

THE MADINA CASE AND THE PROTECTION OF THE BEST INTERESTS OF THE REFUGEE CHILDREN AT THE EUROPEAN BORDERS: A REAL PRIORITY?

INVITED

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- **ABSTRACT:** This article examines the systemic violations of refugee children's rights at the European borders, using the tragic case of Madina Hussiny, a six-year-old Afghan girl, as a central narrative. It highlights the failure of border policies and asylum procedures in prioritizing the best interests of the child, despite international legal frameworks such as the UN Convention on the Rights of the Child and UNHCR Guidelines. The study also explores the criminalization of solidarity, barriers to legal protection, and the inadequate response of national and European institutions. The article calls for a rights-based and child-focused reform of refugee reception policies in the European Union.

- **KEYWORDS:** Children's rights; refugees; human rights; European Union.

O CASO MADINA E A PROTEÇÃO DO MELHOR INTERESSE DAS CRIANÇAS REFUGIADAS NAS FRONTEIRAS EUROPEIAS: UMA PRIORIDADE REAL?

- **RESUMO:** Este artigo examina as violações sistêmicas dos direitos de crianças refugiadas nas fronteiras europeias, utilizando o caso trágico de Madina Hussiny, uma menina afegã de seis anos, como narrativa central. Destaca-se a falha das políticas de fronteira e dos procedimentos de asilo em priorizar o melhor interesse da criança, apesar dos marcos jurídicos internacionais, como a Convenção das Nações Unidas sobre os Direitos da Criança e as Diretrizes do ACNUR. O estudo também explora a criminalização da solidariedade, as barreiras à proteção jurídica e a resposta inadequada das instituições nacionais e europeias. O artigo defende uma reforma das políticas de acolhimento de refugiados na União Europeia baseada em direitos e centrada na criança.
- **PALAVRAS-CHAVE:** Direitos da criança; refugiados; direitos humanos; União Europeia.



1. Introduction

UN agencies data for the end of 2020 show that out of 82.4 million refugees in the world 35 million (42%) are children below 18 years of age and that between 2018 and 2020, an average of between 290,000 and 340,000 children were born into a refugee life per year.¹

This part of the article shortly presents the rights of a child in the context of dynamics of the EU humanitarian crisis that became visible in 2015. Furthermore, the article will portray the case of the child Madina Hussiny, whose death at the European Union borders represents the neglect of refugee child's rights which forcibly balance forces with the states' priority of border control, without questioning whether the principles of security and the principles of human rights protection must necessarily be excluded. A significant limitation of this article is that it does not portray the situation of unaccompanied minors, due to the complexity of this topic.

In 2015, more and more people started to cross the Aegean Sea between Turkey and Greek islands (Lesvos, Samos, Chios, Leros, Kos, and others) as a result of war, conflicts, terror, persecution, and poverty in their home countries, primarily Syria, Iraq, and Afghanistan. This also meant that the main passage now included the so-called 'Balkan Route' from Greece to European Union countries, besides the Mediterranean crossing from Libya to Italy.

Many people perished during these desperate journeys, including many children. Preceded by other tragedies that involved the death of people on the move, the death of little Syrian boy, Alan Kurdi – and the photography of his small body lying on the beach of the island of Kos – has marked the temporal point in which the civic groups started to mobilize into welcome initiatives more strongly and the establishment of the humanitarian corridor through Greece, North Macedonia, Bulgaria, Serbia, as well as the EU Members Croatia, Slovenia, and Austria. In the late summer of 2015, this corridor included another EU Member country, Hungary, until the closure and putting razor-wire on the state border.

At that time, the States, as well as 'ordinary' citizens – 'ordinary' here stands for the people who were simply living in or coming to the areas where the refugees were

1 UNITED NATIONS REFUGEES AGENCY (UNHCR). *Data for 2020*. Available at: <https://www.unhcr.org>. Access on: Nov. 1st, 2021.



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passing, who were not employed or recruited by any humanitarian organization, and who were voluntarily providing their support – were mostly welcoming the people on the move. The police officers would hold the refugee babies or play soccer with the children², citizens would open their homes and gardens to the people, providing them with food, water, and temporary shelter. Hungarian decision to close the border and the treatment of the people on the move was seen in a very negative way.

The transit camps were established by the states all along the route, and the civic volunteer groups were supporting the arriving people, often in collaboration with the state officers such as police, in harsh conditions of hot summer, as well as cold winters. One of the main sources of the news, initiated and done by the volunteers ‘Are You Syrious Daily Digest’, gathering the information from the informal volunteers and formal organizations on the field on the New Year’s Eve of 2015 published the news of this kind:

Around Moria camp at Lesvos refugees are sleeping outside because Frontex border officers have gone home for Christmas and the remaining officials cannot register people fast enough – however, they will not allow the refugees into the official / inner camp until they are registered. The waiting time is currently about 4 days. Thousands of people are waiting out in the cold for registration. or A 7-month-old baby’s life was lost in the Kara Tepe this morning – it seems likely that this could have been caused by overexposure and sleeping in the cold.³

These groups were not paid and often were funded on their own. The issues of security and common policies were discussed, but solidarity was (still) promoted.

More than a million people, the majority of whom were from Syria, Iraq, and Afghanistan, came to Greek shores by the end of 2015⁴. These numbers decreased significantly in 2016, following the change of governments in some of the countries on the route (such as Austria and Croatia), infamous EU-Turkey deal, which included a €6 billion commitment to Turkey in exchange for its containment of European-bound

2 Večernji (Croatian Journal). Sep.16th, 2015. Photo credit Marko Mrkonjić/PIXSELL. These scenes were common in many countries of the Balkan Route.

3 DAILY DIGEST (AYS Daily Digest). *Are You Syrious?*, Dec. 31st, 2015. Available at: <https://www.facebook.com/562503320/posts/10153292240333321/>. Access on: Nov. 1st, 2021.

4 UNITED NATIONS REFUGEE AGENCY (UNHCR). *Refugee Data Finder*. <https://www.unhcr.org/refugee-statistics/>. Access on: Nov. 1st, 2021.



asylum-seekers, and finally, the closure of the humanitarian corridor in March 2016.⁵ These numbers decreased significantly in 2016, following the change of governments in some of the countries on the route (such as Austria and Croatia), the infamous EU-Turkey deal, which included a €6 billion commitment to Turkey in exchange for its containment of European-bound asylum-seekers, and finally, the closure of the humanitarian corridor in March 2016. This, however widely opened the gates to smuggling and trafficking, as well as to detrimental practices such as pushbacks and prevention of access to international protection. It should be emphasized that this is not significant only for children – adults, especially men⁶ are most commonly subjected to border violence. The violence is often denied by the states at the EU borders, and the argument of (EU and national) borders is often used in the discussion.

According to Unicef, as of July 2017, 18,500 refugee and migrant children are estimated to be living in Greece. Among them, 2,350 are unaccompanied children. The majority of children accompanied by their parents or caregivers are under 14 years old, whereas unaccompanied and separated children are mostly 15-17 years old.⁷ In the camps, children are exposed to dangerous conditions⁸, and they cannot access formal education.

5 UNHCR reported 373,652 arrivals in 2016 – Source: UNITED NATIONS REFUGEE AGENCY (UNHCR). *Refugee Data Finder*. <https://www.unhcr.org/refugee-statistics/>. Access on: Nov. 1st, 2021.

6 AUGUSTOVÁ, K. Games, push-backs and the everyday violence at the Bosnian-Croatian border: ‘This thesis also argues that Arab Muslim men, in this context at least, are most commonly subjected to border violence due to the dominant racialized and gendered assumptions about (migrant) men of colour as dangerous and in need of violent interventions.’ AUGUSTOVÁ, K. *Games, push-backs and the everyday violence at the Bosnian-Croatian border*. Birmingham, England: Aston University – School of Languages and Social Sciences, 2021, p. 3.

7 The UNICEF data for 2017 showed that as of 18,500 refugee and migrant children were estimated to be living in Greece. Among them 2,350 were unaccompanied children. UNITED NATIONS CHILDREN’S FUND (UNICEF). *Refugee and migrant children in Greece*, 2017. UNICEF: European Union, 2017.

8 The response to the fires that have destroyed Moria Camp, the largest camp for migrants on the island on Lesbos, by Save the Children, 2020: “The fire in Moria Camp is absolutely devastating. Thousands of children have been left on the streets, without shelter, and at high risk of violence and exploitation. Unaccompanied children left the burning camp on their own and are now desperately searching for a safe place to go. They are scared, hungry, and cold. Many families have lost the few possessions they owned, and now have no food, no water, and no protection. This fire is the result of an inhumane policy that has left tens of thousands enduring dire conditions in overcrowded camps for five years – often with no access to running water or other essential services. The majority of those living in Moria come from conflict zones such as Afghanistan, Syria, and Iraq, and have experienced unimaginable suffering. They came to Europe in search of safety, but instead they ended up living in destitution. Save the Children has documented the self-harm and substance abuse that many children turn to as they lose all hope. This is not a Greek problem; it is a European problem. Now is the time for member states of the European Union (EU) to step up and bring these children to safety. The recent relocation system established by the European Commission needs to be scaled up immediately and European countries must ensure that families can finally live in dignity. This tragedy once again shows that the hotspots in Greece cannot serve as a model for the upcoming EU Migration and Asylum Pact. We cannot allow children and their families to face more suffering, fear, and detention at Europe’s borders.” RELIEFWEB. *Moria Camp: Statement on Fires That Have Destroyed Largest Camp for Migrants on Lesbos*. Available at: <https://reliefweb.int/report/greece/moria-camp-statement-fires-have-destroyed-largest-camp-migrants-lesbos>. Access on: Nov. 1st, 2021.

