



FACULTY OF LAW  
Lund University

Amelie Kraft

# The risky reality to legally exist

## A critical analysis on the notion of legal identity in International Human Rights Law

LAGM01 Graduate Thesis

International Human Rights Law  
30 higher education credits

Supervisor: Eleni Karageorgiou

Semester of graduation: Period 1 Spring 2021

# Contents

<b>SUMMARY</b>	<b>4</b>
<b>SAMMANFATTNING</b>	<b>5</b>
<b>PREFACE</b>	<b>6</b>
<b>ABBREVIATIONS</b>	<b>7</b>
<b>1 INTRODUCTION</b>	<b>8</b>
1.1 Background	8
1.2 Purpose and Contribution to research	12
1.3 Reseach question	13
1.4 Method and Materials	14
1.5 Theoretical approach	16
1.6 Limitations	19
1.7 Outline	19
<b>2 LEGAL IDENTITY IN UN POLICIES AND THE LITTERATURE</b>	<b>20</b>
2.1 UN operational defintions on the legal identity agenda	20
<b>2.1.1 Legal identity</b>	<b>20</b>
<b>2.1.2 Proof of legal identity and identity management</b>	<b>22</b>
<b>2.1.3 Civil registration</b>	<b>24</b>
2.2 Approches to legal identity in research	26
<b>2.2.1 Legal identity narrated in the human rights research</b>	<b>27</b>
<b>2.2.1 The discourse on ‘providing legal identity’ steaming from development studies and humanitarian field</b>	<b>29</b>
2.3 Chapter conclusion	32
<b>3 LEGAL IDENTITY IN RELATION TO THE RIGHTS OF INTERNATIONAL HUMAN RIGHTS LAW</b>	<b>34</b>
3.1 The right to recognition before the law	34
3.2 The right to birth registration	38
3.3 The right to nationality and specific rights for non-nationals	39
3.4 The right to private life in ECtHR’s Article 8 case law	42
3.5 A de facto right in the fulfilment of rights	44
3.6 Chapter conclusion	46

<b>4</b>	<b>LEGAL IDENTITY IN STATES' IMPLEMENTATION: AN EXCLUSIONARY CONCEPT</b>	<b>48</b>
4.1	States' exclusionary practice	48
4.1.1	<i>'National security agendas' justifying discriminatory practice</i>	<b>49</b>
4.1.2	<i>The undocumented as disregarded subjects in providing legal identity equally</i>	<b>50</b>
4.2	States' exclusionary practice through the lens of 'différance'	52
4.3	Legal identity as a mechanism reinforcing state power	54
4.4	The inherent flaws of Human Rights underpinning and demanding legal identity	59
4.5	Chapter conclusion	63
<b>5</b>	<b>FINAL CONCLUSION</b>	<b>65</b>
	<b>BIBLIOGRATHY</b>	<b>68</b>

# Summary

Around 20% of all people worldwide (1.5 billion) do not have an official and legally recognized document as proof of their identity. This affects, for example, their right to vote, to open a bank account, obtain formal employment or seek legal compensation. In other words, their lack of proof for their legal existence excludes them from participating in society on all various levels. This was acknowledged by the UN in the adoption of the Sustainable Development Goals (SDGs) as a wide-ranging issue. In SDG target 16.9, states are by 2030 to ‘provide legal identity for all, including birth registration.’ However, the term ‘legal identity’ is not defined in international law, leaving legal identity as a vague concept in international human rights law (IHRL). This thesis aims, therefore, to offer a better understanding of legal identity and its impacts in IHRL. This includes exploring and critically analysing relating norms in IHRL, the discourse in policymaking and research, as well as states’ implementations. A particular focus is situated in if legal identity facilitates individuals’ access to rights and services, as there have been argued by NGOs and scholars. In addition, legal identity in IHRL is analysed in light of the theory ‘différance’.

The thesis shows that there are several complex understandings of legal identity in international human rights law. Legal identity has been argued as a right, as a tool to realize rights, a concept dictating an individual’s relationship with the state, as a process ranking and excluding certain legal identities, as a concept reinforcing states’ power and, finally, a concept reflecting the power dynamics playing out in the international human rights system. These different understandings show various impacts of legal identity on rights and obligations. What needs to be acknowledged is that legal identity cannot simply be understood as a mechanism for inclusion. The ambiguous meaning of legal identity, allowing wide discretion for the state, has made it a sitting duck for different agencies to use for justifying their interest, agencies which might have another agenda than that of the SDG’s to ‘leave no one behind’.

# Sammanfattning

Omkring 20 procent av alla människor världen över (1,5 miljarder) har inte ett officiellt, juridiskt dokument som bevis på sin identitet. Detta påverkar till exempel deras rösträtt, att öppna ett bankkonto, få formell anställning eller söka juridisk ersättning. Deras brist på bevis på juridisk existens exkluderar dem alltså från att delta på samtliga nivåer i samhället. Denna omfattande problematik uppmärksammades av FN i antagandet av Agenda 2030s Globala Mål (Globala Målen). I mål 16.9 är stater till år 2030 skyldiga att "tillhandahålla juridisk identitet för alla, inklusive födelseregistrering." Uttrycket "juridisk identitet" existerar dock inte i folkrätten, vilket lämnar juridisk identitet som ett särskilt vagt begrepp i den internationella rätten om mänskliga rättigheter (IHRL). Denna uppsats syftar därför till att bättre förstå juridisk identitet och dess effekter i IHRL. Detta inkluderar att utforska och kritiskt analysera relaterade normer i IHRL, diskursen inom policys och forskning gällande staters implementering. Särskilt är fokus på om juridisk identitet underlättar den enskildes tillgång till rättigheter och förmåner, vilket har hävdats av icke-statliga organisationer och forskare. Dessutom analyseras juridisk identitet och IHRL mot bakgrund av teorin om "différance".

Uppsatsen visar att det finns flera komplexa förståelser av juridisk identitet i IHRL. Det har argumenterats som en rättighet, som ett verktyg för att förverkliga rättigheter, ett begrepp som dikterar en individs förhållande till staten, som en hierarkiskapande och exkluderande process, som ett begrepp som förstärker staternas makt och, dessutom, ett koncept som reflekterar de inneboende maktdynamikerna i IHRL. Dessa olika förståelser av juridisk identitet får effekter för rättigheter och skyldigheter. Det bör dock uppmärksammas att juridisk identitet inte bara kan förstås som en mekanism för inkludering. Den tvetydiga innebörden av juridisk identitet, vilket möjliggör ett stort handlingsutrymme för staten, har gjort det till ett öppet mål för olika aktörer att använda för att motivera sin agenda, aktörer som inte sällan har en annan intention än Globala Målen "lämna ingen utanför".

# Preface

Thank you Eleni Karageorgiou, my brilliant and ideal supervisor for this thesis. You are ridiculously ambitious, clever and inspiring to talk to.

Thank you Titti Mattsson, the most admirable director one can imagine. Working for you and the Health Law Research Centre is always engaging and filled with joy. How valuable your encouragement is – on work, studies and plans for the future – cannot be overstated.

Thanks to the staff and lecturers at the Master of Laws in International Human Rights Law. Attending the master has been a lovely, enriching experience and the highlight of my studies.

Thanks to all wonderful friends that I have met thanks to the studies; the friends from the law programme, the master, student organisations, amanuensis work or other places where it turns out we share this experience. You helped me grow, persist and laugh. However, there is even no point in trying to summarize, in a manner that makes it just, how crucial you have been.

