Brooklyn Journal of International Law

Volume 51 | Issue 1 Article 1

12-1-2025

THE SILENT SOUND OF DROWNING: Human Rights Justifications and Complex Intersectionality

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INTRODUCTION

This Article examines the use of "Human Rights Justifications" in Swedish laws and legislative proposals directed towards the complex intersection of migrant, mostly male, children in socially and economically vulnerable areas.[1] This description illustrates how human rights can be abused in a post-hegemonic liberal democratic order, including the slow dismantling of the individual human rights protections for children in Sweden through the use of the United Nations (UN) Convention on the Rights of the Child (CRC).[2] Anti-

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1. *See* Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR]; *see also* discussion *infra* Parts II–III.

2. *See, e.g.*, HURST HANNUM, RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH 1–3 (2019) (arguing for a focus on fundamental human rights); *see generally* CRC, *supra* note 1; Susan Marks, *Human Rights in Disastrous Times*, *in* THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 309 (James Crawford & Martti Koskenniemi eds., 2012) (presenting a critique of human rights); ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014) (providing a realist critique of human rights); JOHN GRAY, THE NEW

authoritarian authors often describe this dismantling as a dramatic constitutional showdown; however, this is not the case in Sweden as it is more like the silent sound of drowning than the tumult of a sinking ship.[3] This can partly be explained by Sweden's constitutional system of parliamentary supremacy, which allows only weak ex-ante concrete judicial review and leaves the interpretation of law to the Parliament.[4] The 2024 *Liberties Rule of Law Report* singles out Sweden, together with Italy, as not immune to democratic backsliding, noting rule-of-law decline in both countries despite their deep democratic traditions.[5]

Even though there is an overlap between populism and a return to a state-centered doctrine, as illustrated by Trumpism in the United States (US), these two developments do not necessarily stem from the same source. One point of overlap between populism and state-centeredness is the hollowing out of the protection of individual rights. This occurs first through populism, which manifests itself in the weakening of minority

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LEVIATHANS: THOUGHTS AFTER LIBERALISM (2023) (for a liberal-rights critiques); SAMUEL MOYN, LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES (2023) (describing the political and historical context of the Cold War and its effects on the formation and evolution of the current human rights framework). The human rights and civil society organizations in Sweden are almost completely unified in ringing the alarm for the swift shift towards an authoritarian Swedish society with the dismantling of individual human rights protection. For example, Civil Rights Defenders raise concerns over the stop-and-search zones, anonymous witnesses, collective punishments of families, the threats of withdrawing funding for civil society organizations that critique the Government, and so on. *See generally* C.R. DEFS., ONE YEAR WITH THE TIDÖ-AGREEMENT: AS A WHOLE, IT IS WORRYING (2023), https://crd.org/wp-content/uploads/2023/12/Tidogranskning_final_ENG.pdf [https://perma.cc/B7UG-72PA]; C.L. UNION FOR EUR., LIBERTIES RULE OF LAW REPORT 2024 (2024), https://www.liberties.eu/f/oj7hht (on file with the Brooklyn Journal of International Law).

3. For example, Francis Fukuyama's describes populism and makes the observation that Strong-men, when in power, will dismantle the democratic institutions that served them in gaining such power. *See generally* FRANCIS FUKUYAMA, LIBERALISM AND ITS DISCONTENTS (2022).

4. *See generally* REGERINGSFORMEN [RF] [CONSTITUTION] 11:14:2, 12:10:2 (Swed.) (governing the judicial review of the Courts and general public authorities).

5. *See* C.L. UNION FOR EUR., *supra* note 2, at 5.

protections, and second through state-centeredness, which prioritizes collective state interest over individual rights.

Sweden proclaimed itself to be a humanitarian superpower until the election of 2022, when a right-wing minority government was elected.[6] The government's power was derived from its dependence on a political party with roots in the neo-Nazi movement, namely the Swedish Democrats.[7] This party's current leadership joined at a time when the party maintained strong ties to the self-proclaimed National Socialist organizations Nordiska Rikspartiet (the "Nordic National Party") and Bevara Sweden Swedish ("Keep Sweden Swedish"), both of which were militant and racist.[8] There is continuous debate over how strong the legacy of the neo-Nazi origin remains within the Swedish Democrats.[9]

Due to their historical and ongoing non-democratic positions, the Swedish Democrats have not been invited to sit in the Swedish Government.[10] Instead, the minority Government—composed of the Moderate Party (conservative), the Liberal Party (historically a strong anti-fascist party, making its decision to align with the Swedish Democrats surprising to

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6. *See* MARIA GRAHN-FARLEY, CHILD RIGHTS, LEGAL THEORY AND SOCIAL ADVOCACY 155–56 (2024).

7. The Nazi origin of the party is clearly mapped and openly demonstrated in what has come to be called the White Book, a party-commissioned study of its Nazi origin. *See* Pia Gripenberg & Hans Rosén, *SD:s nazistiska arv kartlagd – vitboken släppt* [*SD's Nazi Legacy Mapped – White Paper Released*], DAGENS NYHETER (June 26, 2025), https://www.dn.se/sverige/sds-nazistiska-arv-kartlaggs-i-dag-slapps-en-vitbok/ (on file with the Brooklyn Journal of International Law).

8. *See* Erik Glaad, *Expo guidar: från DÖ till Tidö – SD:s väg till makten* [*EXPO Guides: From DÖ to Tidö – SD's Path to Power*], EXPO (Sep. 30, 2025, at 17:34 ET), https://expo.se/guide/expo-guidar-fran-do-till-tido-sds-vag-till-makten/ (on file with the Brooklyn Journal of International Law); *see also* Arash Mokhtari & Linnea Carlén, *Fyra fakta om NMR* [*Four Facts About NMR*], SVT NYHETER (Apr. 30, 2025, at 16:02 ET), https://www.svt.se/nyheter/inrikes/fyra-saker-du-behover-veta-om-nmr [https://perma.cc/ZM3T-8HEA].

9. On the eve of the 2022 election, the Swedish democrat Rebecka Fallenkvist expressed, "Helg seger," which can be understood as "weekend victory" in Swedish, but also as "Sieg Heil." *See* Elisabeth Asbrink, Opinion, *Sweden is Becoming Unbearable*, N.Y. TIMES (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/opinion/sweden-democrats-elections.html (on file with the Brooklyn Journal of International Law).

10. *See* Glaad, *supra* note 8.

many), and the Christian Democrats (once associated with softer-social-policy positions but now markedly more right-leaning akin to American Trumpism)—entered into an agreement with the Swedish Democrats in exchange for parliamentary support.[11] This arrangement, known as the Tidö-Agreement, is named after Tidö Castle, where negotiations were held.[12] This agreement binds the government to fulfill the migration and crime fighting agenda of the Swedish Democrats.[13] As a result, the government formed under this arrangement is frequently referred to as the "Tidö-Government."[14]

The son of the Minister of Migration was revealed this summer to have actively recruited individuals to the Nazi movement, including, among others, the Nordic Resistance Movement ("NMR").[15] On its website, the NMR states that the ideology of

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11. *See id.*

12. *See id.*; *see generally Slottet* [*The Castle*], TIDÖ SLOTT, https://tidoslott.se/tido-slott/ [https://perma.cc/KRQ8-Z4XP] (last visited Dec. 26, 2025) (history of Tidö Castle).

13. *See Tidöavtalet* [*The Tidö Agreement*], SVERIGEDEMOKRATERNA, https://www.sd.se/tidoavtalet/ [https://perma.cc/F8EK-SC38] (last visited Dec. 21, 2025). The official website of the Swedish Democrats where they track the progress of the laws adopted or prepared in the fulfillment of the Tidö Agreement.

14. For the websites of the parties involved in the legislation of the Tidö Agreement, *see id.* (Swedish Democrats); *3 år med Tidö* [*3 Years with Tidö*], LIBERALERNA (Oct. 20, 2025), https://www.liberalerna.se/ovrigt/3-ar-med-tido [https://perma.cc/L8PL-JBRY] (noting that the Liberal Party describes the results of Tidö as a success); *Överenskommelse för Sverige – Tidöavtalet* [*Agreement for Sweden – Tidö Agreement*], KRISTDEMOKRATERNA (Oct. 14, 2022), https://kristdemokraterna.se/arkiv/nyheter/2022/2022-10-14-overenskommelse-for-sverige—-tidoavtalet [https://perma.cc/P6GN-G5B4] (Christian Democrats); *Överenskommelse för Sverige* [*Agreement for Sweden*], MODERATERNA (Oct. 14, 2022), https://moderaterna.se/nyhet/overenskommelseforsverige/ [https://perma.cc/NK7S-862T] (the Conservative Party); *see generally* Tidöavtalet – Överenskommelse för Sverige [The Tidö Agreement – Agreement for Sweden], Oct. 14, 2022, https://www.liberalerna.se/wp-content/uploads/tidoavtalet-overenskommelse-for-sverige-slutlig.pdf [https://perma.cc/67R5-VNBH] (noting that the Tidö Agreement was adopted by these parties).

15. *See* Erik Glaad & Jonathan Leman, *I ministerns närhet* [*In the Minister's Presence*], EXPO (July 5, 2025, at 14:46 ET),

National Socialism (Nazism) runs through everything the organization does.[16] The US State Department classifies the NMR as a white-supremacist terrorist organization.[17]

Following this revelation, the Minister of Migration's popularity increased by 20 percent among the Swedish people already in support of the government coalition, and his support among the Tidö-Government electorate also strengthened.[18] This increased popularity following the Nazi scandal might explain why the Minister of Migration has posted several anti-migrant statements on social media.[19] The difference is stark between the government's characterization of the Minister's son as a young person who had merely fallen into inappropriate company and its portrayal of children with migrant backgrounds in socially and economically vulnerable areas. This contrast is particularly striking given that the same government is proposing a new law—discussed below—under which children who promote a glorified view of crime on social media may be required to wear an ankle monitor.[20] The government justifies the use of ankle monitors on children as a Human Rights

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https://expo.se/fordjupning/i-ministerns-narhet/ (on file with the Brooklyn Journal of International Law).

16. *See Vad är nationalsocialism?* [*What is National Socialism?*], NORDISKA MOTSTÅNDSRÖRELSEN (Jan. 14, 2022), https://xn—motstndsrrelsen-llb70a.se/vad-ar-nationalsocialism/ [https://perma.cc/A3TW-NNHG].

17. *See* Adam Goldman, *U.S. Designates Largest Neo-Nazi Group in Sweden as Terrorist Organization*, N.Y. TIMES (June 14, 2024), https://www.nytimes.com/2024/06/14/us/politics/us-sweden-neo-nazi-group-terrorists.html (on file with the Brooklyn Journal of International Law).

18. *See* Agnès Ericson, *Ny mätning: Forssell har fått högre förtroende* [*New Survey: Forssell Has Gained Higher Trust*], AFTONBLADET (July 16, 2025), https://www.aftonbladet.se/nyheter/a/Mny21B/ny-matning-forssell-har-fatt-hogre-fortroende [https://perma.cc/FKH5-Q2K9].

