

Children's Right to Have Rights – on the Importance of Statutory Rights for Swedish Children Living outside the Country

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1 Introduction: Whose Rights Are Protected, and by Whom?

Some 80 years ago, in 1941, Hannah Arendt fled Paris, where in addition to being an academic, writer, and political theorist, she had worked as an activist and social worker with children escaping the ongoing Nazi annihilation. Ten years later, in her book *The Origins of Totalitarianism*, she asks her now well-known question: 'Who has the right to have rights?'. Her answer is that the concept of global human rights is a paradox because these rights depend on national states' protection of a person who wants to benefit from these supposedly supra-national human rights. This paradox has been interpreted to reveal two often understated premises for enjoying rights: 'the right for one's presence and the right for one's agency to be qualified or officially recognised'.¹ States are largely at liberty to decide whom they want to protect, and to whom they want to deny rights through statutory rights.² If a person does not enjoy the protection of a state, human rights are difficult to enforce.³

This chapter explores how the right to residence and to have one's agency recognized applies for children in the detention camps in northeast Syria for former IS members. The very difficult political and legal processes of bringing home Swedish subjects from these detention camps is examined. In 2019, 70 children who were either born in Sweden or having Swedish mothers were reported to be in detention. In the following years, 18 of these children were

1 Field, S., 'Law of Peace and Children's Right to have Rights', *The International Journal of Children's Rights* 27, no. 3 (2019): 425–454.

2 Faghfour Azar, L., 'Hannah Arendt: The Right to Have Rights'. Key concepts. *Critical Legal Thinking* (2019). <https://criticallegalthinking.com/2019/07/12/hannah-arendt-right-to-have-rights>. Accessed 19 August 2021.

3 Bhabha, J., 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?', *Human Rights Quarterly* 31, no. 2 (2009): 410–451; Brittle, R., and Desmet, E., 'Thirty Years of Research on Children's Rights in the Context of Migration', *The International Journal of Children's Rights* 28, no. 1 (2020): 36–65.

reported to have left the camps and arrived in Sweden through the help of relatives.⁴ In mid-2022, between eight and 30 Swedish children are reported to be still imprisoned in the Roj camp and a few in the Al-Hol camp.⁵

The Swedish position on these children's 'right to have rights' when residing outside Sweden's national jurisdiction corresponds to the approach of other Western democratic states. European states have treated the rights of their underaged citizens in the detention camps in slightly different ways, i.e. in regard to whether children should be evacuated at all, and if so, with their mothers or alone?⁶ A common feature, however, is the hesitance to bring these children back to European states, and the uncertainty about the extent to which the children have agency independently of their parents. Another striking feature are the different positions on children's rights taken by supranational organisations such as the United Nations (UN) compared to European states, exemplified by the communications to France from the UN Committee on the Rights of the Child.⁷

In this chapter, the Swedish approach is analysed in relation to the impact of statutory rights for Swedish children inside and outside the country. The chapter first offers a brief introduction to the Swedish legal system in general terms, and continues with a discussion of human rights for children whose statutory rights are not fully recognized in terms of what is labeled here as 'a ladder to inclusion' in national jurisdiction. The contradicting views on the rights for children expressed by the United Nations and the Swedish government are then analyzed, followed by a concluding discussion on children's right to abode and to recognition of their agency.

4 Sundén, J. 'Därför kommer inte 18-barnen hem', *Svenska Dagbladet* (Stockholm, Sweden), 13 April 2021, www.svd.se/darfor-kommer-inte-is-barnen-hem. Accessed 9 August 2022.

5 Harris, G., 'Rädda barnen larmar: Barnens situation i al-Hol ohållbar', *Dagens Nyheter* (Stockholm, Sweden), 25 Mai 2022. Accessed 28 June 2022.

