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Finnish Children or 'Cubs of the Caliphate'?

Jurisdiction and State 'Response-ability' in Human Rights Law, Private International Law and the Finnish Child Welfare Act

Sanna Mustasaari
Postdoctoral Researcher, Faculty of Law, University of Helsinki
sanna.mustasaari@helsinki.fi

Abstract
This article examines the legal position of children of families allegedly associated with Daesh (ISIL/ISIS) who are currently detained in refugee camps in Syria. The analysis is based on a review of consular legislation, human rights obligations and the rules of the Brussels IIa Regulation as well as the 1996 Hague Child Protection Convention. The analysis suggests that the norms and rules of private international law generate content and substance for the concept of 'jurisdiction' in both international human rights conventions and the Finnish constitution. The particular perspective from which the issue is examined concerns the situation of the Finnish children who are currently held being captive in the refugee camp of Al-Hol in Syria. In particular, the article probes the issue of defining the habitual residence of a child who has been taken by his or her parents to the so-called 'Caliphate' and later captured and held in the refugee camp. It is concluded that these children are likely to be without a habitual residence and the jurisdiction to take protective measures is thus defined in national law. The article argues that under its human rights obligations as well as national norms, especially those contained within the Finnish Child Welfare Act, Finland has the legal obligation to repatriate the children, and in most cases their mothers too, from Al-Hol.

Keywords
rights of the child, obligation to protect, habitual residence, extraterritorial obligations, Al-Hol camp

1. Introduction

The camp of Al-Hol in Syria is located in the east of the Euphrates in the Al-Hasake district, about 70 km from the Syrian border with Turkey. The camp was designed for about 20,000 people, but currently holds approximately 75,000 people – most of them children – who are assumed family members of the fighters of Daesh, the terrorist organisation also known as ISIS (Islamic State in Iraq and Syria) or ISIL (Islamic State in Iraq and the Levant). The conditions in the camp are horrific: it lacks water, sanitation, food and medical support; the residents are exposed to a constant threat to their lives and to their physical and psychological security, and the situation seems only to be getting worse.[1] Since early 2019, the question

1. Doctors Without Borders, 'Syria: Women and children suffer amid poor conditions in Al Hol camp' *Doctorswithoutborders.org* (19 May 2019) <www.doctorswithoutborders.org/what-we-do/news-stories/news/syria-women-and-children-suffer-amid-poor-conditions-al-hol-camp> accessed 20 May 2019; Doctors Without Borders, 'Syria: MSF teams treat women for gunshot wounds amid violence and unrest in Al Hol camp' *Doctorswithoutborders.org* (30 September 2019) <www.doctorswithoutborders.org/what-we-do/news-stories/story/syria-msf-teams-treat-women-gunshot-wounds-amid-violence-and-unrest> accessed 30 September 2019; and International Rescue Committee, 'Data analyzed by the IRC reveals staggering health and humanitarian needs of children in Al Hol camp, Northeast Syria – urging repatriation of foreign children' (Press Release, *International Rescue Committee,* 16 September 2019) <www.rescue.org/press-release/data-analyzed-irc-reveals-staggering-health-and-humanitarian-needs-children-al-hol> accessed 7 November 2019.

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of whether Western States should assume responsibility over their citizens, especially children, detained in Al-Hol and other camps in Syria, have been subject to heated and polarised public debates. This article addresses the question through an analysis of the intersecting legal regimes of international law, private international law and national law.

Currently, the individuals in Al-Hol are not able to leave the camp without the assistance of their national governments, as the Kurdish-dominated Syrian Democratic Forces (SDF) and the local security authorities have stated that, in principle, they will hand them over only to an officially appointed representative of the receiving government. The local authorities have also refused to separate children from their mothers, which is what some States have requested, offering to repatriate only the children.[2] The Soufan Center, a company specialised in producing global security research and services, issued a report on 'the dilemma of repatriation' in July. According to the report, compared to the current situation, the security threats posed by these individuals are more manageable if they repatriated, which 'exacerbates a grievance and revenge narrative, which will only serve to perpetuate the cycle of radicalization and extremism fuelling the next phase of the fight against IS'.[3] Other experts have highlighted the impossibility of finding a solution to the situation that would eliminate all security risks.[4]

Moreover, if European countries refuse to repatriate their citizens, the SDF will be 'left with little choice but to transfer them to Iraq, where observers say they face flawed trials and draconian penalties'.[5] The children's situation is not likely to improve even when the camp closes and families are allowed to leave the camp, which is remotely and inaccessibly located in the desert; the current circumstances in Syria and Iraq are detrimental to children's welfare, and even more so for children suspected of Daesh affiliation.[6]

Although these debates are ongoing across Europe, the particular perspective from which this issue is examined in this article is the situation of the 33 Finnish children and their mothers who were captured escaping Baghouz, the final Daesh stronghold, and brought to Al-Hol. In the Finnish public debate, the issue of taking protective measures has been approached mainly from two perspectives. First, according to many discussants, the State has no jurisdiction and thus no responsibility to intervene to help the children. Second, some people have been keen to apply child welfare law to separate mothers from their children by issuing care orders and taking the children into public care.[7]

The issue of what to do with these 44 individuals has revealed a surprisingly deep and radical polarisation amongst the Finnish general public. After the Parliamentary elections

2. Timo Schwander, 'Die Pflicht zur Rückholung Deutscher aus dem vormaligen IS-Gebiet' (2019) 38(17) *Neue Zeitschrift für Verwaltungsrecht* 1260.
3. The Soufan Center, 'The Dilemma of Repatriation' *Thesoufancenter.org* (1 July 2019) <https://thesoufancenter.org/intelbrief-the-dilemma-of-repatriation/> accessed 20 September 2019.
4. Leena Malkki, a political historian and a researcher of terrorism, has emphasised that no 'zero risk' solution exists to the situation. See, for example, Katariina Taleva, 'Terrorismitutkija al-Holin naisista: "Uhkien ei tarvitse olla juuri Suomessa ollakseen Suomelle relevantteja"' ['Terrorism researcher on al-Hol's women: "Threats do not have to be in Finland to be relevant to Finland"'] *Iltalehti* (14 December 2019) <https://www.iltalehti.fi/kotimaa/a/3547f314-a202-46fb-8b9a-f6c65072355f> accessed 10 March 2020.
5. The Soufan Center (n 3).
6. Human Rights Watch, '"Everyone Must Confess": Abuses against Children Suspected of ISIS Affiliation in Iraq' *Hrw.org* (6 March 2019) <www.hrw.org/report/2019/03/06/everyone-must-confess/abuses-against-children-suspected-isis-affiliation-iraq> accessed 20 September 2019.
7. See, for example, Hanna Gråsten, 'Antti Rinne tapasi al-Holin leirillä olevien suomalaisten naisten ja lasten läheisiä – "Ymmärrän hirveän hyvin huolen"' ['Antti Rinne met Finnish women and children in the al-Hol camp – "I understand the great concern"'] *Iltalehti* (12 July 2019) <https://www.iltalehti.fi/politiikka/a/6e5140c6-99d5-4110-9da4-ade5c7555466> accessed 10 March 2020.

of 2019, the new government has taken measures to assist the return of individuals from Al-Hol. These attempts to help the children have been met with an unusual backlash, which resulted in the trial-like investigation into the Minister of Foreign Affairs, Pekka Haavisto, in the Committee of Constitutional Affairs.[8] In December 2019, Finland repatriated two orphans from Al-Hol. When the children were brought to Finland, the event was live-streamed on YouTube, with the children being recognisable in some parts of the video. Hundreds of people watched the streams and wrote derogatory comments about the children and some people urged others to capture the children. The names of the officials involved were also tracked down.[9]

Several politicians have implied that no legal obligations exist that would directly require the State to take specific actions, whereas several actors in the legal sector, such as law professors and experts in the field of child and human rights, have pleaded in public for the State to adhere to its human rights obligations and bring the individuals home from the camp before lives are lost.[10] According to the Finnish Ombudsman for Children, Finland must do all it can to ensure that the children's rights are guaranteed.[11] Moreover, the relatives of the women and children on the camp have contested the State's refusal to help through appeals to the Parliamentary Ombudsman and the Chancellor of Justice, and it appears that a communication has been filed with the UN Committee on the Rights of the Child.

According to the Finnish Constitution, as well as to international human rights such as the UN Convention on the Rights of the Child, all children are entitled to such protection and care as is necessary for their well-being. In addition to international human rights treaties, the rights of children are protected in various national laws and regulations, including child welfare and child protection norms. The obligations and competences of the State to provide protection are, however, connected to its jurisdiction. The article will begin with a review of the relevant constitutional and human rights framework as well as questions of positive obligations, the standard of due diligence and extraterritorial jurisdiction of the State. It will then move on to examine the rules of consular law and private international law regarding international child protection.

