are not included in the Immigration and Asylum Act, and are supported under the Children Act of 1989. The level of support for unaccompanied minors is in principle the same as for British citizens<sup>274</sup>. However, the type of services they receive varies and 16 and 17 year olds are particularly disadvantaged because many of them are housed in unsuitable and unsupported housing often without access to a social worker. Separated children also continue to be detained in immigration detention centres and occasionally in prisons<sup>275</sup>.

In the UK school is compulsory from the ages 5 to 16. All asylum seekers in that age group have the right to primary and secondary education. The education continues to be free for asylum seekers until the age of 18. Local authorities decide whether language tuition is offered. Asylum seekers, so also separated children, have full access to National Health Service and health care in the UK. Health care is not accessible to those who have exhausted the procedure. They are still entitled to emergency care<sup>276</sup>.

Although the UK has not got the worst records when it comes to the treatment of separated children, there are some significant problems. The care provided to separated children in the UK has mainly been badly affected by the wide ranging and frequent changes to asylum law and policy over the last seven years, the significant increase in the numbers of

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November 2001, available at [www.unhcr.ch](http://www.unhcr.ch).

<sup>271</sup> W. Ayotte, L. Williamson, *Separated Children in the UK: An overview of the current situation*, British Refugee Council, Save the Children, 2003, at <http://www.refugeecouncil.org.uk/publications/pub005.htm>, last visited in June 2003. [Hereinafter: W. Ayotte, *Separated Children in the UK*].

<sup>272</sup> Ibid, p.4.

<sup>273</sup> Ibid, p.7.

<sup>274</sup> EC, *Country Profile: United Kingdom*, 2001, p.22.

<sup>275</sup> W. Ayotte, *Separated Children in the UK*, p.20.

<sup>276</sup> EC, *Country Profile: United Kingdom*, 2001, p.23, 24-25.

separated children coming to the UK and the gap between funding available and the real costs to local authorities of caring for separated children<sup>277</sup>.

## 6.2: The Netherlands

### 6.2.1: Background information on the asylum procedure in the Netherlands

In 2002, the Netherlands received 18,667 asylum claims, which amounted to 3,2 per cent of all the asylum claims lodged in the industrialized world. Compared to the numbers of 2001, the number of asylum claims in 2002 fell with 42,7 per cent. In 2002, most asylum seekers came from Angola, Sierra Leone, Afghanistan and Iraq<sup>278</sup>.

The Ministry of Justice and the Ministry of the Interior have political and administrative responsibility for the aliens' policy, including the reception procedure. The Immigration and Naturalization Services (IND) is under the jurisdiction of the Ministry of Justice and has the role of administering the admissions and asylum procedures. They are also in charge of the four registration centres, and process the asylum applications<sup>279</sup>.

In the Netherlands persons seeking asylum can be admitted into the country based on three statuses. First of all, refugee status (A-status) is granted to those who meet the requirements of the 1951 UN Refugee Convention and the 1967 Protocol relating to the status of refugees. Asylum seekers can also be granted Residence status for humanitarian reasons, the so-called C-status/vtv. This status may be granted "where a person cannot reasonably be expected to return to his or her country of origin, given the living conditions there, if the person has suffered traumatic experiences in his country of origin, or purely because of personal circumstances"<sup>280</sup>. A third status may be granted if "enforced removal to the country of origin would confer unusual hardship to the alien with regard to the general situation in the country"<sup>281</sup>. This status is called Provisional residence status or Vvtv, and is granted on a yearly basis and is renewable.

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<sup>277</sup> W. Ayotte, *Separated Children in the UK*, p. 34.

<sup>278</sup> UNHCR, *Asylum Applications lodged in Industrialized Countries: Levels and Trends, 2000-2002*, Geneva, March 2003, p.7, 20, available at [www.unhcr.ch](http://www.unhcr.ch), last visited June 2003.

<sup>279</sup> European Community, Study carried out by PLS RAMBOLL Management on behalf of the European Commission Directorate General for Justice and Home Affairs, *Country Profile: The Netherlands*, 2001, p.7,8, at [http://europa.eu.int/comm/justice\\_home/doc\\_centre/asylum/seekers/doc/netherlands\\_final\\_en.pdf](http://europa.eu.int/comm/justice_home/doc_centre/asylum/seekers/doc/netherlands_final_en.pdf), last visited June 2003. [Hereinafter: EC, *Country Profile: The Netherlands*, 2001].

<sup>280</sup> Ibid, p.5.

<sup>281</sup> Ibid, p.5.

Dutch asylum law provides for two types of asylum review: an accelerated procedure and a full asylum determination procedure. The accelerated procedure results in either a rejection of the claim or a transfer of the claim for consideration under the full procedure. Under the full procedure an applicant may be granted refugee status or one of the other statuses described above. The accelerated procedure was initially introduced to identify the manifestly unfounded asylum claims, but by the second half of 2002 the procedure was being applied to at least 60 per cent of all cases lodged in the Netherlands. The accelerated procedure takes place in a matter of days<sup>282</sup>.

All asylum seekers whose claims for asylum have been denied have the right to appeal, including those applicants that have been rejected in the accelerated procedure. In 2000, there has been a shift in the final authority for appeals in the Netherlands. The “Raad van State” (Council of State), the Netherlands highest administrative court, is now the final authority in asylum and immigration cases<sup>283</sup>. Unfortunately, recent jurisprudence from the “Raad van State” is narrowing the scope of judicial review. Court may only review the substance of matters that formed part of the original Immigration and Naturalisation Service decision<sup>284</sup>.

#### **6.2.2: Interpretation of the requirements under the 1951 UN Refugee Convention in the Netherlands**

##### *Well-founded fear*

In the Netherlands a considerable amount of attention is given to the personal statements of an asylum seeker to conclude that he or she has a well-founded fear of persecution. But attention is also given to certain objective elements such as a claimant’s personal history and the existing situation in the claimant’s country of origin. It is not required that the applicant has personally experienced difficulties. His or her fear may be well-founded in view of the experiences of others who are in the same situation as the applicant. However, the applicant must show that he or she may be subjected to persecution in that case<sup>285</sup>. Street children will be able to give records of other street children who have been killed, tortured and arbitrary detained. Street children are persecuted on grounds of their lifestyle and habits. Since all the

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<sup>282</sup> Human Rights Watch, *Fleeting Refuge: The Triumph of efficiency over protection in Dutch Asylum Policy*, Vol. 15, No 3 (D), April 2003, p.5. [Hereinafter: HRW, *Fleeting Refuge*, 2003].