# Abbreviations

CRC	Convention of the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRVS	Civil Registration and Vital Statistics
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FN	Förenta nationerna
Human Rights Committee	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ statute	Statute of the International Court of Justice
ICRMW	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IHRL	international human rights law
NGO	non-governmental organisation
OHCHR	United Nations High Commissioner for Human Rights
SDG(s)	Sustainable Development Goal(s)
UNHCR	United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
UN LEIG	United Nations Legal Identity Expert Group
IHL	International Humanitarian Law
World Bank	World Bank Group
WHO	World Health Organization

# 1 Introduction

## 1.1 Background

Imagine the quandary of not being able to identify yourself. On a daily basis, it would, for instance, be impossible to collect a package at the post office or running errands at the bank. However, even the major aspects of life would be constrained. For example, identification is required to get hold of social benefits, to vote, to inherit after a family member's passing, access education or healthcare, obtain formal employment or seek legal compensation. Thus, the possibility to identify oneself is practically a premise for constructively participate in a modern society in the sense that it is constantly acquired. It is a basis for the action of everyday life (at least in the Western world) and a premise for many of the most fundamental rights.<sup>1</sup> Evidently, it is difficult to imagine what chances in life a person would have without proof and recognition of their identity. Still, of the 7.4 billion people worldwide, an estimated 1.5 billion (20%) do not have an official and legally recognized document as proof of their identity. Most of these people live in the developing world.<sup>2</sup> A disproportionate number of the people affected are women and children. United Nations Children's Fund (UNICEF) reports that around 166 million of children worldwide under the age of five do not possess a birth certificate.<sup>3</sup> If these children were to go missing, the law and its institutions would never know which children these were.

Those lacking identification are commonly individuals and groups which already struggles to enjoy rights and freedoms due to oppression, warfare or economic deficiency. Although the implications of this lack are especially inhibitive in Western or urban communities, the globalization, economic

---

<sup>1</sup> *Smirnova v Russia* [2019] App No 915704 (ECtHR) 95–97.

<sup>2</sup> 'Data | Identification for Development' <<https://id4d.worldbank.org/global-dataset>> accessed 24 May 2021.

<sup>3</sup> 'Despite Significant Increase in Birth Registration, a Quarter of the World's Children Remain "Invisible"' <<https://www.unicef.org/press-releases/despite-significant-increase-birth-registration-quarter-worlds-children-remain>> accessed 26 May 2021.



growth, urbanization and expansion of formal governance triggers the importance of legal identity for all people.<sup>4</sup> UNICEF has highlighted this issue as widespread since ‘even in remote rural areas, proof of identity is required for the acquisition of a mobile phone.’<sup>5</sup> Furthermore, the last decades in India exemplifies this shift to an urge for identity requirements. After the country had made an impressive economic development, wide parts of the population were still excluded from taking part in the economic benefits due to the lack of legal identity. In 2010, 60% of the Indian population were without a bank and only 3% of Indians paid income taxes. At the same time, 40% of the population was unregistered at birth and just 60 million (of 1.3 billion people) had passports.<sup>6</sup> However, in the years that followed, a national identification system, ‘Aadhaar’, was implemented, provided residents or passport holders to voluntarily obtain a 12-digit unique identity number. Although the latest concerns have regarded the system’s privacy issues, it has been widely and necessarily implemented; today known as the world’s largest biometric ID system and one of most sophisticated ID programme in the world.<sup>7</sup>

Even though the far-reaching implications and the large number of people affected by the ‘legal identity gap’<sup>8</sup>, the issue was for long an ignored aspect of the human rights and development regimes.<sup>9</sup> The question of ‘legal identity gap’ gained its real first interest after the adoption of Sustainable

---

<sup>4</sup> K Sudhir and Shyam Sunder, ‘What Happens When a Billion Identities Are Digitized?’ (*Yale Insights*) <<https://insights.som.yale.edu/insights/what-happens-when-billion-identities-are-digitized>> accessed 18 May 2021.

<sup>5</sup> UNICEF, ‘Refworld | A Passport to Protection: A Guide to Birth Registration Programming’ (2013) UGDA Reports 6.

<sup>6</sup> Sudhir and Sunder (n 4).

<sup>7</sup> ‘Inclusive and Trusted Digital ID Can Unlock Opportunities for the World’s Most Vulnerable’ (*World Bank*) <<https://www.worldbank.org/en/news/immersive-story/2019/08/14/inclusive-and-trusted-digital-id-can-unlock-opportunities-for-the-worlds-most-vulnerable>> accessed 26 May 2021.

<sup>8</sup> Christoph Sperfeldt argues that ‘legal identity gap’ or ‘identification gaps’ are emerging phrases within the study of legal identity, see Christoph Sperfeldt, ‘Legal Identity in the Sustainable Development Agenda: Actors, Perspectives and Trends in an Emerging Field of Research’ (2021) 0 *The International Journal of Human Rights* 1, 21.

<sup>9</sup> Bronwen Manby, ‘The Sustainable Development Goals and “Legal Identity for All”’: “First, Do No Harm”’ (2021) 139 *World Development* 105343, 3; Simon Szreter, ‘The Right of Registration: Development, Identity Registration, and Social Security—A Historical Perspective’ (2007) 35 *World Development* 67, 67; Sperfeldt (n 8) 2.

Development Goals (SDGs) 2015.<sup>10</sup> Allocated goal 16, ‘Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’, a target for states to ‘provide legal identity for all, including birth registration’ was included (Target 16.). Consequently, the adoption of the target has brought focus on legal identity as a mechanism crucial for development. The acknowledgement has also been boosted by research which highlights 16.9 has a particularly weighty target, as it is significant for other goals, such as Goal 5: Achieve gender equality and empower all women and girls, Target 1.4: Ensure that the poor and vulnerable have control over land and other forms of property, Target 12.c: Rationalize inefficient fossil-fuel subsidies, Target 16.5: Reduce corruption.<sup>11</sup>

In the recognition of the issues of legal identity is of ‘paramount importance’ in terms of fulfilling the Sustainable Development Agenda, the United Nations Deputy Secretary-General initiated the establishment of the United Nations Legal Identity Expert Group (UN LIEG) in September 2018, supported by the Department of Economic and Social Affairs of the UN Secretariat (UN DESA), United Nations Development Programme (UNDP) and the United Nations Children’s Fund (UNICEF).<sup>12</sup> Besides this group, the numbers of initiatives have been rapidly expanding, including private foundations, word banks, foundations, UN agencies and NGOs.<sup>13</sup> The network of actors providing identification counts to over 20 stakeholders,

---

<sup>10</sup> “‘Every SDG Target Needs a Form of Identification’ – Podcast with Alan Gelb and Mariana Dahan’ (*Center For Global Development*) <<https://www.cgdev.org/blog/every-sdg-target-needs-form-identification-podcast-alan-gelb-mariana-dahan>> accessed 18 May 2021.

<sup>11</sup> United Nations Legal Identity Agenda Task Force, ‘Items for Discussion and Decision: Civil Registration and Vital Statistics’, *Overview of the United Nations Legal Identity Agenda* (2020) 4 <<https://unstats.un.org/unsd/statcom/51st-session/documents/BG-Item3k-Overview-E.pdf>>; “‘Every SDG Target Needs a Form of Identification’ – Podcast with Alan Gelb and Mariana Dahan’ (n 10).

<sup>12</sup> ‘Home — UN Legal Identity Agenda’ <<https://unstats.un.org/legal-identity-agenda/>> accessed 17 May 2021.