19. This has been mapped by Sweden's largest newspaper, Dagens Nyheter. *See* Johannes Klenell, *Johan Forssell tar sitt fadersansvar genom att racka ner på invandrare* [*Johan Forssel Takes His Fatherly Responsibility By Bashing Immigrants*], DAGENS NYHETER (Aug. 1, 2025), https://www.dn.se/kultur/johannes-klenell-johan-forssell-tar-sitt-fadersansvar-genom-att-racka-ner-pa-invandrare/ (on file with the Brooklyn Journal of International Law).

20. *See* Departementsserien [Ds] 2024:30 En lag om insatser inom socialtjänsten till vårdnadshavare, barn och unga när samtycke saknas [government report series] 842–43, 851 (Swed.) [hereinafter LIV Ds 2024:30] (regarding children that express a minimizing view of the seriousness of crimes on social media).

Justification, presenting it as a form of support for parents in the exercise of their child rearing responsibilities in accordance with Article 18(2) of the CRC.[21] The departmental inquiry identifies parental shortcomings as a primary risk factor for children's involvement in criminal activity, citing, for example, parents who are disengaged from their children's lives or who fail to provide adequate love and care.[22] By contrast, when the Minister's son was promoting violent Nazism on social media and recruiting other youth to join the white supremacist movement and the Minister stated that he had been unaware of his son's activities—the government described this as a testament to the honesty of the Minister as a parent and emphasized that he was struggling, as many parents do at times.[23]

The use of Human Rights Justifications in connection with the legislative proposals presented in this Article must be understood in the broader Swedish social context, characterized by the normalization of white supremacy and anti-migrant discourse, as in part the incident with the Minister's teenage son illustrates.

First, this Article describes how Human Rights Justifications are used in the ex-post review of the CRC. Second, it examines the now adopted law on stop-and-search (security) zones and two legislative proposals by the Legislative Inquiry. The first legislative proposal is named: *A State-Level Order with Crime-Preventive Measures for Children and Youth*; and the second legislative proposal is the Department Legislative Report called: *The Act on Social Service Interventions for Guardians, Children and Young People When Consent Is Lacking* ("LIV").[24]

Sweden is categorized as a civil law system, with a great emphasis on legislative preparatory works as sources of law,

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21. *See id.* at 851; *see also* CRC, *supra* note 1, art. 18(2).

22. *See* LIV Ds 2024:30, *supra* note 20, at 221.

23. *See Fullt förtroende för migrationsminister Johan Forssell (M)* [*Full Trust in the Minister of Migration Johan Forssell (M)*], SVT NYHETER (July 11, 2025), https://www.svt.se/nyheter/inrikes/ebba-busch-fullt-fortroende-for-migrationsminister-johan-forssell-m [https://perma.cc/NT73-2DWL].

24. *See generally* Statens Offentliga Utredningar [SOU] 2024:30 En statlig ordning med brottsförebyggande åtgärder för barn och unga [government report series] (Swed.) [hereinafter MUK, SOU 2024:30]; LIV Ds 2024:30, *supra* note 20.

placed just after the constitution and legislation in the hierarchy of legal sources.[25] A hierarchy also exists within the legislative preparatory works, with works closer to the adoption of the law carrying greater weight.[26] For example, a government legislative bill ("Prop") holds higher authority than a governmental legislative inquiry ("SOU") and department legislative report ("Ds").[27] In the event of a conflict between that stated in these sources, the Prop takes precedent over the SOU, and the SOU over the Ds.[28]

This selection of laws and legislative preparatory works is based on the systematic effects these legal instruments have on the child-rights framework in general. Specifically, when the framework no longer covers the rights of all children equally and instead excludes specific groups, in this case migrant children, by establishing a two-tier child rights system: one traditional child-rights centered system for ethnic Swedish children and another punitive, force-based system for Swedish children with migrant backgrounds. To use child-rights as a justification for depriving children with migrant backgrounds of their rights risks delegitimizing the entirety of the child-rights regime, as it is used in Sweden, which, in the long run, weakens protection for all children.

This Article comprises four sections. Section I introduces the concept of Human Rights Justifications. Section II examines how the doctrine of human rights has both followed and resisted major global developments from World War II and the Cold War to the Post-Cold War era and the Washington Consensus. Section III presents the governmental use of Human Rights Justifications in its anti-migration crime fighting agenda. Finally, Section IV examines how the use of human rights justifications affects the protection of individual rights at the intersection of socially constructed identities, poverty, and marginalization among children with migrant backgrounds.

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25. For a description of sources of law, *see* LAURA CARLSON, THE FUNDAMENTALS OF SWEDISH LAW 41–42 (2d ed. 2012). For a description of Sweden as a Civil Law country, *see generally* Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405 (2003).

26. *See* CARLSON, *supra* note 25, at 46–47.

27. *See id.*

28. *See id.*

I. HUMAN RIGHTS JUSTIFICATIONS

A Human Rights Justification, as coined here, is when a state activates a human right for its own benefit, in justifying its decisions and actions. Normally, it is the individual who is to invoke a human right against the state, but in the case of Human Rights Justifications, it is the state that invokes human rights for its own benefit and, in so doing, transforms them from a regime measuring state compliance into an instrument of state governance.[29] Human Rights Justifications change the foundation of rights from belonging to the individual to becoming an instrument controlled by the state.[30] Human rights are thus redirected from protecting individuals against a violating state to serving the state itself. The risk is that when human rights are used against themselves in this way, the integrity of the entire regime is weakened. Human rights may then fail in their foundational purpose: to protect the individual when the majority promotes the persecution of minority groups and the state becomes the violator of individual rights. This represents a fundamental shift from how human rights have been used since World War II.

According to the renowned human rights scholar Michael Freeman, the idea that human rights would be used for self-interested purposes is antithetical to human rights because, as Freeman notes, "human rights normally seek to defend the weak against the strong."[31] When human rights are used to justify state action, the transition from defending the weak to legitimizing the strong transforms the purpose of human rights itself—from protecting individuals against the state to protecting the strong state against the weaker individual.

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29. *See* Jeong-Woo Koo & Francisco O. Ramirez, *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004*, 87 SOC. FORCES 1321, 1343 (2009) (discussing an early sociological study of the State as the "enactment of a transnational model of progress and justice").

30. *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 248 (1962) (discussing a canonic critique of this interpretation of liberal rights).

31. *See* Michael Freeman, *Are There Collective Human Rights?*, 43 POL. STUD. 25, 36 (1995).

II. THE EVOLUTION OF HUMAN RIGHTS DOCTRINE

At each modern historical turn, human rights have evolved, and until now, this evolution has largely been on behalf of the individual as protection against abusive states.[32] This is the legacy of the post-World War II era, and even of the laissez-faire neoliberal state of the post-Cold War period, when Western human rights scholars legitimately argued that the state could not only rely on non-interference, but also had obligations to fulfill rights.[33] We are now in a new era in which human rights are used in favor of the state and against individuals as this Article describes.

A. The Individual as Part of International Law

One of the signature features of liberal democratic states is that the interests of an individual, regardless of status, ethnicity, or gender, may take precedence over the interests of a sovereign state. The individual is introduced on the international stage as the object of treaty law binding between states. Hersch Lauterpacht, in his *An International Bill of the Rights of Man*, with experiences from World War II and the Holocaust, argues that there must be some form of international protection for the individual when a state, set to protect the individual, becomes the perpetrator and commits atrocities against its own people.[34] Lauterpacht wrote that "no legal order, international or other, is true to its essential function if it fails to protect effectively the ultimate unit of all law—the individual human being."[35]

The rights of the individual and their equal applicability to all, translated into legal theory as the inalienable rights of all humans, are what arguably makes human rights an expression of post-World War II liberal democracy, or, as Michael Freeman calls it, Western liberalism.[36]

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32. *See* HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 78–79 (Oxford Univ. Press 2013) (1945).

33. *See* Philip Alston, *Putting Economic, Social, and Cultural Rights Back on the Agenda of the United States* 9–10 (N.Y.U. S. of L. Ctr. for Hum. Rts. & Glob. Just., Working Paper No. 22, 2009).

34. *See* LAUTERPACHT, *supra* note 32, at 7.

35. *Id.*

36. *See* Freeman, *supra* note 31, at 25.

B. The Inclusion of Collective Rights Within Individual Human Rights

Arguments about collective rights follow two strands. The first strand is that the individual starts with the collective, and by protecting the rights of minority communities, one is also protecting the individual's autonomy within the community.[37] The second argument is that it is the individual who constitutes the group, so by protecting the individual, the group is also protected.[38] During the Cold War, the distinction between the individual and the collective, or communal, held ideological significance, distinguishing the individualistic West from the communal Eastern Bloc.[39] This distinction lost its geopolitical purpose in the post-Cold War era as the two blocs disappeared. The most famous expression of this period is, of course, Francis Fukuyama's *The End of History*, which theorizes the collapse of the Hegelian dichotomy between the East and the West.[40]

Finding ways to include collective rights under the human rights umbrella has become important for a liberal human rights project in a multicultural, identity-based new world order.[41] This is in part a response to the challenges from mostly the Global South, where human rights, as promoted through liberal and neoliberal agendas by Washington, are said to represent a Western liberal tradition of individualism.[42] The adoption of the African Charter of Human and Peoples' Rights represents a clear departure from the Western liberal perception of human rights as solely individual, by explicitly incorporating collective

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37. This discourse is described by Will Kymlicka. *See* Will Kymlicka, *Liberal Theories of Multiculturalism*, *in* RIGHTS, CULTURE, AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 229, 230 (Lukas H. Meyer, Stanley L. Paulson & Thomas W. Pogge eds., 2003).

38. *See id.*; JOSEPH RAZ, *Multiculturalism: A Liberal Perspective*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 170, 177 (1994).

39. *See* Kymlicka, *supra* note 37, at 229–30 (describing the discourse of individual and collective rights in the 70s-80s).

40. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

41. *See, e.g.*, RAZ, *supra* note 38, at 188–89; Freeman, *supra* note 31, at 25–40; *see generally* Kymlicka, *supra* note 37.

42. *See* Freeman, *supra* note 31, at 39.

rights of people.[43] Yet this adoption is also a response to an understanding of structural racism. In the West, the discussion of collective rights as human rights is primarily a discussion about ethnic minorities.[44]

The Child Rights Committee, which monitors the CRC, departs from the general understanding of collective rights as being connected to minority protection or to ethnic or individual rights and instead develops a balance between the interests of the individual child and the group interest of children, through the doctrine of the "best interests of the child."[45] The Swedish Government Inquiry on the lowering of the age of criminal responsibility explicitly states that the principle of the "best interests of the child" is both an individual and a collective right: "[t]he principle of the best interests of the child in the Convention on the Rights of the Child expresses both an individual and a collective right."[46] This highlights the challenge of using collective rights without their original connection to a minority protection.