6 https://www.euractiv.com/section/politics/short_news/denmark-to-bring-isis-child-ren-home-but-not-mothers/ <https://yle.fi/news/3-12024840> <https://www.spiegel.de/politik/deutschland/geheim-operation-aussenministerium-holt-zehn-deutsche-is-anhaengerinnen-aus-syrien-a-21bb4119-ccaf-476f-aefe-e573b295af07> <https://www.nrk.no/nyheter/fn-ekspert-ber-norge-hente-is-barn-1.15839263> <https://www.savethechildren.org.uk/news/media-centre/press-releases/statement-call-for-British-children-to-recover-in-UK>.

7 Decision adopted by the Committee under the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communications No. 79/2019 and No. 109/2019*, (CRC/C/85/D/79/2019), (CRC/C/85/D/109/2019), 2 November 2020 (see also observations 4 February 2021 and 23 February 2022).

2 Statutory Rights of Children in Sweden Related to International Law

During the 70 years since the publication of Arendt's ground-breaking work,⁸ 'rights' have developed in number as well as depth – as human rights with an aim towards global recognition and as national statutes. Three human-rights instruments with a strong bearing on the statutory rights of children are the Charter of Fundamental Rights of the European Union (CFR), the European Convention on the Fundamental Human Rights and Freedoms (ECHR), and the United Nations Convention on the Rights of the Child (CRC).⁹ The CRC was adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

Sweden is a member of the United Nations, European Union, and the European Council. European law has increasing importance in several areas, including human rights and free movement. Preparatory work plays an important role in the interpretation of legal acts passed by the Swedish Parliament. The central preparatory works are the Government Legislative Bills and Government inquiries published as the Government Official Report Series. The latter are the results of lengthy investigations, often produced through collective work involving experts and civil servants. A Government Legislative Bill summarizes one or several Governmental Official Reports as well as the responses of a referral process among authorities and stakeholders. Substantial changes may be made in relation to the Governmental Official Report's proposal, depending on the government's political agenda or other considerations. Government Legislative Proposals are frequently used when analysing the aim and possible interpretations of a legal act.

Another feature of the Swedish legal system is the dichotomy of the court system, which consists of two main branches: general courts and general administrative courts. In contrast to neighbouring Denmark and Norway, Sweden has two general courts that issue precedents: the Supreme Court (*Högsta domstolen*), for the general courts, and the Supreme Administrative Court (*Högsta förvaltningsdomstolen*), for the general administrative courts.

Sweden ratified the CRC in 1990. This meant that although the rights of the child according to the CRC could be argued in court or administrative

8 Arendt, H., *The Origins of Totalitarianism* (New York: Harcourt Inc., 1973).

9 Dane, L., 'Europadomstolen och barnets bästa', *Förvaltningsrättslig tidskrift*, no. 2 (2015): 193–224; Grahn-Farley, M., 'Högsta domstolens rättighetspraxis från 2003 till 2015: utmaningar och möjligheter med en inkorporering av Barnkonventionen', *Europarättslig tidskrift*, no. 3 (2017): 651–669.

procedures, the CRC was arguably not applicable in court or administrative procedures with the same standing as statutes issued by the Parliament. According to the understanding of Swedish NGOs, these statutes took precedence over the CRC.

Regardless of this assertion, the Supreme Court and the Administrative Supreme Court have passed judgements based on the CRC, both before and after the incorporation of the Convention.¹⁰ Rights and concepts originating from human rights have thus found their way into national statutory rules as well. Principles that originate from the human rights sphere – mostly from the CRC – are transformed into Swedish statutory rights. This transformation started in 1997, well before the CRC was incorporated into Swedish law in 2020. However, as pointed out by Hoffman and Thorburn Stern, neither transformation nor incorporation offer a guarantee for the enforceability of children's rights.¹¹