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Related to the time a person spends in exile, the analysis published on the *World Bank Blogs* states the following:

As of end-2018, the median duration of exile stands at 5 years, i.e., half of the refugees world-wide have spent 5 years or less in exile. The median has fluctuated widely since the end of the Cold War, in 1991, between 4 and 14 years. By contrast, the mean duration stands at 10.3 years, and has been relatively stable since the late 1990s, between 10 and 15 years. (...) In fact, a decline in the average duration of exile is typically not an improvement, but rather the consequence of a degradation of the global situation. (...) We also looked at the number of people who have spent more than five years in exile. As of end-2018, this number stands at 11.9 million. The number of protracted refugees had been remarkably stable since 1991 at 5 to 7 million throughout most of the period, before dramatically jumping in the last 3 years. For this group, the average duration of exile increases over time – largely because of the unresolved situation of Afghan refugees which pushes averages up. It is now well over 20 years.⁹

(If we assume that a refugee child could spend five years or more on the move, exposed to border violence, deprived of education (and the most vulnerable children need the services of the highest quality), or trapped in a camp, it is appropriate to ask how much do the states and the international community really care about child's right, and consequently, the future.

Finally, the article contains an analysis related to the main aspects and challenges faced by the humanitarian staffs and professionals that receive children and adolescents as refugee solicitors in the borders, focusing in the *UNHCR Guidelines on International Protection n° 8 – Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*.

2. The case of Madina Hussiny – a portray of the effects of border policies and practices

To depict the situation of refugee children, from their journey until the access to international protection in one of the safe countries, the article is focusing on the case of a six-year-old Afghan girl Madina Hussiny. The events and processes described in this

⁹ WORLD BANK BLOGS. 2019 update: *How long do refugees stay in exile? To find out, beware of averages*. Available at: <https://blogs.worldbank.org/dev4peace/2019-update-how-long-do-refugees-stay-exile-find-out-beware-averages> 1. Access on: Nov.1st, 2021.



section are related to the EU member country, Croatia. Croatia is a country at the EU borders (like Greece and Italy), and not a part of the EU Schengen zone.¹⁰

2.1 International protection system in Croatia

The asylum system in the Republic of Croatia was established in 2003 with the adoption of the Law on Asylum (Official Gazette 103/03), to harmonize with international documents and EU acquis in the field of international protection. Under the definition of a refugee in the 1951 Convention relating to the Status of Refugee, a refugee is a person unable or unwilling to return to their country of nationality “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.”¹¹

Croatia provides for three types of international protection:

- Refugee status/asylum, when a person cannot return to her country of origin because of persecution or fear of being persecuted for belonging to a particular race, religion, nationality or social group, or political beliefs.
- Subsidiary protection, when a person does not meet the conditions for refugee status but cannot return to her country due to the threat of a death penalty or execution, torture, inhuman or degrading treatment or punishment, or when there is a serious and individual danger for life as a civilian due to widespread violence as part of armed conflict.
- Temporary protection, which is approved in very specific situations (such as a mass influx of refugees), when the Government of Croatia and the Council of

¹⁰ The border-free Schengen Area guarantees free movement to more than 400 million EU citizens, along with non-EU nationals living in the EU or visiting the EU as tourists, exchange students or for business purposes (anyone legally present in the EU). Free movement of persons enables every EU citizen to travel, work and live in an EU country without special formalities. Schengen underpins this freedom by enabling citizens to move around the Schengen Area without being subject to border checks. Today, the Schengen Area encompasses most EU countries, except for Bulgaria, Croatia, Cyprus, Ireland and Romania. However, Bulgaria, Croatia and Romania are currently in the process of joining the Schengen Area and already applying the Schengen acquis to a large extent. Additionally, also the non-EU States Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Area. EUROPEAN COMMISSION. Migration and Home Affairs. *Schengen Area*. EUROPEAN COMMISSION. Migration and Home Affairs. Schengen Area. Available at: https://ec.europa.eu/home-affairs/policies/schengen-borders-and-visa/schengen-area_en. Access on: Oct. 29th, 2021.

¹¹ VLADA REPUBLIKE HRVATSKE. Ured Za Ljudska Prava I Prava Nacionalnih Manijna. *Integracija osoba kojima je odobrena međunarodna zaštita u hrvatsko društvo*. Croatian Government's Office for Human Rights and Rights of National Minorities website. Available at: <https://ljudskaprava.gov.hr/integracija-stranaca-u-hrvatsko-drustvo/643>. Access on: Oct. 29th, 2021.

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the European Union decide so. Currently, there is no decision nor possibility to obtain temporary protection.

If one does not meet conditions for granting international protection, the Ministry of Interior will a negative decision. An asylum seeker can appeal this decision by initiating an administrative dispute before the administrative court.¹²

The first international protection status in Croatia was granted in 2006, while according to Croatian MOI data, *at the end of September 2021 (since 2006), 844 asylum and 148 subsidiary protection statuses were granted*. The majority of international protection applicants in Croatia came from Afghanistan, Iraq, Iran, Turkey, and Syria. In 2020, international protection was granted to 42 people¹³, while the number of the international protection applicants in the same year was 1,932¹⁴. The Asylum Information Database Country report on Croatia states the following:

Access to the territory and to the international protection procedure remained a significant concern in 2020. The AIDA report documents information on pushback practices as reported by testimonies, NGOs, human rights bodies, UN bodies, media and other relevant actors scrutinizing the situation at the border. According to the Danish Refugee Council (DRC) and UNHCR Serbia, at least 18,400 persons have been refused access to the territory, including vulnerable groups such as families and children. This refers to 16,425 pushbacks from Croatia to Bosnia and Herzegovina (BiH) and 1,975 pushbacks from Croatia to Serbia. In many cases these incidents raise serious concerns over the level of violence and the use of force by national law enforcement authorities.¹⁵

As described at the MOI website, the procedure of seeking international protection entails the following:

- 12 UNITED NATIONS REFUGEE AGENCY (UNHCR). Help Croatia. *Types of Protection*. Available at: <https://help.unhcr.org/croatia/asylum-in-croatia/types-of-protection/>. Access on: Sep. 25th, 2021.
- 13 CROATIA. *Croatian MOI data from September 30, 2021*. Available at: https://mup.gov.hr/UserDocsImages/statistika/2021/Medjunarodna_zastita/statisticki%20pokazatelj%20trazitelja%20medunarodne%20zastite%20do%2030.9.2021..pdf. Access on: Oct 29th, 2021.
- 14 EUROPEAN COUNCIL ON REFUGEES AND EXILES (ERE). Asylum Information Database (AIDA). *Country report: Croatia, 2020*. Available at: https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-HR_2020update.pdf. Access on: Oct. 25th, 2021.
- 15 EUROPEAN COUNCIL ON REFUGEES AND EXILES (ERE). Asylum Information Database (AIDA). *Country report: Croatia, 2020*. Available at: https://asylumineurope.org/wp-content/uploads/2021/05/AIDA-HR_2020update.pdf. Access on: Oct. 25th, 2021.



an application for international protection can be lodged at the Asylum Seeker's Reception Centre, while the intention to apply for international protection may be expressed by a foreign national already during border checks at border crossing points, or any police administration/ police station or an alien's reception center, if he or she is already in the territory of the Republic of Croatia. (...) Foreign nationals who have entered the Republic of Croatia illegally, arriving directly from the territory where they suffered persecution within the meaning of the Geneva Convention and where there is a real risk that they might be exposed to serious harm upon returning to their country of origin, will not be punished for illegal entry or stay if they express their intention to apply for international protection without any delay and if they produce valid reasons for their illegal entry or stay.¹⁶

The same information is provided by UNHCR:

You must request protection/asylum immediately, as soon as you enter Croatia. It can be at the border crossing, at a police station or with the first police officer you see, or at the Reception Centre for Foreigners (Detention Centre). In exceptional cases, you can also express your intention to seek protection in the Reception Centre for Asylum Seekers. You can also request protection if you have been caught while irregularly crossing the state border or irregularly staying in Croatia.¹⁷

Furthermore, the rights of asylum seekers include:

- the right to the procedure conducted in a language that they understand
- to be informed of their rights, obligations, and the asylum procedure, as well as to be provided with legal counselling
- the right to health care
- the right to primary and secondary education
- the right to free legal aid before the administrative court of the first instance
- the right to freedom of religion

16 REPUBLIC OF CROATIA. Ministry of the Interior. *Applicants for international protection*. Available at: <https://mup.gov.hr/aliens-281621/international-protection/applicants-for-international-protection/281625>. Access on: Oct. 25th, 2021.