Without minority protection as a guiding principle in interpreting children's rights as generating collective rights, the best interests of the child principle risks becoming a conduit for majority interests over minority ones, especially in times of populism, when strong minority protection becomes even more

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43. *See* African Charter on Human Rights and Peoples' Rights arts. 19–24, June 27, 1981, 1520 U.N.T.S. 217.

44. *See* RAZ, *supra* note 38, at 177; Freeman, *supra* note 31, at 25–40; Kymlicka, *supra* note 37, at 229.

45. The UN Committee has developed a doctrine that treats children as a collective group, departing from the view that the CRC covers the individual child. *See* Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter Comm. on the Rights of the Child, General Comment No. 5]. Although the Convention is titled the Rights of the Child, this approach extends beyond concrete applications of a specific child's rights and instead emphasizes broader, abstract group-based protections. *See id.* The UN Committee also adds a temporal aspect that the decisions should be assessed for their future effects on children as a group when balancing what is in the best interests of both the singular child and the collective children, now and in the future. *See id.*

46. *See* Statens Offentliga Utredningar [SOU] 2025:11 Straffbarhetsåldern [government report series] 232 (Swed.) [hereinafter SOU 2025:11].

important.[47] The Swedish government has relied on the argument that the CRC recognizes collective rights to justify lowering for the minimum age of criminal responsibility, first from fifteen to fourteen years and now further to thirteen.[48] In a surprising move, the government proposed reducing the age directly from fifteen to thirteen, abandoning the earlier legislative proposal that had contemplated a reduction to fourteen.[49] In defending this policy, the government invoked the CRC's best interests of the child principle to prioritize the collective interests of children over the rights of the individual child. The reduction in the age of criminal responsibility, however, applies only to serious crimes and does not constitute a universal lowering of the age of criminal responsibility.[50]

C. Rights and Obligations

1. The Symmetric Period

The Cold War forced a distinction between rights. Since the Cold War, civil and political rights have been understood as negative, while social, economic and cultural rights are understood as positive rights.[51] This split between negative and positive rights depends on whether the corresponding obligation is negative or positive.[52] Negative obligations define civil and political rights as negative, whereas positive obligations define social and economic rights as positive. In the early part of the Cold War, there was a symmetry between negative rights and the negative obligations, and between positive rights and

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47. For an in-depth analysis of the risk of using rights to balance individual and collective interests, *see generally* Paul Yowell, *From Universal Rights to Legislative Rights*, *in* LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 116 (2018).

48. *See* SOU 2025:11, *supra* note 46, at 127–28, 231–32.

49. *See* Justitiedepartementet [Ministry of Justice], Utkast till lagrådsremiss Sänkt straffbarhetsålder för allvarliga brott [Draft Legislative Council Referral Lowering the Age of Criminal Responsibility for Serious Crimes] 5 (Swed.).

50. *See* SOU 2025:11, *supra* note 46, at 127–28, 232.

51. For a discussion on the relationship between negative and positive rights, *see* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 35–36 (40th ed. 2020).

52. *See* LOUIS HENKIN, THE AGE OF RIGHTS 2 (1990).

positive obligations.[53] The definition of the rights thus began with their corresponding obligations.

2. The Asymmetric Period

International law scholars Philip Alston, Louis Henkin, Jack Donnelly, and Henry Shue developed the human rights doctrine and the concept of a positive obligations, as a counterforce to the laissez-faire policies advocated under the Washington Consensus.[54] Alston challenges the position that all forms of social and economic rights will lead to totalitarianism as argued by the US Administration at the time.[55] To support his argument, Alston highlights that the European welfare states are fully capable of maintaining democracy and a social and economic safety net for their people.[56] Henkin, Shue, and Jack Donnelly, in similar ways as Alston, focus on deconstructing the ontological distinction between negative and positive rights by demonstrating that negative rights require positive action by the state for individuals to be able to enjoy them, thus rendering the distinction between negative and positive rights difficult to sustain.[57]

The deconstruction of the distinction between negative and positive rights and obligations is well-developed in relation to the CRC. Sweden ratified the CRC in 1990 and incorporated it into municipal law in 2020.[58] The Social Democratic Government refused to provide guidance on how its rights should be interpreted and did not specify whether those rights

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53. *See* SHUE, *supra* note 51, at 154.

54. *See* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 181–82 (1987); *see also infra* note 57 and accompanying text.

55. *See* Alston & Quinn, *supra* note 54, at 156, 181–82.

56. *See id.* at 170–71, 203.

57. *See* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 53 (2d ed. 1979); SHUE, *supra* note 51, at 154; JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 40–43 (3d ed. 2013).

58. *See* Sveriges internationella överenskommelser [SÖ] 1990:20 FN:s konvention om barnets rättigheter (Swed.) (the moment of ratification); LAG OM FÖRENTA NATIONERNAS KONVENTION OM BARNETS RÄTTIGHETER (Svensk författningssamling [SFS] 2018:1197) (Swed.) (noting that this is the law that incorporated the CRC into Swedish law).

generated negative or positive obligations.[59] This Swedish incorporation of the CRC into municipal law leaves each individual public servant to interpret the precise meaning of the CRC's provisions in each concrete situation involving a child.[60] The UN Committee for the CRC, in the same vein, does not accept a hierarchy between negative and positive rights, nor that rights can fall clearly into one of these two categories.[61] The combined use of this holistic, interdependent doctrine, together with a collective view of rights, in a tough-on-crime agenda, is addressed further below in this Article.[62]

III. FIGHTING MIGRATION AND CRIME THROUGH CHILD RIGHTS

The Swedish word *invandrare* means both migrants and immigrants. No distinction between the two is made. When a person speaking Swedish talks about migrants, they are theoretically referring to immigrants, without distinguishing between generations of immigrants.

References in Sweden to "socially and economically vulnerable areas" function as a proxy for migrant populated areas. According to the Public Authority known as the Delegation against Segregation, which was appointed by the Social Democratic Government in 2017, racial segregation is understood primarily in economic terms—that is, an individual's financial situation, rather than race or ethnicity itself, is treated as the determining factor.[63] The explanation for the occurrence

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59. *See generally* Proposition [Prop.] 2017/18:186 Inkorporering av FN:s konvention om barnets rättigheter [government bill] (Swed.).

60. *See* LAG OM FÖRENTA NATIONERNAS KONVENTION OM BARNETS RÄTTIGHETER (SFS 2018:1197) (Swed.); Departementsserien [Ds] 2019:23 Vägledning vid tolkning och tillämpning av FN:s konvention om barnets rättigheter [government report series] 66 (Swed.); *see generally* Statens Offentliga Utredningar [SOU] 2016:19 Barnkonventionen blir svensk lag [government report series] (Swed.) [hereinafter SOU 2016:19].

61. *See* Comm. on the Rights of the Child, General Comment No. 5, *supra* note 45, ¶ 6.

62. *See, e.g.*, Statens Offentliga Utredningar [SOU] 2024:93 Effektivare verktyg för att bekämpa brott av unga lagöverträdare [government report series] 122 (Swed.) [hereinafter SOU 2024:93] (citing SOU 2016:19, *supra* note 60, at 88).

63. *See generally* Kommittédirektiv [Dir.] 2017:33 Inrättande av en delegation mot segregation [committee directive] (Swed.); DELEGATION MOT SEGREGATION [DELEGATION AGAINST SEGREGATION], DELMOS 2021/334,

of racial segregation is explained only through economic terms where discrimination or ethnic marginalization plays no part and is not even discussed.[64] Instead, racial segregation is explained as a coincidental outcome of low income levels among individuals who happen to belong to ethnic minorities, as though the issue could be reduced merely to the claim that non-European-born individuals tend to earn lower incomes.[65] Laws aimed at children in the fight against crime primarily affect first- and second-generation immigrant children, as these laws are applied in areas where a large proportion of shootings and bombings occur.[66] The Governmental Inquiry on the creation of a Swedish Youth Crime Prevention Agency ("MUK") emphasizes that, in these areas, nearly "three out of four residents (74 percent) have a foreign background."[67]

Swedish authorities have divided Sweden into five zones. Zone One is the most socially and economically vulnerable, and Zone Five is the most affluent area. Most people, about 5.7 million of the total population, live in Zone Four.[68] Approximately half a million people live in Zone One, and approximately 800,000

SEGREGATION I SVERIGE: ÅRSRAPPORT 2021 OM DEN SOCIOEKONOMISKA BOENDESEGREGATIONENS UTVECKLING [SEGREGATION IN SWEDEN: ANNUAL REPORT 2021 ON THE DEVELOPMENT OF SOCIO-ECONOMIC RESIDENTIAL SEGREGATION] (2021).

64. *See* DELEGATION AGAINST SEGREGATION, *supra* note 63, at 28.

65. *See id.* at 28–29.

66. A study by BRÅ (Swedish National Council for Crime Prevention) clearly links shootings and bombs to social and economic vulnerable areas and higher youth populations. *See* BROTTSFÖREBYGGANDE RÅDET (BRÅ) [SWEDISH NAT'L COUNCIL FOR CRIME PREVENTION], RAPPORT 2025:8, VAR INTRÄFFAR SKJUTNINGAR OCH SPRÄNGNINGAR? EN STATISTISK ANALYS AV GEOGRAFISK KONCENTRATION OCH OMRÅDESSKILLNADER [WHERE DO THE SHOOTINGS AND BOMBS TAKE PLACE? A STATISTICAL ANALYSIS OF THE GEOGRAPHICAL CONCENTRATION AND AREA-DIFFERENTIATION] 27 (2025); *see also* LIV Ds 2024:30, *supra* note 20, at 236 (connecting serious repeated criminality to the socio-economic level of the area and to children developing criminal behavior); MUK, SOU 2024:30, *supra* note 24, at 138–39, 144–45, 433.

67. MUK, SOU 2024:30, *supra* note 24, at 433 n.22.

68. *See* BOVERKET [SWEDISH NAT'L BOARD OF HOUS., BLDG. & PLANNING], RAPPORT 2024:18, BOENDESEGREGATIONENS UTVECKLING ÅRSRAPPORT 2024 OM DEN SOCIOEKONOMISKA BOENDESEGREGATIONENS UTVECKLING I SVERIGE [THE DEVELOPMENT OF RESIDENTIAL SEGREGATION: ANNUAL REPORT 2024 ON THE DEVELOPMENT OF SOCIO-ECONOMIC RESIDENTIAL SEGREGATION IN SWEDEN] 10 (2024).

people live in Zone Two.[69] In Zone One, 53 percent of people were not born in Sweden compared to 20 percent nationally.[70] In Zone Two, 39 percent were born outside of Sweden, compared to 11 percent in Zone Five.[71] The laws described in this Article are either already in effect in, or are intended to target, Zones One and Two, creating a complex legal intersection between migration, class, gender and their effect on children.[72]

A. Examples of Human Rights Justifications by the Police and the Parliamentary Ombudsman

The first example of the use of Human Rights Justifications appears in a decision of the Parliamentary Ombudsman concerning a case in which the Swedish police invoked human rights to justify body-searching a ten-year-old child who was present at the filming of a music video.[73] The police had been called to the scene by someone reporting an ongoing crime.[74] They were unaware that a music video was being recorded and believed that a crime was taking place because knives were being used as props.[75] It should be noted that carrying knives in public places is prohibited under Swedish law and that the location in question was a public area.[76] The question, therefore, is whether there can be a minimum age of body-searches and how the police relied on the CRC to justify their actions.