Due to the centrality of the habitual residence of the child as a connecting factor, the factors affecting the assessment of habitual residence will be examined, before turning to the possibility of applying the national child welfare rules to take protective measures concerning children who are abroad and who are potentially without a habitual residence. It is argued that the norms and rules of private international law generate content and substance for the concept of 'jurisdiction' in both international human rights conventions and the Finnish Constitution, which is why it would be useful for the children to have their situation

8. News Now Staff, 'Parliament Committee wants more information in Pekka Haavisto case' *News Now Finland* (14 January 2020) <https://newsnowfinland.fi/domestic/parliament-committee-wants-more-information-in-pekka-haavisto-case> accessed 20 January 2020.
9. YLE, 'Backlash against hunt for evacuated al-Hol kids spawns anti-racism movement' *YLE News* (30 December 2019) <https://yle.fi/uutiset/osasto/news/backlash_against_hunt_for_evacuated_al-hol_kids_spawns_anti-racism_movement/11137958> accessed 20 January 2020.
10. See, for example, Toni Selkälä, 'Konsulipalvelu, al-Hol ja päätöksenteon vaikeus' *Perustuslakiblogi* (13 December 2019) <https://perustuslakiblogi.wordpress.com/2019/12/13/toni-selkala-konsulipalvelu-al-hol-ja-paatoksenteon-vaikeus/> accessed 13 December 2019; and Suvianna Hakalehto and Virve Toivonen, 'Al-Holin leirillä olevien lasten oikeudet' *Perustuslakiblogi* (15 December 2019) <https://perustuslakiblogi.wordpress.com/2019/12/15/suvianna-hakalehto-virve-toivonen-al-holin-leirilla-olevien-lasten-oikeudet/> accessed 16 December 2019.
11. YLE, 'Relatives seek repatriation of Finnish orphans at Al-Hol refugee camp' *YLE News* (2 September 2019). <https://yle.fi/uutiset/osasto/news/relatives_seek_repatriation_of_finnish_orphans_at_al-hol_refugee_camp/10950840> accessed 3 September 2019.

assessed in the light of the Finnish Child Welfare Act, even though the 'task of child welfare in a general sense belongs to all public authorities'.[12] The article concludes with Korhonen and Selkälä's notion of State responsibility as *response-ability* – a notion that seeks to extend the idea of responsibility beyond doctrinal and formal ideas about what States are required to do to protect their citizens abroad.[13]

This article is part of a broader study that seeks to analyse the legal frameworks shaping the relationship between children and the State in transnational situations.[14] Although children of families associated with jihadism raise very particular legal issues compared to other transnational situations in child welfare, the hardships with the law that this particular group faces illustrate well the gaps in the legal framework for transnational child welfare.

2. Jurisdiction and responsibility to secure constitutional and human rights

2.1 Human rights and constitutional rights

2.1.1 Constitutional rights and the rights of the child

The women and children held captives in Al-Hol are suffering inhumane conditions and are clearly in a position in which their basic human rights are being severely breached. Such a situation raises the question of authorities' responsibility to protect the rights of these individuals.

In the public debate, the women have very often been labelled as perpetrators, terrorists and undeserving of State assistance, and politicians have voiced little if any sympathy for the families.[15] However, research suggests significant variation between individuals. The conditions under and reasons for which women travelled to the areas controlled by Daesh are not identical, and the women can neither be accurately depicted as fully dependent victims nor simply free and fully capable perpetrators.[16] While in many cases the role of the women in Daesh has been central, scholars such as Fish remind us that in many cases the use of women and children by Daesh should be viewed within the framework of human trafficking. The difficulty lies in that they 'are far from ideal victims', who 'responded to the appeals of one of the world's most hated and violent terrorist entities […] on the romantic or idealistic impression that they could participate in the construction of a pure Muslim state'.[17]

12. Tarja Pösö, 'Combatting Child Abuse in Finland: From Family to Child-centered Orientation' in Neil Gilbert, Nigel Parton and Marit Skivenes (eds), *Child Protection Systems: International Trends and Orientations* (Oxford University Press 2011) 115.
13. Outi Korhonen and Toni Selkälä, 'Theorizing responsibility' in Anne Orford and Florian Hoffmann with Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 844.
14. The project, which conducts a relational analysis of child protection and welfare in transnational contexts, is at the University of Helsinki.
15. See Sanna Mustasaari, 'Affect in the constructions of justice: "ISIS-families" in the Finnish public debate' *Onati Socio Legal Series* (forthcoming).
16. Alma Orozobekova,'Women Joining Violent Islamist Entities in Syria and Iraq: the Case of Central Asia' (forthcoming).
17. Caroline Fish, '"ISIS Brides" and State Failure to Screen for Human Trafficking in Violation of International Law and Transnational Anti-Trafficking Regimes' *Opinio Juris* (1 March 2019) <http://opiniojuris.org/2019/03/01/isis-brides-and-state-failure-to-screen-for-human-trafficking-in-violation-of-international-law-and-transnational-anti-trafficking-regimes/> accessed 2 September 2019; Caroline Fish, 'Beyond "Sex Slaves" and "Tiny Terrorists": Toward a More Nuanced Understanding of Human Trafficking Crimes Perpetrated by Da'esh' (2018) 31 *New York International Law Review* 1. See also Alma Orozobekova (n 16).

Similarly, children of families associated with Daesh are predominantly approached from a securitised perspective, with a focus on the threat these children pose to the West.[18] Capone has analysed the position of foreign children in the ranks of Daesh and argues that whereas the victim position of affiliated child soldiers is traditionally recognised, foreign children in the ranks of terrorist groups are viewed more in terms of the threat they are seen as posing to national and international security.[19]

The Executive Director of UNICEF, Henrietta Fore, urged States to take measures to protect the rights of children of foreign fighters stranded in Syria and Iraq. The children, who are their citizens or born to their nationals, should be provided with civil documentation and prevented from being or becoming stateless. The children's safe, dignified and voluntary return to and reintegration into their countries of origin should be supported.[20] Similarly, courts and human rights organisations across Europe have called for States to assume their responsibility over their citizens. For example, the French National Consultative Commission on Human Rights (CNCDH) has urged the French authorities to urgently repatriate the French children, as well as their accompanying parent, in order to safeguard the best interests of the child.[21]

In Finland, the Chancellor of Justice, Tuomas Pöysti, delivered his decision on the complaints made concerning the situation of the Finnish women and children in Al-Hol in October 2019.[22] According to Pöysti, the fundamental and human rights of the individuals in the camp, in particular the right to life guaranteed by the Constitution and the Convention on the Rights of the Child, the primacy of the best interests of the child, and the constitutional obligation to secure the human rights of the individuals all served to support the conclusion that at least the children should be repatriated, and that the Finnish authorities should take measures towards that end, within the limits of their competence.

Rights provided in national constitutions (eg Section 7 of the Finnish Constitution), as well as several human rights treaties, safeguard the rights of a person to life, personal liberty, integrity and security. Accordingly, no one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity. The personal integrity of the individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without a reason prescribed in law. In addition to their explicit content as stated in the national constitution, fundamental rights are, according to a well-established starting point, also considered to cover other human rights and thus protect the rights of the individual to at least the same extent as human rights under international treaties.[23] For example, the Finnish Constitutional Law

18. John Millock, 'After ISIL: Justice and Protection for Children in Iraq' *Journal of Middle Eastern Politics and Policy* (9 May 2018) <http://jmepp.hkspublications.org/2018/05/09/after-isil-justice-and-protection-for-children-in-iraq/> accessed 20 May 2019.
19. Francesca Capone, '"Worse" than Child Soldiers? A Critical Analysis of Foreign Children in the Ranks of ISIL' (2017) 17 *International Criminal Law Review* 161 <https://doi.org/10.1163/15718123-01701003>.
20. UNICEF, 'Protect the rights of children of foreign fighters stranded in Syria and Iraq' (Statement by UNICEF Executive Director Henrietta Fore, *UNICEF*, 21 May 2019) <www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq> accessed 20 June 2019.
21. Commission Nationale Consultative des Droits de l'Homme, 'Opinion on the French under-age nationals detained in Syrian camps' (English version, 25 September 2019) <www.cncdh.fr/sites/default/files/190924_opinion_on_french_under-age_nationals_pr_impression.pdf> accessed 10 December 2019. In light of this alarming humanitarian situation, and in the name of republican values and respect for fundamental rights, the National Consultative Commission on Human Rights (CNCDH) urges the national authorities to urgently repatriate the French children, as well as their accompanying parent, in order to safeguard the best interests of the child.
22. The Chancellor of Justice, Decision 9 October 2019, Dnro OKV/998/1/2019, OKV/1082/1/2019, OKV/1089/1/2019, OKV/1104/1/2019, OKV/1109/1/2019, OKV/1131/1/2019, OKV/1132/1/2019, OKV/1134/1/2019, OKV/1171/1/2019, OKV/1186/1/2019, OKV/1256/1/2019, OKV/1257/1/2019, OKV/1561/1/2019.
23. See, for example, Supreme Court of Finland, 30 January 2012, KKO:2012:11, § 21.