In 1997, Sweden's Aliens Act (*utlänningslag*) and Social Services Act (*socialtjänstlag*) were amended to include Articles 3 and 12 of the CRC; this was followed in 1998 with amendments in the Parental Code (*föräldrabalken*) Chapter 6 on custody, residence, and contact. The principle of the best interests of the child in relation to compulsory care was introduced in 2003 in the Care of Young Persons Act (*lag med särskilda bestämmelser om barn och unga*). In 2009 and 2010, Articles 3 and 12 were implemented in the Health and Medical Services Act (*hälso- och sjukvårdslagen*), the Patient Act (*patientlagen*), and the Support and Service for Persons with Certain Functional Impairments Act (*lag med stöd och service till vissa funktionshindrade*). In 2011, the constitution was amended to include a specific provision for children. Chapter 1 Section 2.5 of the Instrument of Government (*regeringsformen*) now reads:¹²

10 E.g. in case NJA 2020 p. 761, the Supreme Court assessed that the best interests of the child should be investigated and assessed in extradition for (alleged) commission of a crime; the Migration Court of Appeal considered the CRC in relation to family reunification in cases MIG 2018:20 13, November 2018 and MIG 2012:3, 21 February 2012. The Supreme Court considered the CRC in case NJA 2014 p. 307 on transfer of parental responsibility to foster parents according to Chapter 6, Section 8 of the Parental Code; in case NJA 2013 p. 1143 on the Hague Convention on child abduction; in case NJA 2013 C 41 on execution of the family home; in case NJA 2006 p. 505 on adoption. The Administrative Supreme Court considered the CRC in cases HFD 2011 ref 13 and HFD 2008 ref 55 according to the Care of Young Persons Act. For approval to include court cases: Ethical Review Board (Stockholm) no. 2018/704-31/5.

11 Hoffman, S., and Stern, R. T., 'Incorporation of the UN Convention on the Rights of the Child in National Law', *The International Journal of Children's Rights* 28, no. 1 (2020): 133–156.

12 Legislative Bill 2009/10:80 *En reformerad grundlag*.

The public institutions shall promote the opportunity for all to attain participation and equality in society and for the rights of the child to be safeguarded.

This provision is not enforceable; rather, it is part of the general aims and ambitions for the governance of children in Sweden.¹³ In 2011, the principle of best interests was implemented in the Educational Act (*skollagen*). CRC Article 3 is further implemented in the Detention Act (*fängelselagen*), the Prisons Act (*fängelselagen*), the Act on a Special Representative for Children (*lag om särskild företrädare för barn*), the Act on International Child Adoption (*lag om internationella adoptioner*), and the Act on Dental Care (*tandvård*). The principle of best interests of the child was included in 2018 in the Parental Code's Chapter 5 on adoption.¹⁴

Thus, the rights of children in Sweden are found in a plurality of norms, such as statutes passed by the Parliament, EU regulations, and international law as well as decrees, guidelines, and other sources of law. As Bhabha notes, fundamental rights under international law to protection, family life, education, and healthcare have been recognized in statutory law.¹⁵ Generally, children are specified by age, and the statutory rights aim towards achieving child protection rather than participation.¹⁶ However, a key question remains: *which* children are entitled to enjoy protection from Swedish statutory rights originating from the human-rights obligation of the Swedish state?¹⁷

3 Children's Right to Equal Treatment and the Right to Life

The two CRC articles most frequently transformed into Swedish law are, as indicated above, Article 3 on the best interests of the child and Article 12 on the rights of the child to have his or her views taken into account. These are two of the four so-called general principles of the CRC. The other two general principles of the CRC – children's right to equal treatment (Article 2) and the

13 Schiratzki, J., 'Children's Right to Family Life and the Swedish Constitution'. In Haugli, T. et al., (Eds.) *Children's Constitutional rights in the Nordic Countries* (Koninklijke: Brill nv, 2020): 357–373.

14 Schiratzki, J., 'The Elusive Best Interests of the Child and the Swedish Constitution'. In Haugli, T. et al. (Eds.), *Children's Constitutional rights in the Nordic Countries* (Koninklijke: Brill NV 2020): 185–198.