The Parliamentary Ombudsmen accept individual complaints from citizens regarding their treatment by public authorities.[77] Although their decisions are not legally binding and do not constitute case law, the Parliamentary Ombudsmen enjoy a high

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69. *See id.* at 9.

70. *See id.*

71. *See id.* at 9–12.

72. *See id.*

73. *See* Justitieombudsmannen [JO], Dnr 2020-7201, Tillämpning av barnkonventionen vid polisens kroppsvisitation av en ung pojke för att i brottsförebyggande syfte söka efter vapen, at 1–2 (Oct. 24, 2022) [hereinafter Body Search, Dnr 7201-2020] (Swed.).

74. *See id.*

75. *See id.*

76. *See* 1 § LAG OM FÖRBUD BETRÄFFANDE KNIVAR OCH ANDRA FARLIGA FÖREMÅL (Svensk författningssamling [SFS] 1988:254) (Swed.).

77. *See* 17 § LAG MED INSTRUKTION FÖR RIKSDAGENS OMBUDSMÄN (JO) (Svensk författningssamling [SFS] 2023:499) (Swed.).

level of moral authority through soft law.[78] In this case, the complaint was filed by the mother of the ten-year-old boy who had been subjected to the body-search.[79] The police argued that the body-search of the ten-year-old was in the best interest of the child in the long term, as it would prevent the child from becoming involved in criminal activity.[80] The police wrote: "Of course, in the short term, it is not in the child's best interests to be subjected to a body search. However, an intervention against a child can help prevent the child from being drawn into serious crime at an early stage."[81]

This statement, however, lacks any empirical support. In this situation the child was not engaged in criminal behavior, so there was therefore no criminal conduct to correct through a body-search.[82] Applying the principles set out in General Comment No. 14 by the UN Committee on the Rights of the Child—which define the best interests of the child in both the immediate and longer term—the police and the Parliamentary Ombudsman defended what could be argued as a potential violation of child rights through Human Rights Justifications.[83]

In other words, the Parliamentary Ombudsman invents a reading of the right to privacy in the CRC by interpreting it against the ordinary meaning of the text, to mean that the CRC's rights are stronger the younger a child is, diminishing the scope of the right as the child grows older.[84] Article 16 of the CRC states that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and

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78. On the non-legally binding status of the decisions issued by the Parliamentary Ombudsmen, *see Decisions*, JO - RIKSDAGENS OMBUDSMÄN (Mar. 5, 2024), https://www.jo.se/en/decisions/ [https://perma.cc/B6G6-3EVR]; *see also* JO - RIKSDAGENS OMBUDSMÄN, https://www.jo.se/en/ [https://perma.cc/4W2D-LNHU] (last visited Jan. 8, 2026).

79. *See* Body Search, Dnr 7201-2020, *supra* note 73, at 1–2.

80. *See id.* at 5.

81. *Id.*

82. *See id.* at 1–2, 5.

83. *See id.* at 5, 7; Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶ 84, U.N. Doc. CRC/C/GC/14 (May, 29, 2013) [hereinafter Comm. on the Rights of the Child, General Comment No. 14].

84. *See* Body Search, Dnr 7201-2020, *supra* note 73, at 8.

reputation," and "[t]he child has the right to the protection of the law against such interference or attacks."[85] The Article does not state that the right to privacy diminishes with a child's age.[86] The Swedish Parliamentary Ombudsman and the Swedish government's reading of the CRC violates Article 31 of the Vienna Convention on the Law of Treaties, since the interpretation of Article 16 clearly goes against the ordinary meaning of the words used in the Article.[87] The Swedish Parliamentary Ombudsman writes:

> Furthermore, the considerations that, according to the Convention on the Rights of the Child, which applies to children under 18 years of age, must be taken into account in the best interests of the child and a child's right to their integrity . . . when weighing the need for the measure . . . . *These considerations weigh more heavily the younger the child is*.[88]

This is repeated in the legislative preparatory work, *Expansion of Police Powers at the Borders*, in regard to body-searching children at the border.[89] This legislative inquiry states: "These considerations weigh more heavily the younger the child is."[90] Referring to the legislative bill the *Expansion of Police Powers at the Borders* continues: "[T]he child's right to his or her integrity must be taken into account when weighing the need for the measure against the need for it. These considerations weigh more heavily the younger the child is."[91] This type of reasoning is not a recognized human rights doctrine: it suggests that rights diminish as a child grows older, even though one could argue that an older child may have greater need for certain rights, such as the right to privacy, compared to an infant.

Another example of the use of Human Rights Justification arises when the police took a thirteen-year-old boy into custody

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85. CRC, *supra* note 1, art. 16.

86. *See id.*

87. *See id.*; Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; *see also* Body Search, Dnr 7201-2020, *supra* note 73, at 8.

88. Body Search, Dnr 7201-2020, *supra* note 73, at 8 (emphasis added).

89. *See* Proposition [Prop.] 2022/23:109 Utökade polisiära befogenheter i gränsnära områden [government bill] 24 (Swed.).

90. *Id.*

91. *Id.* at 30.

for having given them the middle-finger.[92] The Swedish police argued that they took the boy into custody to fulfill their obligations under Article 36 of the CRC by preventing the child from becoming involved in criminal activities.[93] It should be noted that, at the time of this case, giving the police the middle finger did not constitute a crime, meaning the child was not engaged in any criminal activity. As of July 2, 2025, such conduct may constitute a criminal offense under a new law criminalizing degrading comments or humiliating actions directed at the police, punishable by up to six months in prison.[94]

B. Human Rights Justifications in the Legislative Phase

There are four ways in which Human Rights Justifications are used in the legislative phase. First, as a direct reference by the state to human rights as established in human rights treaty law. Second, Human Rights Justifications are used as a particular human rights legal method often connected to UN Committee doctrines. Third, Human Rights Justifications draw on international public law doctrine to justify the legislation. Finally, by interpreting the human rights treaty in a way that goes against its ordinary meaning in violation of Article 31 of the Vienna Convention on the Law of Treaties. Examples of these different ways are described next.

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92. *See* Justitieombudsmannen [JO], Dnr 4204-2021, Polisen har omhändertagit en 13-årig pojke enligt 12 § polislagen utan att det fanns grund för åtgärden, at 1 (May 18, 2022) [hereinafter Dnr 4204-2021] (Swed.); Justitieombudsmannen [JO], Dnr 9144-2020, Polisen har omhändertagit en 13-årig pojke enligt 12 § polislagen
utan att det fanns grund för åtgärden, at 1 (May 18, 2022) (Swed.).

93. *See* Dnr 4204-2021, *supra* note 92, at 3; *see also* GRAHN-FARLEY, *supra* note 6, at 133.

94. *See* BROTTSBALKEN [BrB] [Penal Code] 17:3 (Swed.); Proposition [Prop.] 2024/25:141 Ett starkare skydd för offentliganställda mot våld, hot och trakasserier m.m. [government bill] 6, 8–9 (Swed.). There is not a deciding Supreme Court case available on this new law yet, but this may change judging from the high number of police officers filing complaints over having been insulted, and prosecutors prosecuting for slight insults directed toward police, for example, police being called a "whore" or a "dam fascist." *See* Mårten Schultz, *En pinsamhet för svensk rättsordning* [*An Embarrassment for the Swedish Legal System*], SVENSKA DAGBLADET (Sept. 17, 2025), https://www.svd.se/a/vgaBdX/marten-schultz-vag-av-forolampningsfall-mot-tjansteman-over-svenska-domstolar (on file with the Brooklyn Journal of International Law).

1. Stop-and-Search Zones

The insistence on a holistic reading of the CRC means the elimination of any internal hierarchy among the rights in the Convention. Without a hierarchy, it is up to the government to decide which interests generate which rights and how those rights should be balanced against one another, ultimately deciding the proportionality of any resulting derogations.

An example of how Human Rights Justifications operate is demonstrated by the government's combined reading of three CRC Articles: Article 3, which establishes the best interests of the child; Article 16, which guarantees protection against arbitrary interference with privacy; and Article 19, which protects children against all forms of abuse and violence that may cause harm.[95] The government thus acts as the party activating the CRC in its defense of the stop-and-search law, which authorizes the police to conduct body-searches of children without a minimum age and without suspicion that the child has committed a crime.

The government's holistic approach, combined with the fact that the UN Committee has not defined the exact meaning of Article 19 of the CRC, demonstrates how the Article overrides the right to privacy in the CRC. The government has a personal obligation to prevent all potential risk that a child becomes a victim of future violence. This is how it defends bodily searching a child in the stop-and-search zone: on the grounds that it will prevent the child from becoming a victim of a form of gang violence in the future, which the government interprets as falling under Article 19 of the CRC.[96] This reading of the CRC goes against the ordinary meaning of the text in Article 19, which states:

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of

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95. *See* Departementsserien [Ds] 2023:31 Säkerhetszoner – ökade möjligheter för polisen att visitera för att förebygga brott [government report series] 43–44, 131 (Swed.) [hereinafter Stop-and-Search, Ds 2023:31]; *see also* CRC, *supra* note 1, arts. 3, 16, 19.

96. *See* Stop-and-Search, Ds 2023:31, *supra* note 95, at 131.

> parent(s), legal guardian(s) or any other person who has the care of the child.[97]

Reading the text of this Article, it becomes apparent that it concerns children abused in their families and aims at social services intervening against such abuse. Based on the ordinary meaning of the text, it is difficult to conclude—when interpreted in good faith, as required by the Vienna Convention on the Law of Treaties—that body-searches in stop-and-search zones fall within the scope of the Article.[98] The government nevertheless argues that such measures are in the best interests of the child and are also in accordance with the CRC, as they provide greater protection against the violence and exploitation associated with the underlying criminal activity. This reasoning is framed as a means of protecting children from a "greater degree of coercion."[99] When no court has exclusive authority to interpret the CRC, the primary authority to interpret its meaning falls on the government in this case, even if its reading does not comply with Article 31 of the Vienna Convention.[100] An additional complication is that the CRC is now incorporated into Swedish municipal law, and, as such, it is primarily the government—with its Swedish Democratic parliamentary majority—that interprets the meaning of the CRC in accordance with the Swedish constitutional act, the Instrument of Government (RF 11:14:2).[101]

Further, the government is again relying on a reading of the right to privacy that diminishes as a child gets older:

> This means, among other things, that the considerations that the Convention requires for the best interests of the child and the child's right to privacy must be taken into account when weighing the need for the measure against the child. These considerations weigh more heavily the younger the child is.[102]

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97. CRC, *supra* note 1, art. 19.

98. *See* Vienna Convention on the Law of Treaties, *supra* note 87, art. 31(1).

99. *See* Stop-and-Search, Ds 2023:31, *supra* note 95, at 131.