<sup>13</sup> Mariana Dahan and Alan Gelb, ‘The Role of Identification in the Post-2015 Development Agenda’ (World Bank 2015) World Bank Working Paper 8 <<https://openknowledge.worldbank.org/bitstream/handle/10986/22513/The0role0of0id050development0agenda.pdf?sequence=1&isAllowed=y>>.

probably more initiatives has emerged than from any other target.<sup>14</sup> The World Bank's Identification for Development (ID4D) belongs to one of the most progressing and wide-reaching initiatives.<sup>15</sup> This project has drawn support from various philanthropic funders, such as the Omidyar Network and the Bill and Melinda Gates Foundation. Other players, for example, are the ID2020, an alliance between governments, NGOs, and the private sector, and the regional African initiative ID4Africa.<sup>16</sup> The private sector, from start-ups to established biometric firms, is, too, involved in the development.<sup>17</sup>

The attention to legal identity has, thus, increased globally and significantly.<sup>18</sup> However, it has been questioned to what extent the newly invested actors, such as the private actors and the World Bank-supported initiatives, have contributed to any improvements. It is claimed that the majority of actors rather justify their agenda in affiliating themselves with SDG target 16.9, than supporting it, as the actors' interest are shown to go beyond the scope of SDG target on legal identity. For example, the World Bank has supported over 70 countries, with total financing nearing \$5 billion, with ID-related projects. However, around less than 5% of this investment has not been directly been implementing legal identity.<sup>19</sup>

The lines and limits of the SDG target's scope are indeed blurry in this stage. There was little reported discussion of the negotiations surrounding this target, probably making it the least controversial adoption. However, in parties' aspiration to implement the target, they have therefore struggled to grasp the meaning of 'providing legal identity', i.e. the scope of it and the

---

<sup>14</sup> "Every SDG Target Needs a Form of Identification" – Podcast with Alan Gelb and Mariana Dahan' (n 10).

<sup>15</sup> 'About Us | Identification for Development' <<https://id4d.worldbank.org/about-us>> accessed 26 May 2021.

<sup>16</sup> *ibid*; 'ID4Africa – Identity for All in Africa' <<https://id4africa.com/>> accessed 18 May 2021.

<sup>17</sup> "Every SDG Target Needs a Form of Identification" – Podcast with Alan Gelb and Mariana Dahan' (n 10).

<sup>18</sup> Manby (n 9) 2.

<sup>19</sup> Dahan and Gelb (n 13) 5.

obligation put on states. This has resulted in different agencies and partners interpreting the SDG target on legal identity according to their priorities; national security, child protection, public health etc.<sup>20</sup>

The current situation points at an ambiguity regarding the intention of the goal and what it means for the goal to be successfully met. What has made things especially complicated is that ‘legal identity’ is not a term in international law.<sup>21</sup> Furthermore, of the definitions suggested, there is little consensus regarding what the term ‘legal identity’ means and the majority approaches to legal identity raises from the development studies and tend to not capture the legal implications of the concept.<sup>22</sup>

## **1.2 Purpose and Contribution to research**

Due to the adoption of SDG target 16.9, legal identity has gained international recognition as an important aspect of economic and sustainable development. However, the current approaches to legal identity still derive from a range of interests and understandings. The concept is increasingly argued as a human right, yet the definition of ‘legal identity’ remains undefined in international law. This ambiguity highlights the need to engage with the way legal identity relates to legal practice. For the purpose of this thesis, the aim is to better understand legal identity particularly in relation to the field of international human rights law (IHRL). This includes exploring and critically analysing if and how legal identity is regulated in IHRL, how it has been approached by different actors in the human rights field such as the UN, NGO’s, academics and experts, as well as how it has been implemented by states. Importantly, the aim is to consider the implications for rights-bearing in general, as legal identity is described to ‘facilitate the access to rights’ and acting as an

---

<sup>20</sup> Manby (n 9) 1.

<sup>21</sup> Christoph Sperfeldt, ‘Legal Identity and Statelessness in Southeast Asia - Cambodia’ (2021) 2 <<https://reliefweb.int/report/cambodia/legal-identity-and-statelessness-southeast-asia>> accessed 18 May 2021; Katharine MA Fortin, ‘To Be or Not to Be?: Legal Identity in Crisis in Non-International Armed Conflicts’ (2021) 43 Human Rights Quarterly 29, 29–30.

<sup>22</sup> *ibid.*

‘inclusionary mechanism’. I change this view on legal identity, suggesting that it is also an ‘exclusionary mechanism’. Therefore, the part of states’ practice focuses particularly on where there are tensions on function in practice in international human rights law. Specifically, there are two case studies, one on national security agenda and one on undocumented migrants – areas in which states have large discretion on ensuring human rights obligations.

As the discussion on legal identity is just emerging in International Human Rights Law, a better understanding of legal identity is highly in question.<sup>23</sup> Furthermore, the many efforts of providing legal identity resulting from the Agenda 2030 warrant a critical assessment of the human rights implications to avoid potential pitfalls in this process. A human rights approach to development work, which has for long been endorsed by the UN, also supports the importance of this perspective.<sup>24</sup> Thus, exploring legal identity in international human rights law contributes to the conversations of SDG target 16.9 with aspects such as state obligations, rights-holding, human dignity and the interplay with other human rights. In light of these human rights concepts, useful insights on legal identity can be offered, just as legal identity raises broader questions about IHRL regime and its inherent tensions.

## **1.3 Research question**

### **Overreaching question**

- What is the understanding and impact of the notion ‘legal identity’ in the legal framework of international human rights law?

### **Sub-questions**

---

<sup>23</sup> Sperfeldt (n 8) 1.

<sup>24</sup> UNSDG Human Rights Working Group, ‘The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies’ (2003); ‘UNSDG | Human Rights-Based Approach’ <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>, <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 26 May 2021.

- How is ‘legal identity’ commonly defined and approached by different actors in the human rights field such as the UN, academics and experts? (Chapter 2)
- In what aspects, or if all, are ‘legal identity’ regulated in the IHRL framework? (Chapter 3)
- With a ‘différance rationale’, what does the states’ practice of implementing legal identity show about the function of the concept in IHRL? (Chapter 4)

## 1.4 Method and Materials

The research is partly based on a ‘doctrinal research method and partly on analytic research method.<sup>25</sup> The doctrinal method emphasises the concept of doctrine, which is widely supported as a source of law in international law.<sup>26</sup> The recognition of doctrine is for example found in Article 38(1d) of the ICJ statute<sup>27</sup>, a document regarded as the most authoritative and complete list of international legal sources.<sup>28</sup> The method entails close analysis of the authoritative texts intrinsic to the discipline of law. This process includes applying deductive, indicative and analogical techniques. In more straightforward terms, however, the doctrinal method can be described as a search for: what is the law?<sup>29</sup>

As ‘legal identity’ is not existing as a term in treaty law, codified human rights (just as uncodified) standards are interpreted for deductive reasoning or analogical conclusions. The treaty interpretation can be deduced from articles 31 and 32 of the Vienna Convention on the Law of Treaties<sup>30</sup>, which both

---

<sup>25</sup> P Ishwara Bhat, *Analytical Legal Research for Expounding the Legal World* (Oxford University Press) 146,172.

<sup>26</sup> Egan Suzanne, ‘The Doctrinal Approaches to Research’ in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018) 25.

<sup>27</sup> Statute of the International Court of Justice, 26 June 1945, UNTS 993 70.

<sup>28</sup> Malcolm N Shaw, *International Law* (8th edn, Cambridge University Press 2017) 70.

<sup>29</sup> Suzanne (n 26) 25.

