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**THE REPATRIATION OF FINNISH CHILDREN FROM THE  
AL-HOL CAMP: THE JURISDICTION IN THE LIGHT OF  
HUMAN RIGHTS AND CHILD WELFARE LEGISLATION**

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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## **ABSTRACT**

After the fall of the ISIS, women, and children of Finnish nationality are held detained in a refugee camp in Northeast Syria with thousands of other former members of the ISIS caliphate. The inhuman and unhealthy conditions in the camp have raised human rights concerns and political discussion, leading to the repatriation of some of these Finnish nationals back to Finland. Yet, the legislative base on which the Finnish nationals can be retrieved from the camp remains debated.

The main question of the thesis is to examine the legal issues considering the jurisdiction to repatriate the Finnish children located in the camp. The jurisdiction is examined from the human rights law, private international law, and Finnish national law rules that apply to the Finnish children in the territory of a foreign state. The research is conducted by a qualitative research method. The exceptions to territory-based jurisdiction are examined to observe the extraterritorial jurisdiction of Finland and possible gaps in legislation complicating the protection of the rights of Finnish children. The research is based on the human rights law, the rights of the child, private international law conventions concerning parental responsibility and child protection, and Finnish law concerning human rights and jurisdiction over Finnish children. The Finnish Child Welfare Act is examined as the last resort to provide a legal basis for jurisdiction.

The thesis finds that while human rights impose a positive obligation to states also extraterritorially, the international rules of jurisdiction do not provide Finland jurisdiction to repatriate the Finnish children from Syria. Thus, the Finnish Child Protection Act shall be interpreted broadly to establish jurisdiction for Finnish authorities deriving it from the Brussels IIa Regulation. The thesis finds that to protect the rights of the children, the Act is to be interpreted so that it enables the repatriation of the children.

Keywords: human rights law, extraterritorial jurisdiction, child protection law, Brussels IIa Regulation, Finnish Child Welfare Act

## INTRODUCTION

After years of terrorizing the territory of Syria and spreading fear over the world, the extremist jihadist group the Islamic State of Syria and Iraq, commonly known as ISIS, fell in March 2019.<sup>1</sup> While the former ISIS fighters and their families are mostly Syrian and Iraq nationals, there is a considerable amount of nationals of the Western states, who left their home states in the rise of ISIS and are now left homeless in Syria. The men have been located in separate camps, and the women and children are being kept in various detainee camps, the biggest one of them being the camp of Al-Hol in Northeast Syria. Among these detainees are women and children having Finnish nationality.<sup>2</sup>

The fall of the caliphate started a very polarised discussion in the Western states questioning whether the children can be brought to their states of nationality to ensure the fulfilment of their human rights. There have been differing views on the interpretation of international rules of jurisdiction that could be applied to repatriate the children, and possibly their mothers, from the camps. I aim to gather the accurate legal provisions that will enable the repatriation of the Finnish children to Finland, safe from the dangerous conditions of the Al-Hol camp. The slow proceeding in repatriating the Finnish children reflects the complexity of state authorities using jurisdiction over its nationals in another state's territory. Despite the awareness that Finnish nationals had left to join ISIS during its rise, authorities were not prepared to face the situation that the fall caused. For now, the political debate of the issue has been a hindrance to the state's full enforcement of the obligation to protect the human rights of the children and to repatriate them. This should not be the case.

In this research of legislative issues considering the children's repatriation, the jurisdiction is aimed to be achieved through human rights protection. The conditions in the camp are reported to be very

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<sup>1</sup> Glenn, C. et al. (2019). *Timeline: the Rise, Spread, and Fall of the Islamic State*. Wilson Center. Retrieved from: <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state>. 2 February 2021.

<sup>2</sup> Sutinen, E. (2021, January 22). YK kertoo saaneensa tietoja 12 syyrialaisen ja irakilaisen murhista al-Holin leirillä. *Helsingin Sanomat*. Retrieved from: <https://www.hs.fi/ulkomaat/art-2000007756315.html>. 2 February 2021.

dangerous for the children<sup>3</sup>, and keeping them in the camp violates several of their human rights. To support the integration of the children back to the Finnish society, after living for years in a hostile environment, the fast repatriation of the children back to Finland is necessary. The research question of this thesis is to examine the legal issues with the jurisdiction clauses that might apply to this case, taking into consideration the rules of international conventions and Finnish national law concerning Finnish nationals in the territory of a foreign state. The thesis aims to establish a guideline for the interpretation of relevant legislation so that it provides a legal base for the repatriation of the children, possibly together with their mothers, to Finland. The research is conducted in qualitatively by an examination of the relevant rules of jurisdiction in the Brussels IIa Regulation (2003), the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996) and the Finnish Child Protection Act (2007). In addition, the Vienna Convention of Consular Relations (1963), the United Nations Convention on the Rights of the Child (1989), the European Convention on Human Rights (1953), and the Finnish Constitution are assessed.

The thesis is constructed of five main chapters. The first chapter provides an overview of the topic and issue at hand. I go through the circumstances in Syria and the camp of Al-Hol and present the detainees of the camp. In the second chapter, I examine the human rights aspects of the case. In this chapter, I study what international human rights of the children are violated when they are kept detained, and what rights are promised for them in the Finnish Constitution. The chapter also presents the rights that are addressed in the UN Convention on the Rights of the Child, and an assessment of the extraterritoriality of human rights in the view of jurisdiction. The third chapter concentrates on the legislative rules of jurisdiction. In it, I go through private international law rules that can provide extraterritorial jurisdiction, by examining the Vienna Convention on Consular Relations. Furthermore, the chapter includes an analysis of the Brussels IIa Regulation, which is the primary regulation for the European Union (EU) Member States concerning cross-border jurisdiction cases, and the 1996 Hague Convention on Parental Responsibility and Protection of Children, which is the foundational international treaty for child protection. Also, the relationship between these two conventions is analysed following a look at the concept of habitual residence and evaluation of the children's habitual residence. The fourth chapter takes an in-depth

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<sup>3</sup> Barbarani, S. (2021). *Leaving Syria's notorious al-Hol camp, civilians find little to go home to*. The New Humanitarian. Retrieved from: <https://www.thenewhumanitarian.org/news-feature/2021/01/14/syria-al-hol-camp-returning-home>. 2 February 2021.

look at the Finnish laws that apply to the situation. In the chapter, I go through the relevant provisions of the Finnish Constitution, which creates Finnish authorities a positive obligation to ensure the proper fulfilment of the rights of the children in the camp. I also look into the Finnish Child Welfare Act, namely its Section 17(2), which provides Finland jurisdictional competence to repatriate the children in this extraterritorial case.<sup>4</sup> In the fifth chapter, I present some discussion in legal literature and my insights and proposals for the current situation on how the rights of the children can be protected.

The situation with the Finnish children and their mothers in Al-Hol changes as we speak. The decision of the Finnish government in December 2020 to repatriate some of the children with their mothers to Finland has been an example of the possibility of the jurisdiction of Finnish authorities to act in the children's case.<sup>5</sup> However, the fact that the repatriation has been as complicated of an issue demonstrates that there has to be found the proper rules to follow which enables the repatriation.

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<sup>4</sup> Lastensuojelulaki 13.4.2007/417.

<sup>5</sup> Sippola, J. et al. (2020, December 20). Al-Holin leirillä asuneet kaksi naista ja kuusi lasta on kotiutettu – Suomi haki ensi kertaa leiriltä pois aikuisia , joilla on ISIS kytköksiä. *Helsingin Sanomat*. Retrieved from: <https://www.hs.fi/politiikka/art-2000007694376.html>. 3 February 2021.



# 1. THE FALL OF ISIS AND THE PEOPLE LEFT BEHIND

## 1.1. Background

The extremist Islamic group called ISIS (also called IS, ISIL, and Daesh), was the most powerful terrorist group in the world<sup>6</sup>, until finally facing its breaking point in March 2019 when the Syrian Democratic Forces (SDF) declared defeating it<sup>7</sup>. After the fall of the so-called “caliphate”, the fighters and their families were detained by the SDF in various camps in Syria, waiting for prosecution in Iraq or repatriation actions from their states of origin in the case of foreign fighters. The biggest of the detainee camps is the camp of Al-Hol, located in Northeast Syria.<sup>8</sup> In May 2019, the Al-Hol camp had a total population of over 73 000 persons, of which the vast majority are women and children, 67 % being children.<sup>9</sup> The situation in the camp is changing through time, yet towards a worse condition. The detainees are mostly Syrian and Iraq nationals; however, a significant number of the persons are third-country nationals<sup>10</sup>. By now, some people have escaped the camp by own means and some, mostly children, have been repatriated to their states of origin by the states’ authorities, but not all.

### 1.1.1. Current Situation in Syria

What complicates resolving the situation of the former ISIS fighters and their families is the politically unstable situation in Syria. Usually, foreign persons in the territory of another state are helped by consulates and other authorities, but due to the civil war of Syria, there are no helping institutions and most states have ended their diplomatic and consular operations in the country. The governance in Syria is now maintained by the Syrian Democratic Forces (SDF), which was

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<sup>6</sup> Sfintes, C. (2020). A Reality of the Middle East and ISIS. *Revista Universitara de Sociologie*, 2020(1), 318-326.

<sup>7</sup> Said, R. (2019, March 23). Islamic State ‘caliphate’ defeated yet threat persists. *Reuters*. Retrieved from: <https://www.reuters.com/article/us-mideast-crisis-islamic-state-idUSKCN1R407D>. 3 February 2021.

<sup>8</sup> International Crisis Group. (2019). *Women and Children First: Repatriating the Westerners Affiliated with ISIS*. Retrieved from: <https://www.crisisgroup.org/middle-east-north-africa/eastern-mediterranean/syria/208-women-and-children-first-repatriating-westerners-affiliated-isis>. 3 February 2021.