100. *See* Vienna Convention on the Law of Treaties, *supra* note 87, art. 31(1).

101. *See* OLIVER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 145–46 (3d ed. 2019); *see also supra* note 4 and accompanying text; discussion *supra* Section II.C.2.

102. Stop-and-Search, Ds 2023:31, *supra* note 95, at 115.

Here, the government uses a holistic approach, that allows Article 19 of the CRC to be prioritized over the fundamental human right to protection from arbitrary interference with privacy set out in Article 16 of the CRC, with this hierarchy justified by the best interests principle in Article 3. The government thus takes advantage of the CRC's incorporation into municipal law, making the legislator the primary interpreter of Article 16, as a matter of Swedish law rather than international treaty law.

2. Racial Profiling

Stop-and-search zones are notorious for leading to racial profiling.[103] Professor Deborah Ramirez and colleagues define racial profiling as "any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity."[104]

The balancing between public security, the risk of racial profiling, and the experience of being racially profiled in the adoption of stop-and-search laws was addressed through the introduction of stop-and-search zones, in Swedish referred to as *säkerhetszoner* (security zones).[105] The government addressed the risk of racial profiling by referring to international research on stop-and-search zones, which noted that: "Especially in the USA and the UK, there is extensive research on discriminatory ethnic profiling during police checks. In Sweden, the research is not as extensive and focuses more on people's experiences of ethnic discrimination."[106] This framing effectively recasts racial profiling and discrimination not as practices experienced by

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103. *See* DEBORAH RAMIREZ, JACK MCDEVITT & AMY FARRELL, U.S. DEP'T OF JUST., NJC 184768, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 3 (2000); INDIRA GORIS, FABIEN JOBARD & RENÉ LÉVY, OPEN SOC'Y JUST. INITIATIVE, PROFILING MINORITIES: A STUDY OF STOP-AND-SEARCH PRACTICES IN PARIS 10–11 (2009); *see generally* Steven Hayle, Scot Wortley & Julian Tanner, *Race, Street Life, and Policing: Implications for Racial Profiling*, 58 CAN. J. CRIMINOLOGY & CRIM. JUST. 322 (2016).

104. RAMIREZ ET AL., *supra* note 103, at 3.

105. *See* Stop-and-Search, Ds 2023:31, *supra* note 95, at 84–87.

106. *Id.* at 82.

individuals, but as perceptions held by them. The fact that stop-and-search zones are mostly used in migrant communities, Zones One and Two, the risk for racial discrimination is apparent, and is confirmed by the research conducted by Civil Rights Defenders.[107]

According to their findings, members of Afro-Swedish, Muslim, and Roma groups experience police checks as consistently negative.[108] Maybe not surprisingly, the police, by contrast, did not agree with the accounts provided by Afro-Swedes, Muslims, and Romas in these areas.[109] The prevailing position expressed by the interviewed police officers was that factors such as background and outward appearance were irrelevant to profiling practices.[110] By contrast, those subjected to police checks reported that ethnicity played a significant role in explaining why they were targeted.[111]

The government conducts a balancing test between the risk of racial discrimination and the purported benefits of body-searches involving children. In doing so, it references research suggesting that it is not possible to exclude the possibility that police body-searches may, to some extent, be applied in a discriminatory and stigmatizing manner.[112] The scope of the discrimination is, on the other hand, difficult to establish.[113] On this basis, the government concludes that the measure complies with its international human rights obligations, because the law is not prohibited under international law. In other words, the government relies on the principle that what is not prohibited is permitted under international law. This reasoning is

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107. *See* Civil Rights Defenders, *Yttrande över promemorian säkerhetszoner – ökade möjligheter för polisen att visitera för att förebygga brott (Ds 2023:31)* [*Commentary on the Proposed Law Security Zones – Increased Authority of the Police to Conduct Body Searches to Prevent Crime (Ds 2023:31)*], at 4 (Jan. 18, 2024), https://crd.org/wp-content/uploads/2024/01/Civil-Rights-Defenders-Yttrande-over-promemorian-Sakerhetszoner-okade-mojligheter-for-polisen-att-visitera-for-att-forebygga-brott_DS_2023_31.pdf [https://perma.cc/NNT8-9SN4].

108. *See* Stop-and-Search, Ds 2023:31, *supra* note 95, at 82–83.

109. *See id.*

110. *See id.* at 31, 82–83.

111. *See id.* at 82–83.

112. *See id.* at 83.

113. *See id.*

exemplified by the *Lotus* principle, where only what is explicitly unlawful is prohibited.[114]

The government concludes that the benefits outweigh the costs, in specific circumstances: "there is a risk that the powers [(to body-search and house search cars)] will to some extent be applied in a way that is or is perceived as discriminatory or stigmatizing."[115] The question the government asks is whether the benefits outweigh the cost.[116] Not only does the government find that the need to fight violent crime in these zones outweighs the risk of racism in the stop-and-search zones, but the government also concludes that stop-and-search zones will have a beneficial effect on the promotion of gender equality between men and women. The government's reasoning is as follows: "Since the proposals are considered to increase security, they can contribute to achieving the gender equality policy goal that women and men should have the same power to shape society and their own lives."[117] In the legislative proposition, the government expands its reasoning to stop-and-search zones and notes: "In summary, the positive effects that expanded powers within certain zones are expected to bring, in the form of improved ability to prevent serious violent crimes and keep the public safe, in some situations outweigh the negative effects that they can be expected to bring."[118]

3. The Creation of a Swedish Youth Crime Prevention Agency

This legislative proposal includes the creation of a new state-level public authority, the MUK, authorized to deprive children of their liberty without any regard to a minimum age and without requiring that the child be suspected or convicted of a crime.[119] The assessment will be based on vague criteria such as "the needs, conditions and circumstances of the child or young person and their guardian."[120] The agency will have the

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114. In international law, this doctrine is often connected to the Lotus Case. *See* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 31 (Sept. 7).

115. Stop-and-Search, Ds 2023:31, *supra* note 95, at 84.

116. *See id.* at 84–86.

117. *Id.* at 139.

118. *Id.* at 86–87.

119. *See* MUK, SOU 2024:30, *supra* note 24, at 18, 32.

120. *Id.* at 32.

authority to conduct home visits and to establish a treatment plan for specific children, as long as it is considered to be in the best interests of the child.[121] This can happen even without the child's or its family's consent to participate in the procedures.[122] It should also be noted that this agency will be authorized to impose its service plans on children and their families for the purpose of crime prevention, even in the absence of any suspicion of criminal conduct or a criminal conviction relating to the child.[123] Although the law is described as a social welfare measure, it is proposed that it will be the Swedish Prison and Probation Services who will implement the decisions adopted by social services under the law.[124]

Under the current Social Services Act, a child must be in life-threatening danger, engaged in an escalating criminal behavior, or have a drug addiction to be taken into state custody without the child's or the parents' consent.[125] The proposed Swedish Youth Crime Prevention Agency will intervene at an earlier stage based on an assessment of possible future criminal behavior. As a state-run public agency, MUK will be able to make decisions concerning the deprivation of a child's liberty, removal from the family without consent, or placement under house arrest during specific times of the day, based on a future-risk prognosis made by social services that the child will become involved in criminal activity, even though the child has not committed any crimes and is not suspected of having done so. The government concludes that this is proportionate to the infringement of the right to privacy of the European

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121. *See id.* at 37, 48 (referencing 2 ch. 1 § and 8 ch. 12 § in the proposed law).

122. *See, e.g.*, *id.* at 44–45 (referencing 7 ch. 6–7 §§ in the proposed law, which states that the Youth Crime Prevention Agency may ask the police to bring the child or its guardian to meetings).

123. *See id.* at 32.

124. *See id.* at 31–32, 47 (referencing 8 ch. 5–11 §§ in the proposed law).

125. *See* 1 § LAG MED SÄRSKILDA BESTÄMMELSER OM VÅRD AV UNGA (Svensk författningssamling [SFS] 1990:52) (Swed.) (referring to the voluntary nature of the Social Services Act with specific regulations in regard to the care of the young). However, Sections 2 and 3 state exceptions to the voluntary principle of social services care, in which care is required when a child is being abused by its caretakers, when a child is causing harm to themselves, or when a child is addicted to drugs, criminality, or other destructive behavior. *See id.* 2–3 §§; *see also* 2 ch. 1 § SOCIALTJÄNSTLAG (Svensk författningssamling [SFS] 2025:400) (Swed.).

Convention.[126] The government utilizes a Human Rights Justification with the support of Article 3 of the CRC, which states that "[t]he purpose of the principle of the best interests of the child is to ensure both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child."[127] It is a misreading of the CRC to claim that it obligates states to arbitrarily deprive children of their liberty or parents of their parental rights based on a future prognosis of potential behavior.

4. An Exception to Freedom and Participation When Engaging With Social Services: LIV

Under this proposed Swedish law children may be considered at risk based on several types of conduct. This includes children who (1) are present in public spaces at inappropriate times or locations without adult supervision; (2) have been found to associate with known criminals or with individuals who promote or glorify criminal behavior, including through social media, numerous times; (3) have experimented with drugs without being addicted but display a dismissive or "trivializing attitude" toward the risks of such use, suggesting a likelihood of continued involvement; and (4) exhibit persistent disrespectful or disruptive behavior, such as acting "aggressively or threateningly at school," showing contempt for teachers, public authorities, or their parents, or repeatedly skipping school.[128]

This legislative proposal also includes a special regulation on school attendance for children beyond elementary school, even when there is no compulsory school after a child has passed the elementary school levels.[129] This special regulation on school attendance may concern regular attendance in regular education but may also entail an obligation for the child to participate in extra study time. One possible consequence of failing to attend school is an obligation to remain at one's home, or another designated residence, during specified times, or to wear an ankle monitor. The Swedish Government justifies the

126. *See* MUK, SOU 2024:30, *supra* note 24, at 435–36.
127. *Id.* at 157.
128. *See* LIV Ds 2024:30, *supra* note 20, at 842–43.
129. *See id.* at 842–46.

legislative proposal with that it has obligations in accordance with the CRC to support and protect children:

> In order to guarantee and promote the rights set out in the Convention on the Rights of the Child, a State is obliged by Article 18(2) to provide appropriate support to parents and legal guardians in the performance of their responsibilities for the upbringing and development of the child. The provision of support to parents and legal guardians is reiterated in several articles of the Convention (e.g. Articles 19, 23, 24, 26 and 27).[130]

The government further argues that, in accordance with Article 27 of the CRC, it is the obligation of the state, within its available resources, to secure the standard of living required for the child's development.[131] The government points to its human rights obligations to support the parents so that they are able to provide the support needed for the child's development, in accordance with Article 26 of the CRC.[132] The government also references its obligation under Article 24 of the CRC to develop guidance directed toward parents.[133]

This is an example of the risks that come when the state invokes abstract Human Rights Justifications to justify its own actions. In such cases, the state is not responding to a concrete violation or to an allegation that a specific child's right has been infringed. Instead, by applying children's rights in an abstract and generalized manner—and by relying on an abstract notion of "the child"—these rights become a tool for legitimizing state policies and practices rather than a mechanism for holding the state accountable for its conduct.

