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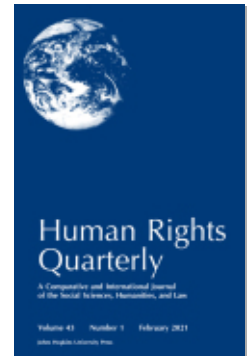
To be or not to be?: Legal Identity in Crisis in  
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# To be or not to be?: Legal Identity in Crisis in Non-international Armed Conflicts

*Katharine M. A. Fortin*

## ABSTRACT

Examining the situations of Syria, Iraq, and Ukraine, this article demonstrates how individuals living outside the control of the *de jure* government struggle to access birth registration and civil status documentation in times of non-international armed conflict. Evaluating how the right to legal identity is protected in international law, the article highlights the need for legal identity to be better protected in armed conflict, so that its conferral and denial is not used as a weapon by the fighting parties.

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## I. INTRODUCTION

This article analyses the issue of legal identity in non-international armed conflict. Apart from a detailed UNICEF report written on birth registration and armed conflict in 2007, the (wider) topic of legal identity in armed conflict has received surprisingly little academic attention, despite being an urgent protection issue for civilians.<sup>1</sup> Examining the situations of Syria, Iraq, and Ukraine, this article demonstrates how the right to legal identity comes under intense pressure when armed groups control territory. In these situations, individuals living outside the control of the *de jure* government struggle to access birth registration and civil status documentation providing legal evidence of births, deaths, and marriages. They are forced to decide whether to remain undocumented, to cross dangerous lines of contact to obtain state documentation, or to seek alternative documentation issued by armed nonstate actors or other actors. By drawing attention to this dangerous dilemma, the article highlights the important need to clarify how legal identity can best be guaranteed and protected under international law, in these complex environments. It also demonstrates how important it is to find better ways to protect civil status documentation from the politics of the armed conflict. Most people would agree that individuals should be able to prove who they are, and access services, without thereby getting embroiled in the dynamics of the armed conflict. But this article shows that in highly fragmented armed conflicts, or in instances where an armed group imposes a completely new documentation system, the registration of life events can become fraught with the politics underlying the conflict. It can even be used as a weapon in the hands of the parties to the armed conflict. By targeting civil registration infrastructure, stripping or reissuing IDs, or denying restoration of civil status documentation, parties to an armed conflict not only expose the local population to serious protection risks, including the risk of statelessness, but can also manipulate the ways in which legal identity is recorded, to institute demographic change.

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1. For further examples of legal identity and civil status documentation being a problem in non-international armed conflict, see UNICEF, INNOCENTI INSIGHT RESEARCH CENTRE, *BIRTH REGISTRATION AND ARMED CONFLICT* (2007), [hereinafter UNICEF, *BIRTH REGISTRATION AND ARMED CONFLICT*]. For a recent complementary analysis of birth registration in non-international armed conflict that was published after this article was completed, see Kathryn Hampton, *Born in the Twilight Zone: Birth Registration in Insurgent Areas*, 101 INT'L REV. RED CROSS 507 (2019). For more contemporary insights see UNHCR, *Yemen* (26 July 2019), <https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen%20Operational%20Update%2026%20July%202019.pdf>; Ivory Coast, see MIRNA ADJAMI, UNICEF, *STATELESSNESS AND NATIONALITY IN CÔTE D'IVOIRE: A STUDY FOR UNHCR* (2016), <https://www.refworld.org/pdfid/58594d114.pdf>; Libya, see *Libya: Civil Registry Authority (CRA), Including Current Areas of Operation and Leadership; Types of Documents Produced by the Registry, Including Ability To Access The Documents; Service Levels, Disruptions and attacks (November 2015–November 2016)* (21 Dec. 2016), <https://www.refworld.org/docid/585a7ef84.html>; Immigration and Refugee Board of Canada; Kosovo, Prosecutor v. Đorđević, Case No. IT-05–87/1-T, Judgment (23 Feb. 2011), ¶¶ 2070–80.

The fact that Sustainable Development Goal (SDG) 16.9 states that by 2030 there should be “legal identity for all” makes it extra important to explore the issue of legal identity in armed conflict. Troublingly, for a long time there was relatively little consensus regarding the meaning of the term “legal identity” in SDG 16.9.<sup>2</sup> Biometrics and technology firms, working partly under the auspices of the World Bank, argued that SDG 16.9 will be fulfilled if people are “identified,” by a digital ID or other means.<sup>3</sup> They argued that if individuals can show who they are, they will have a greater chance of accessing the systems of social welfare and economic empowerment that are at the heart of the other SDGs. Yet from an international law perspective, the term legal identity in SDG 16.9 seems more naturally to refer to legal personhood, which raises different issues to the mere identification of individuals. A human rights approach to the term legal identity understands it even more broadly, as encompassing not only legal personhood in a binary sense (does one have legal personhood or not) but also the multi-dimensional ways in which legal identity is constructed and threatened, for example by an individual’s relationship, identification with, or disassociation from the state or certain societal groups.<sup>4</sup> Researchers adopting this approach have defined legal identity as a “set of elements and characteristics, the combination of which is unique to every person, which defines each person and governs their relationships, obligations and rights under both private and public law.”<sup>5</sup>

In 2019, the members of the United Nations Legal Identity Expert group approved an operational definition of “legal identity” as “the basic characteristics of an individual’s identity. e.g. name, sex, place and date of birth conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth.”<sup>6</sup> The document states that in the “absence of birth registration, legal identity may be conferred by a legally-recognized identification authority; this system should be linked to the civil registration system to ensure a holistic approach

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2. Alan Gelb & Bronwen Manby, *Has Development Converged with Human Rights? Implications for the Legal Identity SDG*, CENTER FOR GLOBAL DEVELOPMENT (3 Nov. 2016). See INSTITUTE ON STATELESSNESS AND INCLUSION, SUSTAINABLE DEVELOPMENT GOAL 16.9: “LEGAL IDENTITY,” NATIONALITY AND STATELESSNESS 7 (2018) [hereinafter ISI LEGAL IDENTITY].
  3. *Id.* See also WORLD BANK, WORLD DEVELOPMENT REPORT 2016: DIGITAL DIVIDENDS 17, 194–97 (2016).
  4. Just as there are different approaches to the definition of legal identity, so is there is a divergence in the manner in which legal identity has been approached by international and national aid organizations, intergovernmental organizations, academics, and human rights advocates. These perspectives include seeing legal identity (i) as a human right (ii) as a tool to combat statelessness and provide citizenship (iii) as a means of collecting vital statistics and (iv) as a tool for achieving development outcomes. Debra Ladner, Erik G. Jensen, & Samuel E. Saunders, *A Critical Assessment of Legal Identity: What it Promises and What it Delivers*, 6 HAGUE J. RULE OF L. 47, 50–53 (2014).
  5. ISI LEGAL IDENTITY, *supra* note 2, at 7.
  6. United Nations Legal Expert Group, United Nations Strategy for Legal Identity for All 3 (2019), <https://unstats.un.org/legal-identity-agenda/documents/UN-Strategy-for-LIA.pdf>

to legal identity from birth to death.”<sup>7</sup> It is noteworthy that rather than seeing legal identity as something innate, this definition seems to understand legal identity as something to be “conferred by” official authorities that issue birth certificates, identification documents, and civil status documentation. The existence of divergent approaches to the term legal identity highlights the complexity of current policy discussions surrounding SDG 16.9. Most particularly, it highlights the need to critically engage with the way in which different aspects of “legal identity” play out in different situations, particularly complex environments where official authorities may be absent.<sup>8</sup> Unless the connection between these different interpretations of legal identity is better understood, there is a danger that systems designed to fulfill the SDG in peacetime might not give sufficient attention to risks that emerge when legal identity is put under pressure.<sup>9</sup>

By exploring these issues, this article adds to ongoing policy conversations about how the international community can and should provide legal identity for all, in ways that provide maximum resilience and protection in conflict-affected environments. It also contributes to ongoing discussions about how civil registration services can best continue in emergencies.<sup>10</sup> By exploring the norm of legal identity in international law, the article advances ongoing discussions about the added value of human rights law vis-à-vis international humanitarian law in times of armed conflict.<sup>11</sup> It also contributes to literature on the positive obligations that a state retains when a *de facto* authority controls territory. It also adds to scholarship on the accountability of armed groups under human rights law, which until now has only included a few studies of individual norms e.g. prosecution, detention, and the right to health.<sup>12</sup> The article explores and illustrates the issue of legal identity in non-international armed conflict through the lens of the armed conflicts in Ukraine, Iraq, and Syria. These three situations of non-international armed conflict powerfully illustrate the common problems associated with legal identity when armed groups control territory. The fact that the conflicts are

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7. *Id.*

8. For further literature on “legal identity” in difficult environments see Ladner et al., *supra* note 4. See also United Nations et al, *Civil Registration in Conflict and Emergency Situations* (2017) [hereinafter *Civil Registration and Emergencies* 2017].

9. See Privacy Int’l, *The Sustainable Development Goals, Identity, and Privacy: Does Their Implementation Risk Human Rights?* (29 Aug. 2018).

10. See *Civil Registration and Emergencies* 2017, *supra* note 8. See also United Nations Legal Identity Task Force, *Civil Registration: Maintaining International Standards In Emergencies* (2020), <https://unstats.un.org/legal-identity-agenda/documents/CR-ER.pdf>.

11. ICRC, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS: RECOMMITTING TO PROTECTION IN ARMED CONFLICT ON THE 70TH ANNIVERSARY OF THE GENEVA CONVENTIONS 53–54 (2019) [hereinafter ICRC CHALLENGES 2019]; see also Katharine Fortin, *The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control*, 63 NETHERLANDS INT’L L. REV. 161 (2016).

12. See DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS, at Ch. 8 (2016), (on prosecution, detention, and the right to health).

different in some respects is helpful because it shows how legal identity issues can play out differently, when different factors are present. The most pertinent difference between the three situations relates to the extent to which the nonstate armed actors involved in the conflict are (or have been) fragmented, in terms of their organization and territorial control. While in Ukraine, the parameters of the two self-proclaimed republics of Luhansk and Donetsk have been relatively stable,<sup>13</sup> the situation in Iraq and Syria has been more volatile. In Iraq, the Islamic State (IS) held consolidated control for a period of time, but then lost it quite dramatically in 2017. In Syria, the conflict has been characterized by a plethora of nonstate armed actors with a fluid control of territory. While focus in the West has largely been on the legal identity and citizenship issues that have emerged with regards foreign fighters and their children in Iraq and Syria, the focus of this article is primarily on the hundreds of thousands of Iraqi and Syrian individuals that are facing the risk of statelessness in Iraq and Syria.<sup>14</sup>

The article begins by providing a short account of how legal identity problems manifest themselves for individuals who have lived, or are living, under the control of armed nonstate actors in Ukraine, Syria, and Iraq. For each country, a description is given of (i) the extent of the problem (ii) the ways in which individuals and communities have dealt with the problem and (iii) the consequences people face, due to a lack of legal identity.<sup>15</sup> In its exploration of legal identity, the article pays attention to the functioning of civil registry systems, and the issuance of civil status documentation such as birth certificates, marriage certificates, death certificates, and ID cards. When describing these three country situations, the articles draws upon NGO reports, statements and reports from UN field offices, the Office of the High Commissioner of Human Rights, and Commissions of Inquiries. It also relies on accounts from news media and other online platforms and is informed by conversations with practitioners working on the issue of legal identity in armed conflict situations. The article then maps how legal identity is protected under international law, in situations of non-international armed conflict. It does this by setting out the key provisions relating to legal identity

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13. Ukraine is also characterized by the involvement of a third state e.g. Russia—whose control over the nonstate actor may be such as to transform the conflict into an international one between two states e.g., Ukraine and Russia. This article does not look at the situation of Crimea, where different and equally serious issues relating to legal identity have arisen. See OPEN SOCIETY JUSTICE INITIATIVE, HUMAN RIGHTS IN THE CONTEXT OF AUTOMATIC NATURALIZATION IN CRIMEA (2018).
  14. United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), *Syria Humanitarian Response in Al Hol Camp* (May 2019).
  15. This article does not seek to address the severe legal identity issues faced by the huge refugee populations that have fled from these countries. Although this is an important issue, it needs separate attention as the involvement of third States ushers in different legal issues. Norwegian Refugee Council (NRC), *NRC Briefing Note, Syrian Refugees' Right to Legal Identity: Implications for Return* (Jan. 2017).

under international humanitarian law and international human rights law, as applied in armed conflict. It proceeds to examine what happens to these obligations when a state loses control of territory. In particular, it considers the extent to which a state may be obliged to facilitate legal identity for individuals in territory outside its control. It examines the human rights jurisprudence relating to territorial control (specifically, situations where a state has lost it) and case law regarding state recognition of the acts of insurgent groups. It also examines the obligations of armed groups under human rights law. Taking stock of this factual and legal analysis, the article ends by reflecting on why civil status documentation and legal identity is becoming so entangled with the political dynamics of the armed conflict. It shows how approaches to legal identity that focus only on birth registration, almost inevitably get caught up with more multidimensional conceptions of legal identity in situations where an armed conflict is of high volatility. The article concludes by suggesting how legal identity in situations of non-international armed conflict can be protected and secured.

## II. UKRAINE

The situation in Ukraine illustrates how issues relating to legal identity become profoundly difficult for individuals living in territories under the control of armed groups. According to the Norwegian Refugee Council, birth and death registration are the most pressing legal concerns for residents of the nongovernment-controlled territories of Luhansk and Donetsk. One in five people who approach the Norwegian Refugee Council's (NRC) legal assistance programs are seeking advice on how to register births and deaths.<sup>16</sup> Shockingly, it is estimated that only one in three children born in nongovernment controlled areas of Ukraine have received Ukrainian birth certificates since 2015.<sup>17</sup> Although it remains possible for parents with state-issued documents in the east of the country to cross the line of contact and seek civil status documentation for their children, the process is reported

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16. NRC, *Briefing Note, Birth and Death Registration for Residents of Non-Government Controlled Areas of Eastern Ukraine* (June 2018) [hereinafter *NRC, Birth and Death Registration*].