<sup>283</sup> Ibid, p.2.

<sup>284</sup> Ibid, p.13.

<sup>285</sup> J-Y Carlier, *Who is a refugee*, 1997, p.478, 488.

children who are living on the streets share the same habits and lifestyle, a street child can demonstrate that there is a great change that he or she will also be persecuted.

In the Netherlands, attention is given to the specific personality of an applicant and the way in which he or she has experienced the facts and circumstances related to his or her case. The personal psychological state of mind of an applicant plays a role in determining whether the fear is well-founded. Special attention has also been given to young asylum seekers and to cases where highly emotional issues are involved<sup>286</sup>. For street children's asylum claims this is a very positive development because street children have experienced traumatic events in their lives in their family as well as on the streets.

#### Membership of a particular social group

In Dutch legal practice, just which of the five persecution grounds is related to the persecution is virtually considered immaterial. The persecution has to be clearly discriminatory and not just random. "Once the discriminatory nature of the persecution has been established, the particular rubric under which it falls is of less importance"<sup>287</sup>.

In Dutch case-law, persecution for reason of membership of a social group has been accepted to include persecution for reasons of sexual orientation and gender<sup>288</sup>. But women in general were considered to be too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar<sup>289</sup>.

The outcome of Dutch cases are similar to cases elsewhere involving the determination of membership of a particular social group. But the theoretical and doctrinal analysis of the category remains underdeveloped. But it is a positive development that they have accepted in Dutch case-law newly introduced particular social groups. In a recent case involving an Angolan asylum seeker, the court strongly took into account the fact that the applicant had been a street child for years<sup>290</sup>. Although the case was not based on street children as a particular social group, it can be an indicator that Dutch immigration courts are willing to accept that street children constitute a particular social group.

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<sup>286</sup> Ibid, p.498.

<sup>287</sup> T., A. Aleinikoff, *Membership in a Particular Social Group: Analyses and Proposed Conclusions*, background paper for the San Remo Expert Roundtable, organised by the UNHCR and the International Institute of Humanitarian Law, sep 2001. [Hereinafter: T. Aleinikoff, *Membership in a Particular Social Group*, 2001].

<sup>288</sup> J-Y Carlier, *Who is a refugee*, 1997, p. 516.

<sup>289</sup> T. Aleinikoff, *Membership in a Particular Social Group*, 2001.

<sup>290</sup> Arrondissementsrechtbank te 's-Gravenhage, Inzake X tegen de Minister voor Vreemdelingenzaken en Integratie (Immigratie en Naturalisatiedienst), 4 October 2002. On file with author.



### Agents of persecution

The agent of persecution may be the government in the country of origin, as well as other persons or groups in the society. But an applicant will only have a well-founded fear in the case of non-state persecutors when the national authorities are unwilling or incapable of protecting the person<sup>291</sup>.

In November 1995, the Council of State changed its jurisprudence. It ruled that no persecution is possible in a situation where every form of factual governmental authority is lacking, so where there is no government anymore, for example Somalia. However, Dutch case-law on this issue is divergent and there seem to be two opinions. Decisions by district courts indicate that they do not follow the opinion of the Council of State whereas they have held that the fact that there is no government in the home country of the applicant should not preclude him from refugee status<sup>292</sup>. There is the possibility of persecution by local/de facto authorities, but this local authority must have established certain administrative, judicial and political structures<sup>293</sup>.

### Internal Flight Alternative

Refugee status will not be granted in the Netherlands when the asylum seeker has an internal flight alternative in his or her country. The Netherlands holds the view that an internal flight alternative cannot be invoked when the persecution emanates from the central authorities. This implies that the concept can only be applied in cases of persecution by local authorities or third parties<sup>294</sup>.

### **6.2.3: Unaccompanied Child Refugees in the Netherlands**

The Netherlands receives the largest number of asylum claims lodged by unaccompanied minors in Europe. The number of UAMs arriving in the Netherlands steadily increased throughout the 1990's, peaking at almost 7,000 arrivals in 2000. However, in recent years, these numbers have been in rapid decline<sup>295</sup>. In 2000, the main nationalities of UAMs seeking asylum came from Angola, China, Guinea and Sierra Leone<sup>296</sup>.

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<sup>291</sup> B. Vermeulen, *Persecution by Third Parties*, 1998, p.58.

<sup>292</sup> Ibid, p.59, 33.

<sup>293</sup> Ibid, p.59, 60.

<sup>294</sup> Ibid, p.22.

<sup>295</sup> HRW, *Fleeting Refuge*, 2003, p.15, 16.

<sup>296</sup> UNHCR, *Trends in Unaccompanied and Separated Children seeking Asylum in Europe, 2000*, Geneva, November 2001, available at [www.unhcr.ch](http://www.unhcr.ch).



UAMs have to follow the general asylum procedure which is also applicable to adults. The Netherlands applies a restrictive immigration policy, also with regard to UAMs<sup>297</sup>. Unfortunately, the accelerated asylum procedure is also being applied to unaccompanied minors. Nowadays, more than 30 percent of claims lodged by unaccompanied children are dealt with through this procedure. This means that children are interviewed immediately after arriving in the Netherlands<sup>298</sup>.

In cases involving unaccompanied minors, the child protection agency NIDOS appoints a guardian after the first interview. The guardian is then responsible for managing the child's case. These guardians are, however, not trained in asylum law or policy. Guardians also only attend interviews conducted by the Immigration and Naturalisation Service in cases in which it appears that the child is traumatized or otherwise in need of special support. In practice, this means that children are frequently interviewed without a lawyer or guardian present<sup>299</sup>.

A special policy has been established for unaccompanied minors. Upon arrival the Immigration and Naturalisation Service will investigate whether an unaccompanied minor should be granted refugee status or any of the other statuses described above. If they do not fulfil the requirements for the granting of one of the statuses, attempts are made to locate their parents or other adults acting as guardians in the country of origin. The Immigration and Naturalisation Service has six months to try to find adequate care in the country of origin. Failing that, the unaccompanied minor receives a residence permit which is valid for one year as a single minor asylum seeker (so-called "vtv-ama"), and which can be renewed twice. If within this three year there is still no adequate care for the unaccompanied minor in his or her country of origin the vtv-ama status will be transferred into a permanent residence permit<sup>300</sup>.