C. Using a Human Rights Doctrine from UN Treaty Bodies

As already demonstrated by the application of the CRC in the Parliamentary Ombudsmen case, the Swedish legislator relies extensively on the General Comments issued by various UN Committees, most often the UN Committee on the Rights of the Child and the UN Human Rights Committee on the

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130. *Id.* at 150.

131. *See id.* at 151; *see also* CRC, *supra* note 1, art. 27.

132. *See* LIV Ds 2024:30, *supra* note 20, at 151; *see also* CRC, *supra* note 1, art. 26.

133. *See* LIV Ds 2024:30, *supra* note 20, at 151; *see also* CRC, *supra* note 1, art. 24.

International Covenant on Civil and Political Rights (ICCPR).[134] The Swedish government, in its legislative preparatory works to these adopted or soon to be adopted laws, has recently come to use three specific human rights doctrines not found within the specific human rights treaties themselves, but within the General Comments of the various UN human rights bodies.[135] The doctrines include: (1) that the right covers both the individual child and the collective of children, (2) that the best interests of the child means both in the concrete situation and in the abstract future, and (3) that the CRC should be read holistically.[136]

1. The CRC Covers Both the Individual Child and the Collective Group of Children

This transformation of an individual right of the child into a collective right of children is most clearly articulated in the preparatory work for the new law proposing the expansion of state power to employ undisclosed surveillance and other measures against children in the fight against crime, as exemplified by the expanded authority to conduct house searches of children's homes:

> When it comes to determining what is in the best interests of the child according to the Convention on the Rights of the Child, it must be taken into account that the Convention aims to protect both the collective group of children – where children may have conflicting interests – and as individuals.[137]

The best interests of the child doctrine, developed by the UN Child Rights Committee in General Comment No. 14, is frequently used by the Swedish government to set one group of children against another. More significantly, it also allows for balancing the interests of one child against the collective of children, often belonging to other groups.[138] Several legislative

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134. *See, e.g.*, LIV Ds 2024:30, *supra* note 20, at 149, 155; SOU 2024:93, *supra* note 62, at 125–26 (using the ICCPR and UNHRC as justifications); *see also* discussion *supra* Section III.A.

135. *See* LIV Ds 2024:30, *supra* note 20, at 149.

136. *See* Comm. on the Rights of the Child, General Comment No. 14, *supra* note 83, ¶¶ 4, 23, 74.

137. SOU 2024:93, *supra* note 62, at 249.

138. *See id.* at 124 (citing SOU 2016:19, *supra* note 60, at 101).

proposals use this principle, asserting that the best interests of the child should be balanced among different children in the abstract under the CRC. The legislative preparatory works explain that this approach makes it necessary to eliminate the "extraordinary" threshold for searches of children's homes.[139] The rationale is that an individual child's right to privacy should be balanced against the collective interests of children who may be victims of crimes.[140]

The legislator reasons that currently it is not possible to conduct a house search if a child steals a pair of jogging shoes for 2,000 SEK (approximately 170 Euros).[141] The government states that this would be offensive to the public if a house search could not be conducted simply because the perpetrator is a child.[142] In this context, the legislator identifies the conflicting interests between the child having his house searched for a pair of shoes and the collective group of children that risk having their shoes stolen.

2. The Best Interests of the Child Should Be Understood in Both the Short and Long Term

As previously discussed, in the Parliamentary Ombudsman decision, the police relied on Human Rights Justifications based on an argument that it was in the best interest of a ten-year-old attending the filming of a rap video to be subjected to a body-search, because this would, in the long term, prevent the child from becoming involved in criminal activity and would therefore serve the child's long-term best interests.[143] Another example where this doctrine is addressed is in the legislative proposal to create the above addressed MUK.[144] It is clear that the government believes that the best interests of the child principle has both a concrete, immediate meaning, and also an abstract projected meaning in a future application.[145] This is expressed

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139. *See id.* at 723–25.

140. *See, e.g.*, *id.*; For the balancing argument between the child whose right is infringed against the children who are affected by crimes committed by children, *see also* LIV Ds 2024:30, *supra* note 20, at 806–07.

141. *See* SOU 2024:93, *supra* note 62, at 248.

142. *See id.* at 248–49.

143. *See* Body Search, Dnr 7201-2020, *supra* note 73, at 1–2, 5.

144. *See, e.g.*, MUK, SOU 2024:30, *supra* note 24, at 426.

145. *See id.*

in the preparatory work as a desire for the government to control the future projected application of the best interests principle in the law.[146]

The governmental inquiry report outlines the criteria that should be used to safeguard the decisions under MUK against individual children, including that "[f]or the assessment of future possible criminality that there should be a combined assessment of the individual child's behavior, living conditions, possible criminality and other circumstances."[147] The government continues, "[t]he assessment to be made of the risk of serious crime needs to be forward-looking and relate to both short- and long-term risk."[148] The decision must be based on "a concrete risk that the child or young person will commit a serious crime."[149] All these decisions are to be guided by the CRC and the best interests of the child as established in the first section of the law.[150]

The Swedish Governmental Inquiry expressly states that the law is not intended to be a criminal law and that a decision by MUK is not a criminal sanction, even though it is the police and penal authorities that will enforce the decisions made by the social services (as discussed under Option One of the governmental inquiry).[151] Also, unlike Denmark—where the law originated—the Swedish law will not require that the child be suspected of a crime.[152] This reasoning does not take into account that the definition of a criminal sanction in international human rights law is autonomous. This means that it will not matter if the municipal system labels a law as non-criminal or designates state actions under the law as non-criminal penalties. If a state action meets the criteria for a criminal sanction under international human rights law, it will, under the principle of "autonomous meaning," be interpreted by

146. *See id.*
147. *Id.* at 229.
148. *Id.*
149. *Id.*
150. *See id.* at 73. Section 2.1 of the report states that all the decisions shall primarily be based on the best interests of the child. *See id.* This is a weakening of the requirement in the CRC that states that the best interests of the child shall be of primary consideration. *See id.*; CRC, *supra* note 1, art. 3.
151. *See* MUK, SOU 2024:30, *supra* note 24, at 31, 227.
152. *See id.* at 227.

an international human rights body in accordance with the relevant treaty rather than municipal law, meaning that the treaty-based definition of a criminal sanction determines its meaning for treaty purposes regardless of domestic labeling.[153]

The proposed law allows MUK to decide on anticipated future actions, which the penal system and relevant agencies will implement.[154] Under human rights law, this effectively amounts to using criminal sanctions to prevent children committing crimes in the future.[155]

When it comes to LIV, it permits measures that qualify as criminal sanctions under international human rights laws, such as house arrest and ankle monitors—applied to children *before* they commit any crime, based solely on an anticipation that they might commit one.[156] This logic is problematic, as it imposes punishment in advance of any criminal act.

This entire law rests on applying the best interests of the child principle to include child's future interests.[157] Once a measure is determined to be in the child's best interest, it is also deemed proportionate, even where it infringes upon the fundamental rights of both the child and the parents as protected by the CRC, the European Convention on Human Rights (ECHR), and the Swedish Constitution in the Instrument of the Government's Bill of Rights.[158]

3. Reading the CRC Holistically

When it comes to the CRC, the Swedish Governmental Committee, through the interpretation of the General

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153. *See* Ryan Goss, *The Engel Criteria in the 21st Century: Irrational Flexibility and Defense in Recent European Court of Human Rights Jurisprudence*, 25 HUM. RTS. L. REV. 1, 3–4 (2025); *see generally* George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUR. J. INT'L L. 279 (2004) (discussing the scope of the autonomous principle in the European Convention on Human Rights).

154. *See* MUK, SOU 2024:30, *supra* note 24, at 38–39 (referring to 4 ch. 1 § in the proposed law).

155. *See* MUK, SOU 2024:30, *supra* note 24, at 31; *see also* LIV Ds 2024:30, *supra* note 20, at 558.

156. *See* LIV Ds 2024:30, *supra* note 20, at 43, 46 (referring to 5 ch. 2 § on prescribing house arrest and 6 ch. 3 § on the use of ankle monitors in the proposed law).

157. *See id.* at 35, 40 (referring to 2 ch. 1 § in the proposed law).

158. *See, e.g.*, *id.* at 135.

Comments of the UN Committee on the Rights of the Child, finds that: "[t]his means for the Convention on the Rights of the Child that the rights in the Convention, although of a different nature, form a whole and presuppose each other."[159] This holistic approach eliminates the hierarchy between rights, since in a holistic context all rights become merged into one whole, and it is central to the government's argument when balancing the competing interests of individual children, groups of children, and adults in migrant areas.

The right to privacy and the positive obligation derived from the CRC that justify secret coercive measures against children are defended through a holistic interpretation of the CRC's rights. Under this doctrine, the CRC is both an instrument of rights for the individual child and an instrument of rights for the collective of children, "[w]hen it comes to the use of coercive measures to prevent crime, the invasion of privacy of children who are at risk of becoming involved in crime is set against the need for other children to feel safe and protected from being exposed to crime."[160] The governmental legislative inquiry continues by stating that, as applied in the CRC, the right to privacy means that infringements of the CRC's right to privacy may be justified under certain circumstances:

> [P]roportionate and aims to protect national security or one of the other interests set out in Articles 13 and 14. At the same time, the interference must be weighed against other interests under the Convention, e.g. a child shall be protected against all forms of exploitation and abuse, even when the child is in the care of his or her parents (Articles 19 and 32–36).[161]

The governmental legislative inquiry further states:

> What is meant by private and family life, home and correspondence is not stated in Article 16(1) and is therefore left to a certain extent to the respective state to determine. With regard to the concept of *privacy*, the [UN] Human Rights Committee has, in relation to the corresponding provision in the [ICCPR], stated that the protection of privacy is something that is relative, depending on the society in which one lives.[162]

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159. SOU 2024:93, *supra* note 62, at 122.
160. *Id.* at 167.
161. *Id.* at 126.
162. *Id.* at 125–26 (citing ICCPR, *supra* note 1, art. 16(1)) (emphasis added).

A holistic reading of the CRC allows a child's right to protection from exploitation to take precedence over Article 36. For example, this includes the right to a fair trial in the ECHR and the legal security established in the CRC.[163] The government notes that this follows from the CRC's positive obligations, reasoning that:

> Neither Article 36 nor the Convention on the Rights of the Child provides any major guidance as to which specific forms of exploitation are covered by the article. However, it is clear from the preparatory work for the Convention on the Rights of the Child that the intention of the broad wording in Article 36 was to provide comprehensive protection, which would include all forms of exploitation that were not covered by Articles 32–35.[164]

The governmental legislative inquiry concludes that, because Article 36 of the CRC does not clearly define what forms of exploitation it encompasses and because the ICCPR Committee has treated the right to privacy as contextual, it is left to each state to determine both the scope of the right to privacy and the meaning of abuse.[165] Particularly, it is important for the state to do this when balancing these two rights and interests against each other. Again relying on a holistic reading, the governmental legislative inquiry connects this statement to Article 4 of the CRC, which requires a state to take "all appropriate legislative, administrative, and other measures" to fulfil the rights recognized by the CRC.[166] This interpretation leads the governmental report to conclude that the obligations to protect the child from future criminality according to the CRC takes precedence over the right of the child to privacy.[167]

As a result of this holistic reading of the CRC—without any hierarchy between rights and while relying on Article 4's principle of the maximum extent of available resources, normally considered a moral goal rather than a legal rule but here elevated into a positive legal obligation—the government

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163. *See* ECHR, *supra* note 1, art. 6; *e.g.*, CRC, *supra* note 1, art. 13 (in the context of freedom of expression).