<sup>9</sup> OCHA. (2019). *Syria: Humanitarian Response in Al Hol camp, Situation Report No. 3 – As of 1 May 2019*. Retrieved from: <https://reliefweb.int/report/syrian-arab-republic/syria-humanitarian-response-al-hol-camp-situation-report-no-3-1-may-2019>. 3 February 2021.

<sup>10</sup> The detainees who are neither Syrian nor Iraqi nationals are called “third-country nationals”.

the main partner of the Western states in the fight against ISIS.<sup>11</sup> The SDF is a multi-national coalition that is mainly led by the Kurdish.<sup>12</sup> The Syrian area is held to be dangerous, and for instance, the Finnish Ministry of Foreign Affairs states that the Syrian territory should be left immediately due to the threat of conflicts and violence.<sup>13</sup> Many parts of the Syrian territory are uninhabitable, and international non-governmental organizations that used to help, have left the territory mostly without assistance.<sup>14</sup> As to the hostile environment, helping organizations refrain from organising humanitarian help in the area. This worsens the conditions of the camp and its detainees when the camp is so poorly upheld.

The SDF has difficulties to take care of the people in the camp, since it does not have a sovereign authority to prosecute the fighters or their family members, and one of its only possibilities is to transfer the detainees to Iraq for prosecution.<sup>15</sup> Prosecution in Iraq raises concerns about fair juridical process.<sup>16</sup> The SDF has stated their will to get the detainees out of the camps, nevertheless that they will only give up detainees to the respondent governments, thus encouraging the states whose nationals are detained to repatriate them to their states of origin. Furthermore, the SDF has declared that it will not separate the children from their mothers, and therefore will only give child detainees without their mothers, with the mother's consent.<sup>17</sup>

### **1.1.2. The Camp of Al-Hol**

The camp of Al-Hol is situated in Northeast Syria, near the Syrian-Iraq border. The camp is originating from the time of the Gulf war of 1991 and was made by the United Nations High Commissioner for Refugees.<sup>18</sup> It was constructed for approximately 15 000 people.<sup>19</sup> The camp has been divided into sections for the Syrian, Iraq, and third-country nationals, and the foreigners

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<sup>11</sup>Van Wilgenburg, W. (N.d.) *Syrian Democratic Force*. European Council on Foreign Relations. Retrieved from: <https://ecfr.eu/special/mena-armed-groups/syrian-democratic-forces-syria/>. 3 February 2021.

<sup>12</sup> *Ibid.*

<sup>13</sup> Ulkoministeriö (2020). *Syyria: Matkustustiedote*. Retrieved from: <https://um.fi/matkustustiedote/-/c/SY10>. 3 February 2020.

<sup>14</sup> Barbarani, S. (2021). *Leaving Syria's notorious al-Hol camp, civilians find little to go home*. The New Humanitarian. Retrieved from: <https://www.thenewhumanitarian.org/news-feature/2021/01/14/syria-al-hol-camp-returning-home>. 3 February 2021.

<sup>15</sup> The Soufan Center. (2019). *The Dilemma of Repatriation*. Retrieved from: <https://thesoufancenter.org/intelbrief-the-dilemma-of-repatriation/>. 3 February 2021.

<sup>16</sup> *Ibid.*

<sup>17</sup> Broches, E. (2020). *What Is Happening With the Foreign Women and Children in SDF Custody in Syria?* Retrieved from: <https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria>. 22 March 2021.

<sup>18</sup> Saad, N.J. (2020). *The Al Hol camp in Northeast Syria: health and humanitarian challenges*. *BMJ Global Health*, 5(1), BMJ Publishing Group, 1.

<sup>19</sup> *Ibid.*

are kept in their sections. Due to the lack of resources and willingness to maintain the camp in a manageable condition, the camp has become a dangerous and inhuman living environment for anyone in there. An epidemiologist from the Médecines Sans Frontières reported in 2020 after staying in the camp, that the camp lacks medical care, sufficient food, water, and shelter.<sup>20</sup> Recently, the United Nations Office for the Coordinator of Humanitarian Affairs reported in a statement of the rising of violence among the camp population.<sup>21</sup> Due to the circumstances, the people are held in the camp, human rights concerns have arisen. This finally led to the discussion of the repatriation of the detainees, especially children, to their origin states.

## 1.2. Repatriation of the Detainees

The difficult situation of third-country nationals has been widely addressed but the states have been reluctant to repatriate the mothers, thereby making the repatriation of the children challenging. The Council of Europe's Commissioner for Human Rights made a statement in May 2019 where she advises the member states to urgently repatriate their underage nationals from Northern Syria and advised them considering repatriating their mothers also.<sup>22</sup>

By repatriation is meant the returning of the persons from Syria to their states of origin or state of nationality. In the case of the spouses of the men ISIS fighters, it is the state of origin and nationality, but in the case of the children, it can be only the state of nationality if they have been born in the caliphate. In the case at hand, repatriation of the Western state nationals is assessed because the camp of Al-Hol is no sustainable solution for holding the detainees. In March 2019, the Al-Hol camp held around 11 000 third country nationals of the overall 73 000 detainees.<sup>23</sup> These third-country nationals are Europeans, North Americans, and Central Asians.<sup>24</sup> As much as

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<sup>20</sup> *Ibid.*

<sup>21</sup> OCHA, (2021). *United Nations Resident Coordinator and Humanitarian Coordinator in Syria, Imran Riza, and Regional Humanitarian Coordinator for the Syria Crisis, Muhannad Hadi – Joint Statement on the Deteriorating Security at Al Hol Camp*. Retrieved from: <https://reliefweb.int/report/syrian-arab-republic/united-nations-resident-coordinator-and-humanitarian-coordinator-syria-6>. 3 February 2021.

<sup>22</sup> Council of Europe Commissioner for Human Rights, (2019). *Council of Europe member states should urgently repatriate their under-age nationals stranded in Northern Syria*. Retrieved from: <https://www.coe.int/en/web/commissioner/-/council-of-europe-member-states-should-urgently-repatriate-their-under-age-nationals-stranded-in-northern-syria>. 3 February 2021.

<sup>23</sup> Saad (2020). *Supra nota* 18.

<sup>24</sup> *Ibid.*

94 % of the detainees in the camp have been women and children, of which 53 % children under 12 years old.<sup>25</sup>

The conditions in the camp have been proven to be especially detrimental to the children: there have been reported multiple child deaths in the camp. In August 2020, UNICEF reported that eight children under the age of five had died in Al-Hol in less than a week.<sup>26</sup> The camp provides no future for the children, and therefore actions from the detainees' states of origin are required. The following chapters will present how these states have reacted and what actions they have already taken.

### 1.2.1. The State's Response in Finland

The focus of this thesis is on the Finnish nationals detained in Al-Hol. Initially, there were reported to be 11 Finnish mothers and over 30 of their Finnish children in the camp.<sup>27</sup> The mothers are known to have Finnish nationality, as they are originally from Finland and left Finland to join ISIS with their husbands. The children of these Finnish women also have Finnish nationality giving to the Finnish Nationality Act.<sup>28</sup> Section 9 of the Act states that a child gains Finnish nationality if the mother is a Finnish national.<sup>29</sup> Thus, whereas the children who travelled together with their mothers to the ISIS caliphate, also the children who were born there to Finnish women are Finnish nationals. After the fall of the caliphate, the retrieval of Finnish children or the children together with their mothers has caused a very heated political discussion in Finland<sup>30</sup>, as some think that neither the mothers nor children have a right to come back to Finland. It is feared that they pose a severe security threat to society. Others say that if the children are repatriated, the mothers should be too, as it would be in the best interest of the children.

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<sup>25</sup> OCHA, (2020). *Syrian Arab Republic North East Syria: Al Hol camp As of 11 October 2020*. Retrieved from: [https://reliefweb.int/sites/reliefweb.int/files/resources/Al%20Hol%20Snapshot\\_11Oct2020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Al%20Hol%20Snapshot_11Oct2020.pdf). 3 February 2021.

<sup>26</sup> Relief Web, (2020). *Syria: Child death rate triples in Al-Hol camp as medical access deteriorates*. Retrieved from: <https://reliefweb.int/report/syrian-arab-republic/syria-child-death-rate-triples-al-hol-camp-medical-access-deteriorates>. 3 February 2021.

<sup>27</sup> Sillanpää, S. (2019, December 13). 11 naista ja heidän lapsensa. *Helsingin Sanomat*. Retrieved from: <https://www.hs.fi/sunnuntai/art-2000006341623.html>. 3 February 2021.

<sup>28</sup> Kansalaisuuslaki 16.5.2003/359

<sup>29</sup> *Ibid.*, Section 9

<sup>30</sup> Strömberg, J. & Sullström, H. (2019). Hallituksen al-Hol-linjaukselle omilta joukoilta kehuja, oppositio haki jo eripuraa aineksia. *Yle Uutiset*. Retrieved from: <https://yle.fi/uutiset/3-11120798>. 6 February 2021.

In December 2019 the Finnish Government gave a decision to repatriate the Finnish children from the camp<sup>31</sup>, and shortly after this Finland repatriated two orphan children from Al-Hol<sup>32</sup>. Afterward, at the end of May 2020, three families of mothers and their children fled independently from Al-Hol to Turkey, and Finnish authorities helped them to travel to Finland from the Finnish consulate in Ankara.<sup>33</sup> Most recently, in December 2020, Finnish authorities repatriated for the first time two mothers with their six children directly from Al-Hol.<sup>34</sup> There remains a small number of Finnish nationals in Al-Hol, including children.