17. *Id.* See also ANTI-DISCRIMINATION CENTRE AND RIGHT TO PROTECTION, *STATELESSNESS IN RUSSIA AND UKRAINE: POSSIBLE WAYS TO OVERCOME THE PROBLEM* 16–17 (2019), [hereinafter *STATELESSNESS IN RUSSIA AND UKRAINE*] for a higher estimate that only 43 percent of children born in the nongovernment controlled areas of Donetsk and Luhansk regions have Ukrainian birth certificates. There is little information available regarding the number of children who have birth certificates issued by the self-declared republics, but it is known that both republics are issuing birth certificates and other types of civil status documentation. See *Putin Orders Russia to Recognize Documents Issued in Rebel-Held East Ukraine*, REUTERS (18 Feb. 2017).

to be costly, uncomfortable, and sometimes dangerous.<sup>18</sup> Civilians are often exposed to minefields along the roads, periodic shelling, or long queuing at checkpoints.<sup>19</sup> Adults whose documentation is lost are not allowed to cross the line and are reported to face a higher risk of arrest or detention.<sup>20</sup> While it is known that the *de facto* authorities are issuing birth certificates and other types of civil status documents, there are very few facts and figures available regarding these documents.<sup>21</sup> Over the last years, the Ukrainian authorities have refused to recognize any documentation issued by the *de facto* authorities in regions of Donetsk and Luhansk.<sup>22</sup> While the government's approach to this particular issue has become less stringent with respect to documents certifying births or deaths, individuals still need to utilize a cumbersome judicial procedure to register the births and deaths of people in nongovernment controlled areas. This costly procedure is time consuming and requires families to either stay away from home for some time, or travel twice across the line of contact—increasing risk and cost.<sup>23</sup> This means that parents in the Donetsk and Luhansk regions under the control of nongovernment authorities are finding it increasingly difficult to register newborn children with state

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18. NRC, *Birth and Death Registration*, *supra* note 16, at 2. UNHCR & RIGHT TO PROTECTION, CROSSING THE LINE OF CONTACT, MONITORING REPORT (2018), UNHCR, *Refugee Agency Urges Better Measures for People Crossing Contact Line In Eastern Ukraine*, UN NEWS SERVICE (30 Sept. 2016).
  19. NRC, Briefing Note, *Upholding the Rights of Conflict-Affected Population in Ukraine 2* (Aug. 2018), [hereinafter NRC, *Rights of Conflict-Affected Population*].
  20. OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS (OHCHR), REPORT ON THE HUMAN RIGHTS SITUATION IN UKRAINE, 16 MAY TO 15 AUGUST 2018 (2018), ¶¶ 58, 62 [hereinafter HUMAN RIGHTS SITUATION IN UKRAINE, 16 MAY TO 15 AUGUST 2018]. The procedure for crossing the line of contact is regulated by the Cabinet of Ministers of Ukraine, Resolution No. 815 (17 July 2019) ¶ 6, <https://zakon.rada.gov.ua/laws/show/815-2019-%D0%BF/print>. “Persons who come to the entry-exit checkpoint without identity documents are referred to the representative of the National Police for verification. Information about such persons is recorded by the authorized official and forwarded to the person in charge at the coordination group for taking final decision [translation].”
  21. See *supra* note 17.
  22. See United Nations Ukraine, *Briefing Note, Birth Registration 2* (Dec. 2017), [https://reliefweb.int/sites/reliefweb.int/files/resources/briefing\\_note\\_on\\_birth\\_registration\\_en\\_0.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/briefing_note_on_birth_registration_en_0.pdf) (blanket invalidity of all documents issued by *de facto* authorities and exception for documents regarding birth and death). See also OHCHR REPORT ON THE HUMAN RIGHTS SITUATION IN UKRAINE, 16 AUGUST TO 15 NOVEMBER 2015, at n122 (2015), which reports that on 16 October 2015, Ukraine informed the United Nations Secretary-General as the depository of international treaties that
 

documents or requests made or issued by the occupying authorities of the Russian Federation, its officials at any level in the Autonomous Republic of Crimea and the city of Sevastopol and by the illegal authorities in certain districts of the Donetsk and Luhansk oblasts of Ukraine, which are temporarily not under control of Ukraine, are null and void and have no legal effect regardless of whether they are presented directly or indefinitely through the authorities of the Russian Federation.
- The footnote refers to Ministry of Foreign Affairs of Ukraine, No. 72/22-612-2486 (12 Oct. 2015). See also NRC, *Rights of Conflict-Affected Population*, *supra* note 19, at 1, 2.
23. NRC, VOICES FROM THE EAST: CHALLENGES IN REGISTRATION, DOCUMENTATION, PROPERTY AND HOUSING RIGHTS OF PEOPLE AFFECTED BY CONFLICT IN EASTERN UKRAINE 22 (2016).



authorities, due to the logistical and financial barriers involved.<sup>24</sup> Equally, some individuals who are politically active may decide not to register their children for fear of persecution or prosecution by the Ukrainian state, due to their involvement with the authorities in eastern Ukraine.<sup>25</sup>

The consequences of nonregistration for children in Ukraine are profound, no matter where they are located. Children who have been born in nongovernment-controlled areas who do not have a birth certificate from the Ukrainian state cannot access healthcare, education, and are unable to formally inherit property.<sup>26</sup> They are also at a great risk of statelessness, because they are unable to establish their nationality. They are unable to leave the self-declared republics or Ukraine, because they are unable to obtain identity or travel documents that are recognized by Ukraine or third states.<sup>27</sup> A lack of legal identity is reported to negatively impact the quality of life and financial security of families with unregistered children, because parents are unable to access child support benefits from the Ukrainian state for those children.<sup>28</sup> Adults without valid passports or identification documents face severe restrictions on their freedom of movement and are at a heightened risk of arrest.<sup>29</sup> Problems relating to legal identity are also experienced in the government controlled side of the line of contact. Young people in Ukraine whose parents live in the nongovernment-controlled areas of Donetsk and Luhansk find it difficult to obtain a passport, because this is only possible on the presentation of ID documents of both parents. In government-controlled territory, just as in rebel-held territory, a lack of legal documentation is said to quickly have a cascading effect on an individual's ability to enjoy other rights. Without a passport, it is impossible for individuals to study at university, register a marriage, or the birth of children.<sup>30</sup> An absence of death certificates makes it difficult for families to manage inheritance claims and settle property transactions.<sup>31</sup> In April 2019, a Russian presidential decree simplifying the procedure for residents of the self-proclaimed republics of Luhansk and Donetsk to get Russian citizenship made the situation in these areas even more complicated.<sup>32</sup> While the Russian influence in these areas of the east of Ukraine raises further questions that may be explored elsewhere, they will not be considered further in this article.

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24. NRC, *Birth and Death Registration*, *supra* note 16, at 2.

25. *Id.* at 2

26. *Id.*

27. *See supra* note 20.

28. NRC, *Birth and Death Registration*, *supra* note 16, at 2.

29. *See supra* note 20.

30. UN Ukraine, *supra* note 22, at 1.

31. NRC, *Rights of Conflict-Affected Population*, *supra* note 19, at 2.

32. Andrew Roth & Shaun Walker, *Russia Tests Ukraine's new President with Passports for Breakaway Regions*, *GUARDIAN* (24 Apr. 2019).

### III. SYRIA

Issues relating to legal identity and civil status registration have been consistently identified as one of the most pressing protection needs in Syria. A survey carried out between May 2015 and October 2015 of 3,209 households in nonstate areas, found that 8 percent of households interviewed had no civil documentation at all, and 28 percent were missing birth certificates for their children.<sup>33</sup> Already in 2015, United Nations High Commissioner for Refugees (UNHCR) recognized that tens of thousands of children in Syria were at risk of statelessness in the future and described the situation as a “ticking time bomb.”<sup>34</sup> In 2018, the NRC stated that the conflict has left an entire generation potentially undocumented or under-documented.<sup>35</sup> There are several detailed reports that document the problem and its origins. These show that while people are often not physically trapped in areas outside the control of the government, they are often afraid of travelling to territory controlled by the government, to obtain birth or marriage certificates.<sup>36</sup> Although it is sometimes possible to utilize a “middle-man” or “broker” to secure documentation from government authorities, the costs associated with this process makes it prohibitive for most people.<sup>37</sup> Syrian law makes it particularly difficult for women to register babies and prove their Syrian nationality in the context of the armed conflict. As a rule in Syria, children acquire nationality through the patrilineal line and, as such, babies are only entitled to Syrian nationality, if it can be demonstrated that the father is Syrian. In exceptional cases, a Syrian mother can pass on her nationality to the child, if born on Syrian soil. This exception theoretically benefits children born to unknown fathers or outside a marriage. In practice, however, this provision is rarely implemented due to the social as well as legal repercussions of registering a child as born outside a marriage.<sup>38</sup>

NGOs working on the ground between 2014 and 2018 have noted that a patchwork of alternative nonstate civil registration procedures emerged in areas controlled by armed groups in these years.<sup>39</sup> These were either

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33. UNHCR & IRC, CIVIL STATUS DOCUMENTATION IN NON-GOVERNMENT AREAS OF NORTHERN SYRIA 8 (2016) [hereinafter UNHCR & IRC, CIVIL STATUS DOCUMENTATION].
  34. Melissa Fleming, *The Situation in Syria is Only Going to get Worse . . . and Here's why*, GUARDIAN (16 Feb. 2015).
  35. UNHCR & NRC, LOST IDENTITY: CHALLENGES RELATING TO LEGAL IDENTIFICATION AND CIVIL DOCUMENTATION IN THE NORTH-WEST OF THE SYRIAN ARAB REPUBLIC 8 (2018) [hereinafter UNHCR & NRC, LOST IDENTITY] (on file with author).
  36. UNHCR & IRC, CIVIL STATUS DOCUMENTATION, *supra* note 33, at 3, 23. See also WHOLE OF SYRIA 2017: PROTECTION NEEDS OVERVIEW 66 (2017); UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 49, 50.
  37. UNHCR & IRC, CIVIL STATUS DOCUMENTATION, *supra* note 33, at 16; UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 66–67; SYNAPS: *Before the Ink Dries: Alternative Civil Documents in Syria* 2–3 (Apr. 2018) (on file with author), (hereinafter *Before the Ink Dries*).
  38. UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 25.
  39. See UNHCR & IRC, CIVIL STATUS DOCUMENTATION, *supra* note 33, at 4, 17–18; UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 32–35; *Before the Ink Dries*, *supra* note 37.

run by the civilian wing of armed actors, local councils, or Sharia courts. Between 2015 and 2018, several of these procedures were supported by Western donors as part of broader stabilization programming to support “public services in order to preserve existing administrative structures at a technical level and avoid institutional collapse.”<sup>40</sup> In addition to responding to needs on the ground, much of this kind of programming can be seen to have had an underlying political character, in that it was intended to support and build up governance structures that would lead to new government of Syria post-Assad.<sup>41</sup> Between 2014 and 2018, the Swedish NGO International Legal Assistance Consortium (ILAC), funded by Sweden, was supporting twenty-one civil status documentation centers in Syria.<sup>42</sup> It is thought that ILAC-supported civil documentation centers issued over 300,000 documents between 2014 and 2019, including birth certificates, marriage certificates, and death certificates.<sup>43</sup> The documents were largely modeled on state issued-documentation, so that the data could be easily re-entered into the government system at the end of the war, but they were issued using the insignia of the Syrian Interim Government (SIG) or its sub-branches.<sup>44</sup> It has been reported that these documents were quite widely recognized in nongovernment-held areas, allowing people to travel, and sometimes were recognized by third states, for example in asylum claims.<sup>45</sup> Adam Smith International (ASI) also supported civil registries across Aleppo and Idlib through its Justice and Community Security (AJACS) program (funded by the Canadian, Danish, Dutch, German, UK, and US governments).<sup>46</sup>

Despite alternative documentation being quite widely available in some parts of the country controlled by armed groups, surveys carried out in 2016 and 2018 found that many people living in areas controlled by armed groups

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40. INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM (ILAC), *RULE OF LAW ASSESSMENT REPORT: SYRIA 2017*, at 80, 150–51 (Mikael Ekman ed., 2017) [hereinafter *ILAC Rule of Law*]. For quote (which relates to Swedish SIDA support for ILAC) see *id.* at 151. For UK involvement in issuance of civil status documentation, see Programme Completion Review: Summary Sheet, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/787036/Syria\\_CSSF\\_Security\\_Programme\\_2017–2018.odt](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/787036/Syria_CSSF_Security_Programme_2017–2018.odt). Stabilization programs use service delivery as a means of restoring security for a population and are of a consciously political nature. There is often a tension between stabilization efforts and humanitarian efforts, which follow the principles of humanity, neutrality, impartiality, and independence. STABILISATION UNIT, *THE UK GOVERNMENT’S APPROACH TO STABILISATION: A GUIDE FOR POLICY MAKERS AND PRACTITIONERS* (2019).

41. Frances Z. Brown, Carnegie Endowment for International Peace, *Dilemmas of Stabilization Assistance: The Case of Syria* (Oct. 2018).

42. FIGURES ON FILE WITH AUTHOR.

43. *Id.*

44. See ILAC, *RULE OF LAW*, *supra* note 40, at 152.

45. *Id.* at 81. See UNHCR & IRC, *CIVIL STATUS DOCUMENTATION*, *supra* note 33, at 17, (for Syrian Interim Government’s aim to establish a civil registry based on the existing system); *id.* at 28 (Turkey); *Before the Ink Dries*, *supra* note 37, at 9.