In the Netherlands, age determination of a person will take place in case of doubt and when in such a case the person cannot provide evidence of his or her age. The age will be determined through an ex-ray of the wrist and the collarbone<sup>301</sup>.

In the Netherlands all children regardless of status or nationality are obliged to go to school until the age of 16 or a total of 12 years. Even illegal immigrants or asylum seekers

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<sup>297</sup> Ministerie van Justitie, *Beleidsnota alleenstaande minderjarige asielzoekers*, Den Haag, 24 Maart 2000, at <http://www.justitie.nl/publicaties/dossiers/Amas.asp?ComponentID=10043&SourcePageID5308#1>, last visited June 2003. [Hereinafter: Ministerie van Justitie, *Beleidsnota alleenstaande minderjarige asielzoekers*].

<sup>298</sup> HRW, *Fleeing Refuge*, 2003, p.18.

<sup>299</sup> Ibid, p.19.

<sup>300</sup> EC, *Country Profile: The Netherlands*, 2001, p.6.

<sup>301</sup> Ministerie van Justitie, *Beleidsnota alleenstaande minderjarige asielzoekers*.

who have exhausted their asylum procedure are obliged to go to school and are admitted to schools if they apply<sup>302</sup>.

### 6.3: Germany

#### 6.3.1: Background information on the asylum procedure in Germany

In 2002, Germany received 71,127 asylum applications. Compared to 2001, the number of asylum applications lodged fell with 19 per cent. Within the EU, Germany receives 19 per cent of the asylum claims. The main countries of asylum applicants in 2002 were Iraq, Turkey, Former Republic of Yugoslavia and the Russian Federation<sup>303</sup>.

The Federal Office for the Recognition of Foreign Refugees within the Ministry of Interior is responsible for the personal interview with the asylum seeker and the ultimate decision on the application<sup>304</sup>. All asylum applicants are under the obligation to stay initially in a reception centre, regardless of the outcome of their procedure.

In Germany, there are three categories of statuses that may be granted to asylum seekers. Category 1 comprises of persons who apply for protection status under the UN 1951 Refugee Convention (kleiners Asyl). The definition of the second category comprises of two groups of persons; foreigners who are given a status as civil war refugees and foreigners who are granted a temporary suspension of deportation. The last category consist of persons who merely request protection against deportation and who have not filed an application for asylum<sup>305</sup>. For most of the categories of statuses the number granted has been significantly decreasing since 1997. For example, in the period between 1995 and 1999, there has been a decrease of 54.4 per cent.

An amendment to the basic right of asylum in 1993 introduced the concept of safe country of origin into the German constitution. A list was drafted of safe countries of origin for which safety from persecution is refutably presumed. Foreigners coming from these countries generally cannot invoke the right to asylum. Currently, these countries are Bulgaria,

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<sup>302</sup> EC, *Country Profile: The Netherlands*, 2001, p.20.

<sup>303</sup> UNHCR, *Asylum Applications lodged in Industrialized Countries: Levels and Trends, 2000-2002*, Geneva, March 2003, p.4, 20, available at [www.unhcr.ch](http://www.unhcr.ch), last visited June 2003.

<sup>304</sup> European Community, Study carried out by PLS RAMBOLL Management on behalf of the European Commission Directorate General for Justice and Home Affairs, *Country Profile: Germany*, 2001, p.9, at [http://europa.eu.int/comm/justice\\_home/doc\\_centre/asylum/seekers/doc/germany\\_final\\_en.pdf](http://europa.eu.int/comm/justice_home/doc_centre/asylum/seekers/doc/germany_final_en.pdf), last visited June 2003. [Hereinafter: EC, *Country Profile: Germany*, 2001].

<sup>305</sup> Ibid, p.16, 17.

Ghana, Poland, Romania, Senegal, Slovak Republic, Czech Republic and Hungary<sup>306</sup>. Persons coming from these countries will have their application dealt with in the accelerated procedure.

In Germany, asylum seekers cannot be taken into custody merely because of their status as asylum seekers.

### **6.3.2:** Interpretation of the requirements under the 1951 UN Refugee Convention in Germany

#### *Well-founded fear*

In Germany, the emphasis is on the objective elements of well-founded fear. The subjective apprehension of the asylum seeker is not enough in itself. The fear must be objectively well-founded, but the rule of what is reasonable must be taken into account. This means that all the circumstances of an individual case must be taken into account to assess whether a return to the country of origin of the applicant is no longer reasonable<sup>307</sup>.

Prior persecution may testify to the objectivity of the fear of future persecution, but the link between past and possible future persecution must be clear cut.

#### *Membership of a particular social group*

In Germany, the notion of particular social group is linked to the existence of stable and inalterable characteristic signs. For example, it has been accepted that a person's gender is an inalterable characteristic sign with which the right of asylum is associated<sup>308</sup>.

It appears from case-law that some courts look for homogeneity among group members and some sort of internal group structure, where other courts investigate whether the alleged group is perceived as a group by the general population<sup>309</sup>.

German courts seem to put emphasise on the individual behaviour or characteristics that lead to a situation of conflict in the applicant's country of origin; they do not refer much to the notion of membership of a particular social group<sup>310</sup>.

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<sup>306</sup> Ibid, p.15.

<sup>307</sup> J-Y Carlier, *Who is a refugee*, 1997, p.240.

<sup>308</sup> Verwaltungsgericht Ansbach 17<sup>th</sup> division (Administrative Court), AN 17K91.44245, 19 February 1992.

<sup>309</sup> T. Aleinikoff, *Membership in a Particular Social Group*, 2001.

<sup>310</sup> J-Y Carlier, *Who is a refugee*, 1997, p.284.

### Agents of persecution

In Germany, persecution must either emanate from the State or at least be imputable to the State. Persecution can consist of either direct persecution (acts perpetrated by State organs) or indirect persecution, i.e. situations in which, despite its ability to intervene, the State fails to prevent persecution organised by private individuals against a group<sup>311</sup>.