15 Bhabha, J. (2009).

16 See Adami, R., Chapter 6 in this volume.

17 Moyn, S., *Human Rights and the Uses of History* (Brooklyn: Verso, 2014).

right to life (Article 6) – are seldom transformed; the reasons for this are not spelled out in the legal history.¹⁸

One explanation, however, is that right to equal treatment is covered by other legal instruments, i.e. ECHR Article 14, the EU Charter Article 21, the Instrument of Government (Chapter 2 Sections 12–13), and other statutes, notably the Discrimination Act. The right to life is protected by the Charter Article 2, and in its negative by ECHR Article 2 and the Swedish constitution (the Instrument of Government Chapter 2 Section 4), in that the death penalty is forbidden.¹⁹ Children's rights are covered by Charter Articles 24, 14, and 32.

With regard to children, the protection provided by CRC Articles 2 and 6 is stronger in its wording than the protection offered in the Charter, the ECHR, and the Swedish constitution. Article 2 CRC includes several grounds for protection that are not covered by the Charter, the Swedish constitution, or the ECHR, for example discrimination relating to the origin, beliefs, or status of the child's parent:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 6 CRC goes beyond the protection of the right to life provided in the Charter, the Constitution, and the ECHR, in that the CRC obligates the states parties to ensure the survival and development of children.

18 Legislative Bill 2017/18:186 *Incorporering av FN:s konvention om barnets rättigheter*. Swedish Government Official Reports 2016:19 *Barnkonventionen blir svensk lag*; Hanson, K. and Lundy, L., 'Does Exactly What It Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called 'General Principles' of the Convention on the Rights of the Child', *International Journal of Children's Rights* 25, no. 2 (2017): 285–306. See also Schiratzki, J., 'Clarification of Concepts – The Four General Principles of the CRC'. In Harvind, H., Schultz T., and Pedersen, A.M., (Eds.), *Children's Rights – an anthology about the impact of the Convention on the Rights of the Child in Danish law* (Copenhagen: DJOF Forlag, 2020): 59–71.

19 The right to life is protected by other international instruments ratified by Sweden. See International Covenant on Civil and Political Rights (ICCPR) Article 6.

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

As for children's right to protection against discrimination and right to life, an important consequence of the 2020 incorporation of the CRC is that these fundamental rights are now Swedish law.

The children who have most to gain from the CRC becoming statutory rights of children are those who are at risk or suffering from discrimination, or whose lives are in jeopardy. Who are these children? They are the ones whose presence and agency are questioned – or, in the words of Article 2 CRC, they are children who differ from the majority owing to their own or their parents', guardians', or families' race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth, or other status. Among these children are also those without a residence permit or what is otherwise labelled as a 'weak connection' to Swedish jurisdiction.

4 Children Considered to Have 'Weak' Connections to Swedish Jurisdiction

To understand the implications of a weak connection to Swedish jurisdiction for children's enjoyment of statutory rights under Swedish law, it is important to remember that 'jurisdiction' is a legal term with, at least two meanings.

Firstly, jurisdiction relates to a court's lawful power to adjudicate specific cases based on personal jurisdiction. For a court to have jurisdiction over someone, this person should, as a main rule, reside in that court's district.²⁰ Under *criminal law*, however, the main principle is that the court in a district where a suspected crime was committed has jurisdiction, irrespective of where the accused resides.²¹ For other legal matters, such as family law, when an adult or child has connections to several countries, the matter of which country has jurisdiction is dealt with under *international private law*. Sweden has ratified a number of international conventions regulating jurisdictional matters,

20 Or having agreed to a proceeding in the specific court, see www.law.cornell.edu/wex/jurisdiction. Accessed 28 June 2022.