Committee has emphasised that, when several interpretations of the law are possible in a given situation, priority must be given to the interpretation that most efficiently promotes human rights.[24] Despite the fact that human rights conventions, such as the European Convention on Human Rights (ECHR) and UN Convention on the Rights of the Child (CRC), generally have the formal status of ordinary law in the Finnish legal system, these conventions have – because of their link with the Finnish Constitution and basic rights – an elevated position compared to ordinary laws.

In addition to the current horrific circumstances in the camp, most of the children brought there had already suffered trauma due to the war and various forms of abuse by Daesh. Studies document these various and severe forms of violence and abuse that children have been subjected to under the totalitarian regime of the 'Caliphate'.[25] Sexual abuse and forced marriages of very young children were common.[26]

The CRC includes several articles relevant to the circumstances of children of Daesh families. Children have the right to life (Article 6); physical and mental wellbeing, care and protection (Articles 3, 19, 36); birth registration, name and nationality (Article 7); identity (Article 8); play, leisure and culture (Article 31); and an adequate standard of living (Article 27). All of these rights are severely violated in the refugee camp and, prior to that, in the ranks of Daesh. Article 3 of the CRC obliges the State to ensure that the rights provided for in the CRC are respected and that appropriate measures are taken to protect and care for the child. According to Article 4, these measures need to be undertaken to the maximum extent of the available resources and, where needed, within the framework of international co-operation.

States that have ratified the CRC must, according to Article 19, take all appropriate legislative and administrative measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, mistreatment or exploitation, including sexual abuse. This is the case especially when children face these forms of abuse while in the care of parents (or any other person). The situation of children taken to the 'Caliphate' might also fall under Article 11 of the CRC, which provides that States' parties shall take measures to combat the illicit transfer and non-return of children abroad; and that to this end, States' parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements. Article 11 is mainly concerned with parental abductions or retentions, whereas Article 35 covers the sale and trafficking of children.[27] If Articles 11 and 35 are read together, a case could be interpreted as falling under their scope when the taking of the children abroad amounts to abuse of parental authority or there is a commercial motive.

According to Article 38, States parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict. Also, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict can be of relevance, as the implementation of this framework also concerns States of origin.[28]

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24. See, for example, Constitutional Law Committee, PeVM 10/1998 vp, p 31. See also Juha Lavapuro, *Uusi perustuslakikontrolli* (Suomalainen Lakimiesyhdistys 2010).
25. Capone (n 19); Fish, 'Beyond "Sex Slaves"' (n 17).
26. The 13-year-old daughter of a Finnish woman in Al-Hol spoke about her life in an interview with the Finnish Broadcasting Company YLE in September 2019. She had been married just before the family left Baghouz in early 2019. The marriage lasted two months, and ended when her husband was killed in battle. See Antti Kuronen, 'Äiti vei Sumeyan Suomesta Isisin alueelle tokaluokkalaisena – tyttö päätyi naimisiin 13-vuotiaana ja kertoo nyt tarinansa Ylelle' *YLE News* (23 September 2019) <https://yle.fi/uutiset/3-10984963> accessed 3 October 2019.
27. UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (UN Children's Fund, UNICEF 2007) <www.refworld.org/docid/585150624.html> accessed 2 May 2019, 143.
28. See, for example, Capone (n 19) 168.

States have the positive obligation to take preventive measures in instances of serious human rights violations and to intervene to prevent abuse and ill treatment of which the authorities have, or ought to have, knowledge.[29] The State's positive obligation under Article 3 (prohibition of torture or inhuman or degrading treatment) to protect especially vulnerable individuals is well established in the jurisprudence of the European Court of Human Rights (ECtHR), for example the *A v the United Kingdom* and *Z and Others v the United Kingdom* cases.[30] The case may fall under Article 3 when the abuse suffered by the individual fulfils the standard of torture, cruel, degrading, or inhumane treatment, and a State authority had, or should have had, knowledge of the serious risk of abuse faced by the victim.

2.1.2 The problem of jurisdiction

Even though human rights embrace a global and universalist approach to the rights of the child, States are only obligated in relation to children in their jurisdiction. For example, according to Article 2 of the CRC:

> 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. (emphasis added)

A similar reference to jurisdiction is found in the ECHR (Article 1). So the key questions we are facing are, indeed, who is within the jurisdiction of the State? And what does jurisdiction mean in this context?[31]

Importantly, jurisdiction does not mean the same thing as the territory of the State. States may, for example, possess extra-territorial obligations under international law.[32] Also the rules of domestic law may oblige authorities to assist citizens abroad. In some cases the State might have jurisdiction concerning a person present in another State, and it is often the rules of private international law that determine which norms apply in any cross-border case. In courts across Europe, for example in recent Dutch and Belgian cases,[33] claims of the women and children in Al-Hol have been quashed because the courts have been unable to find any jurisdiction through which the human rights obligations of the State could impose direct and specific responsibilities on the State towards the individuals in question. However, in some

29. Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 83; Shazia Choudhry and Jonathan Herring, *European Human Rights and Family Law* (Hart Publishing 2010).
30. *A v the United Kingdom,* no 95599/94, Reports of Judgments and Decisions 1998-VI; *Z and Others v the United Kingdom* [GC], application no 29392/95, ECHR 2001-V.
31. Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (ETO Consortium, 2013) <www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23> accessed 20 May 2019.
32. Ibid.
33. In the Netherlands, the Appellate Court in The Hague overturned a lower court's judgment, according to which the State was under an obligation to assist the return of the children. See Zack Newmark, 'Netherlands does not have to help kids trapped in Syria: Appellate Court' *NL Times* (22 November 2019) <https://nltimes.nl/2019/11/22/netherlands-help-kids-trapped-syria-appellate-court> accessed 15 December 2019. In Belgium, courts have in some cases confirmed that the State has no responsibility to assist the return. See, for example, Jacques Fierens, 'Pas d'éléments nouveaux. Rien n'a changé depuis 2018. Les enfants peuvent donc continuer à mourir dans les camps du nord-est de la Syrie' *Justice en ligne* (3 June 2019) <http://www.justice-en-ligne.be/article1189.html> accessed 15 September 2019, while in other cases such responsibility has been identified: see, for example, 'Belgium court orders repatriation of ISIS-linked family from Roj camp in Syria' *Defense Post* (31 October 2019) <https://thedefensepost.com/2019/10/31/belgium-isis-family-repatriation-roj-syria/> accessed 5 January 2020.

other cases, direct constitutional claims have been deemed possible. For example, in July 2019, the Administrative Court in Berlin (VG Berlin) ruled on a case in which a German national mother and her three children who had been in Al-Hol since January 2019 claimed a right to be repatriated from the camp with State assistance.[34] The Federal Foreign Office of Germany had offered to bring back the children, but not the mother, but this solution was rejected by the local authorities in Syria. Through a temporary injunction, the VG Berlin ordered the State to issue travel documents to all four applicants and to return them to Germany from the former territory of the Islamic State, provided that their identity could be confirmed.

The German State appealed the case to the Appellate Administrative Court, Oberverwaltungsgericht Berlin-Brandenburg (OVG Berlin-Brandenburg). In its decision issued on 6 November 2019, the Court dismissed the appeal.[35] According to the Court, the German Basic Law does not limit the applicability of fundamental rights enshrined in it to the German territory.

In his commentary on the case, Schwander points out that the Basic Law is the constitution not for the State territory, but rather for the State authority.[36] The protection of basic rights provided for in the German Basic Law concerns all exercise of State power. The State clearly steps beyond its margin of appreciation if it remains completely inactive or if its efforts to provide protection are manifestly inadequate. Against this background, the simple refusal to repatriate the individuals from circumstances that deprive them of the very core of their human rights, also in the light of minimum international standards, is against the law if such repatriation is practically possible. As Schwander notes, security arguments cannot justify a refusal to repatriate the individuals; 'blocking out' its own nationals for security reasons is alien to the Basic Law.[37] Security threats are to be dealt with, following the individuals' return, by means of criminal law.

Helping the individuals in Al-Hol would require that the State takes action abroad, and, as Schwander points out, the issue of the extraterritorial effect of fundamental rights and the extraterritorial obligations of the State is a controversial one. It has not been conclusively clarified in the rulings of constitutional courts.[38] Schwander makes the point that individual parts of the relevant judgments cannot be generalised, since almost every possible standpoint in this question finds support in some decision of a constitutional court decision, as well as within the legal literature.[39] The next subsection will focus on the standard of due diligence in the context of a positive obligation of the State to take protective measures outside its territorial jurisdiction.