<sup>30</sup> Vienna Convention on the Law of Treaties (adopted 3 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

subscribe to the principle that a treaty must be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose.’<sup>31</sup>

The ‘analytical research’ aims, according to P. Ishwara Bhat, ‘at exposition of law and legal concepts by looking at its source, the power behind it, the interconnections with norms at different hierarchies, and the force behind it which may reflect social recognition.’<sup>32</sup> It particularly considers the important aspect of language to understand social contexts and focus on its silences and relations to understand its meaning. Thus, as soon as the law for the subject is located, the analytical research leads forward to find the meaning of the law through analysis and synthesis.<sup>33</sup> This latter part of the method relates particularly to theory applied (presented in the following sub-chapter) and is mainly used in chapter 4.

Finally, the material employed in this thesis derives mainly from the SDG agenda discussion, from reports to scholarly texts. The UN LIEG’s internal documents<sup>34</sup> on operational definitions on legal identity and relating components provides an important foundation. However, most part of the thesis is built on scholarly texts and research reports. Amongst the cited scholars that are particularly influential of this work are Bronwen Manby’s article on legal identity issues in the African Region ‘The Sustainable Development Goals and “Legal Identity for All”: “First, Do No Harm”’ (2021)<sup>35</sup>, Simon Szreter’s article in history and economics ‘The Right of Registration: Development, Identity Registration, and Social Security—A Historical Perspective’ (2007)<sup>36</sup>, Katharine Fortin’s article on legal identity in conflict zones ‘To Be or Not to Be?: Legal Identity in Crisis in Non-International Armed Conflicts’ (2021)<sup>37</sup> and González López L and others,

---

<sup>31</sup> *ibid* article 31(1).

<sup>32</sup> Bhat (n 25) 170.

<sup>33</sup> *ibid*.

<sup>34</sup> United Nations Legal Identity Agenda Task Force (n 11).

<sup>35</sup> 139 World Development 105343.

<sup>36</sup> 35 World Development 67.

<sup>37</sup> 43 Human Rights Quarterly 29.

report for the UN ‘Civil Registration, Human Rights, and Social Protection in Asia and the Pacific’ (2012)<sup>38</sup>. For the theoretical discussion, critical scholars from the IHRL is providing a central ground for the discussion. Within this are Alison Kesby’s book ‘The Right to Have Rights: Citizenship, Humanity, and International Law’ (Oxford University Press 2012) and Yussef Al Tamimi’s article ‘Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law’<sup>39</sup> included. In terms of jurisprudence, this is particularly limited to the European Court of Human Rights (ECtHR). The reason for this is that the literature guided me in this direction, the formal limitations and that there is a well-developed case law on the area from ECtHR.

## 1.5 Theoretical approach

Approaching a research topic with a bias is inevitable. Ultimately, it is one’s experiences and knowledge that decides how a research question is expressed.<sup>40</sup> What matters is, it is argued by Antonio Cassese, that one ‘should make it explicit and clear’ that decisions are made on the ground of one’s personal bias and not an ‘objective legal precedence’.<sup>41</sup> It is therefore helpful to understand theories as ‘methodological packages’, clarifying one’s biases.<sup>42</sup> This view of theories is often overlooked by legal scholars. However, Jean d’Aspremont suggest that no genuine distinction can be made between legal methodology and legal theory as theory is as much ‘cognitive tools, techniques of argumentation’.<sup>43</sup> Legal theory may then be used in conjunction with for instance doctrinal studies (which is applied as a method for this thesis).<sup>44</sup>

---

<sup>38</sup> 29 Asia-Pacific Population Journal 75.

<sup>39</sup> Yussef Al Tamimi (2018) 27 Social & Legal Studies 283.

<sup>40</sup> Andrea Bianchi, *International Law Theories* (Oxford University Press 2016) 3.

<sup>41</sup> Antonio Cassese, *Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Oxford Hart 2011) 542 cited in Suzanne (n 26) 36.

<sup>42</sup> Lee McConnell, ‘Legal Theory as Research Methodology’ in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018) 45.

<sup>43</sup> Jean d’Aspremont, *Epistemic Forces in International Law* (Edward Elgar Publishing 2015) 178 cited in *ibid*.

<sup>44</sup> McConnell (n 42) 45.



As this thesis is studied in the field of international human rights law, some clarification is required on my approach to this legal field is acquired. Firstly, I presume international human rights law as a regime which closely connected to naturalism, including rationale of ‘inherent human right’ in every individual and ‘human dignity’. Secondly, as many human rights scholars, I lean towards interpreting the law in favour of the individual in circumstances of ambiguity. Lastly, I aim to meet the criterion of a human rights based approach as it is argued that research on human rights shall meet these requirements.<sup>45</sup>

Much of the thesis is inspired by critical legal (human rights) scholars. As legal identity is seen as an instrument through which achieving change and development will be possible, my intuition is to challenge this through with the perspective that views the law as a tool of power dynamics and political change. This can be found within different orientations of critical legal studies, all of which are however difficult silo.<sup>46</sup> However, generally, critical legal theory is particularly stating that the law has inherent social biases and that the law is necessarily intertwined with social issues. Postmodernist influences would challenge the narrative of ‘progress and emancipation’, which are terms familiar with the Human Rights language.<sup>47</sup> As claimed by

---

<sup>45</sup> Rhona Smith, ‘Human Rights Based Approaches to Research’ in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018) 6. Rhona argues that three principles are commonly understood as indicators for the assessment of whether research fulfil a human rights based approach. The first requirement is that the research should advance the realization of human rights. This can for instance entail research that contributes to a better understanding of human rights through a doctrinal analysis. The second requirement is, put in simple terms, to follow the ‘do no harm’-principle. Thus, the studies need to respect the standards of human rights. The final principle is that the research should ideally contribute to the capacity development of duty bearer and rights holders. If the aim with the research is to develop an understanding of human rights, this requirement is fulfilled as long as this is executed in a manner that is directed towards these subjects. However, a master thesis does not typically have the form of a, for example, policy document, which makes me uncertain to what extent a master thesis can make a similar impact. Still, the main actors in discussion for this thesis are the duty-bearer and the rights-holder. Besides this aspect, I see no further warnings on how this work will not have a human rights-approach, which is why I consider this thesis, at least, leaning towards having a human rights based-approach.

<sup>46</sup> McConnell (n 42) 47.

<sup>47</sup> *ibid* 65.

one of the postmodernist pioneers, Michel Foucault, ‘legal processes’ must rather be seen as rearrangement of power relations. ‘Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violence in a system of rules and thus proceeds from domination to domination’ he argues.<sup>48</sup>

The dominating perspective in these chapters is deriving from another postmodernist thinker, namely, Jacques Derrida and a part of his theory of ‘deconstruction’.<sup>49</sup> This theory is not an analysis, a critique nor something able to be transformed into a method. It is rather a process, highly self-questioning, considering the *structure* of meaning. As for Derrida, the meaning of a word is a function of the distinctive contrasts it displays with other, connected meanings, a process he coined as ‘différance’.<sup>50</sup> While this concept initially arose from Derrida’s focus on language, deconstruction, including ‘différance’, is what he described as a ‘problematization of the foundation of law, morality and politics.’<sup>51</sup> In fact, studies with a rationale of ‘deconstruction’ intend to ‘culminate in the problematic of law and justice.’<sup>52</sup> Accordingly, in the last decades, the theory has been widely developed upon in relation to legal thinking and concepts of ‘identity’.<sup>53</sup> These ideas are further described in the thesis as they are applied.

---

<sup>48</sup> Michel Foucault, ‘Nietzsche, Genealogy, History’, *Hommage a Jean Hyppolite* (Presses Universitaires de France 1971) 151.

<sup>49</sup> ‘Différance | Linguistics’ (*Encyclopedia Britannica*) <<https://www.britannica.com/topic/differance>> accessed 18 May 2021.