17 UNITED NATIONS REFUGEE AGENCY (UNHCR). *Asylum in Croatia*. Available at: <https://help.unhcr.org/croatia/asylum-in-croatia/>. Access on Sep. 30th, 2021.

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- the right to work, if after nine months from the day of their application the decision has not been adopted yet (provided that this was not the applicant's fault)
- the right to be appointed a guardian, in case the procedure involves a minor or a person without legal competence.¹⁸

With the described system and procedures based on the national and international law, including the Convention on the rights of the child, how is a story like Madina Hussiny even possible?

2.2 Pushbacks – applied policy of discouragement

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). (EU Charter of Fundamental Rights article 18)

[...]

No contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (1951 Refugee Convention, article 33 (1).

[...]

The officers asked if the group wanted to claim asylum. The group members replied that they did. The respondent described how the officers first of all said 'Ok come with us', then as the group were getting to their feet, the officers laughed at them and said 'What are you doing? Sit down. No one wants to give you asylum.' June 15, 2021, 18:00, Location: Approximately 8 km south of Zagreb, Croatia, 6 persons(s), age: 11-46 years old, from Iran. (Border Violence Monitoring Network Database of Testimonials, 2021).

18 REPUBLIC OF CROATIA. Ministry of the Interior. *Applicants for international protection*. Available at: <https://mup.gov.hr/aliens-281621/international-protection/applicants-for-international-protection/281625>. Access on: Sep. 30th, 2021.



Since the closure of the humanitarian corridor through the countries of the Western Balkans, the media, civil society, international organizations and independent volunteer groups¹⁹ started reporting on pushbacks happening at the borders of Croatia, as well as other countries such, for example Slovenia and Greece. Although pushback is not a legal term, it depicts the informal practices (and therefore different from legal procedures) usually happening at the border areas that force migrants back over the border. The pushback practices may and often involve violence, such as physical violence, offense, or theft, and impede the examination of individual circumstances in relation to asylum/international protection.²⁰

The media also reported on the testimonials by the migrants on the Balkan Route – for example, in October 2020, The Guardian reported that the ‘People on the Balkans migrant trail have allegedly been whipped, robbed and, in one case, sexually abused by members of the Croatian police’²¹.

The Croatian government has been denying any systemic illegal and/or violent practice towards the migrants at the borders. Often it was emphasized that border control is needed to achieve the political goal of Croatia entering the Schengen area (which did not happen until the present day). Furthermore, like in the reply by the Minister of the Interior Davor Božinović, in October 2018, to Dunja Mijatović, Commissioner for Human Rights of the Council of Europe²², the border protection would be used as an argument and the EU Schengen Border Code²³ for the basis of such argument.

Yet, the institutions European Union Agency for Fundamental Rights and Council of Europe, in its note from 2020²⁴ on the key safeguards of European law warns that in accordance with the Return Directive (2008/115/EC) ‘every person must receive

19 For more information, see the related reports and articles by MSF, UNHCR, ECRE, Border Violence Monitoring Network, HRW, especially in the period from 2017 onwards.

20 See for example: ‘Push-backs are a set of state measures by which refugees and migrants are forced back over a border – generally immediately after they crossed it – without consideration of their individual circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken. Push-backs violate – among other laws – the prohibition of collective expulsions stipulated in the European Convention on Human Rights.’ European Center for Constitutional and Human Rights accessed October 29, 2021.

21 THE GUARDIAN. *Croatian police accused of ‘sickening’ assaults on migrants on Balkans trail*. Available at: <https://www.theguardian.com/global-development/2020/oct/21/croatian-police-accused-of-sickening-assaults-on-migrants-on-balkans-trail-bosnia>. Access on: Oct. 29th, 2021.

22 REPUBLICA HRVATSKA. *Ministarstvo. Odgovor Povjerenici za Ljudska, Unutarnjih Poslova*. Available at: <https://mup.gov.hr/vijesti/odgovor-povjerenici-za-ljudska-prava/282415>. Access on: Oct. 30th, 2021.

23 EUROPEAN UNION LAW. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>. Access on: Oct. 28th, 2020.

24 EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS. *Fundamental rights of refugees, asylum applicants and migrants at the European borders*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf. Access on: Oct. 30th, 2021.

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an individual decision. In addition, under EU law as well as CoE law, the principle of non-refoulment forbids States to send back people who would face persecution or serious harm (...), and states that children

are extremely vulnerable and states have the obligation to protect them under Article 3 of the European Convention of Human Rights (ECHR). Such obligations take precedence over any considerations relating to the child's status as an irregular migrant. The best interests of the child must always be a primary consideration. (...) As a general principle, Member States have to take into account the specific situation of children and to ensure an adequate standard of living for the child's physical, mental, spiritual, moral and social development.²⁵

In June 2021, the EU parliamentarians Hilde Vautmans and Guy Verhofstadt raised the question of how will the European Commission tackle pushbacks, who will the Commission hold responsible for violating the principle of non-refoulment and the ban on torture and inhuman or degrading treatment at borders, and whether the Commission intends to put EU funds on hold if the Member States do not change their policies, with the following introduction:

According to an investigation by 'The Guardian', Member States have used illegal methods to push back at least 40 000 refugees and migrants since the beginning of the coronavirus pandemic. These pushbacks are reported to have resulted in 2 000 deaths. Almost half of the deportations have reportedly taken place in Croatia. Some 20 000 migrants have been pushed back in the process since the start of the pandemic. Asylum seekers trying to enter the EU from Bosnia are being forcibly pushed right back across the border by Croatian police officers; this has been going on for years. In the process, the police use methods such as kicking or beating with wooden sticks or metal bars. Often, mobile phones are destroyed, too, or asylum seekers are stripped and their clothes burned. To date, Croatia has refused to acknowledge any such events and reports.²⁶

25 EUROPEAN UNION. *Access to European Union Law*. Available at: <https://eur-lex.europa.eu/legal-content/EN/TX-?uri=celex%3A32016R0399>. Access on: Sept. 30th, 2020.

26 EUROPEAN PARLIAMENT. *Priority question for written answer to the Commission P-002890/2021, Rule 138, Subject: Pushbacks on the Croatia-Bosnia border*. Available at: https://www.europarl.europa.eu/doceo/document/P-9-2021-002890_EN.html. Access on: Oct. 30th, 2021.



In its answer²⁷ two weeks later, the Commission expressed its concern about any allegation of mistreatment of migrants at the EU's borders, with regards to impeding access to the asylum procedure, and informed about signing the agreement on the establishment of an Independent Monitoring Mechanism between the Croatian authorities and civil society representatives on 11 June 2021.

However, the international organizations such as Human Rights Watch commented on the possible impact of such monitoring mechanisms in the following way:

Croatia's example shows how Commission's proposal of monitoring alone lacks teeth. To be effective, such a mechanism should be the tripwire to hold those responsible to account, including political consequences for states like Croatia that tolerate agents brutalizing migrants. More urgently, the Commission should put Zagreb on notice and trigger legal action for breaching EU asylum law and condition border management funding to human rights compliance. Too many people have suffered unacceptable abuse for the EU to continue to look the other way.²⁸

The beginning of October 2021 has brought new developments in the story of pushbacks – in a coordinated research initiative by the news organization Lighthouse Reports, videos of Croatian police officers conducting the violent push-backs of migrants from Croatia to Bosnia and Herzegovina were published and echoed in the public.²⁹ The footage shows masked officers with the equipment typical for the Croatian police forces beating unarmed people in the woods with batons. After a few attempts of denying, the Croatian Government finally acknowledged that its police officers had participated in a violent pushback of migrants on the border with Bosnia and Herzegovina, but trying to show it as isolated incidents involving three officers, and not as a systemic practice.³⁰

27 EUROPEAN PARLIAMENT. *Answer given by Ms Johansson on behalf of the European Commission, P-002890/2021(ASW)*. Available at: https://www.europarl.europa.eu/doceo/document/P-9-2021-002890-ASW_EN.html. Access on: Oct. 30th, 2021.

28 HUMAN RIGHTS WATCH (HRW). *Violent Pushbacks on Croatia Border Require EU Action The EU Should Sanction Croatia for Violence Against Migrants*. Available at: <https://www.hrw.org/news/2020/10/29/violent-push-backs-croatia-border-require-eu-action>. Access on: Oct. 30th, 2021.

29 Lighthouse Reports. Available at: <https://twitter.com/LHreports/status/1445811911816323073>. Access on: Oct. 10th, 2021.

30 REUTERS. *Croatia confirms migrant pushback, Greece promises inquiry*. Available at: <https://www.reuters.com/world/europe/croatia-confirms-violent-migrant-pushback-border-with-bosnia-2021-10-08/>. Access on: Oct. 30th, 2021.

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As the authorities keep on working the best explanations for push-backs and saving the image of the country, the access to asylum and protection of the best interest of a child is still not the primary focus.