2.2 The standard of due diligence and extraterritorial jurisdiction

2.2.1 The standard of due diligence

Generally speaking, international law requires that States comply with their positive obligations in good faith.[40] In addition to the obligation to enact legislation to protect vulnerable citizens, States also have the obligation to take effective measures in response to individual

34. Verwaltungsgericht Berlin, decision 10 July 2019, VG 34 L 245/19.
35. Oberverwaltungsgericht Berlin-Brandenburg, decision 6 November 2019, ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00, § 48.
36. Schwander (n 2).
37. Ibid.
38. Ibid.
39. Ibid.
40. See, for example, Lavrysen (n 29); Lisa Grans, 'The concept of due diligence and the positive obligation to prevent honour-related violence: beyond deterrence' (2018) 222(5) *The International Journal of Human Rights* 733 <https://doi.org/10.1080/13642987.2018.1454907>.

cases.[41] This established principle is known as the *due diligence* obligation. Basing her analysis on a broad set of international and regional case law material as well as legal literature, Grans argues that due diligence essentially consists of an obligation to use the State's best efforts to take effective measures to prevent abuse and inhuman treatment, especially when the victims are in a particularly vulnerable position.[42] Hence, while a State is not responsible for the circumstances to which the women and children are exposed in Al-Hol, it can be responsible for failing to make a good faith effort to protect the vulnerable individuals.[43]

It is of course true that the State has a broad margin of appreciation in the exercise of its authority in a foreign territory, and its duty to protect may not trump the territorial State's authority, so the individuals in Al-Hol may not be repatriated without permission and assistance from the local authorities. However, the SDF and the local authorities maintaining the refugee camp in Al-Hol have expressed their willingness to assist governments in repatriating their citizens from the camp.[44] As the camp is severely overcrowded and lacking in basic resources such as clean water, food, medicine and health care, the local authorities have pleaded with States to repatriate their citizens.

According to Grans, the basic standard of due diligence underlying all positive obligations, and applying in the absence of more specific and more demanding requirements, is 'to take the measures that, firstly, it could reasonably be expected to and, secondly, a well-administered government would take under similar circumstances'.[45] The repatriation of the individuals with the help of the local authorities is possible, and it has indeed been done by some States. For example, Central Asian States have repatriated around 800 individuals from Al-Hol, most of them women and children, and France, Norway, Germany, Sweden and the Netherlands have repatriated orphans but left other children behind.[46]

The principle of due diligence is an established principle in international human rights law. According to Grans, the principle finds support in the case law of the European Court of Human Rights. In the *Opuz v Turkey* case, for example, the Court stated that States must do 'all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'.[47] In the *Osman v the United Kingdom* case, the Court emphasised that when the authorities know of a real risk to the life of an identified person, they are required to take 'measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[48] It is, however, not entirely clear how the due diligence obligation plays out in a situation where the State is to act outside its own territory or a territory under its control.

41. Ibid.
42. Ibid.
43. Ibid 735.
44. Schwander (n 2).
45. Grans (n 40) 736.
46. Letta Tayler, 'Western Europe must repatriate its ISIL fighters and families: Western capitals should take cue from Central Asia which has taken back hundreds of nationals from Syria and Iraq' *Al-Jazeera* (19 June 2019) <www.aljazeera.com/indepth/opinion/western-europe-repatriate-isil-fighters-families-190619110248408.html> accessed 15 August 2019.
47. *Opuz v Turkey*, no 33401/02, § 130, ECHR 2009; Grans (n 40) 741.
48. *Osman v United Kingdom*, no 23452/94 ECHR, § 166, Reports of Judgments and Decisions 1998-VIII; Grans (n 40) 741.

2.2.2 Extraterritorial obligations

It is undoubtedly urgent, as Skogly and Gibney observe, that States are held accountable wherever their actions may influence human rights. In order for this to be possible, they argue, established principles such as sovereignty and jurisdiction need some rethinking.[49] They note that what is 'beginning to become clearer and clearer is that one or more states may directly or indirectly exert sufficient control over an individual to influence his or her human rights enjoyment without that foreign state having territorial control where the individual resides'.[50]

According to Dickson, European law protects some human rights extraterritorially when there is 'a real risk' of them being violated.[51] In his view, the jurisprudence of the European Court of Human Rights is constantly developing in relation to the extraterritorial obligations.[52] Nowak observes that the European Court of Human Rights has stressed that jurisdiction refers primarily to the territory of the State and that 'the exercise of extraterritorial jurisdiction is exceptional and requires special justification'.[53] Currently, a case is pending before the Court against France concerning the refusal to repatriate French individuals from Al-Hol.[54] The case, if it proceeds to a ruling, will provide a new chapter in the Court's doctrine of extraterritorial obligations.

According to Gammeltoft-Hansen, 'assertions of jurisdiction may generally be conceived of in two ways for the purpose of human rights obligations – as a property flowing from a State's effective control over a defined territory, or as a result of a State's effective control over an individual.'[55] He advocates for a functional conception of extraterritorial jurisdiction, according to which the decisive factor is the relationship between the individual and the State in relation to the violated rights, rather than the place where the violation occurred.[56]

The emerging and developing concepts of positive obligations, due diligence and extraterritorial jurisdiction challenge the paradigms of sovereignty and exclusionary, territorial jurisdiction prevailing in international law. Still, despite the growing support for these concepts in the literature, their position as part of the established doctrine of international law remains contested. Moreover, in the Finnish context it is difficult if not impossible to file a case on the basis of the passivity of the State without a link to any provision of an applicable substantive law, even if such passivity in reality constituted a severe violation of human rights.[57] This means that it remains far from clear whether the human rights obligations of the State in relation to the women and particularly children in Al-Hol can be successfully asserted. The issue of whether the State has a jurisdiction and directly applicable legal obli-

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49. Sigrun Skogly and Mark Gibney, 'Introduction' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania Press 2010) 1.
50. Ibid, 4.
51. Brice Dickson, 'The extra-territorial obligations of European states regarding human rights in the context of terrorism' in Federico Fabbrini and Vicki C Jackson (eds), *Constitutionalism Across Borders in the Struggle Against Terrorism* (Edward Elgar Publishing 2016) 213, 215.
52. Manfred Nowak, 'Obligations of states to prevent and prohibit torture in an extraterritorial perspective' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania Press 2010) 11.
53. Ibid 27.
54. Rodi Said, 'Grandparents of stranded jihad children take France to EU rights court' *Rfi* (6 May 2019) <http://en.rfi.fr/middle-east/20190506-jihad-children-syria-grandparents-take-france-eihuman-rights-tribunal> accessed 20 May 2019.
55. Thomas Gammeltoft-Hansen, 'Growing barriers: international refugee law' in Mark Gibney and Sigrun Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (Pennsylvania Press 2010) 55, 65.
56. Ibid 80.
57. Outi Suviranta, 'Oikeuskeinoista viranomaisen passiivisuutta vastaan' (2002) 100(6) *Lakimies* 914.

gations depends, at least partly, on the national rules in different branches of substantive law. The following section will examine whether such applicable provisions could be found in the fields of consular law and child welfare legislation.

3. Jurisdiction over protective measures

3.1 Field of diplomatic and consular law

3.1.1 Consular law

In extraterritorial situations in particular, constitutional rights and human rights may fail to produce any direct and substantial obligation on the State to take action to safeguard these rights. What makes up 'the jurisdiction' of the State in these situations is a question that falls within the intersection of international and national law. Consular law is concerned with the relationship between the State and individuals, whereas diplomatic law deals with State-to-State political relations. Consular norms are provided in national laws, and the field is also governed by international law, the main multilateral treaty in the field being the United Nations Vienna Convention on Consular Relations (VCCR).[58]

Generally speaking, a person facing hardship abroad may turn to the mission, embassy or consulate of his or her home State in order to obtain the appropriate assistance. In Finland, the Consular Act of 1999, amended in 2014, lays down provisions on the consular functions referred to in Article 5 of the VCCR. According to Section 11, consular services for persons in distress may be afforded to persons who are Finnish citizens or foreign citizens residing permanently in Finland, when they are temporarily residing abroad within the consular district of a mission. Such assistance may include, for example, arranging repatriation to Finland. The temporality of the person's stay abroad is not a prerequisite for consular help in a crisis situation, such as an environmental catastrophe or an armed conflict, war or civil war. Section 16 provides that a mission may provide assistance in arranging the evacuation of a person from a crisis area to the closest safe area or to his or her home country, when this is necessary to ensure the personal safety of the person. Furthermore, under the Finnish Passport Act, missions or the Finnish Ministry for Foreign Affairs may issue emergency travel documents needed on the journey to Finland.

The jurisdiction for the provision of consular services is defined in territorial terms. Section 15 of the Consular Act provides that Finnish citizens or foreigners who permanently reside in Finland, shall be assisted by those missions, within whose consular district the individuals reside. According to Section 9, where consular services are needed in a country that does not belong to the consular district of any mission, the Ministry for Foreign Affairs shall determine the provision of those services. However, the ministry may only provide such consular services that do not require service provision within the State concerned and that are otherwise suitable for provision by the ministry. As there are currently no Finnish missions in Syria – the nearest is in Ankara, Turkey – the problem seems to arise in relation to the jurisdiction and thus the applicability of consular legislation; as there is no mission consular district in the area, no branch of the foreign affairs governance has the jurisdiction to provide consular services.

58. Christopher Lau, *Diplomatic & Consular Law: Research Guide* (Berkeley Law School 2015) <https://scholarship.law.berkeley.edu/leg_res/> accessed 2 September 2019.