According to German case-law it must be possible to hold the State accountable for the persecution in some way. “If the authorities would try to provide protection, but would fail, they could not be held accountable for acts of persecution by third parties, and such acts can therefore not be considered as persecution”<sup>312</sup>.

In Germany, there can be no persecution within the meaning of the 1951 UN Refugee Convention in countries in which there is no government or the government is not effectively in control of the country. This means that the right to asylum cannot be granted to an asylum seeker coming from a civil war situation since there is no state authority. It has been recognised that there may be persecution by local/de facto authorities, but they must be in control effectively of the entire country or part of it<sup>313</sup>.

### Internal flight alternative

Germany applies a very restrictive approach when it comes to the internal flight alternative. The exception of internal flight alternative can be applied irrespective of the agent of persecution. So even when the persecutor is the central State, an internal flight alternative can be possible. However, asylum is not denied when that person cannot survive economically in the area where he or she would be safe from persecution or when that person would not be able to reach that area safely<sup>314</sup>.

### **6.3.3: Unaccompanied Child Refugees in Germany**

The main countries of origin of unaccompanied minors are quite different from the main countries of asylum seekers in general. This is definitely the case in Germany, whereas Germany received 18 per cent of all asylum claims lodged in Europe during 2000, they only received 6 per cent of all claims submitted by UAMs. In 2000, only 946 unaccompanied minors lodged an asylum claim in Germany, amounting to only 1 per cent of all the claims

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<sup>311</sup> B. Vermeulen, *Persecution by Third Parties*, 1998, p.20.

<sup>312</sup> Ibid, p.50.

<sup>313</sup> Ibid, p.52.

lodged in Germany that year. The main countries of origin of these UAMs were Afghanistan, Turkey, Sierra Leone and Vietnam<sup>315</sup>.

Germany has also made a reservation to the CRC. According to this reservation the CRC will not be applied directly on a national level and the CRC does not limit Germany's right to pass laws and regulations on the entry and residence of foreigners<sup>316</sup>.

Minor refugees have to pass through the same asylum process as adult asylum seekers. Germany makes a distinction between unaccompanied minors under 16 years of age and those above this age. If a minor is under 16 years of age the authorities will investigate whether the minor has family ties in Germany or whether a family reunification is possible on a short term basis. If this is not the case, the minor is taken to the Local Youth Welfare Office. This Office will file an application for the appointment of a guardian since persons under 16 are not entitled to file an asylum application without a legal representative<sup>317</sup>. All refugees over 16 years of age have unlimited legal capacity in terms of the Asylum Law. Only minors for whom an urgent need for support has been determined are assigned a guardian. In practice, this often means that minors over 16 have to conduct their asylum procedure without a representative and without any personal support. These minors are also placed in collective accommodation centres together with adults<sup>318</sup>.

The age of an unaccompanied minor is an important factor due to the differences in treatment for minors under and those above 16 years. In cases where the authorities consider the age stated not to be credible they carry out an age assessment. A staff member of the Youth Welfare Office or the Aliens Authority will make an assessment of a person's age based on his or her appearance, the so-called inspection view<sup>319</sup>.

Children always have access to primary education during the asylum procedure. Intermediary education or vocational training is also offered to children during the asylum procedure<sup>320</sup>. There is also always access to medication and treatment during the asylum

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<sup>314</sup> Ibid, p.50, 51.

<sup>315</sup> UNHCR, *Trends in Unaccompanied and Separated Children seeking Asylum in Europe, 2000*, Geneva, November 2001, available at [www.unhcr.ch](http://www.unhcr.ch).

<sup>316</sup> UN High Commissioner for Human Rights, *CRC Reservation made by Germany*, available at <http://www.ubhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>, last visited June 2003.

<sup>317</sup> Separated Children in Europe Programme, *Germany: Questionnaire for Country Assessment*, at [http://www.separated-children-europe-p...RepliesQuestionnaires/Germany\\_engQ.htm](http://www.separated-children-europe-p...RepliesQuestionnaires/Germany_engQ.htm), last visited June 2003.

<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

<sup>320</sup> EC, *Country Profile: Germany*, 2001, p.33, 34.

procedure. Medication and treatment are provided gratis in case of urgent needs. Services to meet the special need of children may be granted if necessary on a case-by-case basis<sup>321</sup>.

## 6.4: Spain

### 6.4.1: Background information on the asylum procedure in Spain

The number of asylum claims lodged in Spain varies significantly each year. During the year 2001, asylum applications increased by almost 20 per cent from the previous year. But in 2002 the number of asylum applications decreased by 35 per cent to 6,179 applications. Within the EU, Spain is one of the countries which receives the lowest number of claims compared to the size of their national population. The main countries of origin of the asylum seekers in 2002 were Nigeria, Cuba, Colombia, Algeria and Sierra Leone<sup>322</sup>.

The Ministry of Interior, and in particular its Office for Asylum and Refugees, is responsible for the application process. The Spanish asylum application procedure is divided into two parts; a preliminary asylum procedure to determine the admissibility of a case and a formal procedure to determine whether asylum should be granted<sup>323</sup>. The UNHCR submits an opinion on the admissibility of each claim to the Office for Asylum and Refugees.

In Spain, persons may be admitted into the country on the basis of three different asylum statuses. Refugee status is granted on the basis of the 1951 UN Refugee Convention and the 1967 Protocol relating to the status of refugees. A second status that may be granted is the Residence Status for humanitarian reasons. "This group comprises of persons who do not meet the criteria for refugee status, but whose return to the country of origin cannot take place due to special circumstances and whose case is of humanitarian or public interest"<sup>324</sup>. This status is renewable on a yearly basis. Groups of displaced persons who have been forced to leave their country of origin due to conflicts or serious disturbances of a political, ethnic or religious character may be granted a Residence permit for displaced persons. Groups of those displaced are granted a 1 year residence permit, until the conditions in their country are safe

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<sup>321</sup> Ibid, p.40.

<sup>322</sup> UNHCR, *Asylum Applications lodged in Industrialized Countries: Levels and Trends, 2000-2002*, Geneva, March 2003, p.4, 7, 20. Available at [www.unhcr.ch](http://www.unhcr.ch), last visited June 2003.