164. SOU 2024:93, *supra* note 62, at 128.

165. *See id.* at 126.

166. *See id.*; CRC, *supra* note 1, art. 4.

167. *See* SOU 2024:93, *supra* note 62, at 126.

concludes that the notion of the best interests of the child includes, on the one hand, the child's right to protection against infringements of personal integrity and, on the other hand, the child's right to protection from being drawn into serious crime.[168] This conclusion is used to justify placing children under house arrest and utilizing ankle monitors, even when they have not committed a crime or are not suspected of committing one. The fact that the social services, using a holistic approach, estimate that there is a possibility that the child may become involved in criminal conduct in the future is sufficient.

D. Using International Public Law Human Rights Doctrine

The Swedish government has developed a recurring legislative interpretation of the *Lotus* principle, according to which everything that is not prohibited is permitted. This reasoning frequently appears in the preparatory works, where it is described as consistent with the view that international human rights treaties merely set the framework for the limits of the legislative proposals. This effectively changes all human rights treaties from being a floor to a ceiling when it comes to what the government finds itself able to legislate and able to legitimize without conflicting with its international human rights obligations.

An example of how international human rights and treaty law function not as a check on the government but as a way to justify adopting legislation—which research has demonstrated and interviews with persons living in the migrant communities as having racist effects—can be seen in the legislative work connected to the stop-and-search zones.[169] The government applies the *Lotus* principle using human rights as its boundaries. The government notes, "[i]t is the constitutional regulations and the international regulations that Sweden is bound by that set the framework for how a system of security zones should be designed."[170] The government constructs its proportionality based on the limits of international human rights law, particularly the rights of children as established by

168. *See id.* at 169; *see also* CRC, *supra* note 1, art. 4.

169. *See* Proposition [Prop.] 2023/24:84 Säkerhetszoner – ökade möjligheter för polisen att visitera för att förebygga brott [government bill] 20 (Swed.).

170. Stop-and-Search, Ds 2023:31, *supra* note 95, at 89.

the CRC.[171] In other words, human rights are not used as a minimum requirement and obligation that the government should try to improve and expand, but instead as a ceiling defining what the government is prohibited from doing—pushing up to the very limit of potential violation.

IV. HUMAN RIGHTS JUSTIFICATIONS AS A POST-LIBERAL DEMOCRATIC DOCTRINE

The absence of a critical contextual analysis of how human rights doctrine, developed in post-World War II and post-Cold War periods, as applied in the current post-liberal-democratic era, raises considerable risks. The Swedish examples demonstrate that human rights both come to legitimize and conceal human rights violations against persons belonging to marginalized groups, even in a traditionally liberal democratic country such as Sweden. More significantly, they show how the human rights doctrines developed by the monitoring bodies of the UN can be used to legitimize violations of the very treaties they intended to monitor and to protect.

A. The Effects of Human Rights Justifications on the Protection of Individual Rights Seen Through Complex Intersectionality

The use of human rights doctrine in justifying the political agenda set by the Swedish Democrats is a dramatic shift from the invocation of human rights by previous governments.[172] In 2017, a study requested by the Minister of Cultural Affairs reviewed the case law of Sweden's upper courts covering all core UN human rights treaties, the European Court of Human Rights, and the International Labour Organization (ILO) since their adoption, in order to map the use of human rights in both judicial decisions and legislative work. The study examined 263 Swedish court cases and the legislative preparatory works of the laws adjudicated in those cases, drawn from the Supreme Court, the Supreme Administrative Court, the Courts of Appeal, the

171. *See id.*

172. For a study on human rights treaties in Swedish case law, *see generally* Maria Grahn-Farley, *Fördragskonformtolkning av MR-traktat* [*Treaty-Compliant Interpretation of the HR Treaty*], 2018 SvJT 450 (Swed.).

Administrative Courts of Appeal, the Migration Court of Appeal, and the Labor Court.[173]

What emerges from this study is that the Tidö-Government's use of Human Rights Justifications demonstrates both qualitative and quantitative differences that distinguish this government's legislative reliance on human rights in its own defense from that of previous governments. Previous governments referred to their international obligations passively, without using the treaties as the justification for legislation.[174] They instead related to human rights as instruments of compliance, which differs from the Tidö-Government, which primarily uses human rights as instruments of governance, using them to justify and legitimize its legislation. This shift is especially clear when it comes to derogations from, and frequent infringements of, the rights of migrant children.

B. Complex Intersectionality: Child, Gender, Class, Race, and Ethnicity as Legal and Social Constructions

The proposed laws addressed in this Article are explicitly aimed to be applied in segregated migrant areas. In the legislative proposal to create the MUK, the government report states that "[t]he highest level of suspected criminals are found among persons born in Sweden with both parents born outside of the Swedish borders, followed by the group born outside of Sweden."[175] The government continues: "[i]n areas where socio-economic conditions are worse than average . . . the proportion of first- or second-generation immigrants is often high."[176]

As a related notion, one argument put forward by the government is that MUK will help counter the national

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173. For a labor law case using the Convention on the Rights of Persons with Disabilities, *see generally* Arbetsdomstolen [AD] [Labor Court] 2017 case no. A 146/16, https://arbetsdomstolen.se/media/0ohbypa0/51-17.pdf [https://perma.cc/9WH9-E8QG] (Swed.) (noting that this was, at the time, one of the only two cases found in that study where non-incorporated human rights treaties were used as a standalone legal source by a court); *id.*; Rättsfall från Hovrätterna [RH] [cases from the Courts of Appeal] 1996 p. 9 Ö 1996:87 (Swed.) (using the CRC before its incorporation).

174. *See generally* Grahn-Farley, *supra* note 172.

175. MUK, SOU 2024:30, *supra* note 24, at 433.

176. *Id.*

segregation between ethnic Swedish people and people with migrant backgrounds.[177] It should here be clarified that there is no empirical data presented in the report that MUK actually will have this anticipated effect, but on the contrary, international research also referenced by the government legislative inquiry itself, describes how such a law might instead increase the likelihood of a child becoming criminal because of early age criminal labelling.[178] The government states: "[a]gainst this background, the inquiry assesses that the proposals will be of particular benefit to foreign-born people and their children, since the purpose of the proposals is to prevent children and young people from getting involved in serious crime."[179]

The government further writes, at an intersectional level, that this law directed towards migrant children will also benefit girls because: "[i]t can therefore be presumed that several of the actions MUK decides to take for the individual will lead to that several of the affected boys and young men are given sound values and will opt to not exercise violence against women."[180] From a gender and intersectional perspective, this reasoning has been critiqued within Critical Race Feminist scholarship as a continuation of a post-colonial legacy in which white men perceive themselves as "saving brown women from brown men."[181]

One of the most significant characteristics of a liberal democratic society is its protection not only of political minorities but also of minority populations in relation to the majority. The singular group that is protected through the discrimination prohibition without being a minority population—yet in many societies in fact constitutes a majority population—is the category defined as women. In the legislative preparatory work for MUK, the government's legislative inquiry invokes the stated goal of helping girls with migrant backgrounds as a justification for subjecting boys in the same communities to

177. *See id*.
178. *See id*. at 204.
179. *Id*. at 433.
180. *Id*. at 433–34.
181. For one of the most significant texts on this topic, *see* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER 66, 93 (Patrick Williams & Laura Chrisman eds., 2013) (1993).

MUK.[182] This represents an example of intersectionality applied incorrectly: it fails to recognize that girls and boys in minority communities cannot be separated, and that using girls as pretext to target boys is harmful to both groups. When the state targets the boys, it also affects girls, as they jointly create their communities and often live in the same families.

Women and minority populations share the common right to be protected from discrimination based on their identity. This differs in the case of children: children are not a protected class in general human rights treaties, and the CRC does not protect children as such from discrimination on the basis of age.[183] Instead, the prohibition of discrimination in Article 2 of the CRC follows the structure of the general non-discrimination clauses by providing a list of protected classes, such as "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[184] It should be noted that disability is an additional protected ground that is not included in the two 1966 Covenants but is expressly protected in the CRC.[185]

There is a distinction between a protected class and a vulnerable group. In international law and human rights, specific international treaties exist to protect particularly vulnerable groups deemed to need additional protection and support in the form of specialized rights.[186] These treaties are often connected to some form of constructed identity. The child identity is constructed by its age—that is, by being under the age of eighteen.[187] The child is the only identity that is purely legally, rather than socially, constructed.[188] Therefore, the term "complex intersectionality" is adopted here, as any form of

182. *See* MUK, SOU 2024:30, *supra* note 24, at 433–34.

183. *See* CRC, *supra* note 1, art. 2.

184. *See id.*

185. *See id.*; ICCPR, *supra* note 1, art. 2; International Covenant on Economic, Social, and Cultural Rights art. 2, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

186. *See, e.g.*, CRC, *supra* note 1, art. 2; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; G.A. Res. 61/106, Annex I, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) [hereinafter Convention on the Rights of Persons with Disabilities].

187. *See* CRC, *supra* note 1, art. 1.

188. *See* GRAHN-FARLEY, *supra* note 6, at 30–31, 59–60.

intersectionality involving children combines both socially and legally constructed identities.[189] Identity and group-based treaties under the UN go beyond the anti-discrimination protections within the universal human rights treaties. They not only oblige the state to withhold from discriminatory acts, as required by anti-discrimination law, but also grant rights designed to achieve more substantial equality beyond formal equality.

The UN has identified nine of its human rights treaties as "core treaties."[190] The line between general and identity-group specific treaties is not exactly clear-cut but can be loosely grouped as follows. Of the nine treaties, three are general and not group-based: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[191]

The identity-based treaties are the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families, the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities (CRPD).[192]

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189. *See id.* at 59–60.

190. *See The Core International Human Rights Instruments and Their Monitoring Bodies*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies (on file with the Brooklyn Journal of International Law) (last visited Jan. 10, 2026).

191. *See generally* ICCPR, *supra* note 1; ICESCR, *supra* note 185; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85.

192. *See generally* International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, S. TREATY DOC. 95-18, 660 U.N.T.S. 195; CEDAW, *supra* note 186; CRC, *supra* note 1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 93; G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearance (Dec. 20, 2006); Convention on the Rights of Persons with Disabilities, *supra* note 186.