21 In certain situations, Swedish courts may adjudicate crimes related to terrorism and crimes against humanity committed abroad; see Chapter 2 of the Penal Code.

relating for example to adoption, paternity, parental responsibility, and child protection.²²

Secondly, the term jurisdiction describes the *territory* over which a government or a court may lawfully exercise power. This means, for example, that a court may not execute an order for child protection in another state's territory.²³ Territorial jurisdiction has been considered by the Committee on the Rights of the Child in communications concerning the repatriation of French children held in the detention camps in the Syrian Arab Republic.²⁴

As to children's statutory rights under Swedish law, a long-standing concern regards the rights of children who are present in Sweden without having a legal right to be in the country, e.g. undocumented migrants and EU migrants.²⁵ Over time, the implementation of the CRC led to children without relevant documents becoming entitled to benefit from a number of positive rights.²⁶ Thus, asylum-seeking and undocumented children were treated more favourably than an undocumented person who had turned 18, but less favourably than a child with a residence permit. In the wake of the 2015 migration and a changing political landscape, however, resources have generally become limited.

22 Foremost Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, and from 1 August 2022 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast); hereinafter the Brussels II; the 1996 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; hereinafter the 1996 Hague Convention.

23 A possible alternative is to ask the competent authorities in that country for assistance. The Brussels II; The 1996 Hague Convention.

24 L.H. et al v France CRC/C/85/D/79/2019, CRC/C/85/109/2019. Decision on 2 November 2020.

25 See Hermansson, L. Lundberg, A., Gruber, S., Jolly, A., Lind, A., Righard, E., Scott, H., 'Firewalls; A necessary tool to enable social rights for undocumented migrants in social work', *International Social Work* 00, no. 0 (2020): 1–15; Elsrud, T., Gruber, S. Lundberg, A., *Rättssäkerheten och solidariteten – vad hände?: en antologi om mottagande av människor på flykt* (Linköping University Electronic Press, 2021); Zillén, K., *Barn i välfärdsstatens utkant, Om rätten till sjukvård för barn som är unionsmedborgare och som lever i ekonomisk utsatthet i Sverige* (Uppsala: Iustus, 2019).

26 Referring to Act on the Reception of Asylum Seekers and Others.

5 Ladder to Inclusion

For an immigrant, the association to Swedish jurisdiction can be described in a simplified manner as a ladder. The first rung represents an asylum-seeker with a right to be in the country until a decision under the Aliens Act is taken; the second rung is reached when a residence permit is granted, and the asylum-seeker is considered domiciled;²⁷ the third step is to become a Swedish citizen, for which the person may apply after three to five years of residence.

From rung two, when a residence permit is granted, the migrant is considered to have a legal connection with Sweden. From rung three, as a Swedish citizen, the subject is in principle fully protected by the constitution.

However, to fit the experiences of many migrants and in the light of recent legal developments, more rungs should be added to the theoretical three-step ladder. Firstly, rung one is to be preceded by a 'rung zero' to illustrate a procedure in which an application is rejected, but for subjective or objective reasons, the migrant is unable to leave the country; such migrants find themselves staying on without recognized connections to Swedish jurisdiction. If they remain in Sweden they may, after a fixed period of time, apply again and return to rung one – i.e. lawful presence in the country but not domiciled in the eyes of the law (although this may differ depending on the legal issue). A fourth rung can be added to distinguish between those with dual citizenship and those with only Swedish citizenship. This distinction may have bearing on children's right to protection in cross-border child-abduction cases, as two states may lawfully regard the child as a subject.

For Swedish subjects – children and adults alike – their rights are protected by the constitution. The constitutional rights of a citizen include the right to return to Sweden. For a Swedish subject abroad, the constitutionally protected right does not cease at the country's border, but it cannot be automatically used to 'get home'.²⁸ Whether or not a citizen should, in line with the views of the UN Committee for the Rights of the Child,²⁹ receive diplomatic or financial assistance to return is at the discretion of the Government. It is tempting to suggest that the decisions are influenced by the strength of the subject's legal association with Sweden compared to connections with other states.