46. Adam Smith Int’l, *Lessons from Syria 2013–2018 for Future Stabilisation Efforts* (2018).

did not acquire it.<sup>47</sup> It is not clear whether this was because people did not know alternative documentation existed or because the documentation was generally not recognized outside the area in which it was issued and had barely any international recognition.<sup>48</sup> Even in 2015, when the SIG had quite significant control of territory, there were clear indications that people had a preference for official documentation issued by the government of Syria.<sup>49</sup> In January 2018, as the course of the war shifted in favor of the government, the UNHCR and many international organizations warned people of the dangers of possessing documents issued by the SIG or other alternative providers, as their possession might be construed as political affiliation and put the individual possessing them at risk.<sup>50</sup> To complicate matters further, fraudulent identity documents and fraudulent identities made on official templates looted from government offices have become increasingly available.<sup>51</sup> Human rights observers expressed fear that the Syrian government's announcement of its intention to reissue IDs, in an effort to prevent forgery, was actually intended to instigate demographic change, by disenfranchising individuals unable to present themselves to the authorities.<sup>52</sup> There have also been reports that parties to the conflict have destroyed records contained in civil registry offices and intentionally targeted these offices in these military operations.<sup>53</sup> By the end of 2018, the fragmentation of armed groups, combined with the rise of the Al-Qaida affiliated Salvation Government in Idlib province, disrupted the de facto run civil registration systems and caused Western countries to withdraw their support to the civil registries run by these actors.<sup>54</sup>

Research indicates that life is very difficult for people in Syria who do not have documentation of key life events. The Protection Needs Overview, completed as part of the Whole of Syria Needs Assessment in 2015, found that 91 percent of sub-districts ranked lack or loss of civil status documentation as one of their top three protection threats.<sup>55</sup> In 2017, a similar assessment found that 83 percent of surveyed communities reported suffering problems

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47. UNHCR & IRC, CIVIL STATUS DOCUMENTATION, *supra* note 33, at 24–25.

48. *Id.* at 25; *Before the Ink Dries*, *supra* note 37, at 2.

49. UNHCR & IRC, CIVIL STATUS DOCUMENTATION, *supra* note 33, at 24–25. For the same view expressed in 2018, see *Before the Ink Dries*, *supra* note 37, at 2.

50. Justin Clark, Bahira al-Zarier, & Mohammed Al-Haj Ali, *Marriage and Birth Certificates Issued in Rebel Territory Pose a “Political Risk,”* SYRIA DIRECT (15 Jan. 2018) [hereinafter, *Marriage and Birth Certificates “Political Risk”*].

51. UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 64–65.

52. Zaman al-Wasl, *Syrian Regime to Change Identity Cards, Passports: Interior Minister*, THE SYRIAN OBSERVER, (4 May 2018).

53. UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 11, 20, 50.

54. *Before the Ink Dries*, *supra* note 37, at 5–6.

55. GLOBAL PROTECTION CLUSTER, PROTECTION NEEDS OVERVIEW: WHOLE OF SYRIA PROTECTION SECTOR OCTOBER 2015, at 3–4 (2015), [https://reliefweb.int/sites/reliefweb.int/files/resources/wos\\_protection\\_needs\\_overview\\_2015.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/wos_protection_needs_overview_2015.pdf)

associated with a lack or loss of civil documents.<sup>56</sup> A lack of documents has been repeatedly found to have a cascading negative effect on people's rights in Syria, preventing people from travelling, making it difficult for people to access humanitarian assistance, education, and other essential services as well as putting people at risk of statelessness.<sup>57</sup> It has also caused people to suffer difficulties relating to family reunification, access to property, and housing rights. Civilians who had been living under the control of the Islamic State have faced particularly severe difficulties in Syria and in Iraq. Because these areas were almost completely inaccessible by humanitarian organizations, children born in these areas had very few informal documents confirming their identity such as medical notifications or vaccine books.<sup>58</sup> People fleeing from IS territory were reported to have had their ID cards, family booklets, and passports confiscated by the government forces into whose custody they were taken.<sup>59</sup> Living in Internally Displaced People (IDP) camps, people wishing to record marriages or a child's birth are reported to be improvising homemade family ledgers or birth certificates, sometimes by just writing on scraps of paper.<sup>60</sup> Children in camps are severely affected by a lack of identity papers, rendered effectively at high risk of statelessness, and unable to exercise their key rights such as the right to education.<sup>61</sup> More details of legal identity issues in the IS territory spanning Iraq and Syria are provided in the section below on Iraq.

#### IV. IRAQ

There are fewer statistics and reports available on the situation in IS territory before its so-called Caliphate in Iraq and Syria fell than in opposition-held Syria, probably because humanitarian organizations were not allowed to

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56. WHOLE OF SYRIA 2018 PROTECTION NEEDS OVERVIEW VOL. 2, at 8 (2018). See also *id.* at 16 for a breakdown of communities by governate.
  57. UNHCR & IRC, CIVIL STATUS DOCUMENTATION, *supra* note 33, at 28–30; UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 60–63.
  58. Waleed Abu al-Khair, *ISIL Children: A Generation With no Official Identity*, CARAVANSERAI (28 Apr. 2017), Human Rights Watch, (HRW) *Children of the Caliphate: What to do about Kids Born Under ISIS*, (23 Nov. 2016).
  59. AMNESTY INT'L, THE CONDEMNED: WOMEN AND CHILDREN ISOLATED, TRAPPED AND EXPLOITED IN IRAQ 22,25, 43 (2018), [hereinafter AMNESTY INT'L, THE CONDEMNED].
  60. Ammar Hamou & Madeline Edwards, *Without Proper Civil Status Procedures, a Generation of Syrians "at Risk of Statelessness" in Rukban No-Man's Land*, SYRIA DIRECT (18 Dec. 2018).
  61. UNGA, HRC, 40th Sess., *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* U.N. Doc. A/HRC/40/70 (31 Jan. 2019), ¶ 8, [hereinafter *COI Syria* Jan. 2019], <https://reliefweb.int/sites/reliefweb.int/files/resources/G1902320.pdf>. See also UNGA, HRC, 42nd Sess., Agenda Item 4, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, U.N. Doc A/HRC/42/51 (15 Aug. 2019), ¶¶ 14, 79.

work in this area. However, news reports make clear that individuals living under IS control were severely affected by issues surrounding legal identity. Wishing to present itself as a state-like entity, the IS built up a sophisticated governance structure, with numerous ministries for issues as varied as agriculture, fishing, oil, and health.<sup>62</sup> It relied heavily on funds gathered from taxation and it instituted a complex system of regulation that involved the granting of licenses in exchange for money and the imposition of fines.<sup>63</sup> The armed group is reported to have issued marriage licenses and certificates.<sup>64</sup> Numbered birth certificates were issued throughout the Caliphate—in exchange for a fee—on standard stationery that was marked “The Islamic State, Ministry of Health.” The birth certificates provided the names of the parents, the name and weight of the child, and the location of birth.<sup>65</sup> The group’s actions relating to identity, nationality, and citizenship were highly politicized and linked to the group’s aim to establish a Caliphate. In 2015, a propaganda photo circulating on social media showed a picture of a newborn baby sleeping, with a gun, grenade, and birth certificate placed next to its head.<sup>66</sup> At around the same time, IS foreign fighters were seen burning their passports on social media while saying things like, “we disbelieve in you and your passports.”<sup>67</sup> Having taken control of Mosul, the group was said to have gained access to buildings containing the hardware and software for making state-issued documents. This is said to have allowed the group to issue replica Iraqi ID cards which gave their fighters safe passage out of Iraq.<sup>68</sup> The group apparently also issued its own ID cards to their “fighters,” with a Radio-Frequency Identification chip and hologram to prevent counterfeiting.<sup>69</sup> The group is said to have routinely confiscated civil ID cards,

62. Aymenn al-Tamii, *The Evolution in Islamic State Administration: The Documentary Evidence*, 9 PERSP. TERROR. 117 (2015), <http://www.terrorismanalysts.com/pt/index.php/pot/article/view/447/html>.
63. ERIC ROBINSON, DANIEL EGEL, PATRICK B. JOHNSTON, SEAN MANN, ALEXANDER D. ROTHENBERG, DAVID STEBBINS, RAND CORPORATION, *WHEN THE ISLAMIC STATE COMES TO TOWN: THE ECONOMIC IMPACT OF ISLAMIC STATE GOVERNANCE IN IRAQ AND SYRIA* 10 (2017) (for an estimate that efforts by the Islamic State to tax, extort, and regulate private-sector businesses and local populations rose roughly \$350 million annually).
64. Nabih Bulos, *Born Under a Bad Sign: Mosul Residents with Islamic State Birth Certificates Need a Do-Over*, LA TIMES (6 Mar. 2017).
65. Rukmini Callimachi, *The ISIS Files*, N.Y. TIMES (4 Apr. 2018), <https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html>.
66. Kashmiri Gander, *ISIS Crisis: Propaganda Photo Shows Sleeping Newborn Baby Lying by a gun, Hand Grenade and Birth Certificate*, THE INDEPENDENT (27 Apr. 2015).
67. Shiv Malik, *French ISIS Fighters Filmed Burning Passports and Calling for Terror at Home*, THE GUARDIAN (19 Nov. 2014). See also the story of Hoda Muthana who tweeted a picture of her passport together with several other Western passports with the words “bonfire soon, no need for these anymore, alhamdulillah.” *US Woman “Deeply Regrets” Joining ISIL, Wants to Return Home*, ALJAZEERA (18 Feb. 2019).
68. Sheri Laizer, *IS-Issued Iraqi ID Cards can Lead to Safe Passage in and out of Iraq*, ERKUD DAILY (17 June 2017).
69. Bruce Pannier, *IS Claims it has Issued ID Cards for Those Under its Control*, RADIO FREE EUROPE (14 Apr. 2015).

nationality cards, and other state-issued documents from inhabitants living in its territory.<sup>70</sup> It also apparently deliberately destroyed civil registries, burnt legal records, and destroyed documentation.<sup>71</sup>

When IS was at the peak of its power, civil documentation was a source of anxiety for individuals living under their control in Iraq. Some individuals claim that they did not register the birth of their children with the Islamic State, as an act of resistance to the idea that the group had become their new “state.”<sup>72</sup> But after the group fell, a new set of legal identity related problems arose for individuals living under their control, similar to those seen in Syria. Thousands of men and boys were separated from their families as Mosul fell, sometimes on the basis of the surname on their ID card which suggested an affiliation with IS.<sup>73</sup> This mass roundup of males, many of whom are thought to have been extrajudicially executed, detained, or disappeared, left behind a generation of female-headed households, with perceived affiliations to IS; many of whom were undocumented. In September 2019, an estimated 80,000 families across the country had family members missing at least one civil document.<sup>74</sup> At least 45,000 displaced children living in camps were estimated to be without birth certificates.<sup>75</sup> Since 2016, NGOs have been warning that the so-called “children of the Caliphate” are at severe risk of statelessness because of Iraq’s refusal to recognize IS documentation.<sup>76</sup> Indeed, the risk of statelessness is particularly acute for persons who lived under IS control in Iraq, because there were no humanitarian organizations working in the area which could provide informal alternative documentation that might now be helpful to establish a child’s identity e.g., a vaccination booklet or UNHCR certificate.<sup>77</sup>

People who were previously living in territories under the control of IS are currently facing huge challenges relating to legal identity and civil status documentation. It is reported that many people who obtained ISIS documents for their children, destroyed them when Iraqi forces pushed out the militants, fearing their possession might be interpreted as cooperation with the group.<sup>78</sup> Any remaining civil documentation issued by IS has been

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70. NRC, BARRIERS FROM BIRTH: UNDOCUMENTED CHILDREN IN IRAQ SENTENCED TO A LIFE ON THE MARGINS 8 (Apr. 2019) [hereinafter NRC, BARRIERS FROM BIRTH].

71. UNHCR & NRC, LOST IDENTITY, *supra* note 35, at 50–51.

72. Stephen Kalin, *Iraq’s Children of the Caliphate Face Stateless Future*, REUTERS (15 Nov. 2016).

73. AMNESTY INT’L, THE CONDEMNED, *supra* note 59, at 5, 16; *In Mosul, Hundreds Fear Arrest for Sharing Names with Jihadists*, YOUTUBE, AGENCE FRANCE PRESSE (3 Mar. 2018).

74. ALEXANDRA SAIEH & NAOMI PETERSOHN, NRC, DRC, IRC, PAPERLESS PEOPLE OF POST-CONFLICT IRAQ: DENIED RIGHTS, BARRED FROM BASIC SERVICES AND EXCLUDED FROM RECONSTRUCTION EFFORTS 5 (n.d.) [hereinafter PAPERLESS PEOPLE].

75. *Id.*

76. HRW, *Children of the Caliphate*, *supra* note 58.

77. *Id.*

78. *Id.*

declared invalid by the Iraqi government.<sup>79</sup> In IDP camps, families with perceived ties to IS are routinely prevented from accessing new or replacement identity cards and other civil documentation.<sup>80</sup> To register a newborn baby, it is necessary to present a marriage certificate and the civil IDs of both parents.<sup>81</sup> For women emerging out of IS held territory, registration is often impossible because their IS-issued marriage certificates are invalid, if they still exist, and the father of the child may be missing or dead. If no proof of death exists, an individual must declare a person missing for a set period of time before a Court will agree to issue a death certificate.<sup>82</sup> Court procedures which are initiated to obtain official documentation are blocked and delayed on the basis of small irregularities—sometimes indefinitely.<sup>83</sup> Documents are not renewed for anyone who is on the security database, wanted list, or has relatives on these lists.<sup>84</sup> It is reported that lawyers and humanitarian aid workers working to restore civil documentation for persons with IS ties have also been the subject of harassment and abuse, with allegations that they too are IS supporters.<sup>85</sup> The costs of obtaining replacement documents are also reported to be prohibitively high, with reports of widespread corruption and bribes.<sup>86</sup> Personal status courts, civil status directorates, and administrative bodies responsible for documentation procedures are reported as chronically understaffed and many have been destroyed or closed.<sup>87</sup>

A lack of civil documentation is quickly having a cascading and detrimental effect on people's other rights in Iraq.<sup>88</sup> It is affecting people's ability to move around, to leave IDP camps, access services and basic amenities, and education. In order to register children in Iraqi education, it is necessary to present the identification of the child and of both parents, so without documentation education is impossible.<sup>89</sup> Within the camps, families with perceived links to IS often do not even try to obtain new or

79. NRC, *BARRIERS FROM BIRTH*, *supra* note 70, at 8. See also AMNESTY INT'L, *THE CONDEMNED*, *supra* note 59, at 22.

80. *Id.* It has been commented that civil documentation processes in Iraq are often inter-linked, in that the ability to register a child's birth and obtain a civil ID are dependent on presenting documentation of other antecedent life events, including official marriage certificates, birth certificate/ proof of lineage and death certificates. A combination of four documents is often needed to update each other and access services (i.e., ID, nationality card, public distribution card, and housing card). NRC, *BARRIERS FROM BIRTH*, *supra* note 70, at 17.