<sup>50</sup> *ibid.*

<sup>51</sup> Jacques Derrida, ‘Force of Law: The Mystical Foundation of Authority’ in Cornell et al (Eds) *Deconstruction and the Possibility of Justice* (Routledge, 1992) 8’ in Drucilla Cornell, Michel Rosenfeld and David Gray (eds), *Deconstruction and the Possibility of Justice* (Routledge 1993) 8.

<sup>52</sup> *ibid.* 7.

<sup>53</sup> Catherine Turner, ‘Jacques Derrida: Deconstruction’ (*Critical Legal Thinking*, 27 May 2016) <<https://criticallegalthinking.com/2016/05/27/jacques-derrida-deconstruction/>> accessed 18 May 2021; Yussef Al Tamimi, ‘Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law’ (2018) 27 *Social & Legal Studies* 283, 85.

## 1.6 Limitations

First, the aim of the thesis is not to provide an absolute definition of ‘legal identity’ (as seen in chapter 1.2, it is rather to expose the complexity underlying the notion of legal identity in IHRL and the different interests it has been used to promote). Secondly, several themes are frequently discussed in relation to ‘identity’ in law or legal identity. Those themes are for instance privacy issues, statelessness, digitalization of identification or data protection of biometrics. It can also be ‘identity’ studied from a more personal level, for example, the legal definition of genders raised by queer feminists.<sup>54</sup> While these are themes highly relevant for legal identity and might be touched upon as examples, the research problem does not trigger further questions on these topics. Thirdly, the causes and consequences of the lack of legal identity are not questions for discussion of this thesis, although these aspects are mentioned indirectly. Neither does the thesis claim to answer questions limited to the SDG of legal identity, nor this target’s ‘efficiency’. Finally, this is not a thesis that suggests law or compares (national) legal frameworks. As there are concepts under discussion, the legal study is rather concerned with the use and application of these concepts.

## 1.7 Outline

The thesis starts by looking at how legal identity is narrated and defined given from different understandings of legal identity in policies and the literature (chapter 2). Secondly, the role of legal identity in international human rights law is studied and analysed. (chapter 3). Thirdly, the thesis accounts for the states’ implementation of ‘legal identity’, focusing on the human rights inquiries raised by these results and explaining them, too, from a rationale of ‘différance’, a lens through which broader questions of power mechanisms and human rights protection are analysed (chapter 4). Lastly, the three research areas are concluded together in the last chapter (chapter 5).

---

<sup>54</sup> Compare, for instance, Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 2011).

## 2 Legal identity in UN policies and the litterature

This chapter aims at unpacking the notion of legal identity. Because there is no definition of legal identity in international law, the concept has been used by different actors to inform legal argumentation and policy making. A closer look at it and its current uncertainties are evident as a background to this thesis. How is it different from other more established concepts? How has it been narrated and approached? These are examples of questions initiating this chapter. The starting point is the UN's operational definition and the later subsections zoom in on various understanding and the general discourse.

### 2.1 UN operational defintions on the legal identity agenda

#### 2.1.1 Legal identity

In 2019, the UN Legal Identity Expert Group decided on an operational definition of legal identity Group for their internal use. The definition is, thus, not official or recognized by states. It may however demonstrate initial work for such a definition and it is starting to be referred to in the literature.<sup>55</sup> Thus, in this definition, legal identity is defined 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>56</sup>

This definition also comes with several procedural clarifications to provide a holistic approach to the concept. First, ‘in the absence of birth registration, legal identity may be conferred by a legally recognized identification

---

<sup>55</sup> Compare e.g. Fortin (n 21) 31.

<sup>56</sup> United Nations Legal Identity Agenda Task Force (n 11) 13.

authority'. Secondly, legal identity is retired by the issuance of a death certificate by the civil registration authority upon registration of death. Lastly, the system in which these processes are secured must, from birth to death, be linked to the civil registration system. When this is not the case, the lack of legal identity can vary from absolute; which reflects a situation where the person has never been registered, to relative; when for example papers or records have been issued incorrectly or disappeared.<sup>57</sup>

Apart from the operational definition, the SDG target 16.9 has a connecting indicator: 'the proportion of children under 5 years old whose births have been registered with a civil authority.'<sup>58</sup> As the indicator is supposed to measure the progress of the realization, this points at birth registration being a central factor of legal identity (as the operational definition also do). However, the common conception of legal identity approaches indeed the entire lifetime and has therefore a broader function, not limited to the near future from birth.<sup>59</sup> Finally, legal identity must also be seen to the objective of the SDG, which is interpreted as no one should be denied access to social or economic participation, as well as to public services, for lack of legal recognition or proof thereof.<sup>60</sup> In fact, the earlier drafts of SDG 16.9 proposed the target under the same goal as 'public services'.<sup>61</sup>

According to the SDG target 16.9, legal identity should be provided by states, to all *residents*, thus, not only citizens, in an inclusive and non-discriminatory manner from birth to death.<sup>62</sup> This has the World Bank clarified as 'legal,

---

<sup>57</sup> *ibid* 14.

<sup>58</sup> 'SDG Indicators — SDG Indicators'

<<https://unstats.un.org/sdgs/metadata/?Text=&Goal=16&Target=16.9>> accessed 25 May 2021.

<sup>59</sup> Alan Gelb and Bronwen Manby, 'Has Development Converged with Human Rights? Implications for the Legal Identity SDG' (*Center For Global Development*) <<https://www.cgdev.org/blog/has-development-converged-human-rights-implications-legal-identity-sdg>> accessed 18 May 2021.

<sup>60</sup> Dahan and Gelb (n 13) 7.

<sup>61</sup> 'Working Document for 5-9 May 2014, Eleventh Session of the Open Working Group on SDGs'

<[https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc\\_0205\\_additionalsupporters.pdf](https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc_0205_additionalsupporters.pdf)>.

<sup>62</sup> United Nations Legal Identity Agenda Task Force (n 11) 14.

procedural, and social barriers to enroll in and use identification systems should be identified and mitigated, with special attention to poor people and groups who may be at risk of exclusion for cultural, political or other reasons’ (groups such as women, children, rural populations, the forcibly displaced, and stateless persons).<sup>63</sup> Moreover, legal identity needs to be implemented in accordance with international law and a state’s national legislative frameworks. The systems for identification or the identity data should neither be used as a tool for discrimination nor to infringe on individual or collective rights.<sup>64</sup>

Finally, and not the least important is that the UN LIEG focuses on ensuring legal identity ‘in one whole system’. This emphasizes a holistic approach to the relating component of legal identity, namely civil registration, vital statistics and identity management.<sup>65</sup> For the complete view of legal identity, these correlating features are, thus, described in detail in the two following sections.

### **2.1.2 Proof of legal identity and identity management**

For efficient and accessible enjoyment, one’s legal identity ought to be evidenced. In the literature and by the UN LIEG, this evidence is referred to as ‘proof of legal identity’ and defined as a type of credential.<sup>66</sup> In principle, it can take the physical form as paper ID, driver’s license, bank card, birth certificate or passport, and in lesser physical form; biometric data, unique identifying number or even a password.<sup>67</sup> Traditionally, legal identity has (in the Western world) taken the form of a passport or a national identity card,

---

<sup>63</sup> World Bank, ‘Principles on Identification for Sustainable Development: Toward the Digital Age’ <<http://documents1.worldbank.org/curated/en/213581486378184357/pdf/Principles-on-Identification-for-Sustainable-Development-Toward-the-Digital-Age-Second-Edition.pdf>> accessed 24 May 2021.

<sup>64</sup> *ibid.*

<sup>65</sup> United Nations Legal Identity Agenda Task Force (n 11) 20.

<sup>66</sup> *ibid.* 16.