2.3 Death of Madina

In order to depict how what does a neglect of child's rights mean in the everyday life of refugee children the authors need to tell the real story of a real child. Therefore, here we will tell the story about the Afghan girl Madina Hussiny (sometimes spelled as Hussain or Hosseini) whose destiny seems to be written on a litmus paper for testing the protection of child's rights in the EU. At the time of writing of this article (September-October 2021), the Taliban have already made a military offensive in Afghanistan, leaving millions of people trapped in the country, while the destiny of those that managed to leave *the country* - in Iran and Pakistan, Turkey, and EU border countries, as Madina's story shows, does not ensure reaching safety³¹. In November 2021, it will be five years from the death of Madina at the Croatian-Serbian border.

Madina was a six-year-old when she died on the Croatian-Serbian border.

According to the statement Madina's family gave to the Guardian journalist, they fled Afghanistan after threats against Madina's father related to his work with the police. After moving to Kabul where they still did not feel safe, they left for Europe at the beginning of 2016 and reached the 'Balkan Route'³² a year later. In November 2017, they were in Serbia, from where they entered Croatia at the place not designated for the border control and tried to seek asylum.

Madina's brother Rashid at that time was a fifteen-year-old boy. As non-governmental associations³³ that followed the case reported, Rashid said:

31 There are around 2.5 million UNHCR-registered refugees from Afghanistan globally. The majority - 2.2 million - are in Iran and Pakistan. Source: UK PARLIAMENT. HOUSE OF COMMONS LIBRARY. *Afghanistan: Refugees and displaced people in 2021*. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9296/>. Access on: Sep. 30th, 2021.

32 *The Balkan Route*, the term that has become commonplace in the narrative on migration is sometimes defined as the corridor starting from Turkey and including Greece, North Macedonia, Serbia, and Hungary and from there to the north and west of Europe (see, for example, Prodromidou and Gkasis, 2019). The term sometimes encompasses Hungary and Bulgaria - and it is sometimes referred to as the 'so-called Balcan Route'.

33 ARE YOU SYRIOUS? Available at: <https://www.facebook.com/562503320/posts/10153292240333321/>. Access on: Nov. 1st, 2021.



We were walking through Croatia for about two hours when the police caught us and said we had to go back to Serbia. We were 8 people on that night, Nov 20th/21st. It was dark and we were tired. My mother asked if they can let us spend the night, because we were travelling with my two baby brothers one 3 years old, the other 1 year 6 months old. The police said took us to the train tracks and there was no light. No one said anything about the train, no one warned us. We didn't know. We were walking and suddenly we heard the sound of the train. We all jumped aside – all, except Madina. The train stopped, and in the light, I saw her lying with her face downwards. I went to her, raised her head and saw blood. I picked her up and took her in my hands. The police came and I sat in the police car with Madina, while the rest of the family was outside. I don't know if she was dead or alive, but I think that she was dead. After some time, the ambulance came and they took Madina. We wanted to go, my mother especially, but they didn't let us. They did not tell us where they took her at first. Then my mother went asking: Where is my baby? And we wanted to go to Zagreb to wait for news about Madina. The police told us that Madina was taken to Belgrade hospital and we decided to go to Belgrade. But when we arrived in Belgrade, we asked again, and they said that Madina was not there.

The dramatic testimony highlighted above imposes the questioning of whether States and international organizations really have children's interests as a priority and, moreover, reflected in their policies for the reception of refugees and other types of mass population displacement.

2.4 The Process

The family of little Madina, at that time still in Serbia, with the help of the attorney representing them in Croatia and migrant rights CSOs, raised criminal charges in Croatia against an unknown perpetrator³⁴ based on four criminal offenses: the criminal offense of abuse of position and authority, the criminal offense of violation of the rights of the child, the criminal offense of causing death by negligence and the criminal offense of causing severe mental pain and suffering. It is worth highlighting that the family was sent to Serbia, while Madina (or Madina's body) was taken by the Croatian institutions and that the family did not know where their daughter is or if she was alive. In December 2018 the family was still waiting for Madina's death certificate.

34 LIBERTIES. *Skupine za prava: Hrvatska je policija prekršila zakon u događajima koji su doveli do smrti djevojčice*. Available at: <https://www.liberties.eu/hr/stories/push-back/13831>. Access on: Oct 30th, 2021.



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However, in June 2018 the State Attorney's office (DORH) rejected criminal charges against the police officers responsible for Madina's death and concluded that the police officers did not commit a felony and therefore the criminal charge was rejected.

In Croatia, the Ombudsperson at that time, Ms. Lora Vidović, has warned on many occasions on migrants' complaints against the police violence, and yet, she has not received the answer from either the Ministry of Interior or from the Chief State Attorney's Office (DORH) about undertaken efficient investigations. The Ombudsperson reported it to the Committee on Human and National Minority Rights of the Croatian Parliament in October 2018. This was especially relevant in the context of the investigation of Madina's death. Namely, during the investigations, the parts of the footage documented by the police thermal video cameras made at the time of the alleged incident went missing. As mentioned at the official website of the Croatian Ombudsperson:

The Police claimed the electricity went out just at that time of the alleged incident, but the Ministry of Interior still has not answered the question as to whether they have informed and whom, on the power supply failure and why the incident was not registered in the log system. Also, since all events are noted in the registry of the thermal and camera system, in case the video was erased, there should be a log containing the name of the person that erased it, and probably also an official memo on the persons who have ordered it. In the case of the death of Madina Hussiny, the recordings were not accessible to the Ombudswoman since the Ministry of Interior claimed they were not kept. This January, the Ombudswoman has informed the Chief State Attorney (letter attached at the end of this article) regarding the circumstances of this incident as well as on all other findings on the police treatment of migrants within the context of the criminal charges filed by the family Hussiny. After the media reported on the rejection of the criminal charges, the Ombudswoman requested the information from the Chief State Attorney's Office officially but received no reply. This is why it remains unknown if all thermal video was taken into account for the needs of deciding on the rejection of the criminal charges, and the same goes for the data on movement and location of police officers through the signal from their mobile phones or other communication devices.³⁵

35 REPUBLIKA HRVATSKA. Ombudsman. *Human rights of migrants: Complaints regarding police treatment still not investigated*. Available at: <https://www.ombudsman.hr/en/human-rights-of-migrants-complaints-regarding-police-treatment-police-still-not-investigated/>. Access on: Sep 29th, 2021.



The Ombudsperson articulated clearly that as a commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms, she was denied immediate access to data, even though she is entitled to them per the Data Secrecy Act, the Ombudsman Act, and the Act on the National Preventive Mechanism, which constitutes a serious infringement of the legislation that entitles the Ombudswoman to access the data, making it impossible for her to continue the work under her mandates.³⁶

Madina's family then filed a constitutional appeal alleging that an ineffective investigation into the circumstances of Madina's death violated their constitutional rights - the right to life and the right to a fair trial. However, the Croatian Constitutional Court ruled that the constitutional rights of the family were not violated because the investigation was conducted efficiently and objectively, despite the failure to obtain the thermal camera footage. The family has sued Croatia for an ineffective investigation before the European Court of Human Rights. The Court located in Strassbourg sentenced the Case on November, 18th, 2021.



THE SIX-YEAR-OLD AFGHAN GIRL MADINA HUSSINY - PHOTO CREDITS: HASSAN QASMI

The civil society and the media in Croatia and the EU kept raising questions about Madina's death³⁷. The parliamentary question about her death and illegal *refoulement* reported by the refugees was raised in the European Parliament by the former

³⁶ Ibid.

³⁷ THE GUARDIAN. *They treated her like a dog': tragedy of the six-year-old killed at Croatian border*. Available at: <https://www.theguardian.com/world/2017/dec/08/they-treated-her-like-a-dog-tragedy-of-the-six-year-old-killed-at-croatian-border>. Access on: Oct. 30th, 2021.

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Parliamentarian Josef Weidenholzer³⁸. Nevertheless, until the present day nobody was held responsible for the death of Madina.

2.5 The Decision of the European Court of Human Rights in the Case of Madina vs. Croatia (M.H. and Others v. Croatia – Applications nos. 15670/18 and 43115/18)

On November 18th, 2021, the *European Court of Human Rights*, based in Strassbourg (France), released its decision on the mentioned case (*M.H. and Others v. Croatia – Applications nos. 15670/18 and 43115/18*)³⁹.

In this sense, the Court identified some violations of the *European Convention of Human Rights* (1950)⁴⁰, some of them unanimously, by the Croatian State.