81. *Id.*

82. *Id.* at 18.

83. AMNESTY INT'L, *THE CONDEMNED*, *supra* note 59, at 23. HRW, *Iraq: Officials Arrest, Abuse, Harass Aid Workers* (25 Feb. 2019); HRW, *Iraq: Officials, Threatening, Arresting Lawyers* (12 Sept. 2018).

84. NRC, *BARRIERS FROM BIRTH*, *supra* note 70, at 22.

85. AMNESTY INT'L, *THE CONDEMNED*, *supra* note 59, at 23.

86. *PAPERLESS PEOPLE*, *supra* note 74, at 19.

87. *Id.* at 19–20.

88. NRC, *BARRIERS FROM BIRTH*, *supra* note 70, at 11–14.

89. *Id.* at 11.



replacement documents or identity cards, because they fear that they will be arrested when they come into contact with the authorities or face further stigmatization during the process.<sup>90</sup> Iraqi families living in urban areas previously under the control of IS are being denied basic services, due to a lack of documentation.<sup>91</sup> They are unable to access healthcare, the state justice system, and social welfare.<sup>92</sup> They have difficulty accessing formal employment, because ID cards are needed to secure a job.<sup>93</sup> People without documentation are reported to be at a higher risk of arbitrary detention and arrest at checkpoints, so they often find it difficult to travel between cities and towns.<sup>94</sup> A lack of papers also makes it difficult for people to secure and protect housing, land, property, and residency rights, as it is impossible to get rental contracts without a valid ID. It is also difficult to prove ownership of property, take a property claim to court, or seek compensation for any damage to property in the courts.<sup>95</sup>

## V. IMPORTANCE OF LEGAL IDENTITY REVEALED

An examination of these three situations reveals how crucial civil status documentation is for people living in the midst of non-international armed conflicts. All three situations demonstrate how vital life documentation can be, in terms of facilitating or limiting the enjoyment of basic human rights, such as the right to food, the right to freedom of movement, the right to marry, and the right to register a child, to protect its legal identity. They also show how closely the lack or loss of civil status documentation is linked to a heightened risk of statelessness. UNHCR has repeatedly pointed out the importance of birth registration and other civil status documents for the attainment of nationality, as they prove that an individual has links to a state.<sup>96</sup> However, conversely, the three situations also demonstrate that the possession of certain civil status documentation can be dangerous. In Syria and Iraq, the possession of documentation is taken as evidence of political affiliations that do not necessarily have any basis. In Iraq and Syria, some people were forced to give up their documentation from state authorities in exchange for documents from the IS.<sup>97</sup> The reverse dynamic is now being seen in Iraq, with regard to people's fear of being found with documentation

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90. AMNESTY INT'L, *THE CONDEMNED*, *supra* note 59, at 21–23.

91. *PAPERLESS PEOPLE*, *supra* note 74, at 6.

92. *Id.* at 15.

93. *Id.* at 16–17.

94. NRC, *BARRIERS FROM BIRTH*, *supra* note 70, at 18–19.

95. *PAPERLESS PEOPLE*, *supra* note 74, at 14.

96. UNHCR, *Ensuring Birth Registration for the Prevention of Statelessness*, Action 7, (2017), ¶ 1.3.

97. NRC, *Birth and Death Registration*, *supra* note 16, at, 2.

from the IS. Indeed, the current situation in Iraq shows this fear was justified as civil status documentation is being taken as evidence of political affiliation. The same has been seen in Syria, where there is also evidence of civil registration systems coming under deliberate attack by fighting parties.<sup>98</sup> The situation in all three countries evidences how squarely legal identity issues are being politicized. The three situations also show how the state remains the gatekeeper of legal identity. People seem to prefer state documentation, even when surrounded by alternative providers because it has the greatest ability to unlock access to benefits, travel to third states, achieve nationality, and secure freedom of movement. In order to understand how legal identity is protected by international law in these situations, it is now important to map the legal framework on this issue.<sup>99</sup>

## VI. MAPPING THE LEGAL FRAMEWORK ON LEGAL IDENTITY IN NON-INTERNATIONAL ARMED CONFLICT

When mapping the legal framework that regulates a particular issue in armed conflict, it is helpful to briefly reiterate the core principles regarding the relationship between international human rights law and international humanitarian law. It is now widely and almost universally accepted that both bodies of law apply together in times of armed conflict.<sup>100</sup> The International Court of Justice (ICJ) has confirmed this fact on multiple occasions, indicating that international humanitarian law and international human rights law should be considered complementary to each other. In its *Wall Opinion*, the ICJ stated:

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98. *Before the Ink Dries*, *supra* note 37, at 8; UNHCR & NRC, *LOST IDENTITY*, *supra* note 35, at 11, 20. It is noteworthy that the deliberate targeting of civil administration systems has been seen in other conflicts e.g. Guatemala, Timor Leste, Bosnia-Herzegovina, and Cambodia. See UNICEF, *BIRTH REGISTRATION AND ARMED CONFLICT*, *supra* note 1, at 10.

99. For a complementary detailed review of the legal framework, see Kathryn Hampson, *supra* note 1.

100. See UN HRC, General Comment 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev1/Add.13 (26 May 2004), ¶ 11. There is an overwhelmingly large body of literature on the relationship between human rights law and international humanitarian law. See Andrew Clapham, *Human Rights in Armed Conflict: Metaphors, Maxims and the Move to Interoperability*, 12 J. HUM. RTS & INT'L LEGAL DISC. 9 (2018), for an examination of the legal discourse on this topic. See also Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 US NAVAL WAR COLLEGE INT'L L. STUD. 349 (2010), Jean-Marie Henckaerts & Ellen Nohle, *Concurrent Application of International Humanitarian Law and International Human Rights Law Revisited*, 12 J. HUM. RTS & INT'L LEGAL DISC 23 (2018). For historical perspectives, see Katharine Fortin, *Complementarity Between the ICRC and the United Nations and International Humanitarian law and International Human Rights law, 1948–1968*, 94 INT'L REV. RED CROSS 1433 (2012); Boyd van Dijk, *Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions*, 112 AM. J. INT'L L. 553 (2018).

As regards the relationship between international humanitarian law and human rights law, there are . . . three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>101</sup>

Because international humanitarian law was drafted to deal with the specific problems that arise in armed conflict, it is widely acknowledged to contain more detailed rules on some aspects of armed conflict, for example, the conduct of hostilities where it has been said to be the *lex specialis*.<sup>102</sup> However, it is increasingly accepted that human rights law brings significant added value on some other issues, in particular issues pertaining to the political, economic, social, and cultural rights of the population e.g. freedom of expression, freedom of association, freedom of movement, and the right to health, in terms of services offered to healthy people, as well as the sick and wounded.<sup>103</sup> The following section shows that legal identity is another issue on which human rights law can bring significant added value vis-à-vis international humanitarian law, as while it is hardly dealt with at all by international humanitarian law, it is covered with detailed provisions in human rights law.

## VII. LEGAL IDENTITY AND INTERNATIONAL HUMANITARIAN LAW

The international humanitarian law rules that apply to international armed conflicts are usually much more detailed than the international humanitarian law that applies to non-international armed conflicts. It is then significant that in international armed conflicts between two states, there is only one article that addresses issues related to legal identity.<sup>104</sup> Article 50 of the Geneva Convention (GC) IV calls upon occupying powers to take all necessary steps to facilitate the identification of children, the registration of their parentage, and prohibits any change in their personal status. The commentary to this provision displays how the article was intended to prohibit occupying powers from doing anything to hamper the normal working of the administrative services responsible for the identification of children, in

101. *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ REPORTS 136 (9 July 2004), ¶ 106. See also *Advisory Opinion on the Legality of the Threat of Nuclear Weapons* [1996] ICJ REPORTS 226 (8 July 1996) [25] for the first confirmation by the ICJ that human rights law applies in times of armed conflict.

102. *Id.*

103. See KATHARINE FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW*, at ch. 2 (2017), for a detailed exploration of the added normative value of IHRL versus IHL.

104. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956).

particular new born infants.<sup>105</sup> The drafters recognized that the registration offices were “essential to the legal life of the community and individuals and to the administration of the country (the drawing-up of official documents, preservation of original records and certificates, the keeping of registers of births, deaths and marriages, etc.).”<sup>106</sup> There are other important provisions intended to prevent people going missing. Article 24 of the GC IV recommends that parties arrange for children under twelve years old to wear an identity disc.<sup>107</sup> Parties undertake to set up Information Bureaus to collate information regarding prisoners of war and civilians belonging to the adverse party and keep records of transfers, releases, repatriations, escapes, admissions to hospital, and death and communicate them to the other party.<sup>108</sup> Geneva Convention IV requires parties to an armed conflict to facilitate inquiries from persons looking for their family members whose location has become unclear.<sup>109</sup> Notably, the problem of missing persons in armed conflict should not be seen as an issue from past wars, that has less relevance today.<sup>110</sup> The UN Security Council passed its first resolution on the issue in 2019, noting a “dramatic increase in persons reported missing as result of armed conflict.”<sup>111</sup>

The rules on missing persons are equally applicable to non-international armed conflicts.<sup>112</sup> But there are no explicit provisions in common Article 3 or Additional Protocol II which deal with personal status documentation i.e. no equivalent to Article 50 to GC IV. Interestingly, an earlier draft of Additional Protocol II contained a provision similar to Article 24 of Geneva Convention IV, placing an obligation upon the parties to “endeavour to furnish the means for the identification of children, where necessary

105. Jean S. Pictet, *Commentary to IV Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva, ICRC 1958).

106. *Id.*

107. Geneva Convention IV, *supra* note 104, art. 40.

108. See, e.g., Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 16, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention (III) Relative to the Treatment of Prisoners of War, arts. 19, 122–23, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* 21 Oct. 1950) (*entered into force for U.S.* 2 Feb. 1956); Geneva Convention IV, *supra* note 104, arts. 136–37.

109. Geneva Convention IV, *supra* note 104, art. 137.

110. It is estimated that 1.3 million Germans who went missing in WWII remain unaccounted for, despite efforts to trace them. See <https://www.thelocal.de/20180123/no-longer-able-to-clarify-fates-germans-wwii>.

111. In June 2019, the Security Council adopted its first ever resolution dealing specifically with persons missing in armed conflict. It called upon parties to armed conflict to take all appropriate measures, to actively search for persons reported missing, to enable the return of their remains and to account for persons reported missing “without adverse distinction.” Protection of Civilians in Armed Conflict: Missing Persons in Armed Conflict, U.N. Doc S/RES/2474 (11 June 2019). See also International Review of the Red Cross, No. 905 (Nov. 2018) for a volume devoted to “The missing.”

112. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES 421 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

in the area of armed conflict.”<sup>113</sup> This provision ended up being deleted in the final amendment to the protocol, on the basis that in certain types of conflict it might not be possible to furnish children with any durable means of identification.<sup>114</sup> The final draft of the Protocol sought to provide comfort to a widely held view that the earlier text was too long, entering into unnecessary details and “ventur[ing] into domains which they [states] considered sacrosanct and inappropriate for inclusion in an international instrument.”<sup>115</sup> The deletion of this provision may also have reflected a view that the conceptual scope of international humanitarian law should be narrow, addressing a temporary situation of emergency, rather than the continuance of everyday life.<sup>116</sup> Armed conflicts in the 1970s were much less protracted than they are today. As a result, it was probably not obvious to the drafters that “legal identity” would ever become as problematic in non-international armed conflicts, as it currently is in Ukraine, Iraq, and Syria. Under today’s international humanitarian law, it might be argued that the experiences of social exclusion, inferiority, and powerlessness stemming from the denial, confiscation, or destruction of civil status documentation amounts to an “outrage upon personal dignity” prohibited by common Article 3 of the Geneva Conventions. The notion that a denial of legal status affects personal dignity has grounding in human rights jurisprudence, but has not yet been explored in the case law, academic writings, or commentaries interpreting common Article 3.<sup>117</sup>

113. OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS GENEVA (1974–1977) VOL. I, 41, Draft art. 32(2)(a) (1984).

114. OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS GENEVA (1974–1977) VOL. II, CDDH/SR.49, 60–61, ¶ 10, CDDH/SR.53, 144, ¶ 19.

115. *Id.* CDDH/SR.49, 61, statement from Pakistan.