<sup>323</sup> European Community, Study carried out by PLS RAMBOLL Management on behalf of the European Commission Directorate General for Justice and Home Affairs, *Country Profile: Spain*, 2001, p.9, at [http://europa.eu.int/comm/justice\\_home/doc\\_centre/asylum/seekers/doc/spain\\_final\\_en.pdf](http://europa.eu.int/comm/justice_home/doc_centre/asylum/seekers/doc/spain_final_en.pdf), last visited June 2003. [Hereinafter: EC, *Country Profile: Spain*, 2001].

<sup>324</sup> Ibid, p.6.

enough for them to return<sup>325</sup>. In 2001, the Spanish authorities rejected 93.5 per cent of the asylum claims and only granted 3.5 per cent asylum, the other 3 per cent were granted some form of temporary protection<sup>326</sup>.

A new amendment to the asylum law issued in 1994 put an end to the previous automatic right of entry by introducing an accelerated procedure to determine the admissibility of an application<sup>327</sup>. The accelerated procedure is used to identify inadmissible or manifestly unfounded asylum claims.

Denied asylum seekers may appeal negative decisions to the National Audience, a national court, within two months of notification<sup>328</sup>.

#### **6.4.2: Interpretation of the requirements under the 1951 UN Refugee Convention in Spain**

##### *Well-founded fear*

Whether an applicant has a well-founded fear is assessed in Spain on the basis of a combination of objective and subjective elements. There must be at least some existence of objective facts from which may be inferred sufficient indications that a person suffered from persecution or a reasonable fear of persecution. It is necessary to explain how or to what extent the situation in a country personally affects the asylum seeker<sup>329</sup>. From the objective circumstances it must be possible to conclude that there is a reasonable probability of suffering persecution. The existence of persecution in the past may be an element of proof in evaluating the risk of future persecution<sup>330</sup>.

The subjective element of fear refers to the state of mind of a person. In each case, the personal and sociological circumstances must be taken into account. It is important to take into account the behaviour of the asylum seeker both at the time of the cited events and afterwards in assessing whether the person has a well-founded fear of persecution<sup>331</sup>.

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<sup>325</sup> Ibid, p.7.

<sup>326</sup> U.S. Committee for Refugees, *World Refugee Survey 2002 Country Report: Spain*, at <http://www.refugees.org/world/countryrpt/europe/2002/spain.cfm>, last visited June 2003.

<sup>327</sup> EC, *Country Profile: Spain*, 2001, p.11.

<sup>328</sup> U.S. Committee for Refugees, *World Refugee Survey 2002 Country Report: Spain*, at <http://www.refugees.org/world/countryrpt/europe/2002/spain.cfm>, last visited June 2003.

<sup>329</sup> J-Y Carlier, *Who is a refugee*, 1997, p.344, 345.

<sup>330</sup> Ibid, p.343.

<sup>331</sup> Ibid, p.351.

### Membership of a particular social group

In Spain, no relevant case-law based on membership of a particular social group could be found<sup>332</sup>. It may therefore be difficult to establish a newly recognised particular social group such as street children.

### Agents of persecution

In cases of persecution by non-state actors refugee status is only granted when the State has denied protection although it was requested to protect against third parties and when the persecution is in fact tolerated by the State, not because of inability of affording protection but by reason of a political decision of “laissez-faire”. So Spanish authorities do grant asylum to persons who have suffered persecution from non-state actors when the national authorities of the applicant’s country are unwilling to protect the person<sup>333</sup>.

In case the State is willing to afford protection but protection is ineffective, or the State is unable to grant protection due to terrorism, generalised violence, lack of structures in cases of civil war, refugee status will be denied. In these cases asylum seekers may obtain exceptional leave to remain under Section 17(2) of the Spanish Asylum Act, as amended in 1994<sup>334</sup>. This implies that there can be no persecution in relation to the 1951 UN Refugee Convention when there is no government or the government is not effectively in control of the territory. Persecution always have to be related to a State authority because some kind of implicit state action is required in order to establish persecution. The State must be unwilling to afford protection.

### Internal flight Alternative

There is no provision regarding the concept of internal flight alternative in the Spanish Asylum Law. The Spanish authorities do apply the notion in their consideration of asylum claims, but they proceed very carefully before denying refugee status solely on this basis. In practice the existence of safe areas within a country will only lead to a rejection of an asylum claim when there is also an another additional reason for the rejection, such as a lack of evidence. The fact that an asylum seeker has moved within the territory trying to find a safe

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<sup>332</sup> Ibid, p.368.

<sup>333</sup> European Legal Network on Asylum (ELENA), *Research Paper on Non-State Agents of Persecution*, London, November 1998, up-dated in 2000, p.50.

<sup>334</sup> Ibid, p.51.



area before leaving the country of origin is indicative of the seriousness of the asylum claim<sup>335</sup>. Case-law on this issue is very scarce in Spain.

#### 6.4.3: Unaccompanied Child Refugees in Spain

During 2001, two unaccompanied minors claimed asylum in Spain, 1 from Sierra Leone and 1 from Sri Lanka. Also last year, in 2002, the Spanish Office for Asylum and Refugees (Oficina de Asilo y Refugio) reported only two applications filed by unaccompanied minors. After much discussion with UNHCR, they raised that number to sixteen<sup>336</sup>.

Theoretically, children have the right to apply for asylum in Spain, but the head of the asylum office does not believe that children need asylum in Spain. This also partly explains the low number of unaccompanied child refugees in Spain. According to the Spanish authorities unaccompanied minors are already protected under national law. The most important protection for unaccompanied minors is contained in Organic Law 4/2000, regarding the Rights and Freedoms of Foreign Nationals Living in Spain and their Social Integration. Article 35 of this law requires that unaccompanied minors are placed in the care of the competent services for the protection of minors. Furthermore, this Article states that “if a child cannot be reunited with family members or placed with social service agencies in his or her country of origin within nine months, the child shall be granted a residence permit, the validity of which shall be retroactive to the moment in which the minor was placed in the care of child protective services”<sup>337</sup>. However, this temporary residence permit expires when the child reaches the age of eighteen. At that point, a person may be eligible to apply for permanent residence permit based on his or her length of time in Spain (after two years of residency, a minor can apply for citizenship), or the person may be able to receive an extension of temporary residence on humanitarian grounds<sup>338</sup>.