### 1.2.2. The Response in the Other EU States

To understand the complexity of the situation and of using the state's extraterritorial jurisdiction to its nationals abroad, it is important to take a look at the actions taken by other European states regarding this matter. Norway had stated in 2019 that it only repatriates orphan children from the camp, yet it repatriated one Norwegian-Pakistani mother with her two children based on humanitarian reasons when one of the children had a severe illness that needed medical care.<sup>35</sup> This repatriation caused a governmental crisis in Norway<sup>36</sup>, and in February 2021 the woman was charged with terrorism<sup>37</sup>. Sweden has taken the same approach to repatriate only orphan children from Al-Hol<sup>38</sup>, and has repatriated seven orphans.<sup>39</sup> Also, four women and nine children were reported to be arriving to Sweden from Turkey after they had travelled from Syria to Turkey

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<sup>31</sup> Valtioneuvosto (2019). *Valtioneuvoston periaatepäätös UM/2019/203*. Retrieved from: <https://valtioneuvosto.fi/paatokset/paatos?decisionId=0900908f80677066>. 5 February 2021.

<sup>32</sup> Ulkoministeriö (2019). *Suomen viranomaisten hoivissa kaksi lasta al-Holin leiriltä*. Retrieved from: [https://um.fi/ajankohtaista/-/asset\\_publisher/gc654PySnjTX/content/suomen-viranomaisten-hoivissa-kaksi-lasta-al-holin-leirilt-c3-a4](https://um.fi/ajankohtaista/-/asset_publisher/gc654PySnjTX/content/suomen-viranomaisten-hoivissa-kaksi-lasta-al-holin-leirilt-c3-a4). 3 February 2021.

<sup>33</sup> Ulkoministeriö (2020). *Suomeen kolme perhettä Turkista al-Holin leiriltä*. Retrieved from: [https://um.fi/ajankohtaista/-/asset\\_publisher/gc654PySnjTX/content/suomeen-3-perhett-c3-a4-turkista-al-holin-leirilt-c3-a4](https://um.fi/ajankohtaista/-/asset_publisher/gc654PySnjTX/content/suomeen-3-perhett-c3-a4-turkista-al-holin-leirilt-c3-a4). 3 February 2021.

<sup>34</sup> Rigatelli, S. (2020). *Suomen viranomaiset hakivat kaksi al-Holin leirin naista ja kuusi lasta – UM kotiutti ensimmäistä kertaa äitejä*. Yle Uutiset. Retrieved from: <https://yle.fi/uutiset/3-11707651>. 3 February 2021.

<sup>35</sup> STT-HS, (2020, January 18). *Isis-taistelijan vaimo tuotiin viikonloppuna lapsineen Norjaan, ja nyt tapaus uhkaa hajottaa maan hallituksen*. *Helsingin Sanomat*. Retrieved from: <https://www.hs.fi/ulkomaat/art-2000006377270.html>. 5 February 2021.

<sup>36</sup> *Ibid.*

<sup>37</sup> STT-NTB-HS, (2021, February 6). *Al-Holin leiriltä lastensa kanssa Norjaan noudeutu nainen sai syytteen: Lasten ja kodin hoitaminen oli Isisin avustamista, katsoo syyttäjä*. *Helsingin Sanomat*. Retrieved from: <https://www.hs.fi/ulkomaat/art-2000007784859.html>. 6 February 2021.

<sup>38</sup> Kleberg, S.F. (2019, November 28). *Utrikesminister Ann Linde (S): Vi kan inte bara ta barnen från mammorna*. *SVT Nyheter*. Retrieved from: <https://www.svt.se/nyheter/utrikes/utrikesminister-ann-linde-s-vi-kan-inte-bara-ta-barnen-fran-mammorna>. 5 February 2021.

<sup>39</sup> Thomsen, D. & Klinghoffer, S. (2019, May 15). *IS-terroristen Michael Skråmos sju barn har landat i Sverige*. *SVT Nyheter*. Retrieved from: <https://www.svt.se/nyheter/lokalt/vast/har-landar-is-terroristen-michael-skramos-sju-barn-i-sverige>. 6 February 2021.

independently.<sup>40</sup> In Belgium, there have been several cases in the national courts where the persons detained have tried to claim for repatriation from the camp to Belgium on the basis of their human rights and the state's obligation to protect them.<sup>41</sup> The trend of starting court proceedings to get repatriated from the camp has not yet arrived in Finland, yet in middle of Europe, it has been more common. Neither the Belgian government has also been eager to repatriate the adults – it ruled that the children of Belgian nationals can return to Belgium, and in the case of older children the situation is separately assessed.<sup>42</sup> The Netherlands' position is a general will to cooperate in the return of its nationals, but it refuses to engage in the repatriation.<sup>43</sup> Germany again is willing to repatriate the children of its nationality from the camps, but not their parents.<sup>44</sup> In France, a significant case occurred in June 2020, when a mother, who together with the children's father was detained in prison, permitted French officials to repatriate their children from Syria.<sup>45</sup> The option of repatriating only the children by their mother's consent has been considered in Finland as well, yet there have been no such cases in practice.

On the base of this brief look to some of the other European states whose nationals, both women and children, have been and are detained in the camps, the common opinion of states seems to be only to repatriate the children and not the mothers. Finland has, as one of the only countries, repatriated also mothers without any special reason, such as in Norway's case of repatriating one mother for humanitarian reasons. The fact that most states took the stand to repatriate the orphan children only demonstrates that it is very difficult from a legal point of view to separate the children from their mothers to be able to repatriate only the children. Also, the fact that the SDF has stated that they won't separate the children from their mothers, makes the repatriating of only the children problematic. The reluctance of the states to repatriate the mothers because of fears of public security is controversial to the state's positive obligation to protect the fundamental human rights, which are assessed next.

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<sup>40</sup> Klinghoffer, S. (2020, November 1). Fyra svenska IS-kvinnor på väg hem till Sverige. *SVT Nyheter*. Retrieved from: <https://www.svt.se/nyheter/inrikes/fyra-svenska-is-kvinnor-pa-vag-hem-till-sverige>. 5 February 2021.

<sup>41</sup> Van Poecke, T., Wauters, E. (2021). The Repatriation of European Nationals from Syria as Contested before Domestic Courts in Belgium and Beyond. *KU Leuven, Leuven Centre for Global Studies, Institute for International Law*. Working Paper No. 229 – January 2021.

<sup>42</sup> *Ibid.*, 4.

<sup>43</sup> *Ibid.*, 35.

<sup>44</sup> *Ibid.*, 38.

<sup>45</sup> Christien A. *et al.* (2020). How COVID-19 Underscores the Urgent Need to Repatriate Women and Children from Northeast Syria Camps, *GIWPS*. Retrieved from: <https://giwps.georgetown.edu/how-covid-19-underscores-the-urgent-need-to-repatriate-women-and-children-from-northeast-syria-camps/>. 11 March 2021.

## **2. JURISDICTION TO REPATRIATE FROM THE HUMAN RIGHTS LAW**

### **2.1. The Guaranteed Human Rights**

As found above, the conditions in the Al-Hol camp are inhuman and detrimental, especially to the children. Both the international human rights law and the Constitution of Finland guarantee human rights to the Finnish nationals detained in the camp. Human rights impose positive obligations to states which means that states have to actively participate to ensure that the human rights of people are fulfilled – the states' must take affirmative steps to ensure the protection of human rights.<sup>46</sup> The states of origin of the people detained in the camp of Al-Hol, Finland as well, have a positive obligation to actively protect the human rights of their citizens, even extraterritorially. The standard of due diligence, which is recognized in international law, requires states to act to protect human rights even in a situation that cannot be foreseen.<sup>47</sup> This standard of due diligence can stretch the state's positive obligation to extraterritorial situations thereby requiring actions from the responsible states to safeguard human rights.

The jurisdiction to repatriate the Finnish children from the camp can be sought from the obligation of Finland to protect the rights of the children. Relevant provisions and extraterritoriality of human rights law need to be explored to be able to assess whether extraterritorial jurisdiction of Finnish authorities can be based on the state's obligation to protect the human rights of the children.

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<sup>46</sup> Shelton, D. (Ed.). (2013). *The Oxford handbook of international human rights law*. Oxford, UK: Oxford University Press, 562–563.

<sup>47</sup> Mustasaari, S. (2020). Finnish Children or 'Cubs of the Caliphate'? *Oslo Law Review*, 7(01), Universitetsforlaget, 22-45, 30.

### **2.1.1. International Human Rights Law**

International human rights law is based on human rights conventions. Human rights belong to all humans by default.<sup>48</sup> However, the ISIS operations have impacted the human rights in Syria<sup>49</sup>, thus affecting the rights of the Finnish children in Al-Hol. The United Nations Universal Declaration (UDHR) on Human Rights applies to all people, irrespective of the fact whether a state is a party to it.<sup>50</sup> To Finland, which is a party to the European Council, the European Convention on Human Rights (ECHR) is the primary human rights source.<sup>51</sup> Additionally, an important human rights treaty considering children is the United Nations Convention on the Rights of the Child (CRC).

In this thesis, the focus is mainly on the rights promised to the Finnish nationals in the ECHR. The Convention regulates the right to life<sup>52</sup> and the right to liberty and security<sup>53</sup>, which are at risk for the children in Al-Hol. Moreover, the ECHR states the right to respect for private and family life<sup>54</sup> for the children, which needs to be remembered when considering whether the children are repatriated alone or with their mothers. Another right at risk in the camp is the prohibition of torture and inhuman and degrading treatment<sup>55</sup>, as to the poor conditions in the camp. These rights promised in the ECHR form a base for the state's positive obligation to protect human rights – for instance by repatriating the children from the dangerous camp.

### **2.1.2. Human Rights in the Finnish Constitution**

The constitution of Finland<sup>56</sup> sets constitutional and fundamental human rights for Finnish citizens. While the Constitution is high in the domestic legislative hierarchy, it shall be noted that the abovementioned international conventions have an elevated position compared to ordinary laws of Finland<sup>57</sup>, and thereby their provisions get primacy over the national laws.

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<sup>48</sup> Beitz, C. R. (2011). *The idea of human rights*. Oxford, UK: Oxford University Press, 59.