116. Fortin, *The Application of Human Rights Law*, *supra* note 11, 63, 161–81.

117. It is significant in this regard that the idea that a denial of legal status affects personal dignity has grounding in human rights jurisprudence. See, e.g., *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (8 Sept. 2005), ¶ 179, where the court says that “the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual’s condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.” See also *Kurić and Others v. Slovenia*, App. No. 26828/06, Grand Chamber Judgment, ECtHR (26 June 2012), ¶ 319 where the applicants argued that a “denial of any legal status conferring ‘the right to have rights’ . . . [is] . . . a serious encroachment on human dignity.” It is relevant to note that the Court refrains from elaborating on this point in its judgment, see *id.* ¶¶ 354–59. For criticism of this omission, see partly concurring, partly dissenting judgment of Judge Vučinić. Although Article 3 cases have traditionally addressed bodily injury or intense mental suffering, recent cases show an increased willingness by the European Court of Human Rights to recognize that where treatment humiliates or debases an individual—showing a lack of respect for or diminishing his or her human dignity—or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterized as degrading and also fall within the prohibition set forth in Article 3. See *Burlyu and Others v. Ukraine*, App. No. 3289/10, Judgment, ¶¶ 120–23. For an

### VIII. LEGAL IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW

Considering the lack of explicit provisions addressing legal identity in international humanitarian law, it seems clear that this concept is a matter that is almost exclusively regulated by international human rights law in non-international armed conflicts. International human rights law puts obligations upon states to safeguard rights through legislative, judicial, administrative, educative, and other appropriate measures.<sup>118</sup> The legal identity issues identified in Ukraine, Syria, and Iraq are addressed most squarely by Article 16 of the International Covenant on Civil and Political Rights (ICCPR) which states “Everyone shall have the right to recognition everywhere as a person before the law.”<sup>119</sup> Article 16 is explicitly identified in Article 4 of the ICCPR as a nonderogable right. The drafting papers to this article indicate that the expression “as a person before the law” was meant to ensure recognition of the legal status of every individual.<sup>120</sup> In many ways, legal personhood is central to the whole framework of human rights law because it describes the capacity of human beings to be the holder of rights and obligations under this body of law. Article 16 was intended to “ensure that every person would be a subject, and not an object of the law.”<sup>121</sup> It is for this reason that the right enshrined in Article 16 has famously been described as the “right to have rights.”<sup>122</sup> The situation in Iraq, Ukraine, and Syria has demonstrated that the ability to identify oneself as a legal person is a necessary condition

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example of where case law from human rights jurisprudence has fed into interpretations of international humanitarian law, see Sandesh Sivakumaran, *Torture in International Human Rights and International Law: The Actor and the Ad Hoc Tribunals*, 18 LEIDEN J. INT’L L. 541 (2005).

118. See, e.g., International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., art. 2, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR]; General Comment No. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/31/Rev.1/Add/13 (26 May 2004), ¶ 7; Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), Art 6 [hereinafter UDHR].
119. ICCPR, *supra* note 118.
120. United Nations General Assembly, 10th Sess. (1955), U.N. Doc. A/2929, Ch. VI, ¶ 97. See also MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 336 (1987).
121. See *id.*, Third Comm. 15th Sess. U.N. Doc. A/4625 (1960), ¶ 25. See also Case of *Bámaca-Velásquez v. Guatemala*, Judgment of the Inter-American Court of Human Rights (25 Nov. 2000), Series C No. 70, ¶ 179. See also MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 369, 372 (2d ed., 2005).
122. UNGA, HRC, 19th Sess. *Report of the Working Group on Enforced or Involuntary Disappearances, (including) General Comment on the Right to Recognition as a Person Before the law in the Context of Enforced Disappearances*, U.N. Doc No. A/HRC/19/58/Rev. 1, 9 (2 Mar. 2012). The phrase “right to have rights” was first used by Hannah Arendt. Arendt pointed out that the enjoyment of human rights stemmed not out of an individual’s humanity but from an individual’s membership of a political community. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 267 (rev. ed. 1973) (for an elaboration of these ideas).

for the fulfillment of other rights. When denied this right, individuals suffer “legal invisibility”; a state very close to the “civil death” that Article 16 was intended to prevent.<sup>123</sup> This connection between legal identity and other rights was noted by the drafters of the SDGs.<sup>124</sup> The possession or denial has a cascading effect on a person’s ability to access other rights, and this works both positively and negatively. Of course, in principle, an individual’s legal personhood starts at the moment of birth and ends at death, irrespective of whether the individual has been registered at birth.<sup>125</sup> That being said, it is generally recognized, and has been illustrated above, that legal personhood will normally not be recognized by states unless a person is registered at birth and has other legal documentation. It may be out of this conundrum that the wider concept of legal identity was born.<sup>126</sup>

The importance of birth registration as the practical means through which one’s legal identity is in the first place secured explains why SDG 16.9 identifies registration of births as the *only* indicator of its fulfillment.<sup>127</sup> It also explains why there tends to be more attention given to the implementation of the right to birth registration, than to the right of legal personhood in the United Nations system.<sup>128</sup> The Human Rights Council has passed several detailed resolutions on birth registration, calling on states to consider the development of a “comprehensive civil registration system” and to “prevent the loss or destruction of records, inter alia, due to emergency or armed conflict situations.”<sup>129</sup> The right for children to be registered immediately after birth is articulated in Article 24(2) of the ICCPR and Article 7 of the

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123. Nowak, *supra* note 120, at 369. For the use of the term “legal invisibility” see ISI, *LEGAL IDENTITY*, *supra* note 2, at 20.

124. It is noteworthy that earlier drafts of SDG 16.9 linked “public services” and “legal identity” under one goal. See Working Document for 5–9 May 2014, Eleventh Session of the Open Working Group on SDGs, [https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc\\_0205\\_additional supporters.pdf](https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc_0205_additional supporters.pdf).

125. OHCHR, Background Conference Document Prepared by the Office of the United Nations High Commissioner for Human Rights (2009).

126. It is noted however that the United Nations Legal Identity Expert Group seems to take the view that legal identity is something to be ‘conferred’, rather than innate. See note 6 above.

127. See Statement by Canada/Israel/US team on Means of Implementation; Peaceful Societies and Capable Institutions 4 (9 May 2014), <https://sustainabledevelopment.un.org/content/documents/10052us3.pdf>, (prepared for delivery by Ambassador Elizabeth Cousens, US Ambassador to ECOSOC).

We strongly support a reformulated Target 16C to “promote free and universal legal identity, such as birth registrations.” Every year, 50 million children start life without a legal identity because their birth is not registered. This is a solvable problem and a clear and compelling target ripe for inclusion in this agenda.

128. Human Rights Council, Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law, U.N. Doc. A/HRC/22/L.14/Rev.1, (19 Mar. 2013), pmb. See also U.N. Doc. A/HRC/34/L.24 (20 Mar. 2017), pmb.

129. *Id.* ¶ 6.

Convention on the Rights of the Child (CRC).<sup>130</sup> In 2005, the Committee on the Rights of the Child recommended that all children are registered at birth by means of a “universal, well-managed registration system that is accessible to all and free of charge.”<sup>131</sup> Both the ICCPR and CRC also indicate that every child shall also have a name and the right to acquire nationality.<sup>132</sup> With respect to these rights, Article 7(3) of the CRC adds that states are particularly bound to ensure the implementation of these rights, where a child would otherwise be stateless. Interestingly, Article 8 of the CRC then provides additional provisions regarding legal identity.<sup>133</sup> In its first paragraph, it stipulates that states must undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without interference.<sup>134</sup> In its second paragraph, it says that where a child is illegally deprived of some or all of the elements of his or her identity, states parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity. These provisions are elucidating because they indicate that legal identity should be seen as a multifaceted concept, rather than just a simple existence as a subject of the law.

There are further important provisions relating to legal identity in the Convention on the Elimination of Discrimination against Women (CEDAW).<sup>135</sup> Importantly, this Convention recognizes that just as is seen in Syria and Iraq, legal identity issues often affect women and men differently, due to *inter alia* discriminatory legal frameworks that restrict women’s access to birth registration processes and citizenship rights.<sup>136</sup> Article 15(2) of CEDAW exhorts states parties to accord to women, in civil matters, a legal capacity identical to that of men. It declares that states should give women the equal right to conclude contracts and administer property and that they should be treated equally in all stages of procedure in courts and tribunals. Article 16, to which Syria has made a reservation, places an obligation on states to eliminate discrimination against women in all matters relating to marriage

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130. ICCPR, *supra* note 120, art. 24(2); Convention on the Rights of the Child, *adopted* 20 Nov. 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 7, U.N. Doc. A/44/49 (1989), 1577 U.N.T.S. 3 (*entered into force* 2 Sept. 1990) [hereinafter CRC].

131. General Comment 7 (Implementing Child Rights in Early Childhood) U.N. Doc. CRC/C/GC/7/Rev.7, (1 Nov. 2005), ¶ 25.

132. See CRC, *supra* note 130, arts. 7, 24(2), (3).

133. *Id.* art. 7(3).

134. See *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter American Court of Human Rights Judgment (8 Sept. 2005), ¶ 182 which recognizes that the “right to a name . . . constitutes a basic and essential element of the identity of each individual.”

135. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (*entered into force* 3 Sept. 1981) [hereinafter CEDAW].

136. UNHCR & NRC, *LOST IDENTITY*, *supra* note 35, at 11.



and family relations.<sup>137</sup> It also holds that men and women should have the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.<sup>138</sup> The reality that women struggle most with legal identity and civil status documentation issues in times of armed conflict was explicitly recognized in the CEDAW Committee's recent General Comment No. 30 on armed conflict. This contains a recommendation that states guarantee conflict-affected women and girls "equal rights to obtain documents necessary for the exercise of their legal rights and the right to have such documentation issued in their own names."<sup>139</sup> It also recommends that states ensure the "prompt issuance or replacement of documents without imposing unreasonable conditions."<sup>140</sup> Recognizing that internally displaced and asylum seeking women are often particularly vulnerable to a lack of documentation, the General Comment recommends that states ensure the individual documentation of such women and girls and the timely and equal registration of all births, marriages, and divorces.<sup>141</sup> A similar recognition of the special vulnerability of IDPs to the deprivation of legal identity is found in Principle 20 of the Guiding Principles on Internal Displacement.<sup>142</sup>

While emphasizing the essential connection between legal identity and birth registration, the human rights framework also recognizes that legal identity is a more fine-grained and multi-layered concept than simple legal existence. It was already mentioned that Article 8 of the CRC identifies nationality, name, and family relations as *part of* legal identity, suggesting that

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137. See CEDAW, *supra* note 135, arts. 15(2), 16.

138. It can be seen that this provision would be particularly relevant to the situation in Syria, but it is notable that Syria has made a reservation to Article 16(1)(c) (d) (f) and (g) regarding the equal rights and responsibilities during marriage. See U.N. Doc. CEDAW/SP/2006/2, Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of all forms of Discrimination Against Women, art. 28 (10 Apr. 2006).

139. UN CEDAW, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, U.N. Doc. CEDAW/C/GC/30 (1 Nov. 2013), ¶ 61 (c). It is noteworthy that this issue has also been taken up by the Committee on the Rights of the Child. See CRC, Concluding Observations on the Fifth Periodic Report of the Syrian Arabic Republic, U.N. Doc. CRC/C/SYR/CO/5 (6 Mar. 2019), ¶¶ 24(c), (d).

140. *Id.*

141. *Id.* ¶ 61(d).

142. Principle 20(1) states "Every human being has the right to recognition everywhere as a person before the law." Principle 20(2) asserts that the "authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement, without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents". Principle 20(3) states that "Women and men shall have equal rights to obtain such necessary documents and shall have the right to have such documentation issued in their own names." Guiding Principles on Internal Displacement, U.N. Doc. E/CN.4/1998/53/Add.2 (22 July 1998).

legal identity is made up of different constituent components.<sup>143</sup> A similar idea is found in European Court of Human Rights jurisprudence where legal identity issues have been examined under Article 8 which protects a person's family and private life. The term "private life" has been held to "embrace multiple aspects of [a] person's physical and social identity," such as gender identification, name, and ethnic identity.<sup>144</sup> A central issue in these cases has been how much influence individuals (as opposed to the state) have over how their legal identity is recorded in civil status documentation.<sup>145</sup> In some Article 8 cases, the Court has addressed the consequences of a lack of civil status documentation, recognizing that it places individuals in a position of "vulnerability and legal insecurity."<sup>146</sup> It has held that a state's withholding of identity papers, when they are needed for daily life, may constitute a continuing interference with private life.<sup>147</sup> When expounding this principle in *Smirnova v. Russia*, the court found it relevant that the applicant needed identity papers daily, to perform both mundane tasks such as changing currency and buying train tickets, and also to fulfill important needs like finding employment or receiving medical care.<sup>148</sup> On the basis that Article 8 is a limited right, the Court gave attention to whether the state's measures regarding legal status had a legitimate aim (e.g. national security or the right to control borders) and are necessary in a democratic society.<sup>149</sup> It emphasized that Article 8 not only compels states to refrain from acting in a manner that deprives individuals of their documentation, but also places positive obligations upon states to put in place legislative

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143. Comm. Rts. of Child, Views Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 16/2017, A.L. v. Spain, U.N. Doc. CRC/C/81/D/16/2017 (10 July 2019), for age and date of birth constituting part of legal identity.
144. European Convention on Human Rights, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (*entered into force* 3 Sept. 1953); Case of S and Marper v. UK, App. Nos. 30562/04, 30566/04 (14 Dec. 2008), ¶ 66; B v. France, App. No. 13343/87, Judgment (25 Mar. 1992), ¶ 63, Burghartz v. Switzerland, App. No. 16213/90 (22 Feb. 1994); Ciubotaru v. Moldova, App. No. 27138/04, Judgment (27 Apr. 2010), ¶ 53. See ISI LEGAL IDENTITY, *supra* note 2, at 10, which states that all the "immutable or acquired characteristics of any person, which are legally protected from being the basis for discrimination" make up the "Legal Identity basket."
145. Aktaş and Aslaniskender v. Turkey, App. Nos. 18684/07, 21101/07 (25 June 2019), ¶¶ 42–50. See also Ciubotaru v. Moldova, *supra* note 144.
146. Kurić and Others v. Slovenia, App. No. 26828/06, Grand Chamber Judgment (26 June 2012), ¶ 302, ¶ 356, judgment and partly concurring, partly dissenting opinion of Judge Vučinić on the denial of legal status experienced by the applicants, which had led to diminished access to a wide range of rights.
147. See *Smirnova v. Russia*, App. Nos. 46133/99, 48183/99, Judgment (24 July 2003), ¶ 96.
148. *Id.* ¶ 97.
149. It can be questioned whether the European Court should also give attention to justifications for limitations of Article 8, in instances where the question before it is whether a person is being denied legal personhood (rather than denied aspects of their legal personhood), as this is a nonderogable right under the ICCPR.

structures and procedures that enable individuals the possibility of obtaining their documents.<sup>150</sup>

## IX. HUMAN RIGHTS OBLIGATIONS AND STATE LOSS OF CONTROL

When one compares these primary legal norms to the factual situations in Ukraine, Syria, and Iraq, one is struck by how difficult it is for the human rights framework to be directly applied in situations where armed nonstate actors control territory. It is asserted that there are three pertinent strands of case law and legal principle that are relevant in such a situation. The first line of case law emerges from human rights law itself, which contains jurisprudence on what happens to a state's human rights obligations, in a setting where the *de jure* government has lost control over large swathes of its population. The most detailed case law on this point comes from the European Court of Human Rights.<sup>151</sup> According to this case law, when a state is prevented from exercising its authority over the whole of its territory by a constraining *de facto* situation (e.g. the military occupation by another state or when part of its territory is temporarily subject to a local authority sustained by rebel forces), it does not cease to have jurisdiction over that situation.<sup>152</sup> Instead, the scope of a state's obligations in that area is reduced, to recognize that its capacity to respect, protect, and fulfill legal norms is reduced. States in this situation have been exhorted to take steps to respect their positive obligations under the relevant rights, by utilizing all legal, economic, judicial, or diplomatic means available to them to ensure that the rights of the individuals outside their control are guaranteed.<sup>153</sup> While the European Court of Human Rights has refrained from indicating what measures the state should take in order to comply with their obligations most effectively, it has found it appropriate to verify whether the measures that the state actually took were "appropriate" and "sufficient."<sup>154</sup> When faced with a partial or total failure to act, the Court has determined to what extent a minimum effort was possible and whether it should have been made.<sup>155</sup> According to the European Court, this latter determination is particularly

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150. Kurić and Others v. Slovenia, App. No. 26828/06, Grand Chamber Judgment (26 June 2012), ¶¶ 358–59.