The violations of Madina's fundamental rights, as well as of her family were recognized by the Court are as follows:

- ³⁸ February 20th, 2018, Question for written answer E-001012-18 to the Commission, Rule 130, Josef Weidenholzer (S&D): 'In its 12 February 2018 issue, the Austrian magazine *Profil* reported that six-year-old Madina Hussiny had been killed while trying to flee across the Serbian border to Croatia. She was hit by a train as her family made their way back to Serbia by order of the Croatian border police, who forced them to return. GPS data collected from their mobile phones shows that the Hussiny family were already more than a kilometre into Croatian territory. Is the Commission aware of this case? What is its response? Refugees keep reporting cases of forcible returns, or 'refoulement'. What measures can be taken to put an end to illegal refoulement?' Source: EUROPEAN PARLIAMENT. Parliamentary questions. Question for written answer E-001012-18 to the Commission Rule 130 Josef Weidenholzer (S&D). Available at: https://www.europarl.europa.eu/doceo/document/E-8-2018-001012_EN.html. Access on: September 30th, 2021. The answer was given by the European Commissioner for Migration, Home Affairs and Citizenship Dimitris Avramopoulos on behalf of the Commission was given on 24 May 2018: 'The Commission is aware of this terrible incident in which a little girl died when train hit her as her family made their way back to Serbia from the Croatian border. Croatia is responsible for the management of its border with Serbia at an external border. Under Union law, the external borders may be crossed only at border crossing points and the borders between the border crossing points are under constant surveillance. Any measures taken in this context must be proportionate and in full respect of fundamental rights. The Member States are also bound by the principle of non-refoulement and required to provide asylum-seekers the possibility to reach a border crossing point in order to allow effective access to the asylum procedure. The Commission continues to closely follow the developments along the Western Balkan route, including through continuous bi-monthly video conferences with the relevant countries. The Commission continues the dialogue with all the Member States' authorities concerning their implementation of the Common European Asylum System, including concerning allegations of third-country nationals being denied the possibility to make an application for international protection. The Commission trusts that the individual Member States will ensure that any specific allegations are subject to credible investigations according to their national law. In order to prevent such incidents to be repeated the Commission is working on replacing such irregular routes with safe and legal pathways, such as resettlement.' Source: EUROPEAN PARLIAMENT. Parliamentary Questions. Answer given by Mr Avramopoulos on behalf of the Commission Question reference: E-001012/2018. Available in https://www.europarl.europa.eu/doceo/document/E-8-2018-001012-ASW_EN.html. Accessed Sep. 30th, 2021.
- ³⁹ EUROPEAN COURT OF HUMAN RIGHTS. Multiple Violations Concerning Afghan Family Whose Daughter Died at Croatian Border. Available at file:///C:/Users/Flavio/Downloads/Judgment%20M.H.%20and%20Others%20v.%20Croatia%20-%20Multiple%20violations%20concerning%20Afghan%20family%20whose%20daughter%20died%20at%20Croatian%20border%20%20(1).pdf. Access on: Nov. 18th, 2021.
- ⁴⁰ EUROPEAN COURT OF HUMAN RIGHTS. *European Convention on Human Rights*. Available at: https://www.echr.coe.int/documents/convention_eng.pdf. Access on: Nov. 18th, 2021.



- I - Violation of the *Right to Life* (article 2), unanimously;
- II - Violation of the *Prohibition of Inhuman and Degraded Treatment* (article 3) in respect of the applicant children, by six votes to one;
- III - Violation of the *Right to Security and Liberty* in respect of all the Applicants (article 5, §1°);
- IV - Violation of the *Prohibition of Collective Expulsion of Aliens* in respect to the Applicant mother and her five children (Protocol n°4, article 4);
- V - Violation of the *Right to Individual Petition* (article 34), in respect to all the Applicants.

In its decision, the Court established that⁴¹:

The case concerned the death of a six-year-old Afghan child, MAD.H., who was hit by a train after allegedly having been denied the opportunity to seek asylum by the Croatian authorities and ordered to return to Serbia via the tracks. It also concerned, in particular, the applicants' detention while seeking international protection. The Court found in particular that the investigation into the death had been ineffective, that the applicant children's detention had amounted to ill-treatment, and that the decisions around the applicants' detention had not been dealt with diligently. It also held that some of the applicants had suffered a collective expulsion from Croatia, and that the State had hindered the effective exercise of the applicants' right of individual application by restricting access to their lawyer among other things.

Finally, the Court held that Croatia was to pay the applicants 40,000 euros (EUR) non-pecuniary damage and EUR 16,700 in respect of costs and expenses.⁴²

41 EUROPEAN COURT OF HUMAN RIGHTS. *Multiple Violations Concerning Afghan Family Whose Daughter Died at Croatian Border*. Available at: [file:///C:/Users/Flavio/Downloads/Judgment%20M.H.%20and%20Others%20v.%20Croatia%20-%20Multiple%20violations%20concerning%20Afghan%20family%20whose%20daughter%20died%20at%20Croatian%20border%20%20\(1\).pdf](file:///C:/Users/Flavio/Downloads/Judgment%20M.H.%20and%20Others%20v.%20Croatia%20-%20Multiple%20violations%20concerning%20Afghan%20family%20whose%20daughter%20died%20at%20Croatian%20border%20%20(1).pdf). Access on: Nov. 18th, 2021.

42 EUROPEAN COURT OF HUMAN RIGHTS. *Multiple Violations Concerning Afghan Family Whose Daughter Died at Croatian Border*. Available at: [file:///C:/Users/Flavio/Downloads/Judgment%20M.H.%20and%20Others%20v.%20Croatia%20-%20Multiple%20violations%20concerning%20Afghan%20family%20whose%20daughter%20died%20at%20Croatian%20border%20%20\(1\).pdf](file:///C:/Users/Flavio/Downloads/Judgment%20M.H.%20and%20Others%20v.%20Croatia%20-%20Multiple%20violations%20concerning%20Afghan%20family%20whose%20daughter%20died%20at%20Croatian%20border%20%20(1).pdf). Access on: Nov. 18th, 2021.

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3. Access to Asylum and Charges Against Volunteers – The Criminalization of Solidarity

However, this was not the end of Madina's family story, which continued in the context of the non-refoulment principle. After the death of their daughter, and especially cruel circumstances created around this tragic event, her family tried again to cross the border several times in the early spring of 2018, and to apply for asylum but were pushed back, as reported by the Croatian NGOs⁴³.

Finally, on the night of March 21st, 2018, the family managed to seek asylum in Croatia, in presence of NGO 'Are You Syrious' volunteer, Dragan Umičević. They contacted the NGO informing them that they are in Croatian territory and want to seek asylum. As Umičević was the closest to their location, he went to the location nearby to monitor the process of seeking asylum.

The volunteer stated that during the conditions of the night blizzard the police officers permitted him to flash with the car lights towards the anticipated location of the asylum seekers and that:

In the group of 14 people there were 11 minors, including some very young children. There was a storm, they were frozen, wet, worn out. At the border, I contacted the police, explained the situation, and acted in cooperation with them. It would not have been possible to do otherwise. When the refugees arrived, the police told me I could go home, but I preferred to take them to the police station to make sure that their asylum application was presented. After an informal interview, during which no accusation against me was advanced, I left.⁴⁴

43 'Only three months after the horrific death of the expelled six-year-old girl Madina, for whom no one in Croatia has yet been held accountable, her family is once again exposed to illegal and cruel treatment by the Croatian state. On the night of March 8, a 17-year-old girl sent us a disturbing call for help. She informed us that her family, together with another refugee family, was in Croatia, near the village of Strošinci. She reported that they were hungry and cold and that they wanted to seek asylum in our country. In the group of 19 people, there were 11 children, including two small babies. They asked us to contact the police on their behalf and inform them of their intention to seek asylum in the Republic of Croatia. When we asked them for their names, we realized that it was the family of little Madina, which they confirmed to us in a later conversation. We informed the competent police station (by phone and e-mail), as well as (by e-mail) the UNHCR, the Croatian Law Center, and the Ombudsman about their location, identity, and condition. Although Madina's family feared meeting with the police due to an understandable fear of deportation, realizing that this was the only way to seek asylum in the Republic of Croatia, they approached the police officers on patrol and said they wanted to seek asylum. According to the family, instead of responding to a request to call for medical help for children and providing opportunities to seek international help, they were ridiculed for mentioning calls to the competent institutions, searching, and detailed review of the contents of their mobile phones, and later deportation. It is particularly scandalous that the expulsion took place in a similar way to the night their six-year-old sister was killed in a train crash: both families were forced to return to Serbia with their young children. (...) Source: ARE YOU SYRIOUS NGO. Available at: <https://www.facebook.com>, posted on March 12, 2018.

44 OSSERVATORIO BALCANI E CAUCASO TRANSEUROPA. Croatia, Criminalisation of Solidarity. Available at: <https://www.balcanicaucasos.org/eng/Areas/Croatia/Croatia-criminalisation-of-solidarity-190998>. Access on: Sep. 28th, 2021.



Several weeks after the event the volunteer was charged for assisting the group of Afghan refugees to enter Croatia illegally from Serbia.