3.1.3 The jurisdiction to provide consular services and responsibility to take protective measures

The issue of jurisdiction to provide consular services was also examined in the German case discussed above (VG Berlin and OVG Berlin-Brandenburg).[59] Interestingly, the first instance court reached the above-mentioned decision despite the lack of jurisdiction in terms of consular law, according to which consular officials should provide the necessary help to German nationals who are in need of assistance in their consular district. Since there are currently no German diplomatic or consular facilities in Syria, VG Berlin noted that the consular law rules could not be applied and based its decision directly on the duty of the State to protect individuals, which follows from the right to life provided for in Article 2.2 of the German Basic Law. According to the Basic Law, the freedom of the person shall be inviolable, and may be interfered with only pursuant to a law.

In its appeal against the decision of the VG Berlin, the State stressed that it had no diplomatic or consular mission or any other direct means of intervention in Syria, and listed various difficulties that it would have to tackle if these individuals were brought to Germany. The appellate court, OVG Berlin-Brandenburg, rejected this argument and pointed out that these were circumstances that would possibly make it difficult to bring the applicants back, but the existence of such circumstances did not entail the unfeasibility of the operation or justify a principled refusal to assist in their return.[60]

While the authorities executing State powers have a broad margin of appreciation in deciding which actions to take and how, the court stated that this margin of appreciation is substantively narrowed when a person is directly exposed to a risk to life, it is possible for the State to repatriate the applicants and the repatriation is the only appropriate means of eliminating the risk to life. A threat to public safety or other domestic or foreign policy interests may not override the applicants' right to life.[61] In addition to diplomatic and consular law, rules that govern jurisdiction are also found in child welfare legislation. In international contexts, these rules are to be found in different sources, including EU law, international conventions, and national rules of private international law.

3.2 International child welfare and protection: Brussels IIa Regulation, Hague 1996 Convention and national legislation

3.2.1 Brussels IIa Regulation and Hague 1996 Convention

When a parent exposes a child to a risk for life and violations of physical integrity, or when he or she is unable to safeguard the child's wellbeing, child welfare authorities normally intervene. The threshold for the intervention in the family by the child welfare authorities is crossed when there is a clear risk for the child to be harmed without such intervention. The threshold for State intervention is thus undoubtedly crossed in relation to the children in Al-Hol. Again, the issue arises as to the jurisdiction of the State with respect to protective measures concerning children who are outside of its territory. The rules that govern this jurisdiction are to be found in private international law.

59. Verwaltungsgericht Berlin, decision 10 July 2019, VG 34 L 245/19.
60. Oberverwaltungsgericht Berlin-Brandenburg, decision 6 November 2019 (ECLI:DE:OVGBEBB:2019:1106.OVG10S43.19.00), § 48.
61. Schwander (n 2).

In the literature on private international law, the focus has rarely been on children who face detrimental circumstances abroad.[62] While relatively much has been written about the issues connected to the change of the child's habitual residence from one State to another, the literature mostly focuses either on parental conflicts such as relocation disputes[63] and child abduction cases,[64] or specific issues such as child or forced marriages connected to migrant or second-generation children or youth being sent to or left behind in countries of origin.[65] A far less studied issue, although one of growing significance, is the children's right to welfare and protection and the State's means of providing it for children in transnational families.[66]

Rules concerning the jurisdiction of the State in issuing protective measures can be found in two instruments binding on Finland as well as in its national legislation. These are the global child protection convention, i.e. the 1996 Hague Child Protection Convention (hereafter the 1996 Convention), which has been in force in Finland since 2011, and the Brussels IIa Regulation.[67] Both instruments include rules providing for which country has the jurisdiction to determine the child's custody or issue protective measures to protect the property of the child.

In EU Member States, primacy is given to EU law by default. The relationship between the Convention and the Regulation is determined both in the Regulation and through so-called disconnection clauses.[68] The Brussels IIa Regulation displaces the 1996 Convention when the child is habitually resident in an EU Member State;[69] the 1996 Convention applies when the child is habitually resident or resides in a contracting state that is not an EU Member State.[70] According to Helin, an additional circumstance in which the Regulation displaces the 1996 Convention is at hand when the child is habitually resident or currently residing in a non-Contracting non-EU member state.[71] Furthermore, according to Anton et al, '[t]he combination of the disconnection clauses and the Convention's geographical scope indicates that the latter must be applied in the European Union where proceedings are brought and

62. See, however, Maarit Jänterä-Jareborg and Katharina Boele-Woelki, 'Protecting Children Against Detrimental Family Environments Under the 1996 Hague Convention and Brussels IIbis Regulation' in Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger and Symeon Symeonides (eds), *Convergence and Divergence in Private International Law* (Schulthess & Eleven 2010) 125.
63. Rob George, *Relocation Disputes: Law and Practice in England and New Zealand* (Hart Publishing 2014).
64. Thalia Kruger, *International Child Abduction: the Inadequacies of the Law* (Hart Publishing 2011).
65. Lossius et al., *More than Just Forced Marriage. A Collection of Articles: Final report from IMDi's work with the action plan against forced marriage 2008–2011* (Integrerings- og mangfoldsdirektoratet 2011); Eliane Smits van Waesberghe et al., *Zo zijn we niet getrouwd: Een onderzoek naar omvang en aard van huwelijksdwang, achterlating en huwelijkse gevangenschap* (Verwey-Jonker Instituut 2014) <www.verwey-jonker.nl/doc/vitaliteit/7414_Zo%20zijn%20we%20niet%20getrouwd_web.pdf> accessed 20 April 2019.
66. Marja Tiilikainen, Mulki Al-Sharmani and Sanna Mustasaari (eds), *Wellbeing of Transnational Muslim Families: Marriage, Law and Gender* (Routledge 2019).
67. 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; 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 (OJ 2003 L 338, p. 1). The latter is known as the Brussels IIa Regulation or Brussels IIbis Regulation.
68. Markku Helin, *Suomen kansainvälinen perhe- ja perintöoikeus* (Talentum 2013) 360.
69. Brussells IIa, Article 61. On 2 July 2019, the new Brussels IIa Regulation was published in the Official Journal of the European Union (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). The new Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered, and to agreements registered on or after 1 August 2022.
70. Peter Stone, *EU Private International Law* (3rd edn, Edward Elgar Publishing 2016) 443.
71. Helin (n 68) 360.

the child is habitually resident in a non-EU contracting state, or present in such a state and having no habitual residence.'[72]

It is often thought that the Regulation applies only to disputes involving relations between the courts of EU member States. This is a misconception, as the general jurisdiction rule provided for in Article 8(1) of the Regulation may apply also to disputes involving relations between the courts of an EU State and a third country.

The 1996 Convention applies of course to European countries that are not members of the EU. According to the 1996 Convention, the judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property (Article 5). The authorities shall apply their own law (Article 15). The Convention is universally applicable in terms of choice of law, which means that the applicable law is determined in accordance with the Convention, even in relation to a non-Contracting party (Article 20).[73]

Under the Brussels IIa Regulation, the taking of measures to protect the child is considered a matter of parental responsibility. The rules determining the jurisdiction in issues of parental responsibility are found in Chapter II, Section 2. The main connecting factor here, too, is the habitual residence of the child. According to Article 8(1), the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.

At first glance, it would seem that it does not matter which instrument applies because whichever applies, the jurisdiction is based on the habitual residence of the child. However, as we shall see, the two instruments differ in that Article 14 of the Regulation provides for a residual jurisdiction in situations where no court of a Member State has jurisdiction pursuant to the habitual residence rule.

3.2.2 Brussels IIa Regulation: residual jurisdiction

Neither Syria nor Iraq are signatories to the Hague Child Protection Convention. They cannot claim jurisdiction on the basis of the Convention either based on the habitual residence of the child (Article 5) or the factual residence of the child (Article 6). In principle, of course, these countries may have their own national rules concerning jurisdiction and competence in international child welfare and protection cases, but in practice they are not able to provide for child welfare or protection. From the perspective of the EU States whose citizens are in Syrian territory, the jurisdiction to take measures to protect the children is determined by the rules of the Brussels IIa Regulation.

Article 13 of the Regulation, similar to Article 11 of the 1996 Convention, concerns jurisdiction in cases where a child has no habitual residence. According to the 1996 Convention, the child's presence in the State can found jurisdiction. In the case of the Regulation, however, the jurisdiction based on the child's presence only covers situations where the child is present in a Member State, which is clearly not the case here. Following Article 14, when no Member State has jurisdiction under the Regulation, jurisdiction is determined in each Member State by their own national law. Of course, this residual jurisdiction is restricted by the 1996 Convention, in cases where the child is resident in a non-EU Member State which is also party to the 1996 Convention.[74]

72. Alexander E Anton et al, *Private International Law* (3rd edn, W Green 2011) 793.
73. Helin (n 68) 125.
74. Peter Stone, *EU Private International Law* (3rd edn, Edward Elgar Publishing 2016) 449.

The next section examines the factors relevant in determining the habitual residence of the child. It analyses, in particular, what effects the wrongful removal of the child from his or her country of origin would have on the habitual residence of the child.