151. *Ilaşcu* and Others v. Moldova and Russia, App. No. 48787/99 (ECHR, 8 July 2004), ¶ 312. For a discussion of this case law, see Marko Milanović & Tatjana Papić, *The Applicability of the ECHR in Contested Territories*, 67 INT'L & COMP. L. Q. 779 (2018).

152. *Ilaşcu*, *supra* note 151, ¶ 347.

153. *Id.* See also *Mozer v. Moldova and Russia*, App. No. 11138/10 (23 Feb. 2016), ¶ 99–100.

154. *Ilaşcu*, *supra* note 151, ¶ 334.

155. *Id.* See also *Catan and Others v. Moldova and Russia*, App. No. 43370/04, 8252/05, 18454/06 (19 Oct. 2012) (hereinafter *Catan v. Moldova and Russia*) for further analysis of what measures might suffice.

necessary when it is alleged that absolute rights have been infringed.<sup>156</sup> The Human Rights Committee and the Committee on Economic, Social and Cultural Rights seem to have broadly adopted the same principle as the European court, though they have expounded it in much less detail.<sup>157</sup>

It is notable that Iraq, Ukraine, and Syria have explicitly—at different times—declared that they will not recognize any documentation or acts by the armed groups operating in their territories.<sup>158</sup> From a political perspective, it might be easy to sympathize with this position. If a criminal group—like the Hell’s Angels—were to start issuing official documents relating to functions usually performed by the state, e.g. tax exemptions or promises of political asylum, it would be generally unreasonable to expect the state to honor the group’s promises. But when an armed group controls significant swathes of territory and performs government functions, in parts of the country where the *de jure* government is absent, the positive obligations above would seem to suggest that a state is obliged to take some steps to guarantee the right to legal personhood for the individuals living in that territory. Before examining in detail what these positive obligations could amount to, it is important to note that this case law from human rights treaty bodies is complemented by two further lines of case law on *de facto* authorities (i.e. nonstate actors that control territory to the exclusion of the *de jure* government). These two further lines of case law (which will be referred to as the second and third lines of case law below) suggest that when a *de jure* government has lost control of territory, it should accord recognition to legal acts within that territory that are intended to protect the rights of the people living there.

The second line of case law is found in old jurisprudence from the US Supreme Court and the Mexico US General Claims Commission. After the US Civil War, the US Supreme Court indicated that while the United States was free to disregard the acts of the Confederate Government, it was not free to disregard the validity of the “civil government” and “regular administration of the laws” in the individual states. It stated: “no one . . . seriously ques-

156. It is relevant to note in this respect that while Article 8 (under which legal identity is usually dealt in front of the ECtHR) is not an absolute right, the right to legal personhood contained in Article 16 of the ICCPR is both absolute and nonderogable. On the basis of this, it is arguable that this core aspect of legal identity should be treated as an absolute right—even when assessed under Article 8.

157. See, e.g., HRC, Concluding Observations on the Third Periodic Report of the Republic of Moldova, U.N. Doc. CCPR/C/MDA/CO/3 (18 Nov. 2016), ¶¶ 5–6. See likewise, Comm. on Econ., Soc. & Cultural Rights, Fifty-Second Session: Summary Record of the 4th Meeting, U.N. Doc. E/C.12/2014/SR.4 (29 Apr. 2014) ¶ 41. See also Thomas D. Grant, *Ukraine v. Russian Federation in Light of Ilaşcu: Two Short Points*, EJILTALK! (22 May 2014).

158. For Ukraine, United Nations Ukraine, *Briefing Note*, *supra* note 22. For Syria, see *COI Syria* Jan.2019, *supra* note 61, at 4, ¶ 9; *Marriage and Birth Certificates “Political Risk,” supra* note 50. For anecdotal evidence of the same in Syria, see *Before the Ink Dries*, *supra* note 37, at 8. For Iraq, see NRC, BARRIERS FROM BIRTH, *supra* note 70, at 8; AMNESTY INT’L, THE CONDEMNED, *supra* note 59, at 22.

tions the validity of judicial or legislative acts in the insurrectionary States” that were “not hostile in their purpose” and related to the preservation of order, maintenance of police regulations, prosecution of crime, protection of property, enforcement of contracts, celebration of marriages, settlement of estates, and the transfer and descent of property “regulated precisely as in time of peace.”<sup>159</sup> Later, the Mexico US General Claims Commission similarly found that a state may be held bound by the “impersonal acts” that take place in rebel-held territory, that are part of the “greater part of governmental machinery in every modern country . . . [that] is not affected by changes in the higher administrative officers.”<sup>160</sup> As examples of government in its impersonal aspect, the Tribunal referred to the “sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams . . . the sale of railroad tickets (where railroads are operated by the Government), the registration of births, deaths, and marriages, even many rulings by the police.”<sup>161</sup> This second line of case law which relates to the binding nature of lawful acts by armed groups has similarities with the argument that Article 9 of the Articles on State Responsibility for Internationally Wrongful Acts can cover the acts of armed groups or other civilian nonstate actors in the exceptional circumstances that they are “exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”<sup>162</sup>

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159. *Horn v. Lockhart*, 84 US [17 Wallace] (1873), 570. See also *Texas v. White* (1869) 74 US 700, 733 which confirms that

acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriages and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government must be regarded in general as valid when proceeding from an actual, though unlawful government.

See Fortin, *Accountability of Armed Groups*, *supra* note 103, 254–60 for a detailed examination of this case law. See also MURRAY, *supra* note 12, at 120–30; STEPHEN C., NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 213–15 (2010), who points to further US Supreme Court case law from the period confirming the same principle.

160. See *George W. Hopkins (U.S.A.) v. United Mexican States* (Reports of International Arbitral Awards) (31 Mar. 1926), Vol IV, 41–47, 43, ¶ 4

161. *Id.* ¶¶ 44–45; *The Peerless Motor Car Company (U.S.A.) v. United Mexican States* (Reports of International Arbitral Awards) (13 May 1927).

162. See Commentary to Article 10 of the ASRIWA which states that “the acts of unsuccessful insurrectional movements” can be attributed to the State “in the special circumstances envisaged by Article 9.” ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* U.N. Doc. A/56/83 (9 Aug. 2001), (including Commentary), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). See Katharine Fortin, *The Relevance of Article 9 of the Articles on States Responsibility for the Internationally Wrongful Acts of Armed Groups*, in *NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT* 371 (James Summers & Alex Gough eds., 2018). For analysis of this view, see TILMAN RODENHÄUSER, *ORGANIZING REBELLION: NON-STATE ARMED GROUPS UNDER INTERNATIONAL HUMANITARIAN LAW, HUMAN RIGHTS LAW AND INTERNATIONAL CRIMINAL LAW* 137–39 (2018); TATYANA EATWELL, *GENEVA ACADEMY, STATE RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS COMMITTED IN THE STATE TERRITORY BY ARMED NON-STATE ACTORS* 29–30 (2018).

The third line of case law, which is considerably more current than the jurisprudence referred to above has emerged out of the Namibia case, where the ICJ carved out a humanitarian exception to the nonrecognition principle which usually prevents third states from recognizing the acts of occupying states.<sup>163</sup> The ICJ also explicitly identified the registration of births, marriages, and deaths as examples of acts that should not be considered “invalid” by third states because nonrecognition of these acts would have a detrimental impact on the people of Namibia, rather than South Africa *per se*.<sup>164</sup> Later in case law on the rights of individuals living in the Turkish Republic of Northern Cyprus (TRNC), the European Court of Human Rights indicated that the principle at the heart of the *Namibia* case, which related to the acts of an occupying state, should equally apply to a *de facto* authority i.e. the TRNC. In a striking passage, the court said:

the acts of these authorities related thereto [to life going on] cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context.<sup>165</sup>

Like the ICJ, the European Court of Human Rights identified the registration of births, deaths, and marriages as examples of acts that can only be ignored to the detriment of the inhabitants.<sup>166</sup> Although the *Cyprus v. Turkey* case, where this statement was made, involved the acts of Turkey on Cyprus soil and the relationship between Turkey and the Turkish Republic of Northern Cyprus (TRNC), in its discussion of this legal principle, the European Court paid little attention to the relationship between Turkey and the TRNC and concentrated almost wholly on the TRNC, *de facto authorities* and *de facto entities*.

Although both these lines of case law set out the circumstances in which a state should give legal effects to arrangements brokered by an armed group or *de facto* entity, it is noteworthy that they differ in the manner in which they treat the form of the arrangements and the motivations of the armed group. The case law from the Mexican Claims Commission and the US Supreme Court puts store on the notion that the regulation of some aspects of life by the armed group carries on the same way as in times of peace and is

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163. Security Council (SC) Res. 276 (30 Jan. 1970), ¶ 2, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap%20VII%20SRES%20276.pdf>.

164. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276(1970)*, I.C.J. REPORTS (21 June 1971), ¶ 125 [hereinafter *Namibia Advisory Opinion*].

165. *Cyprus v. Turkey*, App. No. 25781/94, Judgement (10 May 2001), ¶ 96. See also MURRAY, *supra* note 12, at 126, for discussion of this case.

166. *Cyprus v. Turkey*, *supra*, note 165, ¶ 90.

not connected to the armed group's subjective aims vis-à-vis the dynamics of the armed conflict. In the more recent case law based on the *Namibia* precedent, the European Court of Human Rights has shown a reluctance to consider subjective factors, such as the motivations of the *de facto* entity or the feelings of the population under its control. It has examined instead at whether the effects of the arrangements or transactions can be ignored only to the detriment of the inhabitants of the territory. Applying this test in the *Loizidou v. Turkey* case, the Court was not willing to give legal effect to the provision of the TRNC Constitution that deprived the applicant of her property because the provision was not to her benefit.<sup>167</sup> Yet applying the same test, the court was willing to recognize remedies provided by the TRNC, where it could be shown, on a case by case basis, that they existed to the advantage of the individuals and offered them reasonable prospects of success in preventing violations of the Convention.<sup>168</sup> In making this evaluation, the Court took scant note of the arguments made by the rights holders themselves that the remedies were not in their interest.<sup>169</sup> Instead, the Court was persuaded by its view that there would be a legal vacuum if these remedies did not exist. Although it only conducted a cursory examination of the legal structures instituted by the TRNC, it did note that they broadly reflected the judicial and common law tradition of Cyprus and were not substantially different from the courts in the south of Cyprus.<sup>170</sup>

It is important to consider how these different threads of this case law connect, in practical terms, to the situation in Ukraine, Syria, and Iraq. In relatively stable situations—like Ukraine—where the armed groups in question have established governance structures and protracted control over civilian life, these three threads of case law together provide support for the idea that the state should recognize the documents issued by the armed group. At the very least, states should set up robust, accessible, and gender-sensitive procedures whereby the information contained within alternative documentation registering births, marriages, and deaths can be validated and processed into state-issued documentation. Notably, this argument has been used with some success by NGOs in Ukraine challenging the blanket invalidity that the Ukraine government placed on all documents issued by the nongovernmental authorities in Luhansk and Donetsk.<sup>171</sup> It is also the argument made by the United Nations office in Ukraine and OHCHR, which has cited the *Namibia Advisory Opinion*<sup>172</sup> to argue that the Ukrainian gov-

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167. *Loizidou v. Turkey*, Application No. 15318/89, Judgment (18 Dec. 1996), ¶ 44–46.

168. *Cyprus v. Turkey*, *supra* note 165, ¶ 91.

169. *Id.* ¶¶ 91–92, 98.

170. For observations by the Commission and Court on this issue, see *id.* ¶¶ 231, 237.

171. See *supra* note 22. See also Letter to Volodymyr Groysman, Prime Minister, Ukraine from eleven NGOs (20 Dec. 2018), [https://www.nrc.no/globalassets/pdf/position-papers/ukraine/letter-on-administrative-procedure\\_20.12.2012\\_eng.pdf](https://www.nrc.no/globalassets/pdf/position-papers/ukraine/letter-on-administrative-procedure_20.12.2012_eng.pdf).