<sup>49</sup> Conduit, D. & Rich, B. (2016). Foreign Fighters, Human Rights and Self-Determination in Syria and Iraq: Decoding the Humanitarian Impact of Foreign Fighters in Practice. *International Community Law Review*, 18(5), Brill, 431-454, 453.

<sup>50</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

<sup>51</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Article 1

<sup>52</sup> *Ibid.*, Article 2

<sup>53</sup> *Ibid.*, Article 5

<sup>54</sup> *Ibid.*, Article 8

<sup>55</sup> *Ibid.*, Article 13

<sup>56</sup> Suomen Perustuslaki, 731/1999

<sup>57</sup> Mustasaari (2020). *Supra nota* 47, 27.



In Section Two, the Constitution states the basic rights and liberties, which include equality<sup>58</sup>, the right to life, personal liberty and integrity<sup>59</sup>, protection under the law<sup>60</sup>, and protection of basic rights and liberties<sup>61</sup> *inter alia*. These rights impose the state of Finland an obligation to take active measures to guarantee the fulfilment of the basic rights and liberties, thereby stating its positive obligation to human rights protection as legal norms.

To reflect these rights and liberties to the situation at hand, they set an obligation for the Finnish authorities to protect the Finnish children from the inhuman conditions of the Al-Hol camp. In the evaluation of the jurisdiction of Finland to repatriate the Finnish children from Al-Hol, the rights guaranteed in the Constitution and the obligation of the state to actively protect these rights must be taken into account.

## **2.2. The Rights of the Child**

The Al-Hol camp holds captive children who have travelled to the caliphate with their parents or been born there, and some might even have been born in the refugee camps, as presented above. Now, the rights of these children cannot be and are not guaranteed since the camp is an unsafe and improper living environment. For the protection of children, the United Nations has established the Convention on the Rights of the Child to ensure wider rights for children who are more vulnerable than adults. The implementation of the CRC added the states' parties obligations towards children.<sup>62</sup> The Convention defines children as all human beings under 18 years old.<sup>63</sup> In the discussion of the children detained in Al-Hol, the rights in CRC must be considered. Finland is a party to the Convention and thus has to abide by it.

The CRC covers several aspects considering the circumstances in which the children are kept in the camp and, ways in which their rights are endangered. The most relevant articles in CRC in the case of the detained children are Articles 3, 6, 7, 8, 11, 27, and 31. The Convention establishes in Article 3 that the child's best interest must be the primary consideration in all actions concerning

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<sup>58</sup> Suomen Perustuslaki, Section 6

<sup>59</sup> *Ibid*, Section 7

<sup>60</sup> *Ibid*, Section 21

<sup>61</sup> *Ibid*, Section 22

<sup>62</sup> Grugel, J. (2013). Children's rights and children's welfare after the Convention on the Rights of the Child. *Progress in Development Studies*, Sage Publications, 13(1), 19-30, 21.

<sup>63</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 1

the child, and the state must ensure the well-being of the child.<sup>64</sup> This Article is the most important in the evaluation of repatriation of the children, as according to Article 3(1), the child has a right to have her interests assessed and be given priority in decision making.<sup>65</sup> This comes to an evaluation in situations when it is assessed whether it is for the child's best to repatriate them alone or with their mother, as the interests in the wording can be implied as taking other rights and interests into consideration in its interpretation.<sup>66</sup> Article 6 establishes the inherent right to life which all party states must recognize and imposes the State an obligation to ensure the survival and development of the child to the maximum extent possible.<sup>67</sup> According to Article 7, the child shall be registered immediately after birth to get a name and nationality, and according to Article 8 states must preserve the child's identity.<sup>68</sup> These rights are endangered if Finnish women in Al-Hol have given birth to children who are not registered in the caliphate. Non-registration can affect consular and other state help if the child does not have a passport to prove nationality. Furthermore, the CRC includes the right of the child to an adequate standard of living in Article 27 and the right to rest and play in Article 31.<sup>69</sup> The camp is no environment for a child to live adequately, nor have the guaranteed rest or play. There is no clause that would prevent a child from being transferred or joined to an extremist association such as ISIS, yet Article 11 provides that the states parties to the convention shall take measures to combat the illicit transfer and non-return of children abroad.<sup>70</sup> The occasion of transferring children from their state of origin to the ISIS caliphate could fall under this Article.<sup>71</sup> Lastly, Article 38 imposes states an obligation to take all feasible measures to ensure protection and care of children who are affected by armed conflict.<sup>72</sup>

Based on the Convention on the Rights of the Child, as well as the human rights presented before, it can be found that Finland has multiple reasons to protect the children from the conditions in the Al-Hol camp and repatriate them.

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<sup>64</sup> *Ibid.*, Article 3

<sup>65</sup> Kallio, H. *et al.* (2018). *Ulkomaalaisoikeus*. (1st ed.). Helsinki, Finland: Alma Talent, 410.

<sup>66</sup> Sormunen, M. (2016). 'In All Actions Concerning Children'? *The International Journal of Children's Rights*, 24(1), 155-184, Brill, 158.

<sup>67</sup> UN General Assembly, *Supra nota* 63, Article 6

<sup>68</sup> *Ibid.*, Articles 7-8

<sup>69</sup> *Ibid.*, Article 27, 31

<sup>70</sup> *Ibid.*, Article 11

<sup>71</sup> Mustasaari (2020). *Supra nota* 47, 27.

<sup>72</sup> UN General Assembly, *Supra nota* 63, Article 38

### 2.3. The Extraterritoriality of Human Rights

The ECHR states in its first Article the following: “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention” (emphasis added).<sup>73</sup> A similar clause can be also found in the CRC.<sup>74</sup> The ECHR does not define who is in a state’s jurisdiction, which means that the state’s obligation to secure human rights reach extraterritorial situations as long as the person is seen to belong to the state’s jurisdiction. In legal literature, the ECHR has been understood to have extraterritorial applicability, mainly derived from the jurisprudence of the European Court of Human Rights: The Court has taken an approach towards an interpretation of the Article 1 ECHR where the obligation to protect reaches situations where people are outside the state’s territory.<sup>75</sup> Yet extraterritoriality is not the rule, more the exception. The extraterritoriality of the human rights of children in Al-Hol is central from the view of Finland’s jurisdiction since the positive obligation to protect the rights could provide Finnish authorities a base for repatriation.

Support to the extraterritoriality of human right protection obligation can be derived also from the provisions of the UDHR, where Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this Declaration”, Article 22 states that “everyone, as a member of society, has the right to ...” and Article 28 sets that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.<sup>76</sup> Furthermore, it has been argued that the extraterritoriality of human rights obligations can be based on jurisdiction established under international law principles<sup>77</sup>, such as the rules of private international law. These rules are examined later.

While the extraterritoriality of the human rights obliging Finland to protect the children even when they are in Syria is uncertain, the legal base for the jurisdiction of Finnish authorities has to be examined through the relevant legal provisions considering jurisdiction of a state in extraterritorial

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<sup>73</sup> Council of Europe, *Supra nota* 51, Article 1

<sup>74</sup> UN General Assembly, *Supra nota* 63, Article 2

<sup>75</sup> Dickson, B. (2016). The Extra-territorial Obligations of European States regarding Human Rights in the Context of Terrorism. In F. Fabbrini, & V. Jackson (Eds.), *Constitutionalism Across Borders in the Struggle Against Terrorism*, Edward Elgar Publishing, 213-232, 12. ; Besson, S. (2012). The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to. *Leiden Journal of International Law*, 25(4), Cambridge University Press, 857-884.

<sup>76</sup> UN General Assembly, *Supra nota* 50, Articles 2, 22, 28 ; Joseph, S. (2011). *Blame it on the WTO?: A Human Rights Critique*. Oxford, UK: Oxford University Press, 246.

<sup>77</sup> King, H. (2009). The extraterritorial human rights obligations of states. *Human Rights Law Review*, 9(4), 521-556, 522.

situations. In this current research, the human rights obligation of Finland cannot be taken to provide a strong enough base for jurisdiction without any link to substantive law. Therefore, the substantive laws of jurisdiction need to be analysed.<sup>78</sup>

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<sup>78</sup> Mustasaari (2020). *Supra nota* 47, 31.

### **3. JURISDICTION TO REPATRIATE FROM PRIVATE INTERNATIONAL LAW**

Jurisdiction is needed to take protective measures for the Finnish children. Only with extraterritorial jurisdiction can Finland repatriate its nationals from the camp of Al-Hol, due to it being located in foreign territory. As presented above, primarily a state has jurisdiction over its nationals on its territory.<sup>79</sup> State jurisdiction can be defined as jurisdiction under domestic law.<sup>80</sup> To examine Finland's jurisdiction to repatriate the children from Al-Hol, the extraterritorial jurisdiction is next searched from the rules of private international law. Typically, extraterritorial jurisdiction over a person is based on a consular relationship between states. In this chapter, the applicability of the Vienna Convention on Consular Relations of 1963 (VCCR), the European Union's 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 (the Brussels IIa Regulation) and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Hague 1996 Convention) are analysed.

#### **3.1. Consular Relations Providing Jurisdiction**

Consular law regulates the relationship between states and individuals.<sup>81</sup> Consular relationships are voluntarily bound between two states, so the states can provide support for their nationals located in the other state's territory. The Finnish Consular Services Act is the law that consular

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<sup>79</sup> Spadaro, A. (2021). Repatriation of family members of foreign fighters: individual right or state prerogative? *International and Comparative Law Quarterly*, 70(1), Cambridge University Press, 251-265, 260.

<sup>80</sup> Besson (2012). *Supra nota* 75, 868.