The Misdemeanour Court found him guilty of “negligence without intent” and claimed that the volunteer should have presumed that the family was maybe not in Croatia, even though the family shared three GPS locations with the NGO. The sentence included a fine of over 8,000 Euros, yet the prosecution had requested a fine of 42,000 Euros, two months in prison for the volunteer, and the ban on the activity of the NGO, which was not a subject of the legal proceeding. The volunteer has appealed the verdict before the higher court, yet at the moment of writing this article the outcome of the process is still pending.⁴⁵

This case was the first case of judicial proceeding against volunteers helping refugees in Croatia - there are many other examples of the trend named *criminalization of solidarity*, which encompasses not only the legal proceedings but also other forms of ‘policing of people who help migrants, including through search and rescue operations, reception activities and the provision of food, housing, and services. In particular, people helping migrants, including lifeguards, journalists, priests, volunteers, and NGOs, have been portrayed and investigated as criminals.’⁴⁶ The trend can be noticed in various European countries, including Greece, Italy, France, and others - as of December 2019, the ReSOMA network has mapped 171 individuals criminalized in 13 EU Member States. As stated in the study by 2018 the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, such ‘policing humanitarianism negatively affects EU citizens’ rights - such as the freedom of assembly, freedom of speech and freedom of conscience. When civil society is effectively silenced and its accountability role undermined, policies to combat migrant smuggling may be overused and give rise to serious breaches of the EU’s founding values, notably the rule of law, democracy and fundamental rights.’⁴⁷ Going back to the Croatian case, it is important to mention that about the same period (April 2018), The NGOs included

45 MEDIUM. *AYS Special 2019/2020: On trial for saving lives – Criminalization of solidarity*. Available at: <https://medium.com/are-you-syrious/ays-special-2019-2020-on-trial-for-saving-lives-criminalization-of-solidarity-d569fdffe50a>. Access on: Sep. 28th, 2021.

46 RESEARCH SOCIAL PLATFORM ON MIGRATION (ReSOMA). *The criminalisation of solidarity in Europe*. Available at: <https://www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf>. Access on: Nov. 1st, 2021.

47 COMMITTEES EUROPEAN PARLIAMENT. Policy Department for Citizens’ Rights and Constitutional Affairs, European Union, 2018. *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*. Available at: <http://www.europarl.europa.eu/supporting-analyses>. Access on: Nov. 1st, 2021.

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in the case shared the police went to the houses of their activists, requesting them to attend informational talks at the police station, scheduled at the same time as the press conference on the development of the situation of Madina's family.

There was another element of the story development. The usual process after expressing the intention to seek asylum in Croatia is to be transferred to the centers for asylum seekers in the Croatian capital, Zagreb, or nearby town Kutina. However, the family was detained at the detention center in Tovarnik, near the Croatian-Serbian border. According to the NGO Center for Peace Studies, they were held in three separate rooms and were only able to see each other during meals. They also did not have any information about their case and they could not communicate with their attorney. The family's lawyer has filed a constitutional complaint and requested the European Court of Human Rights to take a temporary measure to release the family. The Court has issued the measure seeking adequate conditions for the family, but the family was held in the detention for another two months, in prison-like conditions. In June 2018, the family was finally released from the detention center and moved to the asylum seekers center. Very soon they left Croatia.

4. Specificities of the Assessment on the Status of Children and Adolescents as Refugees – Guidelines on International Protection no. 08 of UNHCR

The situation analyzed and proposed by this research involves the field experience in Croatia, one of the main countries that constitutes routes for people who flee their homeland for reasons like political, national, religious and ethno-racial persecution, as well as imminent risks such as sexual exploitation, slave work⁴⁸, human trafficking among other serious threats to which refugee children are subjected.

⁴⁸ The International Labor Organization reports that "...research jointly developed by the International Labor Organization (ILO) and the Walk Free Foundation, in partnership with the International Organization for Migration (IOM), has revealed the true scale of modern slavery around the world. The data, released during the United Nations General Assembly, shows that more than 40 million people worldwide were victims of modern slavery in 2016. The ILO also released an estimate related to child labor, which confirms that around 152 million children, aged between 5 and 17, were subject to child labor. The new estimates also show that women and girls are disproportionately affected by modern slavery, representing almost 29 million or 71 percent of the general total. Women represent 99 percent of forced labor victims in the commercial sex industry and 84 percent of forced marriages..." INTERNATIONAL LABOR ORGANIZATION (ILO). *Modern slavery and child labor 40 million in modern slavery and 152 million in child labor around the world*. Available at: https://www.ilo.org/global/about-the-ilo/news-room/news/WCMS_574717/lang-en/index.htm. Access on: Oct 25th, 2021.



The search for a dignified and safer life in European countries, especially in Germany, intensified with the Syrian war that began on March 15th, 2015, as well as various conflicts in Africa and more recently the Taliban's resumption of power in Afghanistan, has made the Balkans and its coastline (Adriatic Sea) an important corridor for massive populations who move towards the heart of Western Europe.

It should be noted that some European Governments have been experiencing a resurgence of xenophobia and racism, driven by the spread of fear and hatred towards refugees, usually seen as a threat to their socioeconomic stability, their culture and their way of life, a feeling that usually affects displaced persons from Latin America, Africa, Asia and the Middle East. Countries like Greece, Albania, Hungary, Italy, among others, the first ones on the European continent to be affected by displaced persons, immigrants and refugees (in the present work the focus is on refugees), had been forced to create refugee camps, many of which were precariously set up. As a consequence, it is not uncommon to hear about fires destroying these camps, as occurred in the Moria camp in Greece in September, 2020, which left about thirteen thousand refugees without shelter, including more than four hundred children⁴⁹.

From the point of view of the dramatic situation involving refugees on European soil today, geopolitical limit in the present research, the analytical approach to the scenario of children and adolescents takes on no less tragic contours considering the specificities and high vulnerability that characterize their personal situation at the country in which they are in transit, in the refugee camps.

On the other hand, even within their own families, the minors seeking asylum can find themselves under permanent threats. Besides that, the aforementioned infants nevertheless often find themselves in a situation classified as "unaccompanied" (children separated from parents or other relatives and who are not monitored by any adult responsible for their care, according to the law or customs of their home country).

Also, petitioning children and adolescents may be separated from parents or their previous legal or customary caregivers, but not necessarily kept apart from other relatives, which places them under the classification of "separated children" according to the *Guidelines on Unaccompanied Children Seeking Refuge and the Intergenerational Guiding Principles on Unaccompanied and Separated Children* (Geneva, 2004).

49 BBC. Moria migrants: Fire destroys Greek camp leaving 13,000 without shelter. Available at: <https://www.bbc.com/news/world-europe-54082201>. Access on: Oct 25th, 2021.

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To that extent, the *Guidelines on International Protection no. 08 of the United Nations High Commissioner for Refugees* (UNHCR)⁵⁰ establishes important paths and indispensable guidelines, as will be seen. The current situation, in force in the territories of the main European countries that receive refugee populations at the first moment of their arrival in the old continent presents, with regard to children and adolescents, a substantial amount of items addressed by the mentioned set of guidelines presented by UNHCR. These guidelines involve remarks and warnings both under the substantive point of view and merit analyses related to the concrete situation of each minor refugee applicant as under procedural aspects.

4.1 Applying the Refugee Definition to Children and Adolescents. Vulnerabilities and Considerations to the Motivations of a Child Refugee Seeker

It is well known that the psychological, physical, intellectual, mental and cultural condition of a minor implies a considerable level of complexity when it is a question of applying legal guidelines in an impersonal and uniform manner. In this regard, experience has shown that reading and interpreting the narratives and reports of minors who seek to be received by other States based on the necessity of proving the existence of justified fear for their lives and their safety, in order to be considered refugees under international law, does not always lead to the best results just because of the greater vulnerability that characterizes the situation of children and adolescents in the middle of the greatest wave of massive displacement of human beings in the history of mankind, imposed by multiple and combined factors.

This way Eloisa de Souza Arruda argues that⁵¹:

Humanity has been on the move since the beginning. Some people move looking for new economic opportunities and new horizons. Others do it to escape armed conflicts, poverty, food

50 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR). *Guidelines on International Protection no 08. Refugee Applications Submitted by Children Under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Refugees Convention*. Available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9747.pdf>. Access on: Oct 25th, 2021.

51 ARRUDA, Eloisa de Souza. *A Proteção dos Direitos Humanos de Migrantes e Refugiados nas Cidades*. In: *1948-2018: 70 Anos da Declaração Universal dos Direitos Humanos*. Eloisa de Souza Arruda; Flávio de Leão Bastos Pereira (Org.). São Paulo: Imprensa Oficial do Estado (IMESP), 2018, p. 130-131.



insecurity, persecution, terrorism or obliged to leave their native places due to the adverse effects of climate change or natural disasters or other environmental factors. And many of them decide to leave their cities or their countries due to a combination of several of these reasons. In the last few years we have witnessed a human mobility that has reached unprecedented levels. More people than ever are living in a country other than the one where they were born.

The international definition for refugee involves precisely the presence of the element of *well-founded fear of persecution*⁵² from various causes and exactly at this point, the psychological structure of a child applicant usually determines that the interpretation of the presence or absence of such a requirement will depend on different perceptions, especially from the agent of the receiving country, based on his sensitivity or in the awareness of humanitarian law organizations.

If, on one side, the vulnerability of minors seeking refuge is a result of their biological condition, age, etc., on the other, the reluctant position of the Governments in dealing with such massive human displacements from nationalistic, xenophobic and racialized points of view, places children and adolescents in a context of civilization limbo, since the admission and inclusion criteria for refugee status for adults are not necessarily the same for them.