27 In part, this development was preceded by 1970s integration policy, in which the importance of citizenship was downplayed as the importance of domicile was emphasized (Legislative Bill 1975:26). See also Schiratzki, J., *Föräldraansvar i välfärdsrätten* (Stockholm: Norstedts Juridik, 2013).

28 See www.swedenabroad.se. Accessed 4 April 2022.

29 CRC/C/85/D/79/2019, CRC/C/85/D/109/2019.

6 Swedish Children in Detention Camps in Northeast Syria

As mentioned above, in 2019, 70 Swedish children, either orphaned or with their mothers, were reported to be in held in detention camps for former members of Daesh from outside the region and who were suspected of serious crimes. In mid-2022, between eight and 30 Swedish children are reported to be still imprisoned in the detention camps in northeast Syria.³⁰ As early as March 2019, the Swedish Government – through the Minister for Justice and Migration and the Minister for Home Affairs – expressed concerns for these children:³¹

In the middle of this, there are also children who were born on the site or who were forced to follow when their parents left Sweden to join the IS. The child perspective is central to the government. However, the opportunities to act on site are limited due to the security situation. The Foreign Service's staff cannot operate in the conflict area. If a Swedish citizen were to go to a Swedish foreign service mission, Swedish foreign service missions may have the opportunity to assist with consular support. The situation for the children is complicated, both legally and in terms of security, and is further analysed. In cases where the children have already returned to Sweden, the social services must be involved, and the children's situation investigated so that appropriate efforts can be decided.

As the statement indicates, the Swedish children in the detention camps found themselves not only in detention but also in the intersection of several sub-areas of statutory rights. These include family law (regarding paternity, maternity, and parental responsibilities); public law (regarding citizenship, population registration, and issuing of passports); municipality law and social law (to identify a Swedish municipality responsible for a child protection order under the Care of Young Persons Act); and international private law and criminal law (in terms of the CRC, Articles 1–12, 14, 18–22, 24–27 and 37 are at stake here).

As stated by the Ministers, as Swedish subjects these children are in principle protected by statutory rights. All the same, the Swedish state, like several other European states, has repeatedly referred to its inability 'under the law' to repatriate Swedish subjects from the camps.

³⁰ Ferhatovic, M. 'Så många svenska kvinnor och barn har återvänt från IS i Syrien', *Dagens Nyheter* (Stockholm, Sweden), 5 March 2022.

³¹ Johansson, M. and Damberg, M., 'Komplicerad situation för IS-återvändares barn', DN-Debatt, *Dagens Nyheter* (Stockholm, Sweden) 11 March 2019.

7 UN vs. Sweden

Several calls have been made by the UN and NGOs to urge European states to repatriate their child subjects from the detention camps. These calls of the UN Special Representative for Children and Armed Conflict for immediate repatriation of all minor children to the states from which they or their parents originated proved to be a test of how far national and international child protection legislation goes to protect the rights of children of citizens who are suspected of crimes against humanity. The requests did not result in the Swedish state repatriating its subjects.

In January 2021, through the High Commissioner of Human Rights, the United Nations expressed its concern in a 26-page Joint Communication from Special Procedures.³² The communication was prompted by a 'registration and verification exercise' in the Al-Hol detention camp in June 2020. The UN, represented by 12 Special Rapporteurs and one working group, presented the concerns to the Swedish government and urged it once more to repatriate the country's underage citizens.

The Swedish response to the UN's plea amounted to this: Sweden has neither an obligation nor the capacity to repatriate its subjects because Sweden lacks jurisdiction in Syrian territory.³³ The Swedish government stated:

44. At the same time, the Government recognises the complexity of the situation and wishes to reiterate that women in the camps may have committed serious crimes, including associating with Daesh. The importance of accountability for the serious crimes committed in Syria and Iraq must be acknowledged.