<sup>81</sup> Wouters, J. et al. (2013). The European Union and Consular Law. *KU Leuven, Leuven Centre for Global Governance Studies, Institute for International Law*. Working Paper No. 107 – June 2013, 14.

help for the Finnish children in Al-Hol can be based on.<sup>82</sup> The Act is based on the VCCR. Both of them are here analysed as potential bases for jurisdiction.

### **3.1.1. The Vienna Convention on Consular Relations of 1963 and the Finnish Consular Services Act**

The Finnish Consular Services Act lays down the provisions of Article 5 of the VCCR. Article 5 lists down the consular functions, which consist of protecting nationals, furthering the states' relations, issuing passports and travel documents, *et cetera*.<sup>83</sup> The scope of application of the Finnish Act is regulated in Section 2. According to it, consular services may be provided for Finnish citizens or foreign citizens residing permanently and lawfully in Finland.<sup>84</sup> As an exception to this residency rule, Section 11 provides that in the case of persons in distress, consular services may be afforded to persons who are temporarily residing abroad within the consular district of a mission and whom the mission has found to be in distress because of illness, injury, accident, crime or other comparable reason.<sup>85</sup> The temporality in Section 11 is not a prerequisite for providing help in a crisis, for instance in wartime.<sup>86</sup> Section 12 states that the mission shall advise and assist a person in distress for instance by arranging repatriation.<sup>87</sup>

Consular services shall generally be provided by embassies, legations, consulates-general, consulates, vice consulates, and consular agencies in the country where the mission is established, as stated in Section 9.<sup>88</sup> However, if consular services are needed in a state which is not a consular district of any mission, the Ministry of Foreign Affairs determines the provision of consular services.<sup>89</sup> Section 15 of the Act states that in the event of war, a mission or the Ministry of Foreign Affairs may assist persons referred to in Section 2 as well as family members accompanying them who reside with the consular district under certain conditions regardless of their nationality.<sup>90</sup>

### **3.1.2. The Consular Relationship between Finland and Syria**

A consular relationship between two states is only born by a mutual agreement, it is not born by default of being a party to the Vienna Convention. As seen from the provisions of the Finnish Act,

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<sup>82</sup> Konsulipalvelulaki, 498/1999, Section 1

<sup>83</sup> United Nations, Vienna Convention on Consular Relations, 24 April 1963, Article 5

<sup>84</sup> Konsulipalvelulaki, *Supra nota* 82, Section 2

<sup>85</sup> *Ibid.*, Section 11.

<sup>86</sup> Mustasaari (2020) *Supra nota* 47, 32.

<sup>87</sup> Konsulipalvelulaki, *Supra nota* 82, Section 12

<sup>88</sup> *Ibid.*, Section 9

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* Section 15

the provision of consular services is linked to the existence of a consular mission and the staying of the person needing help in the consular district. There is no Finnish embassy nor other consular missions currently in Syria due to the Syrian civil war. The nearest consular mission from the camp of Al-Hol is in Ankara, Turkey. From there Finnish nationals can be helped, but only in situations where the detained persons have travelled independently to the consulate. It is known that some Finnish nationals have used this route and thereby received help in travelling to Finland.<sup>91</sup>

### **3.1.3. Applicability of Consular Law to Repatriation**

Section 2 of the Finnish Act does not apply, as the children are living permanently in Finland. Section 11 of persons in distress of the Act could enable the repatriation of the Finnish citizens from the Al-Hol camp if there was a consular mission in Syria. However, as found out, currently there is not. Consular law could serve as the base of jurisdiction to repatriate only if the Finnish consulate would operate in Syria. There is neither a consular relationship between Finland and the Kurds governing the camp. However, this would not provide jurisdiction on the consular basis, because consular law does not apply to relationships between states and non-state actors.<sup>92</sup>

On the basis of the presented, consular law could be the basis for repatriation but not in this specific case of the Finnish children in Al-Hol. Thus, other ways to find jurisdiction for repatriation are still to be analysed.

## **3.2. The Brussels IIa Regulation and the Hague 1996 Convention**

A state has the right to intervene in parental responsibility matters when the parent exposes the child to a risk for life or is unable to take care of the child's wellbeing.<sup>93</sup> The threshold to take protective measures is overlapped when there is a clear risk to the child without the intervention by the state.<sup>94</sup> For cross-border child protection cases, the EU and the Hague Conference have regulated conventions, which are the Brussels IIa Regulation and the Hague 1996 Convention. These conventions establish rules on which state involved in the case shall have jurisdiction. They can apply to the case of Finnish children in Al-Hol since Finland is a party to them.

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<sup>91</sup> Ulkoministeriö (2020). *Supra nota* 33.

<sup>92</sup> Spadaro (2021). *Supra nota* 79, 262.

<sup>93</sup> Mustasaari (2020) *Supra nota* 47, 33.

<sup>94</sup> *Ibid.*

### 3.2.1. Jurisdiction based on the Brussels IIa Regulation

The Brussels IIa Regulation determines the general jurisdiction for parental responsibility matters in Article 8.<sup>95</sup> According to it, the courts of a Member State have jurisdiction in matters of parental responsibility for a child who is habitually resident in that Member State at the time the court is seized. Court of Justice of the European Union (CJEU) has defined the concept of habitual residence in its case law. In the ruling C-523/07, the Court pointed that “the habitual residence of a child, within the meaning of Article 8(1) of the Regulation, must be established based on all the circumstances specific to each individual case”.<sup>96</sup> It also stated that the habitual residence of Article 8(1) must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in the state.<sup>97</sup> This is looked more into in chapter 3.3.

As an alternative base for jurisdiction from the place of habitual residence, Article 13 of the Regulation states that if the habitual residence of the child cannot be established and jurisdiction cannot be determined on rules relating to divorce, legal separation, or marriage, the court of the Member State where the child is present shall have jurisdiction. This also applies to refugee children or internationally displaced children according to paragraph two. Thereby, also the location of the child can provide jurisdiction.

#### 3.2.1.1. Applicability of the Brussels IIa Regulation

The Regulation applies to children yet does not define any maximum age for the children who are covered by it. This is left to the national laws to determine. In Article 2(3), the geographical scope of the Regulation is determined to be the Member States.<sup>98</sup> Since the Brussels IIa Regulation is an EU regulation, it is applicable as EU law. As a rule, between the EU Member States, the EU law is applied.<sup>99</sup> The regulation applies therefore only to cross-border cases between states that are the EU Member States and is the base for jurisdiction primarily only in such cases. Since Syria is not a Member State to the EU, the Regulation’s general base for jurisdiction is not applicable.

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<sup>95</sup> 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, OJL 338 , 23/12/2003 P. 0001 – 0029, Article 8

<sup>96</sup> Court decision, 2.4.2009, C-523/07, ECLI:EU:C:2009:225, point 37.

<sup>97</sup> *Ibid.*, point 44.

<sup>98</sup> Council Regulation, *Supra nota* 93, Article 2

<sup>99</sup> Helin, M. (2020). *Suomen kansainvälinen perhe- ja perintöoikeus*. Helsinki, Finland: Alma Talent, 486.



However, for cases where the child is domiciled in a third state, there is a special rule of residual jurisdiction. The Regulation might thus apply to the Finnish children by the residual jurisdiction clause.

### **3.2.1.2. Residual Jurisdiction**

The Brussels IIa Regulation has a rule of residual jurisdiction. In Article 14, the Convention states that where no court of a Member State has jurisdiction under Articles 8 to 13, the jurisdiction shall be determined, in each Member State, by the laws of that State.<sup>100</sup> In practice, this means that the rules of jurisdiction of the Regulation are defined quite broadly so as there is no general requirement for the defendant to be domiciled within the EU.<sup>101</sup> Therefore the residual jurisdiction concerns the persons habitually resident outside the EU, of which one classical example is the proceedings of parental responsibility when the child who has an EU citizenship is habitually resident outside the EU.<sup>102</sup>

The citizenship of the EU provides the nationals of the Member States certain rights<sup>103</sup>, and as to Article 14, the children's EU citizenship enables the application of residual jurisdiction. The Finnish children in Al-Hol are European Union citizens, as Article 20 of the Treaty on the Functioning of the European Union states, that a person holding the nationality of a Member State is a citizen of the Union. Thus, in the case of the children in Al-Hol, Finland may gain residual jurisdiction as no other Member State has jurisdiction over them based on the Articles of the Regulation.

### **3.2.2. The Hague Convention on Parental Responsibilities and Child Protection of 1996**

The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children came into force in Finland in 2011 and is the other child protection convention that can provide Finland jurisdiction. The Convention aims to improve the protection of children in cases having an

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<sup>100</sup> Council Regulation, *Supra nota* 93, Article 14

<sup>101</sup> Nuyts, A. (2007). *Study on Residual Jurisdiction*. Brussels: Service Contract with the European Commission JLS/C4/2005/07-30-CE)0040309/00-37, General Report (Final version dated 3 September 2007), Brussels, 13.

<sup>102</sup> *Ibid.*

<sup>103</sup> Rauceau, C. (2016). European Citizenship and the Right to Reside: 'No One on the Outside has a Right to be Inside?'. *European Law Journal*, 22(4), Blackwell Publishing, 470-491, 470.

international element.<sup>104</sup> The Convention sets down the rules on which country's authorities can take necessary protective measures concerning the child.

### **3.2.2.1. Jurisdiction Based on the Hague 1996 Convention**

Similarly, to the Regulation, the Hague 1996 Convention bases jurisdiction on the place of habitual residence of the child, to avoid the possibility of authorities of the state parties competing of jurisdiction<sup>105</sup>. By Article 5 of the Convention, the judicial or administrative authorities of the Contracting State of the habitual residence of the child have the jurisdiction to take measures directed to the protection of the child's person or property.<sup>106</sup> When the state uses jurisdiction based on Article 5, it shall apply its national law according to Article 15.<sup>107</sup>

The Convention takes additionally into account more complex situations, where the place of jurisdiction needs to be found. In Article 6, the Convention places that in cases of refugee children and children who, due to disturbances occurring in their own country are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in Article 5.<sup>108</sup> According to the second paragraph, this also applies to children whose habitual residence cannot be established.<sup>109</sup> Thereby this Convention sets an alternative base for jurisdiction – the place where the child is present. Moreover, for cases of urgency, the Convention states that the authorities of any Contracting State in whose territory the child is present have jurisdiction to take any necessary measures of protection.