The claims of unaccompanied minors who do apply for asylum are processed the same as adults. Under Spanish law, these minors should be appointed a guardian or legal

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<sup>335</sup> European Legal Network on Asylum (ELENA), *Research Paper on the application of the concept of internal protection alternative*, London, November 1998, up-dated as of autumn 2000, at <http://www.ecre.org/research/ipa.pdf>, last visited May 2003.

<sup>336</sup> Interview with Isabel de las Casas, UNHCR Legal Assistant working on women and children’s issues, on the treatment of unaccompanied minors in Spain, 11 June 2003.

<sup>337</sup> Article 35 from Organic Law 4/2000 of January 11, Regarding the Rights and Freedoms of Foreign Nationals Living in Spain and Their Social Integration, as amended by Organic Law 8/2000, of December 22, Reforming Organic Law 4/2000.

<sup>338</sup> Human Rights Watch, *What Spanish laws protect unaccompanied migrant children?*, at <http://www.hrwatc.org/campaigns/spain/spanishlaw.htm>, last visited May 2003.

representative for the duration of the asylum procedure. However, the system for the protection of unaccompanied minors in Spain does not function properly. Each autonomous community in Spain has different ways of appointing guardians and some work better than others<sup>339</sup>.

Police and residential centre staff make the first, and often only, determination of a child's age. These staff members are not provided any training on how to evaluate a child's age. Unaccompanied children as young as thirteen told Human Rights Watch during a survey that the police expelled them based on visual assessments<sup>340</sup>. Only in cases where there is doubt about a child's age, will the Spanish authorities conduct a medical examination. Age determination is then done with a forensic exam of the wrist, by x-ray.

According to Spanish law on the legal protection of minors, the children of aliens, have the same rights as those accorded to Spanish children regardless of their legal status<sup>341</sup>. This provision applies to the right to education of unaccompanied minors as well as to their right to health care.

## **6.5: European Union Asylum Harmonisation Process**

Within the EU they are trying to harmonise the asylum procedures of the different Member States. This will of course have implications on the existing procedures. In the following section I will describe the harmonisation process thus far. It is important to assess what kind of implications this harmonisation process will have on asylum claims made by children. I will only look at EU legislation which is important for street children's asylum claims and explain the relevance of the legislation.

### **6.5.1: Overview of asylum developments in the European Union**

Over the years, the Member States of the EU developed an intensive political and economic co-operation. This co-operation also revealed the necessity to work together on related fields such as immigration, border controls and asylum policy. The Amsterdam Treaty has had major implications for the field of asylum and immigration. Prior to the Amsterdam Treaty

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<sup>339</sup> Interview with Isabel de las Casas, UNHCR Legal Assistant working on women and children's issues, on the treatment of unaccompanied minors in Spain, 11 June 2003.

<sup>340</sup> Human Rights Watch, *Arbitrary age determination procedures*, at <http://www.staging.hrw.org/reports/2002/spain-morocco/spnmorc0402-03.htm>, last visited May 2003.

<sup>341</sup> EC, *Country Profile: Spain*, 2001, p.18.

joint action on asylum issues has generally been taken by Member States acting through intergovernmental agreements. Under this treaty, the Member States agreed to harmonise their national asylum systems into a common EU policy. The EU Commission has the sole right of initiative i.e. the sole right to propose legislation on asylum and immigration issues<sup>342</sup>.

The Amsterdam Treaty has accelerated policy-making in the field of asylum and immigration because Member States have been given a clear timetable for agreement. During an European Council Summit in Tampere, Finland, the Member States affirmed the need to develop a common asylum system based on the full and inclusive application of the 1951 UN Refugee Convention and the full respect for guarantees to access EU territory by those in need of protection<sup>343</sup>.

Since the Tampere Summit, the EU Commission has made many proposals in the field of asylum and immigration. The most important legislation for child refugees will be discussed in the following sections.

#### **6.5.2: Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries<sup>344</sup>**

This Council Resolution on unaccompanied minors is the only attempt by the EU Member States to specify the appropriate procedures for minors seeking asylum and lays down the minimum standards of procedures for minors seeking asylum. According to the Resolution, the vulnerable situation of unaccompanied minors must be taken into account. Unaccompanied minors should be entitled to the necessary protection and basic care and in all actions concerning children, the best interest of the child shall be a primary consideration.

According to the Resolution unaccompanied minors should have the right to apply for asylum and their claims should be processed as a matter of urgency. Unfortunately, the resolution does not address the issue of the accelerated asylum procedure<sup>345</sup>. It is important to process a child's asylum claim as soon as possible because the insecurity will especially have

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<sup>342</sup> European Council on Refugees and Exiles (ECRE), *Overview of asylum developments in the EU*, at [http://www.ecre.org/policy/eu\\_developments.shtml](http://www.ecre.org/policy/eu_developments.shtml), last visited in June 2003.

<sup>343</sup> S. Ruxton, *Separated Children seeking Asylum in Europe: A programme for Action*, Save the Children & UNHCR, p.5, available at <http://www.separated-children-europe-programme.org/Global/English/Publications.htm>, last visited June 2003. [Hereinafter: S. Ruxton, *A Programme for Action*].

<sup>344</sup> Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals Third Countries, 397Y0719(02), Official Journal C 221, 19 July 1997, p.0023-0027. [Hereinafter: Resolution on unaccompanied minors].

<sup>345</sup> Article 4(2) of the Resolution on unaccompanied minors.

a bad impact on a child's state of mind, but the accelerated procedure is not a proper way to assess children's claim for as they do not take into account the best interest of a child. The Resolution does state in Article 4(7) that "allowance should be made for a minor's age, maturity and mental development, and for the fact that he or she may have limited knowledge of conditions in the country of origin" when assessing an application made by an UAM.

As far as officials dealing with unaccompanied minors are concerned, the Resolution states that interviews should be conducted by officials with an adequate level of experience of interviewing unaccompanied minors<sup>346</sup>.

Under the Resolution, Member States should provide as soon as possible for the necessary representation of the minor. This guardian should ensure that the minor's needs are duly met. Also, the minor should have access to general education facilities and receive appropriate medical treatment<sup>347</sup>.