4. Habitual residence of the child

4.1 Jurisdiction and the habitual residence of the child

4.1.1 Starting points for the assessment: the factual centre of a person's life

Habitual residence is the connecting factor used in several of the child law instruments, including the 1996 Convention, the 1980 Child Abduction Convention[75] and the Brussels IIa Regulation. The concept of habitual residence is not defined in the Conventions, but it concerns the assessment of factual circumstances in each individual case. It is not intended as a juridical concept, but refers to the real life: 'residence is an act and place. It has to do with living'.[76] Habitual residence is the centre of a person's interests, a factual centre of his or her life.[77] In making this assessment, the attachments of the person to different States are to be weighed up.[78]

The CJEU has provided some guidance in its case law as to what should be taken into account in the assessment concerning the habitual residence within the meaning of Article 8(1) of the Regulation. The habitual residence of the child is determined on the basis of a factual and casuistical approach, which focuses on the real and factual circumstances of the child. Physical presence alone is not decisive.[79] The presence of the child in the State should not be temporary[80] and it should reflect some degree of integration in a social and family environment, including the geographical and family origins, and the family and social connections which the parent and child have with that State.[81]

In addition to objective facts, subjective facts, such as the intentions of the guardians may play a role. According to the CJEU:

> In particular, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.[82]

75. Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
76. Rafael Durán, 'Defining and Coping with Residence International Retirement Migration to Spain' (2015) 14 *Revista de Investigaciones Políticas y Sosiológicas* 9, cited in Katja Karjalainen, *Ikääntyminen, liikkuvuus ja kansainvälinen yksityisoikeus Euroopassa: Vertaileva tutkimus rajat ylittävistä ongelmista sekä edunvalvonnasta Suomessa ja Espanjassa* (Suomalainen Lakimiesyhdistys 2016), 154 fn 8.
77. Helin (n 68); Stone (n 74) 450.
78. Stone (n 74) 449; Michael Bogdan (2008) *Svensk internationell privat- och processrätt* (7th edn, Norstedts Juridik 2008) 155; Jeff Atkinson, 'The Meaning of Habitual Residence under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children' (2011) 63(4) *Oklahoma Law Review* 647.
79. Case C-523/07, *A*, judgment of 2 April 2009 (ECLI:EU:C:2009:225) para 33.
80. Case C376/14 PPU, *C v M*, judgment of 9 October 2014 (ECLI:EU:C:2014:2268) para 51; Case C499/15, *W and V v X*, judgment of 15 February 2017 (EU:C:2017:118) para 60; Case C111/17 PPU, *OL v PQ*, judgment of 8 June 2017 (EU:C:2017:436) para 43; Case C512/17, *HR*, judgment of 28 June 2018 (EU:C:2018:513) para 41.
81. Case C-523/07, *A*, judgment of 2 April 2009 (ECLI:EU:C:2009:225) para 44; Case C497/10 PPU, *Barbara Mercredi v Richard Chaffe*, judgment of 22 December 2010 (ECLI:EU:C:2010:829) para 55.
82. Case C-523/07, *A*, judgment of 2 April 2009 (ECLI:EU:C:2009:225) para 39.

The CJEU has emphasised that concepts under EU law have an independent meaning and that they must be interpreted as uniformly as possible.[83] At the same time, however, the habitual residence is contextual, in connection with the goals of the Regulation, and cannot be similarly defined in all cases.[84]

4.1.2 Contextual assessment of the habitual residence

The contextuality of the assessment means that the factors taken into account and their weight in discretion concerning habitual residence in other areas cannot be directly transposed when assessing habitual residency for the purposes of defining which State has the jurisdiction to take protective measures concerning a child.[85] When the question of habitual residence arises in relation to jurisdiction, the most important issue is to avoid conflicts between jurisdictions, i.e. situations where no State would have the jurisdiction to take protective measures. Account must be taken of where the child can be most efficiently protected, and, as the CJEU has pointed out, 'the grounds of jurisdiction established by the Regulation are shaped in the light of the best interests of the child and the criterion of proximity'.[86]

It is possible that a person is taken abroad in circumstances in which the removal of the person may, for some reason, be deemed wrongful. Child abduction, a situation in which a parent takes the child abroad without the consent of the other guardian, offers one example, but there might also be other situations in which the removal of the person has breached the law. It is therefore necessary to examine whether, and under which circumstances, the habitual residence of the child may change if the removal has been unlawful from the outset.

4.2 Change of child's habitual residence in cases of wrongful removal

4.2.1 Habitual residence in the case of coerced or criminal removal of the child

The guardian of the child has the competence and authority to decide about issues that concern the child's place of residence, or the child's travel abroad. The only limitation is that the guardian must use this authority in the best interests of the child. Taking a child to a place where the conditions are detrimental to the physical and psychological safety of the child or to its right to development is clearly wrongful and against the law. A parent who takes the child to a conflict area or war zone, for example, must clearly be considered as having exceeded the scope of his or her parental authority and rights.[87] As was mentioned above, the Daesh practices of abusing children in acts of violence, as child brides as well as different forms of labour, indicate that a parent who knowingly takes the child to be involved in such practices could be deemed to have participated, for example, in human trafficking. The question arises as to whether such wrongful removal can actually have the effect of changing the habitual reference. No case law touches upon this issue directly, but similar themes have been addressed in the literature on vulnerable adults and a phenomenon known as 'transnational marriage abandonment'.

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83. See, for example, Case C497/10 PPU, *Barbara Mercredi v Richard Chaffe*, judgment of 22 December 2010 (ECLI:EU:C:2010:829) para 45; Case C-393/18 PPU, *UD v XB*, 17 October 2018 (ECLI:EU:C:2018:835).
84. Karjalainen (n 76) 171.
85. Stone (n 74) 449.
86. Case C-523/07, *A*, judgment of 2 April 2009 (ECLI:EU:C:2009:225) para 35; see also Karjalainen (n 76) and Stone (n 74).
87. In Finnish law, the authority of the guardian is connected to the requirement to act in the best interests of the child. See Act on Child Custody and Right of Access, Section 1.

In light of the Hague Convention of 13 January 2000 on the International Protection of Adults, Karjalainen discusses a situation in which a vulnerable adult has been taken abroad against his or her will and whether the change of the habitual residence requires the subjective element of will and consent, and observes that neither the Adults Convention nor Finnish legislation provides an answer to this question. The issue also arises in the context of transnational marriage abandonment, which refers to situations in which a woman 'is taken back to her home country either coercively or is deceived into returning on false pretences (e.g. holiday) and abandoned there, while the husband returns and revokes her visa' and initiates divorce proceedings.[88] Transnational marriage abandonment can be directly linked to the children of the woman.

The CJEU's case law has dealt with issues of coercion or violence related to transnational marriage abandonment and the consequences of such abuse to the assessment of the habitual residence of a child. Case C-393/18 PPU concerned the habitual residence of a child whose mother was a Bangladeshi national and whose father was a British national.[89] The wife had followed her husband to the UK, where they had intended to live together. According to her, the husband had tricked her into going back to Bangladesh when she was heavily pregnant and in a vulnerable state, and then unlawfully detained her by coercion means to stay in Bangladesh, leading to her being forced to give birth to the child in Bangladesh.

The UK Court referred the case to the CJEU, asking, firstly, whether the physical presence of a child in a State is an essential condition of habitual residence within the meaning of the Brussels IIa Regulation (Article 8); and secondly, whether the alleged illegal breach of the mother's rights has any impact on how habitual residence should be assessed. According to the referring UK court, the position of the mother raises the subsidiary issue of the effect on the concept of habitual residence of the circumstances in which the child was born in a third country, specifically due to the mother being unlawfully kept in a State where the holders of parental responsibility had no joint intention of residing.

The father and the European Commission were of the opinion that the habitual residence of the child cannot be in a State in which the child has never been physically present, while the mother, the UK Government and the Czech Government were of the view that circumstances such as those in the main proceedings may justify the child being regarded as habitually resident in that State.[90] The stance of the CJEU was clear: the child must have been physically present in the State before it can have a habitual residence in that State; 'habitual residence' may not be established in a State to which the child has never been.

According to the CJEU, neither the absence of the child's habitual residence, because that child is not physically present in a Member State of the European Union, nor the existence of courts of a member State better placed to hear the case of that child, even though the child never resided in that State, can establish the habitual residence of the child in a State in which that child has never been present.[91] Contrary to the opinion of the Advocate General, Saugmandsgaard Øe, the CJEU thus ruled that physical presence was essential. Following this reasoning, the court did not substantively engage with the issue of forced removal.

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88. Sundari Anitha et al, *Disposable Women: Abuse, violence and abandonment in transnational marriages* (University of Lincoln 2016) 5. See also Anupama Roy, Sundari Anitha and Harshita Yalamarty '"Abandoned Women": Transnational Marriages and Gendered Legal Citizens' (2019) 34(100) *Australian Feminist Studies* 165; and Tone Linn Wærstad, *Protecting Muslim Minority Women's Human Rights at Divorce : Application of the Protection against Discrimination Quarantee in Norwegian Domestic Law, Private International Law and Human Rights Law* (Nomos 2017), specifically at 222–238.
89. Case C-393/18 PPU, *UD v XB*, judgment of 17 October 2018 (ECLI:EU:C:2018:835).
90. Ibid, para 44.
91. Ibid, para 59.