### **3.2.2.2. Applicability of the Hague 1996 Convention**

Contrary to the Brussels IIa Regulation, the Hague 1996 Convention sets an age limit to children to which it is applicable. According to Article 2, the Convention applies to all children under 18 years old.<sup>110</sup> Thus, the children under 18 years old in Al-Hol are covered by the Convention.

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<sup>104</sup> Scarano, N. (2016). Protection of children and the 1996 Hague convention, *Journal of Social Welfare and Family Law*, 38:2, 205-207, 205.

<sup>105</sup> Alexandre-Hughes, S. (2013). International Parenting and Child Protection Matters Beyond the Specific Issue of Parental Child Abduction: The 1996 Hague Convention on the International Protection of Children. *Children Australia*, 38(4), Cambridge University Press, 156-161, 157.

<sup>106</sup> Hague Conference on Private International Law, Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993, Article 5

<sup>107</sup> *Ibid.*, Article 15

<sup>108</sup> *Ibid.*, Article 6

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, Article 2

However, the Convention is only applicable to cases that arise between two states parties to it. Also, the primary rule in the Convention is that the Contracting State where the child is habitually resident has the jurisdiction. Syria is not a member of the Convention. Whilst Finland is a member, it does not provide applicability of this Convention to the case of the children.

Nonetheless, there occurs an exception to this territorial requirement. The Hague Conference on Private International Law Department Bureau has presented in their Practical Handbook of the Convention, that the child does not need to be habitually resident in a contracting state for instance in the cases of refugee children or children whose habitual residence cannot be established, as the child may have his or her habitual residence in a non-contracting state but still fall within Article 6.<sup>111</sup> By this approach, if the jurisdiction is used without the base from the Convention when the child is habitually resident or present in a non-contracting state, the measures taken will not be enforceable under the Convention and thus are not under mandatory recognition by the Contracting States, even though they can be taken.<sup>112</sup> This rule could provide Finland jurisdiction to take protective measures towards the children.

### **3.2.3. The Relationship between the Brussels IIa Regulation and the Hague 1996 Convention**

The Brussels IIa Regulation and the Hague 1996 Convention are very similar in their contents because the Hague Convention worked as a model when the EU Regulation was drafted. As the case considers the protective measures towards the Finnish children, the fact that Finland is a party to the EU and the Hague Convention, it has to be determined which rules apply.

Between the EU Member States, the EU law is applied. Thus, in cases considering two European Union Member States, the Regulation is to be applied as the legislative base for jurisdiction. As to cases where there is a state not a member of the EU, but which is a party to the Hague 1996 Convention, the Convention is to be applied. The Hague Convention also gets primacy over the Brussels IIa Regulation if the parties have agreed of the jurisdiction of a non-member state to the Hague Convention.<sup>113</sup>

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<sup>111</sup> The Hague Conference on Private International Law Permanent Bureau, (2014). *Practical Handbook on the operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*. The Netherlands, 25.

<sup>112</sup> *Ibid.*, 27. ; Abashidze, A. *et al.* (2018)., Parental Responsibility and Children Protection: The 1996 Hague Convention vs. the 1993 Minsk Convention. *Journal of Advanced Research in Law and Economics*, 9(3(33)), 1152-1162, 1159.

<sup>113</sup> Helin (2020). *Supra nota* 99, 484-485.

However, in cases where one party is neither a party to the EU nor the Hague Convention, it is seen that if the other party is a member of the EU, the Brussels IIa Regulation can be applied as long as the Hague 1996 Convention is not violated.<sup>114</sup> This situation might occur for instance when there is no state party to the Hague 1996 Convention that would have jurisdiction based on Articles 5 or 6. By this approach, the Brussels IIa Regulation's rule of residual jurisdiction can be applied.

### **3.3. Evaluation of the Habitual Residence of the Children**

As seen in the above evaluation, in child protection law, the child's place of habitual residence is the vital base of jurisdiction when the question regards the child's custody and visitation rights.<sup>115</sup> In both, the Brussels IIa Regulation and the Hague 1996 Convention, the place of habitual residence is the main criterion of jurisdiction.<sup>116</sup> The place of habitual residence is the primary connecting factor that determines which state has jurisdiction in a case. This can be explained by the fact that the evidence on which the most favourable result for the child can be found is usually located in the place of habitual residence.<sup>117</sup>

The place of habitual residence is not defined under Finnish law.<sup>118</sup> It is neither determined in the Brussels IIa Regulation nor the Hague 1996 Convention and thus has to be determined by the relevant authorities in each individual case on the basis of factual elements.<sup>119</sup> Here, the evaluation is to be done through the guidelines of the CJEU.

In the light of the definition of habitual residence provided by the CJEU, the child's habitual residence shall be considered the state which reflects some degree of integration by the child in a social and family environment.<sup>120</sup> When evaluating the stay in a Member State, needs to be taken into account the concepts of duration, regularity, conditions, and reasons for the stay, and the family's move to the 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 the state are taken into

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<sup>114</sup> *Ibid.*, 482.

<sup>115</sup> *Ibid.*, 29.

<sup>116</sup> Kruger, T. & Samyn, L. (2016). Brussels II bis: Successes and suggested improvements. *Journal of Private International Law*, 12(1), Routledge, 132-168, 150.

<sup>117</sup> Mikkola, T. (2012). *Kansainvälinen lapsioikeus*. Helsinki, Finland: Alma Talent, 29.

<sup>118</sup> *Ibid.*

<sup>119</sup> The Hague Conference on Private International Law Permanent Bureau, (2014). *Supra nota* 111, 40.

<sup>120</sup> Court decision, 2.4.2009, *Supra nota* 96.

consideration.<sup>121</sup> Furthermore, the child's perspective can affect the evaluation of the place of habitual residence.<sup>122</sup>

It is questionable, whether the camp in which the children and their mothers are kept as detainees can be seen as creating the children their habitual residence in Syria. The families' move to Syria was for criminal cause, the children are not provided schooling and they are not socially integrated into the state, as they are kept in isolation in the camp. These do not imply great integration to the state. The physical presence in Syria is the weightiest factor implying integration.

Nonetheless, the CJEU has stated that the physical presence of the child in the state is not decisive.<sup>123</sup> If the children would be seen as having their habitual residence in Finland because of tight ties to Finland, for instance, because they have Finnish nationality, the base for jurisdiction would be in the Regulation regardless of the physical presence being in Syria. However, as some children might have been born in Syria, there are not enough ties that would bind them to the Finnish society, as their language knowledge *et cetera* are not known. The Finnish Parliamentary Deputy Ombudsman Maija Sakslin has seen in her statement, that as the children have resided several years if not their whole life outside Finland, there is no habitual residence in Finland that would create jurisdiction.<sup>124</sup>

In this case of the Finnish children detained in Al-Hol, based on what is found above, it can be considered that the children cannot be taken as having a habitual residence neither in Syria nor in Finland. The detainee camp does not establish them home in Syria, any integration to the society nor family, or other aspects that are meaningful in the determination of the habitual residence.

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<sup>121</sup> *Ibid.*

<sup>122</sup> Atkinson, J. (2011). The meaning of "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection Children. *Oklahoma Law Review*, 63(4), 647-662, 661.

<sup>123</sup> Court decision, *Supra nota* 96.

<sup>124</sup> Apulaisoikeusasiamies Maija Sakslin, (2020). MINISTERIÖN MENETTELY LASTEN AUTTAMISEKSI AL-HOL'IN LEIRILTÄ, EOAK/3173/2019

## **4. JURISDICTION TO REPATRIATE FROM THE FINNISH CHILD WELFARE ACT**

### **4.1. The Finnish Child Welfare Act**

As found above, the Hague 1996 Convention is primarily inapplicable to the case of children in Al-Hol, since Syria is not a party to the convention. The Brussels IIa Regulation can be applied but only through Article 14 of residual jurisdiction. Thereby the Regulation itself does not provide Finland any jurisdiction – it has to be searched from the substantive national law. The Regulation stated in Article 14 that the residual jurisdiction is to be searched from Finland’s national laws when no Member State has jurisdiction over the Finnish Children in Al-Hol. Consequently, the relevant domestic law, the Child Welfare Act of Finland and mainly its Section 17 are analysed here to establish the base for extraterritorial jurisdiction to take protective measures over the Finnish children in Al-Hol.