The Swedish Government also suggested an alternative interpretation of the concept of jurisdiction and Sweden's legal obligations to fulfil children's rights.

32 United Nations Human Rights Council. Swedish Government Observations 210326 SP Joint Communication (AL SWE 1/2021). <https://spcommreports.ohchr.org/TmSearch/Results>. Accessed 9 August 2022. See also Holm, F. and Wistrand Johansson, E., 'Hanteringen av svenska IS-resenärer i Syrien ur folkrättsligt perspektiv', *Svensk Juristtidning* (2022): 250–277.

33 UD2021/01294, 26 March 2021. The Swedish government does not have an ambition to establish a legal mechanism to prosecute people who fought for the terrorist group Daesh on the ground in Syria and Iraq.

45. While appreciating the references to key principles of human rights law, the Government respectfully disagrees with the legal reasoning and conclusions in the Communication, in particular concerning the fundamental concept of jurisdiction and Sweden's legal obligations.

Sweden has not (yet) ratified the 3rd Optional Protocol to the Convention on the Rights of the Child on a communications procedure. Therefore, complaints regarding Sweden cannot be heard by the Committee on the Rights of the Child. However, complaints under the CRC regarding children in the camps for former IS members have been directed towards Finland and France who are signatory states to this optional protocol.³⁴ In 2019, in response to a communication to the UN Committee on the Rights of the Child, the French Government took a similar view as its Swedish counterpart regarding the scope of jurisdiction. In its decision, the Committee on the Rights of the Child states:³⁵

9.6 The Committee is being called upon to determine if the State party has competence *ratione personae* over the children detained in the camps in north-eastern Syrian Arab Republic. The Committee recalls that, under the Convention, States have the obligation to respect and ensure the rights of the children within their jurisdiction, but the Convention does not limit a State's jurisdiction to 'territory'. (...) A State may also have jurisdiction in respect of acts that are performed, or that produce effects, outside its national borders. In the migration context, the Committee has held that under the Convention, States should take extraterritorial responsibility for the protection of children who are their nationals outside their territory through child-sensitive, rights-based consular protection. In its decision on *C.E. v. Belgium*, the Committee considered that Belgium had jurisdiction to ensure the rights of a child located in Morocco who had been separated from a Belgian-Moroccan couple that had taken her in under the *kafalah* system.

34 No. 100/2019 Finland, No. 79/2019 and No. 109/2019 France.

35 *L.H. et al v. France*, communications No. 79/2019 and No. 109/2019, CRC/C/85/D/79/2019. CRC/C/85/D/109/2019 2 November 2020. https://www.ejiltalk.org/wp-content/uploads/2020/12/CRC_C_85_D_79_2019_E-1.pdf. Accessed 9 August 2022. See also https://tbiinternet.ohchr.org/Treaties/CRC/Shared%20Documents/FRA/CRC_C_89_D_77-79-109-2019_33552_F.pdf. Accessed 9 August 2022.

Based on a joint submission from a group of 31 academics, the Committee on the Rights of the Child favoured a 'flexible and child-rights focused approach to the extraterritorial application of the Convention'.³⁶ Consequently, the Committee found that a State party, in this case France, does exercise jurisdiction over minor nationals outside their territory. The Committee on the Rights of the Child thus stresses the responsibilities of a state to bring home its minor citizens. The Committee's approach has been criticized for stretching state jurisdiction and prioritizing nationality while other children are left in dire need.³⁷

In its answer to the UN, the Swedish Government has stated that as an alternative to repatriation of Swedish children detained in the camps, it will continue work to improve the humanitarian situation in northeast Syria, including the al-Hol and Roj camps. The Government stresses that consular work by Swedish authorities is ongoing in the camps and that staff of the Swedish Ministry of Foreign Affairs have made so-called 'Reports of concern' (*orosanmälan*) to the social services authorities in the relevant Swedish municipalities. It is unclear how the reports will help the detained children, as the territorial jurisdiction of Swedish municipalities is by no means more far-reaching than that of the state of Sweden; on the contrary, municipal jurisdiction is normally limited to the municipality's territory (Chapter 2 of the Social Service Act). In cross-border cases, child protection is a matter of cross-border cooperation or negotiation. In relation to the state parties to the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (HCC 1996 Child Protection Convention), the procedure is somewhat more predictable than for non-member states of this convention, such as Syria.