According to the opinion of the Advocate General Saugmandsgaard Øe, the coercion exercised by the father was a relevant factor in assessing the habitual residence of the child, because it clearly affected 'conditions and reasons for the stay' of the mother and child, a factor which in his opinion should be taken into account.[92] According to the mother, the coercive action exercised by her husband and his relatives forced her and the baby to 'remain in a village where she is stigmatised by the local community and deprived of essential commodities and of income'.[93] This, according to the Advocate General, would raise the question of 'whether the mother's and child's involuntary and precarious stay in a third state is sufficiently permanent and regular for the child to have her habitual residence there'.[94]

The Advocate General also deliberated on the cultural and family connections of the child. The fact that the mother is of Bangladeshi origin and is staying in Bangladesh in her family's village relates to the child's cultural and family connections that result from those origins. In his opinion, however, the geographical and family origins of the parent with custody of the child are only one of the factors to be taken into account in the assessment.[95]

On the one hand, one might indeed ask whether, in this case, it was 'possible to speak of integration in a social and family environment if the infant's connections with that third State came about solely because of a situation resulting from the coercion exercised by the infant's father'.[96] On the other hand, attributing decisive importance to the reasons for a person's stay in a country would have distanced the concept of habitual residence from its origins as a concept based in factual residence, thus blurring the concept even further.

4.2.2 Wrongful removal of the child in the context of child abduction

Both the Regulation (Article 10) and the 1996 Convention (Article 7) make an exception to the general rule of habitual residence as the juridical basis over proceedings of parental responsibility when the child was wrongfully removed from the State of its habitual residence. 'Wrongful' here refers to abduction within the meaning of the Hague Child Abduction Convention of 1980 (Article 3) as being in breach of some other person's or institution's rights of custody. Hence 'wrongful' means not what is permissible behaviour of the parent in relation to the child, but what is permissible in relation to other recognised holders of parental responsibility over the child. So, despite the illegal or even criminal nature of the act of taking the child to, for example, a war zone or an area controlled by a totalitarian, child-abusive regime, such an act is not 'wrongful' within the meaning of Article 10 of the Regulation or Article 7 of the 1996 Convention. With this in mind, and from the perspective of the problem under scrutiny here, it is useful to briefly examine how, in child abduction cases, the jurisdiction is conferred upon the State where the child was habitually resident immediately prior to the wrongful removal.

According to Article 10 of the Brussels IIa Regulation, in the case of wrongful removal, the jurisdiction is conferred upon the State where the child was habitually resident immediately before the wrongful removal. When this removal was to a non-Member State, the jurisdiction conferred by Article 10 on the court of the Member State of origin continues indefinitely

92. Opinion of the Advocate General Saugmandsgaard Øe, delivered on 20 September 2018, in Case C-393/18 PPU, *UD v XB* (ECLI:EU:C:2018:749) para 85.
93. Ibid, para 86.
94. Ibid.
95. Ibid, para 87.
96. Ibid, para 86.

– provided that nothing else follows from the 1996 Convention.[97] Similarly, according to Article 7(1) of the 1996 Convention,

> [i]n case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and a) each person, institution or other body *having rights of custody has acquiesced in the removal or retention*; or b) the child has resided in that other State for a period of at least one year *after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child*, no request for return lodged within that period is still pending, *and the child is settled in his or her new environment*. (emphasis added)

It has been held to be important that the concept of habitual residence is not a legal artefact, but remains open and factually based. This view has not been endorsed by all States; in the drafting of the 1996 Convention, the USA advocated an approach according to which a wrongful removal would mean that the place of residence had not changed.[98] This approach, however, was not adopted in the Convention. Even a wrongful removal may thus lead to a change in the habitual residence. However, in these cases the jurisdiction does not follow the main rule but is conferred upon the State of origin. In the light of the increasing awareness of the threat of abuse of children in transnationally mobile families with connections to violent radicalism, it might be worth considering a similar conferral of jurisdiction in relation to unlawful or criminal removal of children from the State of origin.

4.2.3 Can the habitual residence of the children in Al-Hol be defined?

The issues raised above, concerning the notion of 'wrongful removal' in the context of private international law, demonstrate that the moral or legal 'wrongfulness' of the removal of the child from the territory of the State plays only a very limited role in the determination of the child's place of habitual residence. The fact that the removal of the child was against the best interests of the child, or was even clearly illegal, does not prevent a change in the habitual residence. Moreover, the habitual residence test seems to be a poor fit with extraordinary circumstances and crises such as armed conflicts. This, however, does not mean that the habitual residence of the children in Al-Hol would necessarily be in Syria.

While a person may have a habitual residence only in one State and habitual residence in a State excludes all other claims for habitual residence, it is possible that a person is not habitually resident anywhere. According to the CJEU, at the end of the assessment it may turn out that it is impossible to establish that the person has a habitual residence in any State.[99]

All the criteria in the habitual residence test seek to establish the centrality of the child's interest and life understood in the ordinary sense. Life in a conflict zone, particularly where children are systematically abused, is far from that concept of the everyday life that the test is designed to examine. What meaning can integration have in a deep and violent crisis, other than that of staying alive and coping? Or language, when one is too ill or traumatised to speak; or routines of daily life when one is held captive? It is far from clear that the children

97. Stone (n 74) 453.
98. Peter Nygh, 'The New Hague Child Protection Convention' (1997) 11 *International Journal of Law, Policy and the Family* 344, 348.
99. Case C-523/07, *A*, judgment of 2 April 2009 (ECLI:EU:C:2009:225) para 43.

in Al-Hol could be considered habitually resident in Syria. In some rare cases it might even be possible that the habitual residence of the child would still be Finland, although generally speaking this is unlikely.

The most convincing interpretation would be that there is no way to establish the habitual residence of people who have resided in the areas controlled by Daesh, because there has not been an established society, including residential buildings, schools, etc. to integrate into and during the crisis, people have moved several times, fleeing the war. Individual cases are likely to vary a lot, but it is probable that in many cases the individuals must be considered to have no habitual residence.

As pointed out above, the Regulation assigns the determination of jurisdiction on national law when no EU Member State would have jurisdiction according to the Regulation. As neither Syria nor Iraq are parties to the 1996 Convention, the rules of which would otherwise prevail over the residual jurisdiction, the search for the rules concerning jurisdiction seems to lead to the law of the forum, in this case Finnish law. The next section will turn to the Finnish international and substantive rules on child welfare and protection.

The important difference between the 1996 Convention and the Regulation is that the Convention includes no provision of residual grounds for jurisdiction. Assuming that the jurisdiction based on national law in the case of children in Al-Hol would, however, not breach the rights of any State since Syria and Iraq are not signatories to the Convention. Furthermore, as the States are currently suffering the turmoil of civil war, there are no operative authorities with claims to jurisdiction. However, at the national level, the lack of a norm basis for assuming jurisdiction based on national law means that the issue is open to interpretation and, consequently, politically more difficult.

5. Private international law and national rules on child welfare and protection

5.1 Rules of private international law in national child welfare legislation

5.1.1 International rules in the Finnish Child Welfare Act

In Finland, child welfare and protection is governed by the 2007 Child Welfare Act (417/2007). The rules belonging to the field of private international law are provided in Section 17 of the Act. Different extensions have been added to the Section casuistically, with the result that the section is very unclear.

The section seems to provide for jurisdiction in the case of Finnish children in Al-Hol. According to Section 17(2), a child whose parents are or have been Finnish citizens but currently have no permanent or temporary place of residence in Finland, and who is currently in detrimental circumstances and not receiving appropriate care in his or her current place of temporary residence, is entitled to welfare services. Arranging child welfare in these cases is deemed to be the responsibility of the authorities of the municipality in which both or one of the child's parents are residing permanently or temporarily or, if neither parent is residing permanently or temporarily in Finland, with the authorities of the municipality in which both or either of the child's parents were last residing permanently or temporarily. If neither of the parents has resided permanently or temporarily in Finland, the decision-making power is deemed to rest with the authorities of the City of Helsinki.

Following on from the Brussels IIa Regulation and Finnish Child Welfare Act, it would seem safe to assume that Finland has the jurisdiction to issue protective measures concerning the children in Al-Hol. However, the lack of clarity in Section 17 of the Child Welfare Act is prone to blur this issue and, as such, is in urgent need of reform.

The main benefit that follows from the applicability of the national child welfare legislation is that it is clear that the State has both the jurisdiction and the obligation to protect the children. The child is not only subjected to the protection measures, but is also entitled to protection.[100]

5.1.2 Shortcomings and targets for development in the international regulation of child welfare services

In addition to the apparent lack of clarity, other shortcomings can be found in the international rules of the Child Welfare Act. There is a discrepancy between the international protection rules in the Child Welfare Act and other sources of law discussed in this article. For example, the responsibility to provide a child welfare service is linked to the citizenship of the child's parents, not to the permanence of their residence as constituted in the Consular Act.