The latter may be understood as a quasi-general treaty, since anyone may become a "person with disabilities" under the treaty either at birth or later in life through illness or accident.[193]

Examples of protected classes are defined in the International Covenant on Civil and Political Rights, including "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and the CRC adds disability in comparison with the ICCPR.[194] To some extent, there is an overlap between the identities codified as belonging to a protected class and more vulnerability-based conventions, even though vulnerability as a human rights concept was only in full use by the time of the adoption of the CRPD. The function of the CRPD is not limited to the idea of a protected class as basis for non-discrimination. The CRPD instead adopts an explicitly intersectional approach to disability discrimination by recognizing that women and children (Articles 6 and 7) are subject to distinct forms of discrimination based on both gender and age.[195]

For example, the child is not a protected class, and neither is disability under the ICCPR. Migrant worker status is also not treated as a protected class, even though migrant workers may fall within the protected grounds such as national origin, since they often belong to a different nationality. Sweden has not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Even if it had, this Convention would only in limited cases be applicable to the situation in Sweden's migrant communities in socio-economic Zones One and Two, because the people living there are not migrant workers in the meaning of the Convention, which defines migration as undertaken for the purpose of remunerated activity.[196] The categorization of "migrant" in the Swedish context and language means on a broad level anyone that has moved to Sweden from a country outside of Sweden in

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193. *See generally* Convention on the Rights of Persons with Disabilities, *supra* note 186.

194. *See* CRC, *supra* note 1, art. 2(1); ICCPR, *supra* note 1, art. 2(1).

195. *See* Convention on the Rights of Persons with Disabilities, *supra* note 186, arts. 6, 7.

196. *See* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, *supra* note 192, art. 2(1); *see also* discussion *supra* Part III.

ways that are traceable from first and second generations, and, at times, even the third. By the second generation, such tracing is usually possible only through family names and racial and ethnic group affiliation. A key distinction that is often made is whether the original migrant is born outside Sweden or Europe, a categorization that is commonly linked to racialized perceptions of whiteness.

In Sweden it is difficult to detach the link between class, ethnicity, and race as formal proxies for each other.[197] This is because official data presents these factors together within the five-zone system: Zone One is the weakest and most vulnerable socially and economically with the highest level of migrants and people born outside of Sweden, and Zone Two reflects declining vulnerability and lower migration numbers; and this pattern is consistent all the way to Zone Five, which has the highest economic and social status and the lowest migration numbers.[198]

The challenge is when Human Rights Justifications are used to justify one group's interests over another group or individual's interest without acknowledging the possible risk of discrimination or that one group might be in a more vulnerable position than the group whose interest it is being balanced.[199] By relying on the balancing of interests and eliminating the positionality of the person whose right is being derogated against another group's right, means a de facto elimination of the discrimination protection established in human rights treaties.

A clear example of this is the adoption of the stop-and-search zones, where the government legislative inquiry admits that there is a risk of racial discrimination. Persons belonging to discriminated and protected classes, such as Afro-Swedes, Muslims, and Romas, clearly express how they are being targeted by these stop-and-search zones. Nevertheless, this lived experience is weighed against an abstract general utility

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197. *See* DELEGATION AGAINST SEGREGATION, *supra* note 63, at 22–24. For a discussion of class, gender, and race, *see generally* Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (2008); Maria Grahn-Farley, *Race and Class: More than a Liberal Paradox*, 56 BUFF. L. REV. 935 (2008).

198. *See* BOVERKET, *supra* note 68, at 9–12.

199. This has been developed in the chapter in complex intersectionality by Maria Grahn-Farley. *See* GRAHN-FARLEY, *supra* note 6, at 59–80.

interest to in crime prevention.[200] This balacing occurs despite social science evidence indicating that stop-and-search zones are ineffective, and may, in fact, make the situation worse.

This is the weakness of balancing rights in an abstract legal context free from empirical social data, thereby calling into question whether the law will have the effect it claims. This form of balancing of rights, through a lens of proportionality that legitimizes the derogations from individual protection against racial discrimination, is a severe form of Human Rights Justification made possible by the deconstruction of the distinction between individual and collective rights and by the elimination of any hierarchy among rights through a holistic and interdependent reading of human rights.

When the state controls when and how to activate human rights regimes and determines the interests against which particular rights are to be balanced, the prohibition of discrimination can effectively be eliminated using countervailing interests justified through the child's best interests principle and a holistic reading of the categories of rights.

In the government legislative inquiry, SOU 2025:11, on the lowering of the age of criminal responsibility, the argument is advanced that the rights in the CRC are both individual and collective.[201] For the government, this implies balancing the interests of one group of children against another. Different groups of children—based on sex, age, socioeconomic, and cultural status—may require different treatment. This is because, as the report states, what might be best for one group might not be best for another.[202] This position is made explicit in the inquiry's articulation of how the principle of the best interests of the child should be applied:

> When assessing what is in the best interests of the child, it should also be taken into account that children are not a homogeneous group. Children have different circumstances and needs depending on, among other things, gender, age, socio-economic conditions, cultural and ethnic background and disability. What is best for one child in a given situation is not

200. *See* discussion *supra* Section III.B.
201. *See* SOU 2025:11, *supra* note 46, at 127–28, 232.
202. *See id.*

> necessarily best for another child. What benefits one group of children may disadvantage another group of children.[203]

Normally, when specific treatment is discussed based on race and ethnicity, it refers to affirmative actions: taking positive steps to ensure that individuals who suffer racial discrimination receive targeted protection of their rights. It is unclear what the governmental inquiry means when it states that ethnicity, for example, justifies differential treatment in the context of lowering of the age of criminal responsibility.[204]

CONCLUSION

The literature on democratic backsliding by and large focuses on Hungary and Poland, and, to some extent, on the US during the first election of Donald Trump, and Latin America, for example, under Chavez in Venezuela.[205] We are still in the early stages of taking stock of the evolution of the human rights doctrines in a post-hegemonic liberal-democratic era. Human Rights Justifications is one of the doctrines now emerging, and it remains unclear whether it will develop into a counter-discourse power, as earlier doctrines did in response to the Washington Consensus, or whether human rights will instead evolve into a framework that tacitly approves practices

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203. *Id.* at 127–28.

204. *See id*.

205. For a discussion on democratic backsliding in Hungary and Poland, *see* Michael Bernhard, *Democratic Backsliding in Poland and Hungary*, 80 SLAVIC REV. 585, 585–607 (2021); *see generally* Laurent Pech & Lane Kim Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 3 (2017); Gábor Halmai, *Rule of Law Backsliding and Memory Politics in Hungary*, 19 EUR. CON. L. REV. 602 (2023). For different positions within the political spectrum, *see generally* BEN RHODES, AFTER THE FALL: THE RISE OF AUTHORITARIANISM IN THE WORLD WE'VE MADE (2022); ANNE APPLEBAUM, TWILIGHT OF DEMOCRACY: THE SEDUCTIVE LURE OF AUTHORITARIANISM (2020); BILL EMMOTT, THE FATE OF THE WEST: THE BATTLE TO SAVE THE WORLD'S MOST SUCCESSFUL POLITICAL IDEA (2017); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: A NEW EDITION FOR OUR PERILOUS TIMES (2022); GRAY, *supra* note 2; PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018). For a discussion on Latin America, *see generally* RACHEL E. BOWEN, THE ACHILLES HEEL OF DEMOCRACY: JUDICIAL AUTONOMY AND THE RULE OF LAW IN CENTRAL AMERICA (2017). For a discussion on Venezuela, *see* Dorothy Kronick, Barry Plunkett & Pedro L. Rodriguez, *Backsliding by Surprise: The Rise of Chavismo*, 11 POL. SCI. RSCH. & METHODS 838, 838 (2023).

comparable to the Jim Crow laws in the US and apartheid-era legislation in South Africa, as occurred in the early post-World War II period.

When there are no longer clearly identified groups or identity-based coalitions recognized as protected categories in law, minority groups become increasingly vulnerable during democratic backsliding, particularly at the nexus of populism and state-centeredness.[206] This vulnerability arises through new forms of alliances when liberal democratic backsliding is fueled by broad anti-democratic coalition-building rather than by suppression of individual interest groups or identity-based claims. As the two scholars Kronick and Plunkett illustrate, suppression of human rights in Venezuela and Turkey were justified as part of protecting democracy, in the form of a broad coalition building between divergent groups that had one thing in common, they felt a cross-cutting frustration.[207] Swedish children living in socially and economically vulnerable migrant areas represent one such new group: laws are targeted at them, and there is a resounding silence from the political opposition in defending these children.

Human rights in Sweden, as demonstrated both through ex-post review by the Parliamentary Ombudsmen and through legislation shaped by the practice of Human Rights Justifications, increasingly operate on behalf of the state. In this framework, the balancing of rights among competing interests functions as a proxy for advancing the interests of a powerful majority over those of weaker minority groups and individuals belonging to those minorities. Through the practice of Human Rights Justifications, the state emerges as the most powerful collective right holder.

Human rights doctrine has from post-World War II and the post-Cold War era responded to the demands of international and global changes and challenges. Human rights scholars challenged neoliberal hegemony by engaging in counter discourse aimed at the deconstruction of the dichotomies of rights and obligations. This, in turn, led to the deconstruction of the binary between negative and positive rights, strengthening the doctrine of positive obligations—a doctrine that frames

206. *See* Kronick et al., *supra* note 205, at 839.
207. *See id.* at 838.

human rights as demands on the state for the effective enjoyment of one's human rights. Together with the dismantling of a hierarchy of rights through holistic, interest-based balancing, this shift has made it possible for the Swedish government to use Human Rights Justifications in legislation aimed at migrant children, resulting in severe derogations from key rights, including protection against discrimination and fundamental rule-of-law principles such as no crime, no punishment.

This Article demonstrates the four ways in which the Swedish government uses human rights to defend its own actions and decisions in its fight against crime and migrants:

1) Directly appealing to a human right.
2) Using the United Nations (UN) Committees human rights doctrine.
3) Using international public law principles.
4) Misrepresenting the ordinary meaning of the treaty text used.

One thing that is clear from this Article is that human rights when applied in municipal legal systems are at risk of serving as instruments to deprive people of their individual rights because of the open-ended construction of human rights. This happens when its detailed application is left to each individual state to decide, rendering human rights much differently from much more regulated constitutional rights vulnerable to misappropriation by the state.

Sweden is rapidly dismantling individual human rights protections in the complex intersection of children, gender, ethnicity, race, and class through the use of law. Children with migrant backgrounds living in Zones One and Two are targeted by most of the laws of the government's migration and crime fighting agenda. This is not only taking place through the Tidö-Government, but there is also little substantive political opposition, because wide populist support favors being tough on crime, which in the Swedish context means being tough on children in migrant areas.

The dismantling of children's rights is not met by loud protests from the opposition or being challenged by a fierce court. Instead, it is the sound of silence that demands attention. When populism and state-centeredness meet through a crime-fighting, anti-migrant ideology, the weakest groups, and within them, the most vulnerable individuals, are those who need protection the

most, yet they are often the first to lose their rights through Human Rights Justifications.