In addition to these comments, there is the abstract nature of the norms of international human rights law, which are dependent on States for them to achieve more concrete effects. International norms and laws depend on solid actions, such as public policies, such as public policies at the State level.

The situation presented in this study regarding to the field experiences currently presented in Croatia and, in general, in the Balkans and other host States, demand real support and burden sharing among European countries, ensuring the proper hosting and reception of refugee flows by destination countries. An example is the provision for sharing financial and material assistance for the resettlement of refugees (burden sharing), as defined by Helisane Mahlke⁵³:

52 The 1951 International Convention on the Status of Refugees defines the refugee situation: A refugee is any person who, owing to well-founded fears of persecution because of race, religion, nationality, membership of a particular social group or public opinion, is outside his or her country of origin and who, owing to such fears, is unable or unwilling to return to it. (MAHLKE, Helisane. *Direito Internacional dos Refugiados - Novo Paradigma Jurídico*. Belo Horizonte: Arraes Editores, 2017, p. 6). This definition is independent of the refugee applicant's age.

53 MAHLKE, Helisane, op. cit., p. 85.

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The principle of “burden sharing” derives from the 1951 Convention which, in its preamble, foresees the need to promote solidarity among States that receive refugees [...] The principle comprehends two activities: i) financial aid to countries of refugee, generally underdeveloped or developing countries, to help the maintenance of the refugees who go there, in particular to finance UNHCR activities in the country; ii) the second type is a “physical” aid [...] assisting in the dispersion and resettlement of refugees in a given area.

Experience proves that the unavailability of resources in the States that first receive the flows of migrants and refugees tends to aggravate xenophobic and racist feelings against such displaced populations. For children, it also intensifies the risks of sexual exploitation, slave labor, etc. In other words, in the same way that poverty and violence in the countries of origin generate the enslavement of children and adolescents for different purposes, the precariousness and abandonment of minors in refugee camps and frontiers can be considered an existing factor present at the root of the problem.

In this sense, the measures and care required when receiving the thousands of children and adolescents who currently reach the borderlands seeking for refuge are diverse, as much from a political, logistical, financial and legal point of view.

It can be stated, considering the UNHCR’s experience, that minors’ requests for refugee often results in misconducts by those who receive and should listen to them with a minimum degree of expertise.

So, an important point to be considered when a child applies for refuge is whether he/she belongs to a family nucleus or whether it is a child who should be individually considered. Even if alone, children and adolescents may still belong to a family from which they are separated.

The warning related to the deficiencies in handling the situation of minors seeking refuge is not always properly considered. Be noticed, for instance, that children, especially those who are very young, are not able to transmit, to vocalize and articulate in words, gestures and ideas the real risks to which they are subjected; in several on-site situations, they are not aware of what risks they are exposed to. A contextual consideration in relation to the family and its structure is therefore essential, in so far as the family itself is likely to constitute a risk, such as in cases of “selling of children” for exploitation of their labor or even sexual exploitation, violations driven by the situation of extreme poverty in which the family finds itself in the refugee camps.



As already emphasized, in order to ensure that the field professional, volunteer or active member of governmental and humanitarian assistance institutions, can be more efficient in his work of identifying the requirements for the characterization of a child's refugee status, it is mandatory to pay special attention to the context in place in the child's country of origin, as well as to consider the reality of the routes and crossings the applicant child has traveled.

By and by, it can be verified a gradual awareness on international level and also by global and regional organizations the need to protect minors. This can be seen with the publication on August 29th, 2006, of an important report by the Brazilian Professor and independent expert for the United Nations study on violence against children appointed by the Secretary-General pursuant to General Assembly resolution 57/90 of 2002, Paulo Sérgio Pinheiro, approved by the United Nations General Assembly (Res.60/231), on violence against children within the family, schools, welfare institutions, prison systems, and communities where they live⁵⁴.

Listening to children is an important factor that can make the difference in preserving their lives with dignity, since they must be considered individuals with their own rights and needs, as already assured by international law and recognized by the Executive Committee of the United Nations High Commissioner for Refugees - UNHCR. In fact, the Executive Committee has already recognized that children express their own feelings, forms and manifestations of persecution⁵⁵.

The United Nations Committee on the Rights of the Child has already expressed itself on the elements necessary for considering a child as a refugee in the following terms⁵⁶:

[...] should be evaluated in a way that consider age and gender, by looking at the motives, forms and specific manifestations of persecution experienced by children. Persecution of relatives, recruitment of minors, trafficking of children for prostitution and sexual exploitation or

54 UNITED NATIONS GENERAL ASSEMBLY. *Report of the independent expert for the United Nations study on violence against children*. Note by the Secretary-General. Available at: <https://www.refworld.org/docid/453780fe0.html>. Access on: Oct. 28th, 2021.

55 UNITED NATIONS (UN). Executive Committee. *Conclusão sobre as Crianças em Risco*. October 5th, 2007, no. 107 (LVIII) - 2007, (hereafter "Executive Committee, Conclusion no. 107"), paragraph (b)(x)(viii). Available at: <http://www.unhcr.org/refworld/docid/471897232.html>. Access on: Oct 28th, 2021.

56 UNITED NATIONS (UN). Committee on the Rights of the Child, General Comment no. 6 (2005). *Tratamento de Crianças Desacompanhadas e Separadas Fora de Seu País de Origem*. CRC/GC/2005/6, September, 2005 (hereafter, "CDC, General Comment No. 6"), 74.

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subjection to female genital mutilation, are some of the specific forms and manifestations of persecution against children that may justify recognition of refugee status, if such acts are related to the elements of the 1951 Refugee Convention. Thus, States should pay special attention to these specific forms and manifestations of persecution against children, as well as gender-based violence, in the national procedures that determine refugee status [...]

The above interpretation highlighted by the UN Committee on the Rights of the Child addresses one of the most important principles in place for the protection of children and adolescents, which is, the priority consideration of their interests, as established in article 3, item 1, of the 1989 *Convention on the Rights of the Child*⁵⁷.

It is important to emphasize the importance of the 1989 Convention for the subject now being discussed and also as a parameter for field aid actions, since it determines the obligation of States to respect and ensure the rights foreseen in the territory of each country in its respective jurisdiction, ruling out any kind of discrimination (art. 2). The right to life of refugee minors is considered inherent to their human condition and corresponds to the duty of the States-Parties of the Convention that must ensure their survival and development to the limit of their possibilities (art.6).

Just as important as the above provisions is the determination that children must have be guaranteed *the right to freely express their viewpoints to which should be guaranteed the necessary importance and weight to their points of view (art.12)*. Considering the situations that humanitarian teams face in the field with regard to children, this guideline comes to be very important.

In this context, it is to be underlined that, according to Guidelines no.08, for the protection of children and adolescents, will be considered as such, any person under the age of 18 who is the main refugee applicant, to whom the relevant procedural safeguards must be observed.

Exceptionally, such protective guidelines may be extended to over-aged persons, in the light of specific vulnerabilities, such as when the persecutions have had a negative impact on the applicant's development and psychological maturity, if compared to a child.

57 UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER. *Convention on the Rights of the Child*. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. Access on: Oct. 28th, 2021. The mentioned Convention states: *Article 3 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*



It should be stressed that the flexibility above mentioned is justified by the fact that in many countries there is a relevant imprecision in establishing and consequently identifying dates of birth and the biological age of minors, not to mention the legal, cultural and religious aspects that influence this reference. Therefore, the maintenance of the same criteria used for adult refugees, when receiving displaced children, can worsen the risks that fall upon this category of refugees, as already decided by the current *United Kingdom Refugee and Immigration Court* (former *United Kingdom Immigration Appeals Court*) case *Sarjoy Jakitay vs. Secretary of State for Home Affairs*, in the Appeal no. 12658, United Kingdom, IAT, on November 15th, 1995⁵⁸. It should also be noted, in the same sense, the *Decision V AO-02635*, by the *Immigration and Refugee Board*, on March 22nd, 2001⁵⁹.

Very young children, at very early ages, should also be heard as main refugee applicants, as already decided by the *High Court of Australia* on April 13th, 2000, in the judgment of the case *Chen Shi Hai vs. Ministry of Immigration and Multicultural Affairs*⁶⁰, since it is the right of children, even at a young age, to receive adequate guidance and instruction to exercise their safeguards, in a manner that is consistent and appropriate to their specific capabilities still under development.

In the complex context of identifying and interpreting the needs of children requesting refuge, which is not always direct and clear, given their personal situation of high vulnerability and due to the fact that their maturity is still being formed, it is also relevant to identify whether the needs of the child at risk reveals as being specifically his or if they can be included in the context of the parents' request. In this regard, both the United Nations High Commissioner for Refugees (UNHCR) and the international judicial experience provide parameters so that when it is evidenced that the family and the child have their own reasons for refuge, the child's request should be analyzed separately. To that end, *The House of Lords (Judicial Committee)* in the United Kingdom

58 UK Upper Tribunal Immigration and Asylum Chamber. [2015] UKUT 658. R (on the application of Sameda) v Secretary of State for the Home Department (statelessness; Pham [2015] UKSC 19 applied) (IJR). Available at: <https://tribunalsdecisions.service.gov.uk/utiac/2015-ukut-658>. Access on: Oct 30th, 2021.