The issue of cross-border child protection in the context of violent radicalism is a special one and raises a very particular set of problems. Still, the public debate concerning the women and children in Al-Hol demonstrated that guidelines and good practices are urgently called for in the field of transnational child welfare. The issue has also been prone to misunderstandings. For example, for a long time the assumption persisted in the public debate that there was no ground for State action and that if there were a jurisdiction to issue protective measures, a care order would be issued and the children would be taken into care and separated from their mothers. It is therefore necessary to briefly examine which protective measures could be taken and how these should be applied in the light of the established principles of child welfare.

5.2 Care orders

5.2.1 Two types of care orders: taking the child into care and emergency placement of the child

The Child Welfare Act provides the criteria under which the child can be taken into care, even against the will of the child's parents or guardians. The child can be taken into care when his or her health or development is seriously endangered by lack of care or other circumstances in which he or she is being brought up.[101]

While the conditions for taking the children into care are clearly met in the case of children in Al-Hol, this should however not be taken to mean that the children may be separated from their mothers without due process and that the mothers could simply be left behind. Child welfare is based on well-established foundational principles, including the support of the child's right to development and wellbeing; the paramount importance of the best interests of the child; the requirement of discreteness and the commitment to the human dignity of everyone in the family; and the principle of minimum State interference, meaning that open-care measures are applied whenever possible, and protective measures aim to reunify the family whenever possible.

While the taking of the child into care according to Section 40 of the Act is a measure that can only be taken if open-care measures are not possible or sufficient, the emergency placement of a child according to Section 38 of the Act is possible even without the consideration of open-care measures. However, this measure should not be taken merely for political reasons or reluctance to help the mothers. Moreover, the Child Welfare Act should be read

100. Janne Aer, *Lastensuojeluoikeus: Lapsi- ja perhekohtaisen lastensuojelun oikeudelliset perusteet* (Talentum Media 2014) 38.
101. Pösö (n 12).

in relation to the Finnish Constitution as well as other human rights obligations, especially the Convention on the Rights of the Child and the European Convention on Human Rights.

An emergency placement of a child in Al-Hol is possible in principle, for example in a situation where the mother would not or could not return to Finland and, in such a situation, would not consent to the child being brought to safety or providing the child with the necessary care. However, if the authorities are in practice in a position where they could help the mother but refuse to do so, and instead use the measure of emergency placement of the child, this would very likely infringe both the protection of family life and several other fundamental and human rights of the mother.

5.2.2 The use of child protection measures to separate the children and the mothers

It has been suggested that the women in Al-Hol deserve no help from the State and that legal grounds should be found that would enable the State to bring home the children but not the mothers.[102] This position is deeply troubling, not least because it demonstrates a willingness to leave the Kurdish authorities in their plight to deal with Finnish citizens. Regretfully, it also shows how some interlocutors treat human rights as a cover for political decisions that have already been made. Leaving these concerns aside, it should be noted that the suggested procedure gives rise to several objections.

First, authorities cannot carry out coercive measures in a foreign territory, and the local authorities have refused to separate the mothers and the children.

Second, even if the local authorities gave their permission to separate the mothers and the children, in the chaotic circumstances of the camp, any effective attempt to repatriate the children would, in fact, require cooperation with the mothers. A poorly prepared placement or the threat of a care order and separation may even put the child at risk, as the mother may, for example, try to hide the child or conceal the child's identity.

Third, the placement of the child out of home interferes with the right to respect for family life of both the child and the parents, as provided, for example, in Article 8 of the European Convention on Human Rights. Such an interference may be permissible, but it must be conducted in accordance with the law and for legitimate reasons, for example in the interests of national security. If the purpose of applying a measure, for example an emergency placement of a child, is not in line with the aims and principles of the Child Welfare Act, the measure is not used in accordance with the law and is therefore not legitimate. Human rights should not be restricted beyond what is necessary to protect the child. If the mother were to stay in the camp, it would in practice prevent all family life and possibly sever the relationship between the child and the mother. Such a solution requires very weighty and substantial criteria to be evinced in an individual case.

In international situations, it is sometimes necessary to resort to a procedure whereby a child is returned to his or her country of residence from the country to which he or she has been taken illegally. Such repatriations are present in child abduction situations that are subject to child abduction provisions. The purpose of these provisions is to prevent child custody and other proceedings from being transferred to the abductor's home country. In

102. This position was taken explicitly, for example, by the leader of the Center Party, Katri Kulmuni and several other Finnish politicians. See YLE, 'Keskustan Kulmuni auttaisi al-Holin lapsia, mutta ei äitejä – haluaa oikeudellisen perustan, jolla lapset ja äidit voitaisiin erottaa' [Kulmuni would help al-Hol's children but not mothers – she wants a legal basis to separate children and mothers] (11 December 2019) <https://yle.fi/uutiset/3-11112913> accessed 17 December 2019.

a repatriation, the parent does not always have the opportunity to travel with the child to be returned to the country where the child is resolved. As noted above, the situation of child abduction differs fundamentally from the present situation in that, firstly, the repatriation is based on clear rules and a system set up in international cooperation for the rapid return of the child to his or her country of residence. Nevertheless, situations involving child abduction must also be assessed from the perspective of the protection of family life and the best interests of the child, as demonstrated, for example, by the European Court of Human Rights in the *X v Latvia* case.[103]

It has been suggested that children can be separated from their mothers without any problems if the mother consents to the child being taken to Finland while she remains in the camp. Given the circumstances of the camp, the mother's consent cannot be ascribed weighty legal importance. On the one hand, such consent cannot be considered to be voluntary if the alternative to consenting places the child at grave risk. On the other hand, the mother's refusal to provide the child with the necessary help and care cannot be legally decisive.

A completely different situation is the assessment of the need for child protection and the provision of emergency care in Finland. Potential returnees will undoubtedly need child protection measures. To conclude, Finnish authorities should act immediately and repatriate the children together with their mothers. This would help to guarantee the fairness of the procedure, as well as to ensure co-operation with the mothers.

5. Conclusions: legal responsibility as response-ability

This article has reviewed the legal framework relating to the position of the Finnish children and their mothers who are currently held captives in the camp of Al-Hol in Syria. While the human rights of these individuals are clearly and gravely violated in the camp on a daily basis, court cases from across Europe have illustrated the difficulties in claims for State jurisdiction and corresponding responsibility to efficiently assist the return of the individuals from the camp.

The examination concerning doctrines of extraterritorial jurisdiction, positive obligations and the standard of due diligence demonstrated that although these concepts are emerging in the mainstream theory of international law and human rights law, their position still remains contested. This means that it is uncertain whether the human rights obligations of the State in relation to the women and particularly children in Al-Hol can be successfully asserted. The argument presented in this article is that the norms and rules of private international law generate content and substance for the concept of 'jurisdiction' in both international human rights conventions and the Finnish constitution.

Contrary to the common belief, in many cases the rules of the Brussels IIa Regulation might refer to the law of the forum in the determination of the jurisdiction to take protective measures. This is because in many cases, the determination of the habitual residence of children in Al-Hol is likely to prove impossible. In the Finnish case, the national norms are provided in the Child Welfare Act, and it seems indeed to be the case that following these national norms, Finland has the jurisdiction to take protective measures concerning those children whose parent is a Finnish citizen.

Speaking on a more general level, the possible abuse related to taking children abroad to face detrimental circumstances should be further researched in order to be better recog-

103. *X v Latvia* [GC], no. 27853/09, ECHR 2013.

nised, perhaps also in the rules of private international law. The issue of illegal or criminal removal of children might be considered more thoroughly in the doctrine and taken into account as a possible basis for conferring the jurisdiction to protect the child in its State of origin. Under British law, jurisdiction in child welfare cases may be based on the principle of *parens patriae* (Latin for 'parent of the nation'), which refers to the public policy power of the State to intervene against an abusive or negligent parent.[104] Similarly in other European countries, courts seem to have been able to base their jurisdiction on the obvious 'abuse of parental authority'.[105]

I want to conclude with a notion of State responsibility as *response-ability* suggested by Korhonen and Selkälä, who note that 'the practice of international law is a discussion on what to do here and now' and as such can be reduced neither to a formalistic account of state responsibility, nor to responsibility managerialism.[106] The conceptual scope of responsibility as response-ability is 'open beyond the formal, dogmatic, or managerial ideas and authorities'[107] and 'its progress comes from continued (re)negotiation of the terms of the old, the new and the unknown, not from permanent closure, codification and/or normalisation'.[108] Responding to violations of the rights of children whose parents are considered enemies of the nation, and who themselves are often framed as dangerous bodies, calls for approaches that go beyond formalism or strategy, both in public and private (international) law.

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104. *A v A and another* (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60 [2013] 3 WLR 761.
105. See, for example, Jänterä-Jareborg and Boele-Woelki (n 62) 149-150.
106. Korhonen and Selkälä (n 13) 855, 844.
107. Ibid.
108. Ibid.