<sup>67</sup> Mia Harbitz and María del Carmen Tamargo, ‘The Significance of Legal Identity in Situations of Poverty and Social Exclusion: The Link between Gender, Ethnicity, and Legal Identity’ (2009) <<https://publications.iadb.org/en/significance-legal-identity-situations-poverty-and-social-exclusion-link-between-gender-ethnicity>> accessed 18 May 2021.

however, legal identity can be proved in multiple ways.<sup>68</sup> Disassociating proof of legal identity with national credential would in fact make more of a suiting description as national status is not an important criterion for the essential purpose of legal identity. It would also exclude many states' identification systems as sufficient; for example, India's Aadhaar system does not denote national status.<sup>69</sup>

Proof of legal identity is needed to identify oneself, a process which at least advanced economic systems and strong states require daily. This everyday necessity of identification has made proof of legal identity the centre of debate considering legal identity and development. It has also initiated other indicator for the SDG target by the World Bank, measuring the possession of a *credential* for 'legal identity'.<sup>70</sup> Thus, this alternative indicator is argued to be a more appropriate measurement of the goal.<sup>71</sup>

The standards on proof of legal identity are mainly left to national discretion and therefore difficult to define in general. The UN LIEG defines proof of legal identity as a credential, which needs to be 'in accordance with emerging international norms and principles.'<sup>72</sup> Besides the fact that it is questionable to refer to hypothetical international regulations, there is indeed no other internationally recognized standard of identity credentials of yet than that of the International Civil Aviation Organization (ICAO).<sup>73</sup> The World Bank has set principles for 'Identification for sustainable development' as a part of their assistance in the implementation of the SDG target. This include for instance standards on non-discrimination, security, sustainability and oversight.<sup>74</sup>

---

<sup>68</sup> Commonwealth Secretariat, 'Legal Identity for All' (2017) 43 Commonwealth Law Bulletin 489, 490.

<sup>69</sup> Dahan and Gelb (n 13) 5.

<sup>70</sup> 'Data Visualization | Identification for Development' <<https://id4d.worldbank.org/global-dataset/visualization>> accessed 25 May 2021.

<sup>71</sup> 'The Criterion Problem: Measuring the Legal Identity Target in the Post-2015 Agenda' <<https://blogs.worldbank.org/digital-development/criterion-problem-measuring-legal-identity-target-post-2015-agenda>> accessed 25 May 2021.

<sup>72</sup> 'Home — UN Legal Identity Agenda' (n 12).

<sup>73</sup> 'ICAO TRIP' <<https://www.icao.int/Security/FAL/TRIP/Pages/default.aspx>> accessed 25 May 2021; Dahan and Gelb (n 13).

<sup>74</sup> Word Bank (n 63).

However, the standards have been described more as a first step towards implementation of more digital solutions of official ID, as the World Bank has been pushing for digital ID since 2016.<sup>75</sup> Thus, the international community is not taking the lead in this development and the national discretion add to the existing ambiguity. Accordingly, the technology businesses have found an opening to explore and shape the identification demands of the future.<sup>76</sup>

A proof of legal identity must be secured by a government-authorized entity and its systems for managing information and documents associated with such identity.<sup>77</sup> By the UN LIEG, this process is defined as ‘identity management’.<sup>78</sup> The term is not internationally agreed upon yet, neither seems it to have found its way in the literature yet. However, identity management needs not the least to be acknowledged as it constitutes a large part of the ‘implementation of legal identity’, which is a central topic for this thesis.

### 2.1.3 Civil registration

The UN Legal Identity Expert Group defines civil registration as ‘the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population, as provided through decree or regulation in accordance with the legal requirement in each country.’<sup>79</sup> There are no particular requirements of the form and character of a civil register and there are of today wide national and cultural differences. In some contexts, the register might be collected to one single national system, and in others, there are multiple registrations, which can, or cannot, connect all information.<sup>80</sup>

---

<sup>75</sup> ‘The Sustainable Development Goals, Identity, and Privacy: Does Their Implementation Risk Human Rights?’ (*Privacy International*) <<http://privacyinternational.org/long-read/2237/sustainable-development-goals-identity-and-privacy-does-their-implementation-risk>> accessed 18 May 2021.

<sup>76</sup> *ibid*; ‘Legal Identity: A Proxy for Inclusion’ (*Thales Group*) <<https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/inspired/legal-identity>> accessed 25 May 2021.

<sup>77</sup> United Nations Legal Identity Agenda Task Force (n 11) 18.

<sup>78</sup> *ibid*.

<sup>79</sup> *ibid* 19.

<sup>80</sup> Manby (n 9) 3.



For the registration to be 'civil registration', the main purpose must be to establish the documents provided by the law. Accordingly, civil registration relates strongly to have one's identity recognized, as well as the relationship to significant other and the state.<sup>81</sup> More importantly, the UN LIEG defines legal identity as a concept 'conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth.' Given this understanding, civil registration is indeed a prominent component for the formation of legal identity. It is then the process of the civil registry that transforms elements of 'identity' to 'legal identity'. Moreover, for this process to be efficient, it is described in the literature that the information must be 'publicly recognized, securely registered, and accessible for personal use.'<sup>82</sup>

An outcome of civil registration which has a particularly strong connection to legal identity is Virtual Statistics, often referred to as 'Civil registration and Virtual Statistics' (CRVS).<sup>83</sup> Initiating from an individual's civil registration, 'virtual statistics' is the part which collects information of 'vital events in a lifetime of a person as well relevant characteristics of the events themselves and of the person and persons concerned.'<sup>84</sup> The source of statistics deriving from this registration is thus essential for good governance. The WHO maintains that 'Well-functioning CRVS systems are[...] central to achieving the ambition of leaving no one behind, including marginalized and hard-to-reach populations.'<sup>85</sup> Therefore, CRVS typically involves a range of actors, such as the ministries of interior/home affairs, the national statistics office, health agencies and development partners.<sup>86</sup> However, CRVS is mainly

---

<sup>81</sup> Imke Harbers, 'Legal Identity for All? Gender Inequality in the Timing of Birth Registration in Mexico' (2020) 128 *World Development* 104778, 1; Szreter (n 9) 67.

<sup>82</sup> Szreter (n 9).

<sup>83</sup> 'Civil Registration: Why Counting Births and Deaths Is Important' <<https://www.who.int/news-room/fact-sheets/detail/civil-registration-why-counting-births-and-deaths-is-important>> accessed 18 May 2021.

<sup>84</sup> United Nations Legal Identity Agenda Task Force (n 11) 19.

<sup>85</sup> 'Civil Registration: Why Counting Births and Deaths Is Important' (n 83).

<sup>86</sup> Samuel Mills, Jane Kim Lee and Bahie Mary Rassekh, 'A Multisectoral Institutional Arrangements Approach to Integrating Civil Registration, Vital Statistics, and Identity Management Systems' (2019) 38 *Journal of Health, Population and Nutrition* 19, 2.

critical to legal status.<sup>87</sup> Already in the first version of the UN Handbook of Vital Statistics Methods (1955), the primary value of civil registration was established as legal.<sup>88</sup> Thus, the statistical aim is motivated in that it establishes the formal relationship with the State and provide individuals with a connection to their specific others.