172. *Namibia Advisory Opinion*, *supra* note 164, at 16.

ernment should give limited recognition to the civil status documentation issued by the self-proclaimed republics in Luhansk and Donetsk.<sup>173</sup> The UN Ukraine office argued that the Ukrainian government should create an administrative procedure by which documents produced in the self-proclaimed republics could be accepted alongside corroborating documentary evidence (e.g. medical records, photographs) by the civil registration authorities.<sup>174</sup> During such a process, it will be important to check that marriages were consensual and that both parties were adults.<sup>175</sup>

While progress on this issue has been slow, in recent years there have been some notable developments in Ukraine. Previously, individuals seeking civil status documentation for family members had to obtain a court order establishing birth or death as a legal fact, providing witness evidence of the event (e.g. birth or death) rather than being able to rely upon documentation from the self-proclaimed republics in Donetsk or Luhansk attesting to its occurrence.<sup>176</sup> This was particularly difficult when witnesses were located in Luhansk and Donetsk. In February 2016, the government introduced a “simplified court procedure,” but the procedures remained complex, lengthy, and costly.<sup>177</sup> In December 2017, the Ukrainian government introduced a new procedure whereby the birth of children born outside of public health facilities could be confirmed by genetic expertise or special commissions, that involved humanitarian organizations travelling to Donbass.<sup>178</sup> In 2018, in response to NGO pressure, the government finally provided a specific carve-out to the blanket invalidity for “documents certifying facts of birth or death of a person.”<sup>179</sup> The new Law 2268 exempted applicants from paying court fees in cases where parents are seeking to establish legal facts, such as birth or death and are deemed to have been affected by the conflict. Although this law has now come into effect, the phrase “affected by the armed conflict” is being interpreted very narrowly by the Supreme Court of

173. UN Ukraine, *Briefing Note*, *supra* note 22. See also HUMAN RIGHTS SITUATION IN UKRAINE, 16 MAY TO 15 AUGUST 2018, *supra* note 20, ¶ 132; HUMAN RIGHTS SITUATION IN UKRAINE, 16 MAY TO 15 AUGUST 2015, *supra* note 22, ¶¶ 173–76.

174. See UN Ukraine, *Briefing Note*, *supra* note 22.

175. See CEDAW, *supra* note 135, art. 16(2) states “The betrothal and the marriage of a child shall have no legal effect.” CRC, *supra* note 130, art. 49 states “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.” It is noteworthy in this respect that the Islamic State allowed children as young as nine to be married. Mark Drumbl, & Rona, Gabor, *Navigating Challenges in Child Protection and the Reintegration of Children Associated with Armed Groups*, in CRADLED BY CONFLICT: CHILD INVOLVEMENT WITH ARMED GROUPS IN CONTEMPORARY CONFLICT 231, N.137 (Siobhan O’Neil, & Kato van Broeckhoven eds., 2018).

176. STATELESSNESS IN RUSSIA AND UKRAINE, *supra* note 17, at 14–17.

177. NRC, *Rights of Conflict-Affected Population*, *supra* note 19, at 2; NRC, *Birth and Death Registration*, *supra* note 16, at 2.

178. *Id.* at 3.

179. NRC, *Rights of Conflict-Affected Population*, *supra* note 19, at 2; NRC, *Birth and Death Registration*, *supra* note 16, at 3.



Ukraine, with the result that the majority of applicants are deemed to fall outside its provision.<sup>180</sup> There is little evidence that the same legal arguments have been made in relation to documents issued by the IS, even though they would probably apply as a matter of law.<sup>181</sup> There are two likely reasons for this. It could be that the abhorrent practices of the IS have made this argument politically untenable. It may also be because IS documents have been largely destroyed or lost, rendering arguments regarding their recognition redundant.

In less stable situations, the application of the latter two threads of case law becomes more complicated due to the intense and deliberate politicization of legal identity and issues relating to the fragmentation of the armed groups. In instances where legal identity issues have become heavily politicized, but control of territory remains stable, the application of the case law from the Mexican Claims Commission and the US Supreme Court becomes more difficult. It is hard to see the registration of births, deaths, and marriages as impersonal acts of government lacking in hostile intent when armed groups like IS destroy and confiscate state-based documentation, politicize the issuance of their own documentation and attack civil registration infrastructure.<sup>182</sup> However, it has been shown above that the more current *Namibia* precedent would likely still hold strong in this instance as it places less store on these kinds of subjective factors. However this line of case law will only apply to *de facto* authorities and *de facto* entities, so it becomes less certain whether it will apply if an armed group's control over territory becomes fragmented.<sup>183</sup> In circumstances where an armed group fragments and loses control over territory completely, a state will remain bound by its obligations under human rights law to take sufficient and appropriate positive measures to protect the rights of individuals throughout its territory. These will now be explored in more detail.

The extent of a state's positive obligations under human rights law with regard to legal identity when an armed group controls territory will depend on the circumstances of the situation. A human rights treaty body would probably be slow to find that a state must *ensure* that people living outside its

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180. *Id.* The only persons who are considered to have been "affected" by the armed conflict are those who have been detained or wounded. For examples of Supreme Court decisions rejecting applications for court fee exemptions, see UNHCR, *Legislative Update* 3 (2020).

181. The only factual difference which could be relevant is that the Islamic State initiated a legal system that was quite different from the legal system that was in place before. See *supra* note 170.

182. For comment on cases falling into the doubtful zone between person and impersonal from the General Claims Commission, see FORTIN, *THE ACCOUNTABILITY OF ARMED GROUPS*, *supra* note 103, at 257–58. For further discussion of the difficulties experienced by the US Supreme Court in distinguishing routine measures from acts promoting rebellion, see NEFF, *supra* note 159, at 214–15.

183. MURRAY, *supra* note 12, at 131.

control are registered at birth, largely because the physical act of registration by a state requires presence in the territory. That being said, the impossibility of the state's physical presence in territory held by armed nonstate actors should never be assumed in situations of non-international armed conflict. It has often been noted that the Sri Lankan state carried on taking responsibility for key services such as education and health, in territory that was firmly in the hands of the Liberation Tigers of Tamil Eelam (LTTE).<sup>184</sup> Civil servants employed by the state remained active in LTTE territory throughout the armed conflict, working on such issues that remained within the agreed competences of the state. Likewise, when assessing whether Moldova had fulfilled its positive obligations in Transdniestria with regard to the right to education, the European Court of Human Rights considered it relevant that Moldova had carried on paying for the rent and refurbishment of the school buildings in this region outside its control and carried on paying for teachers' salaries, educational materials, buses, and computers.<sup>185</sup> This situation shows that it is perfectly conceivable that a state could continue to maintain civil registries in areas of the country outside its control, deploying civil servants, paying salaries of civil servants, or entering an agreement with the armed group on this issue.<sup>186</sup> Equally, it may be possible for governments to delegate civil registration services to a UN agency, such as the UNHCR or UNICEF for the duration of the armed conflict, by agreeing (also with armed groups) to its access to the territory and the recognition of its mandate.<sup>187</sup>

Even when a state has lost control of a portion of its territory, it will remain bound to utilize its legal, economic, judicial, or diplomatic to guarantee the right of legal personhood to the individuals who are (or have been) living in territory controlled by armed groups.<sup>188</sup> It will need to show it is making

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184. ZACHARIAH CHERIAN MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR* 109, 112 (2011).

185. *Id.* at 115.

186. See *Catan and Others v. Moldova and Russia* ¶¶ 133, 147–48.

187. The UNHCR engages in birth registration in the context of the prevention and reduction of statelessness and the protection of persons of concern. As part of its statelessness mandate, it works with populations at risk of statelessness who, in the absence of birth registration, may be prevented from establishing a legal identity and proving their claim to a nationality. See UNGA, Executive Committee of the High Commissioner's Programme, *Report of the fifty-seventh session of the Executive Committee of the High Commissioner's Programme Conclusion on Identification Prevention and Reduction of Statelessness and Protection of Stateless*, U.N. Doc. A/AC.96/1035 (10 Oct. 2006), at 18, file:///C:/Users/Nancy%20Ent/Downloads/A\_AC.96\_1035-EN.pdf. As part of its protection mandate, the UNHCR works on birth registration because it provides children of concern, including stateless children, access to rights and services and age-appropriate legal protection, protects them against violence and abuse, and prevents family separation in emergencies. UNHCR, *A FRAMEWORK FOR THE PROTECTION OF CHILDREN* (2012), <https://www.unhcr.org/en-us/protection/children/50f6cf0b9/framework-protection-children.html>.

188. Notably, in instances where there is no military force at all (i.e. a no-man's land), the Court has held a State to have full responsibility under the Convention, rather than a qualified responsibility restricted to positive obligations. While acknowledging that

efforts to facilitate the issue of new documentation to individuals who have lived (or are living) in territory controlled by armed groups, and should not instigate procedures, fines, or fees which punish these individuals.<sup>189</sup> It may also be possible for a state to negotiate with an armed actor on the issue of legal identity, to find solutions by means of a special agreement.<sup>190</sup> A state may also raise the issue of legal identity at the international level and seek international mediation to try and find a solution for the problem.<sup>191</sup> It may be possible for a state to set up special or mobile registration services near the line of contact that are accessible for people living in the rebel held zones and that can send information to the central registry.<sup>192</sup> It is noteworthy that in Sudan, UNICEF and Plan Sudan linked birth registration activities to the pre-existing UNICEF and World Health Organization-run mobile healthcare and vaccination programs in Darfur. Access to these areas was achieved through the employment of what they called “hit-and-run” vaccination and birth registration missions staffed by vaccinators and civil registrars. The program was risky but made possible through continuous negotiations between the government, armed groups, local communities, INGOs, and UN agencies.<sup>193</sup> In Ukraine, NGOs have recommended that the government bring the relevant services needed for the registration of births and deaths closer to the line of contact, so that they can be more easily accessed by individuals living in the Donbass region.<sup>194</sup> In other words, a determination of the content of a state’s obligations cannot be based on its presumed capacities or incapacities but should depend on a careful scrutiny

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States may encounter practical difficulties in fulfilling these obligations, the Court has suggested that these difficulties can be considered when assessing the proportionality of the acts or omissions complained of. See *Sargsyan v. Azerbaijan*, App. No. 40167/06 (16 June 2015), ¶¶ 148–51.

189. See U.N. Doc. CRC/C/SYR/CO/5, *supra* note 139, ¶ 24(b).

190. Geneva Conventions, Common art. 3, <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>, encourages parties to make “special agreements” in a non-international armed conflict to bring into force all or other parts of the Convention. It is noteworthy that in the *Ilaşcu*, *supra* note 151, it was considered relevant whether Moldova had put a particular issue on the negotiating table in the court’s assessment of whether it had taken “all due means.”

191. See *Ilaşcu*, *supra* note 151, ¶¶ 348–50, *Ivantoc and Others v. Moldova and Russia*, App. No. 23687/05 (15 Nov. 2011), ¶ 109.

192. See U.N. Doc. CRC/C/SYR/CO/5, *supra* note 189, ¶ 24(b) where the CRC suggests that Syria should consider using mobile teams to promote and facilitate birth registration. It is noteworthy that the UNHCR has introduced such mobile systems for remote communities in Burkina Faso. Under this program, newborn babies are registered digitally by the midwife and issued with a bracelet containing a unique code. The baby is thereby registered, and a birth certificate can be printed and collected from any civil registration center in the country on the presentation of the bracelet. See UNHCR, *Ensuring Birth Registration for the Prevention of Statelessness*, *supra* note 96, at 8; PLAN, *BIRTH REGISTRATION IN EMERGENCIES: A REVIEW OF BEST PRACTICES IN HUMANITARIAN ACTION* 44 (2014).

193. *Id.* at 41–45.

194. NRC, *Rights of Conflict-Affected Population*, *supra* note 19, at 3. See also Letter to Volodymyr Groysman, *supra* note 171.

of the situation on the ground.<sup>195</sup> It will often be within a state's power to find ways to make it easier for individuals to register of births, marriages, and deaths of people presenting themselves in state-controlled territory, having been living in areas under the control of armed groups by waiving fees or recognizing the contents of alternative documents.<sup>196</sup> Care should be taken to ensure that procedures are gender-sensitive and take cognizance of the fact that there are high numbers of people who are missing or dead without proof. There is no excuse for a state making it more difficult for such individuals, by imposing high fees, procedural barriers, or impossible conditions, as in Iraq.

As a final point on the legal framework, it is important to note that the situations in Ukraine, Iraq, and Syria also show the value and importance of current debates on whether the armed groups themselves have obligations under human rights law, particularly in situations where they control territory.<sup>197</sup> It is not possible to deal with the legal foundations of this debate in detail here, but it is relevant to note that it is increasingly commonplace for human rights accountability mechanisms to find that armed groups have obligations under human rights law, especially in instances where they control territory.<sup>198</sup> If these practices are accepted as having legal legitimacy, it must be accepted that armed groups are also bound by the human rights norms set out above relating to birth registration and legal identity and are under an obligation to ensure that "everyone has the right to recognition everywhere as a person before the law."<sup>199</sup> This does not necessarily mean that armed groups are under an obligation to register children's births and issue documentation relating to marriages and deaths themselves, but it

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195. See *Ilaşcu*, *supra* note 151, ¶ 334.

196. It is noteworthy that the Committee on the Rights of the Child suggested in its Concluding Recommendations that Syria might consider recognizing documents issued locally by mukhtars or sheikhs (i.e. religious and community leaders) to facilitate the issuance of birth certificates. See Committee on the Rights of the Child, Concluding Observations on the fifth periodic report of the Syrian Arab Republic, U.N. Doc. CRC/C/SYR/CO/5, *supra* note 139, ¶ 24(a).

197. ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2009), Cedric Ryngaert, *Human Rights Obligations of Armed Groups*, 2 *BELGE DE DROIT INT'L* 355 (2008); FORTIN, THE ACCOUNTABILITY OF ARMED GROUPS, *supra* note 103; MURRAY, *supra* note 12; RODENHÄUSER, *supra* note 162, at 115–212, Andrew Clapham, *Human Rights Obligations for Non-State-Actors: Where are we Now?*, in *DOING PEACE THE RIGHTS WAY: ESSAYS IN INTERNATIONAL LAW AND RELATIONS IN HONOUR OF LOUISE ARBOUR* (Fannie Lafontaine & François Larocque (2019)); ANNYSSA BELLA, GENEVA ACADEMY, HUMAN RIGHTS OBLIGATIONS OF ARMED NON-STATE ACTORS: AN EXPLORATION OF THE PRACTICE OF THE UN HUMAN RIGHTS COUNCIL (2016). For a recent view showing that there is still uncertainty on these questions, see ICRC CHALLENGES 2019, *supra* note 11, at 53–54.