The Finnish Child Welfare Act aims to protect children the right to a safe growth environment, balanced and well-rounded development and special protection.<sup>125</sup> In Section 11, the Act regulates the provision of welfare services in normal situations, for instance in basic intra-Finland cases.<sup>126</sup> For extraterritorial cases, Section 17 of the Act determines jurisdiction to arrange child welfare in special situations. It is a complementary Section to situations where the municipality where the child has habitual residence cannot be defined.<sup>127</sup>

### **4.2. Section 17 of the Finnish Child Welfare Act**

According to Section 17(1), if a case of the recognition and enforcement of matters of parental responsibility is to be decided in Finland on the basis of the Brussels IIa Regulation or other

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<sup>125</sup> Lastensuojelulaki, *Supra nota* 4, Section 1

<sup>126</sup> *Ibid.*, Section 11

<sup>127</sup> Aer, J. (2012). *Lastensuojeluoikeus: Lapsi- ja perhekohtaisen lastensuojelun oikeudelliset perusteet*. (1st ed.). Helsinki, Finland: Alma Talent, 147.

binding treaties, the decision is made by the authorities of the municipality where the child's most recent permanent or temporary place of residence is.<sup>128</sup> If the child has no permanent residence, the municipality where the child's parent or parents have their permanent residence, or where it has last been if it no longer is in Finland, shall make the decision.<sup>129</sup> Otherwise, the decision-making power will have the authorities of Helsinki city.<sup>130</sup> Section 17(2) states that arranging child welfare for a child whose parents are or have been or one of whose parents is or has been, a Finnish citizen but who have/has no permanent or temporary place of residence in Finland and who cannot be deemed to be receiving appropriate care in the child's country of domicile or temporary residence, shall be the responsibility of the municipality determined based on the provisions of subsection 1.<sup>131</sup> Child welfare may be arranged under this subsection only if the Regulation or treaty binding Finland referred to in subsection 1 does not provide otherwise.<sup>132</sup> Section 17(3) provides that the Ministry of Foreign Affairs may assist to execute an investigation abroad of the child's need for welfare.<sup>133</sup> Section 17(4) regards children located in a Hague 1996 Convention member state.<sup>134</sup>

#### **4.2.1. Analysis of Section 17**

The first and fourth subparagraphs of Section 17 are not relevant to the case of Finnish children in Al-Hol, because Finland does not have such jurisdiction under the Brussels IIa Regulation to which subparagraph 1 refers to, and Syria is not a party to the Hague 1996 Convention to which the fourth subparagraph refers. The second subparagraph is the most important here. An example situation of the application of Section 17(2) can for instance be a case, where the place of habitual residence of a child has as a result of divorce changed, and the parent cannot take care of the child in the new home state.<sup>135</sup> The situation of the children taken to Al-Hol or been born there can be parallel to the example situation.

As found in Chapter 3.3., the children can be seen as persons without a habitual residence. The children in Al-Hol fit the scope of Section 17(2), as their mothers are Finnish citizens, they do not have permanent residence in Finland and they are not receiving appropriate care in their country

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<sup>128</sup> Lastensuojelulaki, *supra nota* 4, Section 17(1)

<sup>129</sup> *Ibid.* f

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, Section 17(2)

<sup>132</sup> *Ibid.*, Section 17(2)

<sup>133</sup> *Ibid.*, Section 17(3)

<sup>134</sup> *Ibid.*, Section 17(4)

<sup>135</sup> Rätty, T. (2015). *Lastensuojelulaki: käytäntö ja soveltaminen*, Helsinki, Finland: Edita Publishing, 161.

of domicile or temporary residence, in Syria. Section 17(2) is the only relevant provision of Finnish law that provides jurisdiction to the children's case. According to Section 17(3), the Ministry of Foreign Affairs shall examine the children's conditions in the camp and on the base of the examination, execute the repatriation of the children to Finland. According to the Section, the municipality that will have the right to take caretaking measures over the children is the one where the mother has last resided while in Finland. Thus, it depends on the individual case.

Consequently, the municipality having competence in Finland as evaluated on the basis of Section 17(2), can base Finland a jurisdiction by Article 14 of the Brussels IIa Regulation. Based on it, it is the responsibility of Finnish authorities to provide child welfare services to the Finnish children in Al-Hol. This rule is the last resort that provides Finland the jurisdiction to fulfil its obligation to protect the rights of the children. This interpretation of Article 14 of the Regulation and Section 17 of the Act has been taken also by legal professionals such as the Finnish Parliamentary Deputy Ombudsman, and researcher Sanna Mustasaari from the University of Helsinki.<sup>136</sup>

#### **4.2.2. The Question of the Child's Nationality**

In the evaluation of the applicability of Section 17 of the act, it is evident that the children in Al-Hol must have Finnish nationality by default of their parent's Finnish nationality. Nationality has a significant role in the Brussels IIa Regulation, despite it not being the primary source of jurisdiction.<sup>137</sup> Therefore, a question that has not been taken into account in the literature but should be due to the implementation of all the relevant rules is, whether some of the children might have another nationality from their father's side if they are not Finnish. Dual citizenship of the would mean that the children have citizenship of more than one country, and in some states another citizenship can be renounced in case of obtaining other.<sup>138</sup> However, due to the word limit, this thesis shall not be examining the nationality question. It could however be necessary to research whether the children can still have Finnish nationality if they have dual nationality from a state which does not recognise it thereby excluding the Finnish nationality. This fact could change the situation of repatriating the Finnish children.

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<sup>136</sup> See Apulaisoikeusasiamies Maija Sakslin, (2020). *Supra nota* 124.; Mustasaari, S. (2019). al-Holin suomalaisnaiset ja -lapset kansainvälisen yksityisoikeuden näkökulmasta. *Perustuslakiblogi*. Retrieved from: <https://perustuslakiblogi.wordpress.com/2019/12/17/sanna-mustasaari-al-holin-suomalaisnaiset-ja-lapset-kansainvalisen-yksityisoikeuden-nakokulmasta/>. 18 February 2021.

<sup>137</sup> Kruger, T. & Verhellen, J. (2011). Dual Nationality = Double Trouble? *Journal of Private International Law*, 7(3), Routledge, 601-626, 605.

<sup>138</sup> Brøndsted Sejersen, T. (2008). "I Vow to Thee My Countries": The Expansion of Dual Citizenship in the 21st Century. *The International Migration Review*, 42(3), Blackwell Publishing, 523-549, 529.



## **5. FINDINGS AND PROPOSED SOLUTIONS**

### **5.1. Main Findings**

This thesis has focused on the legal framework on which the repatriation of the Finnish children can be executed. While the human rights of the children are guaranteed on the Finnish and international level, the children in the camp remain vulnerable and their situation is serious. For the enforcement of the human rights obligations of Finland, Finnish authorities have to use extraterritorial jurisdiction to safeguard human rights. The ECHR, the CRC, and the Finnish Constitution establish the base for protection of the children's human rights even though the children are not located in the Finnish territory.

The jurisdiction needed a base from the relevant substantive law, which was found from the rules of private international law. While consular legislation did not provide any jurisdiction and the Hague 1996 Convention is not applicable since Syria is not a member of it, the Brussels IIa Regulation established the link to the Finnish Child Welfare Act, thereby establishing the jurisdiction to repatriate the children on the base of Section 17(2) of the Act. The rule of residual jurisdiction of the Brussels IIa Regulation enables the application of the Regulation even though Syria is not a Member State to the EU. The jurisdiction established in this way ensures the possibility of Finnish authorities to repatriate the rest of the children still located in the camp. This legislative base is important, as the repatriation measures taken by Finland have been poor and disrespectful towards the rights of the children.

### **5.2. Discussion**

The issue of repatriating persons from the camps is new and has not been examined deeply. The question is both political and legal. In the Western states, the focus has been on the political context. Different legal professionals have viewed the issue from varying points. Even in the court

cases of the issue raised in Belgian, Dutch, German, and French courts, the courts have dealt with the issue of repatriation differently<sup>139</sup>, which implies the number of approaches that can be taken.

The Finnish chancellor of justice Tuomas Pöysti gave his opinion in 2019. Pöysti sees that the consular law does not provide Finland any obligation to repatriate all Finnish nationals or persons who have a residence permit in Finland when considering the weighing of human rights.<sup>140</sup> Interestingly, differing from the view of the Finnish Deputy Parliamentary Ombudsman Sakslin, Pöysti does not evaluate Section 17 of the Finnish Child Welfare Act as suitable to the case.<sup>141</sup> However, he sees that the rights promised in the CRC are endangered in the camp and that together with the constitutional rights, the Finnish authorities should aim to repatriate at least the children.<sup>142</sup>

The view of Sakslin, that Section 17 of the Act is to be applied to the case since consular legislation does not provide jurisdiction, has also been taken by Mustasaari, who however points out that the Section is in urgent need of reform, as it has not been established to consider situations such as the issue at hand.<sup>143</sup> Importantly, Pöysti, Sakslin, and Mustasaari all agree that human rights guaranteed in the international conventions and the Finnish constitution create Finland an obligation to act, whether it was based on Section 17 and the Brussels IIa Regulation, or otherwise.<sup>144</sup> Two Finnish Doctors of Law, Hakalehto and Toivonen, emphasize the child's best interest of Article 3 CRC in the repatriation, and state that decisions taken by Finnish authorities have to fulfil all the children's rights now endangered in the camp.<sup>145</sup> Lastly, the Finnish Child Ombudsman Elina Pekkarinen gave her opinion stating that the CRC obliges Finnish authorities to act regardless of the issue of extraterritorial use of jurisdiction.<sup>146</sup> The Finnish professionals are pro-repatriation based on the need to ensure the protection of the children's rights.

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<sup>139</sup> Van Poecke, T., Wauters, E. (2021). *Supra nota* 41, 45.

<sup>140</sup> Valtioneuvoston Oikeuskansleri, (2019). Vastaus. 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

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> Mustasaari (2020). *Supra nota* 47, 41.

<sup>144</sup> Valtioneuvoston Oikeuskansleri, (2019), *Supra nota* 140, 10; Apulaisoikeusasiamies Maija Sakslin, (2020). *Supra nota* 124, 25; Mustasaari (2020). *Supra nota* 47, 24.

<sup>145</sup> Hakalehto, S. & Toivonen, V. (2019). Suvianna Hakalehto & Virve Toivonen: al-Holin leirillä olevien lasten oikeudet. *Perustuslakiblogi*. Retrieved from: <https://perustuslakiblogi.wordpress.com/2019/12/15/suvianna-hakalehto-irve-toivonen-al-holin-leirilla-olevien-lasten-oikeudet/>. 8 March 2021.

<sup>146</sup> Lapsiasiainvaltuutettu (2020). *Lapsen etua etsimässä: Lapsiasiain Vuosikirja*. Lapsiasiainvaltuutetun toimiston julkaisuja 2020:1. 4M Suomi, 51.