## 2.2 Approches to legal identity in research

What can make the scope of legal identity hard to grasp is that the concept is currently a tool for different motives.<sup>89</sup> Katherine Fortin holds that ‘just as there are different approaches to the definition of legal identity, so is there 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.’<sup>90</sup> The research which focuses on the history of registration and identification have emphasized the negative, as well as positive contributions of registers of people in general; both as a mean to empower authoritarian regimes and to enable public and commercial society. The development literature focuses on the registration programmes for a well-functioning bureaucracy and economic empowerment. In both history and development, legal identity is a tool for emphasizes the importance of collecting vital statistics and or reaching development outcomes.<sup>91</sup> In the international human rights law discourse, the literature on legal identity emphasis the centrality of official recognition to the claim of rights and obligations. It associates legal identity as a factor in social protection and inclusion, or not rarely, as a tool to combat statelessness and provide citizenship.<sup>92</sup>

---

<sup>87</sup> Statistical Office of the United Nations, ‘Handbook of Vital Statistics Methods’ (1955) ST/STAT/SERFI7.

<sup>88</sup> *ibid* 5.

<sup>89</sup> Debra Ladner, Erik G Jensen and Samuel E Saunders, ‘A Critical Assessment of Legal Identity: What It Promises and What It Delivers’ (2014) 6 *Hague Journal on the Rule of Law* 47, 50–52; Sperfeldt (n 8) 2.

<sup>90</sup> Fortin (n 21) 31.

<sup>91</sup> Ladner, Jensen and Saunders (n 89) 51.

<sup>92</sup> Fortin (n 21) 49.

In the following sub-sections, a closer study of some important approaches is provided. First, the term ‘legal identity’ is interpreted in light of the literature on human rights law and the ambiguities which have been raised in this sense. Secondly, the general discourse of legal identity and its SDG target that is dominating research is exemplified. This aims to highlight the relevant aspects of legal identity in relation to international human rights law particularly.

### **2.2.1 Legal identity narrated in the human rights research**

The majority of scholars and advocates agreeing upon legal identity being a form of acknowledgement of an individual’s recognition before the law as it facilitates ‘the realization of specific rights and corresponding duties’.<sup>93</sup> For example, Katherine Fortin holds that in international law, the term ‘legal identity’ seems to refer specifically to legal personhood and the identification thereof. However, by NGOs and in certain literature, legal identity is acknowledge as a nation that regulates an individual’s relationship or disassociation from the State, or certain social groups. For example, several human rights scholars have acknowledged a definition of legal identity where it ‘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>94</sup> Furthermore, amongst human rights scholars, legal identity is often portrayed as a multidimensional concept, operating on a spectrum.<sup>95</sup> Thus, apart from the more given elements, such as name, sex, personal data and date of birth, legal identity has come to be associated with multiple attributes, including data such as credit and employment history, qualifications, and health history and

---

<sup>93</sup> Lucía González López and others, ‘Civil Registration, Human Rights, and Social Protection in Asia and the Pacific’ (2012) 29 *Asia-Pacific Population Journal* 75, 79; Secretariat (n 68) 500.

<sup>94</sup> Gelb and Manby (n 59).

<sup>95</sup> Fortin (n 21) 34.

civil status.<sup>96</sup> (In this aspect, legal identity can play a significant role in issues of statelessness, returning to this in chapter 3.)

A complicated factor of the broader understanding of legal identity is what components form a potential threshold for legal identity. This is often left unspecified in recommendations or research, probably because it is yet an area for national legislation and dependent on different interests.<sup>97</sup> Moreover, the terminology in the literature is also shifting in this aspect. Sometimes, a characteristic, such as age, is referred to as ‘legal identity’ on its own, and in other cases, it is rather *an element* of legal identity.<sup>98</sup> However, the biggest elephant in the room in terms of human rights and registration of identity, is that legal personhood should not at all require a registration theoretically. An individual’s legal personhood – their ability to be a rights-bearer – begins, in principle, at the moment of birth and ends at death unconditional of registration. However, Fortin explains that it remains that legal personhood will not be recognized by States unless a person is registered at birth or is later permitted legal documentation and ‘it may be out of this conundrum that the wider concept of “legal identity” was born’.<sup>99</sup> Thus, legal identity acknowledged this gap between theory and practice and act as formal recognition of statuses, although to which extent this is the case is still unclear.

Furthermore, it is not just what type of information to be registered that is uncertain considering legal identity. It is even contested if legal identity requires to be registered at all. For instance, Bronwen Manby argues that ‘A person’s ‘legal identity’ [...] should be separated from the question of whether they have been formally identified and registered by state authorities [...]’.<sup>100</sup> She speaks of legal identity merely as ‘the recognition of... identity in law’, differentiating it from identification, which is to her the process that

---

<sup>96</sup> Secretariat (n 68) 490.

<sup>97</sup> Institute on Statelessness and Inclusion, ‘Sustainable Development Goal 16.9: “Legal Identity”, Nationality and Statelessness’ (2018) 9–13 <<https://files.institutesi.org/Legal-identity.pdf>>.

<sup>98</sup> *ibid.* In this thesis, the latter view is used for pedagogical reasons, and legal identity is a person’s combination of these characteristics.

<sup>99</sup> Fortin (n 21) 50.

<sup>100</sup> Manby (n 9) 3.

distinguishes an individual from others.<sup>101</sup> Accordingly, legal identity would be a concept which every living human possesses to various levels, but might not be registered for everyone. For instance, a person which has not been registered as a family member would still have the legal identity to inherit as a family member, if this was the law in the specific case. However, this view of legal identity does not force the state to ‘facilitate the access to rights and services’.<sup>102</sup> Therefore, Manby argues that ‘providing legal identity’ in SDG 16.9 must be interpreted as for states to provide ‘officially recognized legal identity’ and ‘proof of legal identity’. Nonetheless, Manby’s definition stands in direct contrast to the UNLIEG’s definition on legal identity as this mentions it as ‘conferred through registration [...]’.<sup>103</sup> However, for the purpose of this thesis, it is rather the UN view that is used. The significant differences of the interpretation highlight nonetheless the freshness and uncertainties of this specific topic in the literature.

### **2.2.1 The discourse on ‘providing legal identity’ steaming from development studies and humanitarian field**

The incitement for raising the importance of legal identity has for long derived from ambitions of economic growth as a factor for sustainable development. For example, it has been argued that legal identity has historically been central in the economic growth in Western communities. It was, for example, the identity registration system, adapted to and used by citizens, that was the key factor in economic development in early modern Britain.<sup>104</sup> Hence, these kinds of systems would be beneficial for the economic development of today’s poorest areas, as it is also in these contexts the ‘legal identity gap’ is the most subsisted. Furthermore, the Aadhaar system, which was implemented about a decade ago, demonstrate the necessity of legal identity in economic development. As people increasingly

---

<sup>101</sup> *ibid* 50.

<sup>102</sup> González López and others (n 93) 29; Secretariat (n 68) 50.

<sup>103</sup> United Nations Legal Identity Agenda Task Force (n 11) 13.

<sup>104</sup> Szreter (n 9) 72.

urbanized the cities in India to enhance their livelihood, more people required the ability to identify themselves. In a village, everyone knows everyone, but outside the village, it is harder to claim who you are. In Yale Insights, economics professor K. Sudhir explains that ‘without identification, you couldn’t rent a house, you couldn’t get a bank account, you could hardly live any aspect of life that we assume, naturally, we should all get to live.’<sup>105</sup> Accordingly, this comment illustrates how the ‘social contract’ in a modern world requires individuals to be able to identify themselves.<sup>106</sup> Thus, having legal identity is a prerequisite for being a part to the ‘social contract’.<sup>107</sup> Nonetheless, the economic perspective of legal identity makes it not a coincidence that legal identity was articulated as a SDG target. One of aim of the SDG goals is just to ‘not leave anyone behind’ in the global economic growth.<sup>108</sup>

During the drafting of the Sustainable Development Goals in 2014, legal identity was explained as a ‘solvable’ problem.<sup>109</sup> However, it is important to understand that weaknesses in civil registration systems or inadequate legal frameworks are just one of many reasons for the lack of legal identity. This might be the aspect that lawyers and advocates naturally focus on. However, research points at causes of non-absolute or total lack of legal identity are context-specific and interconnected. In the context of Southeast Asia, for example, common causes relate to colonial legacies, gender discrimination; mobile lifestyles and the lack of protections for migrants.<sup>110</sup> Thus, the lack of legal identity tend to affect marginalized groups and this view might imply

---

<sup>105</sup> Sudhir and Sunder (n 4).