198. FORTIN, THE ACCOUNTABILITY OF ARMED GROUPS, *supra* note 103, at 15–21. There are also examples of armed groups voluntarily committing themselves to the norms found in human rights law. Particularly relevant for this article is the example of the Sudan People's Liberation Army committing to the Convention on the Rights of the Child in 1995. See UNICEF, BIRTH REGISTRATION AND ARMED CONFLICT, *supra* note 1.

199. See Article 6 of the UDHR, *supra* note 118.

does mean that they are under an obligation not to impede ongoing civil registration processes in territory under their control.<sup>200</sup> It could likewise be interpreted to include an obligation to facilitate the presence of a UN agency, such as UNHCR, to carry out birth registrations for the central register. It might also include an obligation to explore cooperation with the *de jure* government on this issue. Certainly, it would include an obligation not to destroy civil registration records, ID cards, or civil status documentation or interfere with ongoing work of this nature by civil servants. A finding that these obligations are binding upon armed groups in control of territory and exercising government functions is important because it has been seen already that issues relating to legal identity are not adequately covered by the international humanitarian law that applies in non-international armed conflicts. As a result, it becomes especially valuable that there is a human rights legal rule that international organizations and NGOs can point to, when addressing situations where armed groups are interfering with or destroying civil status documentation systems, in territories outside state control.

## X. LEGAL IDENTITY AND THE DYNAMICS OF ARMED CONFLICT

The current situation in Syria and Iraq shows how quickly legal identity can become mired in the political dynamics of armed conflict. It has shown how, even when legal identity is interpreted in the simplest manner, as birth registration or legal personhood, documents evidencing legal identity can quickly become dangerous for the persons holding them. This reality is a sobering contrast to the ideal contained in the case law referenced above that seems to suggest that the registration of births, marriages, and deaths pertains to something so fundamentally humanitarian, that it should be beyond the dynamics of the armed conflict. While there may be ways to protect this ideal, it is important to reflect on why this politicization is occurring. It is likely that ultimately it reflects the fact recognized in human rights law, and set out above, that legal identity is more than the letters of a name and birth date typed on the page of a birth registration form. As was shown in the case law on private life above, legal identity is multi-layered and constituted of different aspects: nationality, age, name, family relations, gender, religion, ethnicity. Moreover, none of these layers exist in a vacuum. Each layer is connected to the social context in which the non-international armed conflict exists.<sup>201</sup> Equally, the situations in Syria and Iraq

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200. It is argued that an armed group's obligations will depend first on its capacity and second on the arrangements regarding civil registry that are already in place. Consideration may need to be given to whether armed groups need to have recourse to a legal authority (e.g., domestic law) to issue documentation.

201. See PETER L. BERGER AND THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 195 (1966) stating "Theories about identity are always embedded in a more general interpretation of reality. . . [i]dentity remains unintelligible unless it is located in a world."

demonstrate another reality captured in this case law, that legal identity is partly externally constructed and partly internally constructed.<sup>202</sup> The socially constructed external dimension of legal identity poses a particular danger for individuals in armed conflict, because it is constructed in a realm that is outside an individual's direct influence and may not tally with the identity to which they themselves ascribe.<sup>203</sup> It is the confluence of these dynamics that leads to a situation in which a person's surname on an ID card in Iraq becomes the basis on which a person is accused of being affiliated to the IS, in circumstances where they do not self-ascribe to this group.<sup>204</sup> A person's surname is often interpreted to hold information about a person's gender, religion, ethnic affiliation, and family relations—and it is the construction of legal identity that emerges out of these constituent parts that leads to a person's ID card being taken as evidence of a person's political affiliation within an armed conflict.

Additionally, the situation in Syria, Iraq, and Ukraine highlights the reality that the socially constructed aspects of legal identity are not only created by the information on an ID card or civil register (e.g. name), but also the manner in which a person's legal identity is issued or recorded. It has been demonstrated above that the dangers associated with a person's legal identity are acutely affected by the nature of the entity that has issued a document or recorded a birth e.g. state or armed nonstate actor. This is regretful, as it feeds into the notion that civil status documentation is evidence of political affiliation. It is also of concern that the article shows that aspects of legal identity are constructed both in the eye of the beholder, and also by the entity issuing the documentation. While some armed groups might try to make their civil status documentation as neutral as possible without any insignia or stamps of affiliation at all, others, like the IS in Syria and Iraq, have deliberately linked the issuance of birth certificates with their state building projects. It is no coincidence that the IS started issuing birth certificates at almost the same time as foreign fighters affiliated with the group burnt their passports; the symbolic construction of one legal identity marked the symbolic destruction of another.<sup>205</sup> It is these multi-dimensional aspects of legal identity that have made its conferral and denial so powerful in non-international armed

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202. James D. Fearon, *What is Identity (As We Now Use the Word)?* Draft Paper, Stanford University 14–20 (3 Nov. 1999). See, e.g., social identity theory which recognizes that the concept of identity is both social and cognitive and rooted in the social psychological idea of categorization. Phillip L. Hammock, *Theoretical Foundations of Identity*, in *THE OXFORD HANDBOOK OF IDENTITY DEVELOPMENT* 11 (Kate C. McLean & Moin Syed eds., 2015); JOLLE DEMMERS, *THEORIES OF VIOLENT CONFLICT: AN INTRODUCTION* 20 (2012). See also MAYKEL VERKUYTEN, *THE SOCIAL PSYCHOLOGY OF ETHNIC IDENTITY* 74 (2018). She writes:

the identity concept is not about individuals as such nor about society as such, but about the relation of the two. It is about the intricacies, paradoxes, dilemmas, contradictions, imperatives, superficialities and profundities of the way in which individuals relate to and are related to in the world they live.

See also *id.* at 91, 92 for the terms “ascription” and “self-ascription” processes.

203. *Id.* at 87–88, 90 on an individual's de- or dis-identification with a group.

204. *Id.* at 91.

205. See *supra* notes 66, 67.

conflicts. By exercising control over civil status documentation, parties obtain important information about the people living under their control that render them vulnerable. They also hold a decisive influence on individuals' ability to flee, return, and define their identity vis-a-vis the state or certain marginalized groups. Parties to an armed conflict can manipulate, deny, or destroy civil status documentation to pursue campaigns of persecution, by identifying minority groups and then discriminating against them.

## XI. CONCLUSIONS

This article has shown that systems designed to protect legal identity are often put under intense pressure in situations of non-international armed conflict. It demonstrates the cascading problems that can stem from a lack of legal identity, by focusing on the situation in Syria, Iraq, and Ukraine. The dire situation in these countries confirms that a focus on legal identity is an effective use of resources because just as a lack of legal identity causes a spiraling denial of other rights, its acquisition or recovery can facilitate a spiraling acquisition of rights and protections.<sup>206</sup> As was stated during the drafting of the Sustainable Development Goals in 2014, legal identity is a "solvable" problem.<sup>207</sup> That being so, this article demonstrates that there is much to be worked out, in terms of deciding how the problem can "best" be solved in conflict-affected environments. Any solution must be delivered in a manner that not only provides everyone with a legal identity at birth but that is sensitive to the more multidimensional aspects of legal identity that accompany an individual through their life. The analysis makes it tempting to conclude that an eradication of systems that rely solely on "paper documents" would surely be a step in the right direction. Facts emerging out of Iraq, Ukraine, and Syria show how easily paper records are lost, destroyed, damaged, and confiscated in the context of armed conflict, leaving individuals "paperless" and at a heightened risk of statelessness. The introduction of digital systems might take some pressure off individuals to keep their own legal identity safe, for the duration of their lifetime. The existence of some digitalization would put the responsibility more firmly on the system, and its administrators, to secure and protect individuals' identity and make lost documents more easily replaceable. Yet it is important not to move too swiftly in this direction because digitalized systems also bring problems associated

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206. It is noteworthy that in situations of armed conflict, a lack of civil status documentation may also make children particularly vulnerable to underage recruitment. While this has not been explicitly illustrated by the situations in Syria, Iraq and Ukraine, it has been made known in earlier studies of this issue. See UNICEF, BIRTH REGISTRATION AND ARMED CONFLICT, *supra* note 1, at 7, 14–16.

207. See *supra* note 127.

with data privacy and discrimination, and these too would likely become more profound in times of armed conflict.<sup>208</sup> Also, digital systems can be easily manipulated and their administrators cannot necessarily be trusted not to exploit these systems to further their military aims.<sup>209</sup>

Finding ways to protect legal identity documentation from political abuse and politicization will not be easy. The article has shown how the simple registration of a person's name may end up putting an individual in danger, by affiliating him or her to a particular armed faction. The situation in Syria and Iraq demonstrates how severely aspects of legal identity relating to ethnic, political, and religious affiliation (including real and perceived affiliation) come under pressure in times of armed conflict, because they match the fault lines along which non-international armed conflicts are fought. Moreover, the article has shown that it is essentially because the concept of legal identity captures both a baseline legal personhood and also more multi-dimensional aspects (e.g. an individual's relationship, identification with or disassociation from the state or certain societal group) that legal identity and civil status documentation become such a powerful tool in the hands of a fighting party. By denying legal identity to a whole group, a state can effectively render them legally invisible and deny them all kinds of other rights too, including the right to education, healthcare, housing, jobs, and the freedom to move around the country and protect their rights in a court of law. Likewise, the issue or destruction of civil status documents securing an individual's legal identity may become part of an armed group or a state's strategy to exclude a particular minority group, seek legitimacy or institute demographic change. In order to de-weaponize legal identity in the hands of fighting parties, attention needs to be given to how its provision can be better protected from the dynamics of the armed conflict. To achieve this goal, more advocacy is necessary at an international and national level. At the international level, there is a clear need for more policy discussions regarding how legal identity can and should be protected and secured under SDG 16.9, particularly in conflict-affected environments. The right to legal identity (and the access to civil status documentation that makes it a reality) needs to be more broadly recognized as a right that everyone has—including IDPs and people living in areas under armed group control, even those designated as terrorist groups.

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208. Michele Eken, *Kenya's Controversial Digital ID Scheme Faces Pushback*, OPEN SOC'Y JUSTICE INITIATIVE (19 Dec. 2019), <https://www.justiceinitiative.org/voices/kenyas-controversial-digital-id-scheme-faces-push-back>; Pam Dixon, *A Failure to "Do No Harm"—India's Aadhar Biometric ID Program and its Inability to Protect Privacy in Relation to Measures in Europe and the US*, 7 HEALTH & TECH. 539 (2017); TARANGINI SRIRAMAN, IN PURSUIT OF PROOF: A HISTORY OF IDENTIFICATION DOCUMENTS IN INDIA 209–65 (2019).

209. *Syria: Turkish Identification Cards Obliterate Identity of Natives and Displaced Populations Alike*, SYRIANS FOR TRUTH AND JUSTICE (21 Oct. 2019).



Efforts should be taken to understand legal identity as a humanitarian necessity—like food and water. This may help build a stronger case that states engaged in non-international armed conflicts are required under international law to set up procedures to issue individuals with official civil status documentation, when they are living in territories under the control of armed groups. It may also provide an opportunity for birth registration to be carried out, alongside the delivery of essential services such as child vaccinations or health interventions.<sup>210</sup> Understanding legal identity as a humanitarian necessity may also assist humanitarian NGOs in engaging with armed groups on the best practice of not altering systems of civil status registration (e.g. laws and procedures), achieving consistency and not marking documents with political stamps that may put their holders in danger. Notably, unlike most other governance activities provided by armed groups (e.g. healthcare, court judgments, detention, policing, and food) the issuance of legal identity documents by an armed group leaves the holder of the documents with a physical commodity that will accompany them throughout their lifetime. This makes it important to be extra cautious when determining what such alternative documents should look like, because while the possession of armed group-issued documents might be in an individual's interest at one moment in the armed conflict, at a later moment in the conflict the same documents might expose that individual to serious risk.<sup>211</sup> It also makes it important that registries containing details of people's legal identity are protected from interference so that the information they hold is kept confidential. In addition to holding personal details of persons registered, civil registers also provide evidence of an individual's location at a particular point in time and this information could end up putting them in danger.

Fighting parties should also be dissuaded from destroying or altering civil registries, in any circumstance. It is also important that discussions take place with representatives of NGOs and third states which have funded civil status documentation programs in Syria, with consideration given to what kind best practices should be supported in future armed conflicts. It might, for example, be agreed that support should be limited to life documentation that does not contain any language or logo which may undermine their neutrality—as such a stamp might (later) put the holder of the documents in danger or jeopardize recognition by other actors, including the state of that country. There may also be discussion of a greater role of an international organization, such as UNICEF or UNHCR in becoming the

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210. For the use of mobile registration teams in armed conflict see UNICEF, *BIRTH REGISTRATION AND ARMED CONFLICT*, *supra* note 1, at 24–25.

211. It is noteworthy that in Angola, UNITA operated a birth registration system in territory under its control but it did not issue physical documents as in the event of the individuals being captured, it was thought that these documents would identify their holders as associated with the “enemy.” See UNICEF, *BIRTH REGISTRATION AND ARMED CONFLICT*, *supra* note 1, at 32.

guardian of civil status documentation in times of armed conflict, working with mobile teams if possible.<sup>212</sup> Achieving consensus on this issue could help the brokering of agreements between fighting parties that allows an international organization or NGO access to territory and encourages the inclusion of provisions on legal identity in peace agreements.<sup>213</sup> Unless and until more conversations take place on this issue at the international level, it seems likely that systems of civil status registration will continue to be a subtle, but perniciously powerful weapon in the hands of fighting parties in non-international armed conflicts, leading individuals to face a high risk of statelessness, disenfranchisement, and exclusion from key services.

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212. For the use of mobile registration teams in armed conflict *see id.* at 26.

213. For examples of how legal identity issues have been dealt with in peace agreements *see id.* at 21. For an example of access agreements brokered between armed groups and NGOs on this issue, *see id.* at 32.