The Resolution allows Member States to make age assessments in case of serious doubts through a medical age-test carried out by qualified medical personnel. The Resolution does not, however, take into account that such a medical examination has its limitations. In many European countries such a medical examination is conducted through bone x-rays. Existing bone directories are largely based on the physical measurements of white people and neglect the impact of ethnic, geographical, social, environmental and nutritional factors<sup>348</sup>.

Although the Resolution lays down some good provisions for the improvement of the situation of unaccompanied minors in the EU, there are also provisions which can lead to abuses of children's rights in Member States. For example, Member States may place unaccompanied minors aged 16 or above in reception centres for adult asylum seekers and they may, in accordance with their national legislation and practice, refuse admission at the frontier to unaccompanied minors in particular if they are without the required documentation and authorisation<sup>349</sup>.

However, the major obstacle to this Resolution is that Member States have inadequately implemented the provisions. This can be seen by the disparities in treatment and procedure between Member States and the general inadequacies of policy towards separated children<sup>350</sup>.

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<sup>346</sup> Article 4(5)(b) of the Resolution on unaccompanied minors.

<sup>347</sup> Article 3(5), 3(6) and 3(7) of the Resolution on unaccompanied minors.

<sup>348</sup> Human Right Watch, *Arbitrary age determination procedures*, at <http://www.staginghrw.org/reports/2002/spain-morocco/spnmorc0402-03.htm>, last visited May 2003.

<sup>349</sup> Article 2(1) of the Resolution on unaccompanied minors.

**6.5.3: 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**

This Proposal was difficult to establish since the legal terms and practice are different and not adequately defined in all the Member States. It was difficult to find consensus even at the national level<sup>351</sup>. The Proposal lays down the common interpretation of the criteria for the application of the refugee definition of the 1951 UN Refugee Convention. Unfortunately, this means that in many cases the Commission has adopted the standards of the lowest common denominator.

The Proposal also has some positive aspects for children. The best interest of the child should be a primary consideration of Member States when implementing the Directive and the proposal contains special provisions for the protection of unaccompanied minors. A very positive aspect is the fact that the Proposal acknowledges the importance of recognising child-specific forms of human rights violations and persecution<sup>352</sup>. Further, Member States should also take into account a child's age and maturity and the fact that children may manifest their fears differently from adults.

Article 28 of the Proposal is devoted to the specific needs of unaccompanied minors. This Article requires Member States to provide unaccompanied minors with the necessary representation and housing. Staff working with these minors should receive appropriate training on the children's needs.

The Proposal also recognises the importance of providing children with education and appropriate medical care. Article 27(3) states that "minors are often the victims of many specific forms of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or suffer from armed conflict. Member States are required to provide minors that have been victimised with rehabilitation services, appropriate mental health care and qualified psycho-social counselling, when it is necessary". This is important for street children coming to Europe because they have suffered significantly from all kinds of abuse and neglect.

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<sup>350</sup> S. Ruxton, *A Programme for Action*, p.20.

<sup>351</sup> Ibid, p.31.

<sup>352</sup> Proposal for a Council Directive on minimum standards for status as refugees, Chapter II, Article7(d).

**6.5.4:** Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status<sup>353</sup>

The Proposal does not create a common procedure but sets the rules to align Member States' legislation by the same standards. The Commission drafted this Proposal because for the harmonisation of asylum procedures it is essential to ensure that regardless of where an asylum claim is lodged the applicant will have a fair, humane and uniform chance of recognition as a refugee<sup>354</sup>.

The Proposal includes some important provisions for separated children. Article 10 introduces the necessary additional procedural guarantees for unaccompanied minors. Unaccompanied minors should as a minimum be assisted by a legal guardian or advisor in the asylum procedure. The legal guardian must be appointed as soon as possible, which means that this person must be able to help the unaccompanied minor he represents to prepare for the personal interview on the admissibility and/or substance of the asylum application. The legal guardian or adviser must have the opportunity to be present during the interview. These are very important provisions because the first interview in an asylum procedure is many times essential for the continuation of the process.

Article 10(3) lays down two minimum standards with respect to medical examinations to determine the age of unaccompanied minors. "The methods should be safe and respect human dignity and un accompanied minor that is to undergo this examination should be properly informed about it in a language he understands".

Article 10 is the only provision which specifically mentions children. Of course the other provisions are also applicable to unaccompanied minors but minors might have other needs than adults. It is important to keep in mind the best interest of children and recognise that they require special attention.

The attempts to harmonise the asylum procedures within the EU are positive. A common system and interpretation would improve the transparency and clarity of the asylum procedure in the EU. This might also lead to a better division of asylum seekers over Europe; asylum seekers would get the same treatment everywhere and may not feel the need to travel to the most 'liberal' country. The asylum procedures and especially the interpretation of the

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<sup>353</sup> Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal C 062 E, 27 February 2001, p.0231-0242.

<sup>354</sup> S. Ruxton, *A Programme for Action*, p.19.

requirements of the 1951 UN Refugee Convention are still very diverse in the different Member States which leads to different decisions in similar cases. So there is the need for a common asylum policy.

More and more unaccompanied minors are travelling to Europe in order to seek protection. These children are extremely vulnerable and attention should be given to their special needs. The policy towards unaccompanied minors in the different EU Member States need to be improved. There are still too many problems within the systems and children's rights are violated during the process<sup>355</sup>. The EU harmonisation process could be a good tool to address these issues. Unfortunately, the EU Commission has not focused on the issue of refugee children when drafting the legislation.

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<sup>355</sup> See section 6.1.3, 6.2.3, 6.3.3, 6.4.3 of this paper describing briefly the policy towards unaccompanied minors in the UK, The Netherlands, Germany and Spain identifying the main problems.

## **7: Conclusion:**

### **Street Children**

An estimated 100 million children live on the streets and the number is only growing. These children are exposed to all kinds of danger. Children living on the streets lack any supervision by adults which makes them easy targets for exploitation. Many children have already been sexually or psychically abused by a relative before they end up on the streets.

Many times, street children do not have enough food, adequate shelter or access to health facilities. In many countries, the government who are supposed to help them, treats them as nuisance and criminals. The biggest fear street children have are police officers and private security guards. Street children are tortured, beaten, sexual abused and arbitrarily detained on a regularly basis. This treatment can be identified in several countries all around the world. The treatment street children endure is not region nor religion related; it has to do with the view many individuals have of these children. The public view of street children in many countries is overwhelmingly negative.