Foreign professionals have also referred to human rights law in the repatriation discussion, mainly the CRC and the ECHR. Repatriating only the children seems to be the leading opinion of legal scholars and authorities. Dworkin from the European Council of Foreign Affairs states that repatriation is the only path that provides a solution for the issue of European citizens detained in Syria.<sup>147</sup> Capone finds that the mere deprivation of liberty in unsafe circumstances of these children who have not planned to participate in ISIS's operations should trigger a "proactive reaction by the states of nationality"<sup>148</sup>, thus stating the need to repatriation. The Council of Europe Parliamentary Assembly has encouraged to repatriate also mothers by reminding the Member States to repatriate them with children on the basis of human rights.<sup>149</sup> Luquerna suggests seeing the children as fitting to the definition of refugees so that the children will not become stateless, and the children could be protected under refugee law<sup>150</sup>, while Nyamutata proposes to see the children as child soldiers to get protection provided to child soldiers by law<sup>151</sup>. As to the extraterritoriality of human rights obligations, Chrisje Sandelowsky-Bosman and Ton Liefwaard from the Leiden University Department of Child Law have suggested that states would have extraterritorial jurisdiction when they have tight strings to a child in a vulnerable position abroad, thus making the interpretation of state's jurisdiction less restricted by the state's human right obligations, especially when the state's passivity enhances the child's vulnerable position.<sup>152</sup> This view is worth considering since as presented in Chapter 2, the repatriation of the children from Al-Hol can be based on the extraterritorial protection of human rights.

### 5.3. Proposals

While the current situation is that most of the Finnish children have either travelled independently with their mothers to Finland, or have been repatriated by the Finnish authorities, there is a need

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<sup>147</sup> Dworkin, A. (2019). Beyond good and evil: Why Europe should bring ISIS foreign fighters home. *European Council of Foreign Affairs*. Retrieved from: [https://ecfr.eu/publication/beyond\\_good\\_and\\_evil\\_why\\_europe\\_should\\_bring\\_isis\\_foreign\\_fighters\\_home/](https://ecfr.eu/publication/beyond_good_and_evil_why_europe_should_bring_isis_foreign_fighters_home/). 8 March 2021.

<sup>148</sup> Capone, F. (2019). The children (and wives) of foreign ISIS fighters: Which obligations upon the States of nationality. *QIL*, 60.

<sup>149</sup> Council of Europe Parliamentary Assembly, (2020). International obligations concerning the repatriation of children from war and conflict zones, Report Doc. 15055.

<sup>150</sup> Luquerna, A. (2020). The Children of ISIS: Statelessness and Eligibility for Asylum under International Law, *Chicago Journal of International Law*, Vol. 21: No. 1, Article 5, 177.

<sup>151</sup> Nyamutata, C. (2020). Young Terrorists or Child Soldiers? ISIS Children, International Law and Victimhood. *Journal of Conflict and Security Law*, 25(2), 237-261.

<sup>152</sup> Sandelowsky-Bosman, C. & Liefwaard, T. (2020) Children Trapped in Camps in Syria, Iraq and Turkey: Reflections on Jurisdiction and State Obligations under the United Nations Convention on the Rights of the Child, *Nordic Journal of Human Rights*, 38(2), Routledge, 141-158, 157.

for making a policy on this issue to which all authorities are committed to. There remain Finnish nationals in the camp of Al-Hol in inhuman and dangerous conditions violating their human rights as we speak. The issue of the children and their mothers is complex, due to the non-negotiable fact that they are residing on another state's territory where Finland has no consular or diplomatic authorities, and where is no government eager to help Finland in repatriation. The Kurdish SDF forces governing the camps have stated their position not to give up only the children to the states of nationality if the mothers are unwilling to it, making again the repatriation of the children more difficult. Most European states, Finland included, have been reluctant to repatriate the mothers as they joined ISIS voluntarily and can be threats to public security. It is nonetheless impossible to consider the case of the children wholly independently from their mothers – the child's right to family life is protected in human rights and requires considering the mothers. The child's best interest principle of CRC supports the view that the child should not be forcibly separated from the mother.

The existence of two similar conventions, the Brussels IIa Regulation and the Hague 1996 Convention is seen as making the resolving of jurisdictional questions difficult.<sup>153</sup> Since the EU law binds Finland, the best way to approach the issue at hand is through the Brussels IIa Regulation. Article 14 of the Regulation is the relevant provision on which the application of the Finnish Child Welfare Act, and namely its Section 17(2), shall be based. By Section 17(2) of the Act, the Ministry of Foreign Affairs can assist the children from the camp. However, as proven by the actions of Finnish authorities, Section 17(2) seems complicated to interpret as it has not been evident that the repatriation is based on the Section. Broad interpretation of it was needed in order to establish jurisdiction. The applicability and interpretation of Section 17 should be analysed in further research.

While repatriation of children is dependent on the mother's will due to SDF's statement, the mothers have to be heard. If the mother states that the child can be repatriated but not alone, the child's best interest principle and the protection of the child's family life support the mother's repatriation. The need of the child for welfare and care in Finland, and the mother's possible criminal responsibility of taking part in a terrorist organization, shall be solved in Finland in due

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<sup>153</sup> Pranevičienė, K. (2014). Unification of Judicial Practice Concerning Parental Responsibility in the European Union – Challenges Applying Regulation Brussels II Bis. *Baltic Journal of Law & Politics*, 7(1), Oxford University Press, 113-127, 124.

process. As long as the children are located in the camp in Syria, there is no possibility to provide fair procedures to take care of the Finnish children. Immediate repatriation is needed.

Nonetheless, the questions of habitual residence of the children – *i.e.* do they have any – and of the possible dual nationality of the children need proper examination in the future research of this issue, because they both are significant for the interpretation of the relevant rules on jurisdiction.

As found, protection of human rights extends broader than a state's territory. The situation where nationals of a state leave the state to join a terrorist organization such as ISIS is fairly new as is the question of jurisdiction over such persons. It is complicated to base jurisdiction on the present legislation, but not impossible, as found out in this research. What is needed is the broad interpretation of the relevant rules while having the children's best at the centre. The positive obligation of states to protect the human rights of their citizens and nationals reaches to extraterritorial situations in these types of cases of clear human rights violations, and thereby provide Finland obligation to repatriate the children who are entitled of protection on the base of Finnish Child Welfare Act. The children in Al-Hol deserve to be saved before more damage occurs, and the only party capable of helping is the Finnish government.

## CONCLUSION

This thesis aimed to examine the problems relating to the repatriation of Finnish children detained in the camp of Al-Hol and to provide an overview of the legislation on which the repatriation of Finnish children can be executed. Finland, among other European states, has been reluctant to repatriate the former ISIS members, namely the mothers of the children. Finland has shown the green light to repatriate the children who involuntarily have been taken to these horrendous conditions, however struggling to have a policy on how to act. The problems of repatriation are caused mainly because the children are located outside the territory of Finland. The thesis presented the human rights of the children that are guaranteed yet violated in this situation. The recognizing of extraterritorial human rights, and the state's obligation to actively protect the human rights of the children even when abroad, let us look for jurisdictional competence based on private international law.

Syria, where the children are being held captive, does not have an operating consular mission and is not a party to the Hague 1996 Convention nor to European Union which regulates jurisdiction in child protection matters in Brussels IIa Regulation. Thus, consular law or the Hague 1996 Convention cannot be applied. Although Syria is not a member of the EU, the Brussels IIa Regulation can be applied by the clause of residual jurisdiction in Article 14. Residual jurisdiction enables Finland to apply its domestic rules to the case, leading to the application of Section 17 of the Finnish Child Welfare Act. Section 17, even though it is found to be complicated to interpret, suits well to this issue: it has been made for situations in which the child is not habitually resident in Finland yet has ties to Finland, and is not getting proper welfare in the place of stay. For the Finnish state to fulfil its positive obligation to protect the human rights of the children of its nationality, it can apply these rules as a base for jurisdiction and repatriate the children from the camp. The question of repatriating the mothers of the children, who are also Finnish nationals or have a permanent residence permit in Finland, has not been addressed in depth in this thesis due to the word limit. However, the repatriation of the mothers is a question closely connected to the children's repatriation, as it can be in the child's best interest that the mother is repatriated – especially if the child cannot be repatriated at all without the mother.

The overlook to other European states and the opinions of scholars showed that the fear of public security has been a big reason why the repatriation acts have been slow. The states struggle with the case of the mothers. Nonetheless, the children's position should not be worsened because of their parents' actions. The sooner the children can be repatriated to Finland, the sooner they can start integrating into the society and get the protection, healthcare, and safe growing environment they deserve.

For the safeguarding of the human rights of the children in a vulnerable position, Finnish authorities should take immediate actions to repatriate the children from the camp. The Brussels IIa Regulation provides the base to apply the Finnish Welfare Act. As the Kurdish forces have stated their willingness to give the detainees to their origin states if they repatriate them, there are no hindrances for Finnish authorities to act. If repatriation of the children is dependent on the repatriation of the mothers, the mothers shall be repatriated also. International human rights, the rights of the child, and the Finnish constitution support the repatriation of the mothers. From the view of the future of the child, the relationship with their mother is important and should not be broken merely on the fact that the mothers might impose a security threat – these issues can be solved in Finland through legal procedures.

This thesis is primarily limited to the children and their repatriation, and as seen, it is a significant issue itself. There is a need for more research on the habitual residence of the children, their possible dual nationality, the repatriation of the mothers and the issue of extraterritorial jurisdiction. This will certainly not be the last case where the need for extraterritorial jurisdiction arises in such complex situations, and to ease resolving international cases, the Finnish Child Welfare act is in need of examination and reform.

The case of the Finnish children in need of help in Al-Hol seemed to surprise the authorities. It has been two years now after the fall of the ISIS caliphate, and some Finnish children yet remain in the camp, detained for nothing they have done. It is time to generate a common policy the help them.

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