59 UNITED NATIONS REFUGEE AGENCY (UNHCR). REFWORLD. IMMIGRATION AND REFUGEE BOARD (REFUGEE DIVISION). *Decision V AO-02635, V AO-02635*, Canada: Immigration and Refugee Board of Canada, 22 March 2001. Available at: <https://www.refworld.org/cases,IRBC,4b18dec82.html>. Access on: Oct 31st, 2021.

60 UNITED NATIONS REFUGEE AGENCY (UNHCR). REFWORLD. IMMIGRATION AND REFUGEE BOARD (REFUGEE DIVISION). *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, Australia: High Court, 13 April 2000. Available at: https://www.refworld.org/cases,AUS_HC,3ae6b6df4.html. Access on: Oct 31st, 2021.

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has already decided in case [2008] UKHL 64 when dealing with a Lebanese child who was asking for asylum⁶¹.

The New Zealand experience is also moving in the same direction in Appeals 76250 and 76251 from December 2008 and in the face of claims by refugee children from Saudi Arabia and Somalia⁶².

Field experience shows that sometimes, situations that project threats or maltreatment to adults, but that do not necessarily constitute *persecution* for purposes of granting *refugee* status, often constitute, for children, a real context of threats, well-founded fear and persecution that justify the recognition of refugee status. *The United States Department of Citizenship and Immigration Services* has already decided this in its *Guidelines for Refugee Applications* filed by children on December 10th, 1998, in which it was established that “the harm that a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution”⁶³.

Sometimes parents or guardians bring elements that point to the risks and threats that hang over the child in the country of origin and that, because of his age, he is not aware of the dangers to which he is subjected. In such cases, it must be assumed that the child has a well-founded fear, even if he is not aware of the feelings. Thus, the Federal Court of Canada has decided that “when a child’s parent or guardian has a well-founded fear of persecution against the child, the child may be presumed to have such fear, even if the he does not express or feel it”⁶⁴.

The focus of the analysis presented in this research, considering the ongoing situation in Croatia and, in general, in the Balkans and in the European Union countries that receive the flow of refugee children from Africa, Asia, and the Middle East,

61 UNITED NATIONS REFUGEE AGENCY (UNHCR). REFWORLD. IMMIGRATION AND REFUGEE BOARD (REFUGEE DIVISION). *EM (Lebanon) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2008] UKHL 64, United Kingdom: House of Lords (Judicial Committee), 22 October 2008. Available at: https://www.refworld.org/cases,GBR_HL,490058699.html. Access on: Oct 31st, 2021.

62 UNITED NATIONS REFUGEE AGENCY (UNHCR). REFWORLD. IMMIGRATION AND REFUGEE BOARD (REFUGEE DIVISION). *Refugee Appeal Nos. 76250 & 76251, Nos. 76250 & 76251*, New Zealand: Refugee Status Appeals Authority, 1 December 2008, available at: https://www.refworld.org/cases,NZL_RSAA,494f64952.html. Access on: Oct 31st, 2021.

63 UNITED STATES BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES. United States Immigration and Naturalization Service (INS). *Guidelines For Children’s Asylum Claims*. 10 December 1998, available at: <https://www.refworld.org/docid/3f8ec0574.html>. Access on: Oct 31st, 2021.

64 CANADA. Minister of Citizenship and Immigration vs. Patel, 2008 FC 747, [2009] 2 F.C.R. 196, Canada: Federal Court, 17 June 2008, available at: https://www.refworld.org/cases,CAN_FC,4a6438952.html. Access on: Oct 31st, 2021. See, also, UNITED NATIONS (UN). UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR). *Guidelines on International Protection no. 08 - Refugee Applications by Children under Articles 1(A)2 and 1(F) of the 1951 Convention and/or of the 1967 Protocol on the Status of Refugees*. Available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9747.pdf?view=1>. Access on: Oct 30th, 2021.

shows that there are countless aspects, details and also the need for adequate training and sensitization of professionals and government agents who receive and hear the requests of children and adolescents seeking refuge.

Aspects that impact the lives of mentioned infants, such as street children; their socio-economic position and, eventually, their caste of origin in their homeland; their health conditions, their education; eventual traumas imposed by sexual exploitation and abuses of all sorts; the kidnapping and recruitment of boys as *child soldiers*; disabled children; minors considered to be from a non-conventional family according to the cultural standards of the country to which they try not to return; children born of rape, including war and genocidal rape and who face discrimination; pregnant girls rejected by their own family and subjected to forced harassment and prostitution, often “sold” even over the internet, etc. are, unfortunately, common contexts and need to be considered when evaluation applications for refugee status⁶⁵.

By way as example, in the case of street children, the Inter-American Court of Human Rights has already decided, case Villagrán-Morales and others vs. Guatemala⁶⁶, that a “predominant pattern of violence against street children in Guatemala” was characterized”. This decision had been adopted the *1989 Convention on the Rights of the Child* to interpret article 19 of the *American Convention on Human Rights* (1969), recognizing the Guatemalan state’s failure to adopt the necessary measures to guarantee a dignified life for its street children, who are subjected to misery, with threats to their physical, mental and moral integrity, as well as threats to their own lives⁶⁷.

This example clearly demonstrates the need for a clear perception of the systematic context of threats that defines the situation of children and adolescents in the country of origin, even if they are not aware of it.

65 Legal categories with their own meanings. On this context see PEREIRA, Flávio de Leão Bastos, *A Violência Sexual Contra Mulheres e Meninas em Conflitos Armados e Genocídios: O Caso das Meninas Yazidis*. In: Mulher, Sociedade e Vulnerabilidade/ Patrícia Tuma Martins Bertolin, Denise Almeida de Andrade, Monica Sapucaia Machado (Org.). Erechim: Deviant, 2017, p. 157-184.

66 INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso de los “Niños de la Calle” (Villagrán Morales y otros) vs. Guatemala*. Decision of November 19th, 1999. Available at: https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_63_esp.pdf. Access on: Oct 31st, 2021.

67 UNITED NATIONS (UN). UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR). *Guidelines on International Protection No. 08 - Refugee Applications submitted by Children under Articles 1(A)2 and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*. Available at: <https://www.acnur.org/fileadmin/Documentos/BDL/2014/9747.pdf?view=1>. Access on: Oct 30th, 2021.

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5. Conclusion

Protection of the best interest of refugee children is not a priority of the states, nor is their access to fundamental rights.

If the tragic death of the child Alan Kurdi in 2015 marked the moment when the public attention and the European Union (EU) states decisions switched more towards the solidarity principle, the case of Madina Hussiny showed that this principle has stopped being relevant. Madina's story, like the stories of many other children, including the children trapped in the refugee camps at the Greek islands, or children drowned in the Mediterranean trying to escape from Lybia, shows that the *principle of the best interest of a child*, as well as *child's fundamental right of access to protection*, is not a priority of the international community and the individual states.

Instead, border protection seems to have greater weight, for whatever reason this may be, such as the lack of coherent, joint policies that would be implemented with respect for the human and child's rights, which would not exclude the security aspect. Furthermore, the practices such as push-backs and unlawful detention not only diminish the rights of a child but may harm further integration process, as well as citizens' trust towards the state system and procedures.

The latter is connected to the worrying trend of discouragement of civil activism and solidarity that we see across European countries. The charges, intimidations, and labeling the civil society organizations and individual volunteers (citizens) as smugglers in this moment of history may mean taking the last opportunity from refugee children and families. This is why in the complexities of global migration the states need to prioritize human rights, just as much as they do security.

Different reasons made more complex the challenges presented before the States and, also, before the international organizations, related to their responsibility assumed since 1945 to protect human rights in the global sphere: armed conflicts, persecutions by different reasons like political, national, racial, ethnical or religious differences and, furthermore, environmental degradation caused by global warming, deforestation and other predatory actions under the responsibility of man, by industries and under the complicity of the States themselves, with the consequent reduction in the production of food suitable for the maintenance of life, among others. Natural disasters such as the earthquakes that occurred in Haiti - Central America - (for



example, in 2010 and 2021) cannot be ruled out, either, as causes of intense flows of Haitian refugees to Brazil, which intensified in 2021.

In this sense, the principles of *protecting the best interests of children*, as well as their *fundamental right to protection*, must be part of the international agenda as a priority, under risk of jeopardizing world peace and development in the near future, a basic vision that must be the object of awareness of current and future generations so that humanity itself can reach a pacified, developed and sustainable world for present and future generations.

The *Guidelines on the International Protection n° 8 of the United Nations of the High Commissioner for Refugees of the United Nations (UNHCR)* reflects, thus, a valuable reference to be observed at the borders by the responsible and professional staffs, official authorities or not, when receiving children and adolescents refugee applicants.

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