The lifestyles street children are forced to live and the treatment they receive, violates their most fundamental human rights such as the right to an adequate standard of living, right to education, right to life, right to freedom from torture. The list of human rights violations of the rights of street children just goes on and on. This is a good indication that the situation street children are in is very serious and that it should be dealt with in an effective way. So far initiatives by non-governmental organisations, such as Casa Alianza, and a verdict in favour of street children by the Inter-American Court of Human Rights have not helped extensively.

### **Recommendations:**

- *Governments must start taking responsibility and stop the violence towards street children. States are obliged to comply with international rules especially those they are a Party to. This also means that street children must have access to legal procedures. Legal mechanisms must be made available to street children and be more effective.*
- *Organisations working with and for street children should develop programmes to educate people about the difficulties the children face. Public awareness programmes educating people about the fate of street children could improve the image the children enjoy. Nowadays at best many individuals do not care about the fate of these children, at worst they target and harass the children which have resulted into the death of many street children. Changing the*



*negative image of street children would make the legal mechanisms more effective and stop the impunity perpetrators nowadays enjoy.*

- *Governments and international organisations should make funds available to support these public awareness programmes.*

## **Asylum Claims**

The most important international instrument for persons seeking refugee is the 1951 UN Refugee Convention and the 1967 Protocol relating to the Status of Refugees. In recent years, the number of persons coming to the EU Member States seeking refugee has grown significantly<sup>356</sup>. Many EU Member States have been interpreting the requirements as laid down in Article 1 of the 1951 UN Refugee Convention very strict. But even in countries where the requirements are interpreted very strictly, street children fulfil the requirements under the 1951 UN Refugee Convention.

The term well-founded fear has objective and subjective elements which need to be assessed on a case-by-case basis. In the case of street children, the objective elements can easily be established through country reports of organisations such as Amnesty International and Human Rights Watch. Also the Committee on the Rights of the Child has for many countries expressed its concern about the treatment street children receive. The subjective elements refers to a person's state of mind. From Chapter 3 of this paper, we can conclude that most street children will have a well-founded fear because of the dangers they and other street children face in the form of abuse and violent attacks.

Around the world the same habits, lifestyles and treatment street children endure can be identified. Street children stand apart as a distinct social category both in their own minds and that of the public. Both the UNHCR and the EU have explained what should be understood as membership of a particular social group. Street children certainly fall within these descriptions and definitions. In the US and Canada immigration judges have already recognised street children as a particular social group.

In the case of street children, several persecutors can be identified, such as children's parents in case of domestic violence and abuse, police officers and other individuals who attack street children. Governments in many countries are unwilling to protect children from the abuse they endure within their family and they also do not stop the violence on the streets.

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<sup>356</sup> According to the U.S. Committee for Refugees "World Refugee Survey 2002", there were 14,900,000 refugees and asylum seekers worldwide as of December 31, 2002. Europe hosted 972,800 refugees and asylum seekers as of that date, amounting to only 15 per cent of the worldwide number. The World Refugee

The violence is even encouraged which can be seen from the impunity persons enjoy for the attacks on street children.

Street children do not have an internal flight alternative. The phenomenon of street children is mainly seen in the big cities of countries. The treatment of street children is not different in the several cities. The children do not have family to rely on. They are either abandoned, have faced abuse or their family can simply not take care of them and protect them. In rural areas these children would not be able to make it on their own.

### **Recommendations:**

- *The best interest of a child should always be taken into account when dealing with children's asylum claims.*
- *Asylum authorities in the EU Member States must always keep in mind that children are more vulnerable than adults. Children may assess their fears differently.*
- *Street children must be recognised as a particular social group in Europe.*
- *EU Member States must recognise non-state actors as agents of persecution even in cases where there is no or no effective government, especially because then persons are vulnerable. Nowadays, more and more non-state actors are identified as persecutors.*
- *Internal flight alternative should only be accepted in the case of children when there is a safe area where the child is free from persecution and where there is adequate care available. This means there should be enough food, shelter, medical facilities and that the child is taken care of by appropriate guardians. A child should not have to take care of him or herself.*

### **European Union**

It is confusing that the EU Member States apply different standards. For reasons of clarity and transparency it would be better to have an uniform system within the EU.

Within the EU harmonisation some important issues are not addressed. Many EU Member States apply the notion of safe country of origin. Foreigners coming from these countries generally cannot invoke the right to asylum. Many countries on the list of safe country of origin are Eastern European countries and other countries where flagrant human rights abuses still take place. For example, in Bulgaria street children are regularly attacked by police officers and skinhead gangs<sup>357</sup>.

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Survey is available on the U.S. Committee for Refugees website at <http://www.refugees.org>.  
<sup>357</sup> See section 3.2.4. of this paper for more information.

The situation of street children forces them to flee alone to Europe making them unaccompanied minors. There are many problems relating to the treatment of these children in the EU. The problems that exist today in the policies towards unaccompanied minors are mainly the result of a lack of resources and appropriate funding and the fact that the best interest of a child does not seem to be the first priority for national authorities. In Europe the emphasise nowadays is too much on how to reduce the number of refugees in their countries.

**Recommendations:**

- *In their Proposals the EU Commission must not lay down rules using as a standard the lowest common denominator. The Commission must put their standards higher so that persons in need of protection have easier access to the help they need in Europe.*
- *The notion of safe country of origin violates the principle of non-refoulement<sup>358</sup>. Persons coming from safe countries of origin go through the accelerated asylum procedure meaning that their case is not properly assessed. Especially in the case of children this will have a devastating impact.*
- *Harmonising the unaccompanied minors policies within the EU and making sure that children's rights are not violated during the asylum procedure should be a top priority of the Member States and the EU institutions.*

Now to come back to the main question of this paper: Should street children be granted refugee status under the UN 1951 Refugee Convention? As described above, street children fulfil all the requirements under this Convention. So it is obvious that street children should be granted refugee status and all the protection that comes with this status.

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<sup>358</sup> According to Article 33 of the 1951 UN Refugee Convention, the principle of non-refoulement means that a refugee is not to be returned to a country where he or she would be at risk of persecution and where his or her life or freedom would be threatened.

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