All the same, children who have been wrongfully taken to or detained in states that are not members of the 1996 Child Protection Convention are occasionally brought home to Sweden after negotiations with local authorities (examples include the Kurdistan Region) or expulsion. In these cases, the abducting parent may stand trial for child abduction and the child is returned

36 L.H. et al v France CRC/C/85/D/79/2019, CRC/C/85/109/2019. Decision on 2 November 2020. # 8.8, see also # 8.1–8.7.

37 Marko Milanovic, M., 'Repatriating the Children of Foreign Terrorist Fighters and the Extraterritorial Application of Human Rights' <https://www.ejiltalk.org/repatriating-the-children-of-foreign-terrorist-fighters-and-the-extraterritorial-application-of-human-rights/> November 10, 2020. Accessed 9 August 2022.

to the parent from whom the child was taken.³⁸ In other cases, children returning with their mothers are taken into compulsory care according to the Care of Young Persons Act. These care proceedings initiated by reports of concern issued by the Swedish Security Service.³⁹

8 In Conclusion: 'A Right in Its Fundamental Sense Is Power Held by the Powerless'⁴⁰

The frequently debated situation for children in the detention camp for former IS members has been analysed in order to examine the statement that, regardless of the plurality of human rights, states are largely at liberty to decide whose presence in their territories and whose agency they will recognize.⁴¹ Article 4 CRC appears to be drafted as to encourage states to be generous in the entitlement of rights for children. It provides that the states shall, within the maximum extent of their resources and within the framework of international cooperation, ensure that the rights of the child according to the CRC are implemented.

In regard to the legal argumentation described in this chapter, the right of children in the detention camps in northeast Syria to have rights – based on their Swedish nationality, Swedish citizenship, and Swedish statutory rights – has been key for bringing the children over the border and into Sweden. However, this right to have rights does not appear to have been decisive in bringing the children out of the camps: what made a difference were the steps taken by the Autonomous Administration of North and East Syria to release the Swedish children and their mothers from the camp and to expel them from Syria to Sweden, thereby forcing Swedish authorities to act once the children arrived in Sweden.

Thus, the rejection of the right of the children to remain in Syria was a key factor for the children's possibility to be present in Swedish territory. It is

38 The Court of Appeal over Skåne and Blekinge, 24 June 2021 Case B 747-21; Lund District Court, Case B 5335-14, 8 Mars 2021. In September 2021, a returned woman was detained, suspected of a serious violation of international law and a serious war crime.

39 The Administrative Court in Malmö, Case 15266-20 19 January 2021; the Administrative Court in Gothenburg, Cases 16160-20 and 16166-20 26 January 2021; the Administrative Court in Stockholm, Cases 27048-20 and 27178-20 1 February 2021; and the Administrative Court in Jönköping, Cases 1502-21 and 1503-21 3 May 2021.

40 Federle, K., 'Rights flow downhill', *The International Journal of Children's Rights* 2, no. 4 (1994): 343–368, 345.

41 Field, S.M. (2019).

questionable to what extent these children were entitled to agency in Sweden. Another question is how, in the long run, statutory rights originating from human rights could be expected help to protect children's relationships that are significant for their identity and sense of personhood.⁴²

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42 Condry, R. and Minson, S., 'Conceptualizing the effects of imprisonment on families: Collateral consequences, secondary punishment, or symbiotic harms?', *Theoretical Criminology* 25, no. 3 (2020): 540–558, 549.

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