<sup>106</sup> Harbitz, M and Boekle-Giuffrida, B. (2009) Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality, Inter-American Development Bank Working Paper, Washington, USA, p.18.

<sup>107</sup> Mia Harbitz and Bettina Boekle-Giuffrida, ‘Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality’ (2009) 18 <<https://publications.iadb.org/publications/english/document/Democratic-Governance-Citizenship-and-Legal-Identity-Linking-Theoretical-Discussion-and-Operational-Reality.pdf>> accessed 18 May 2021.

<sup>108</sup> ‘UNSDG | Leave No One Behind’ <<https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind>> accessed 26 May 2021.

<sup>109</sup> Statement by Canada/Israel/US team on Means of Implementation; Peaceful Societies and Capable Institutions 2014.

<sup>110</sup> Sperfeldt (n 21) 2.

that legal identity is not a universal treatment for people not accessing rights and services.

The research show various degrees on the complexities around the effects of legal identity. A wide range of the research show that at least *the lack of* legal identity can challenge both the development and individual emancipation. Political scientist Imke Harbes argues that the overall research on birth registration suggests that the registration, or lack of it, does not merely reflect existing inequality, but play a critical role in reinforcing them.<sup>111</sup> In particular, the lack of legal identity seems to affect the already discriminated, poor or marginalized groups the hardest. For women, children and for persons with disabilities, access to education, legal protection and health services is heavily dependent on certificates of birth, marriage and divorce.<sup>112</sup> Women's economic situation tend also to be strengthened with proof of legal identity, as it enables claims to property, financial assets or social services.<sup>113</sup>

In times of conflict or forced migration, the need for legal identity is nonetheless central for individuals. Fortin holds that 'the situation in Iraq, Ukraine and Syria has demonstrated that the ability to identify oneself as a legal person is a necessary condition for the fulfilment of other rights.' Furthermore, providing legal identity to unregistered children (with a documentary link to their country of origin) has been held to promote durable solutions, i.e. solutions aimed at enabling refugees to rebuild their lives in dignity and peace. This was for instance the case thanks to an amendment in Thailand's legislation in 2008, which allowed for birth registry regardless of the nationality or immigration status of the child's parents. The amendment resulted in that 1,922 children in displacement camps on the border between Thailand and Myanmar were registered at birth and issued birth certificates under the time of barely two years.<sup>114</sup>

---

<sup>111</sup> Harbers (n 81) 3.

<sup>112</sup> González López and others (n 93) 78.

<sup>113</sup> Harbers (n 81) 3; "Every SDG Target Needs a Form of Identification" – Podcast with Alan Gelb and Mariana Dahan' (n 10).

<sup>114</sup> González López and others (n 93) 86.

Simultaneously, there are also implications on to what extent legal identity resolves contemporary inequalities in practice. For example, while there are times that the correlation between birth registration and access to rights and benefits are strong, birth registration is sometimes not enough on its own to provide this.<sup>115</sup> Debera Ladner, Erik G. Jensen and Samuel E. Saunders argue that legal identity can serve an accurate role as judiciary institutions and law enforcement are more established. Improved registration systems can also be useful to document and report on widespread patterns of human rights violations, such as child labour and early marriages. The empirical baseline might promote the appropriate solutions which may accordingly reduce human rights abuses. On an individual level, however, birth certificates provide little protection against human rights violation.<sup>116</sup> Furthermore, this can imply that birth registration is not of a character that facilitates rights effectively, compared with for instance a passport. It may, however, also imply that legal identity is a rather insignificant component in the bigger picture of human rights protection.

## **2.3 Chapter conclusion**

The UN LIEG and its operational definition emphasise civil registration and proof of legal identity was important aspects of legal identity. Much of the discussion in the literature of legal identity also results in questions on this. Therefore, legal identity can be understood as a proof of legal status in the combination of different characteristics. The discourse on legal identity, steaming from the literature of human rights highlight, however, that legal identity is a concept vital for the relationship with the state and as a facilitator for individuals' access to rights. The concept is therefore considered as a mechanism providing social inclusion. Nonetheless, the chapter shows that legal identity is not an autonomous notion in relation to international human rights law as it relates to several pre-existing concepts. However, the different

---

<sup>115</sup> Ladner, Jensen and Saunders (n 89) 58.

<sup>116</sup> *ibid.*



approaches to legal identity contribute to the indefinite limits of the concept. There are still several ambiguities in the purpose of the concept and the terminology. Furthermore, the fact that it is often marginalised groups or individuals that suffers from the lack of legal identity implies that legal identity may not be such a simple tool for inclusion of certain groups.

# 3 Legal identity in relation to the rights of International Human Rights Law

Overall, legal identity is frequently connected with a right-based language in literature, which is implying or stating it to be a human right.<sup>117</sup> The UN Agenda on legal identity even introduces legal identity as a part of having human rights, although not explicitly stating ‘a right’ to legal identity.<sup>118</sup> However, as legal identity is not explicitly used in international human rights law, *apriori*, there is not an explicit right on this in the human rights law regime. Hence, for this chapter, the focus is on understanding where legal identity ‘fits’ in IHRL, the concept’s potential nature as a right and whether a legal basis can be deduced to IHRL. Thus, compared to the previous chapter, this chapter’s starting point is the law rather than the discourse. However, the last sub-chapter also provides more of general reasoning in terms of legal identity from a rights-based language.

## 3.1 The right to recognition before the law

The right to recognition before the law is commonly associated with legal identity and can be found in various human rights conventions.<sup>119</sup> For instance, in Article 6 of the Universal Declaration of Human Rights (UDHR)<sup>120</sup>, it is articulated in terms of ‘The right to recognition as a person before the law’, and in Article 16 of the International Covenant on Civil and Political Rights (ICCPR)<sup>121</sup>, it is stated that ‘Everyone shall have the right to recognition everywhere as a person before the law’. Furthermore, similar

---

<sup>117</sup> González López and others (n 93) 76.

<sup>118</sup> United Nations Legal Identity Agenda Task Force (n 11).

<sup>119</sup> See e.g. Fortin (n 21) 43; ‘Home — UN Legal Identity Agenda’ (n 12).

<sup>120</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

<sup>121</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

provisions are codified in for example the American Declaration of the Rights and Duties of man<sup>122</sup> Article XVII, as well as in numerous group-specific conventions, for example: International Convention on the Protocol of the Rights of All Migrant Workers and Members of Their Families (ICRMW)<sup>123</sup> Article 24, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>124</sup> Article 15(2) and Article 12 Convention on the Rights of Persons with Disabilities (CRPD)<sup>125</sup>. However, in the European Convention of Human Rights (ECHR)<sup>126</sup>, a similar right cannot be found. It was found excessive in the adoption of this convention; a right to hold rights was already implied with the procedural rights, such as the one guaranteed under Article 4 Protocol 4 ECHR.<sup>127</sup>

Given from Article 4 of ICCPR, the right to be recognized before the law is a non-derogable right, meaning that a state cannot derogate temporarily from a part of its obligations to fulfil the right.<sup>128</sup> Besides this fact, most of the confided examples of the rights provide little information on which context the right is applicable in. Neither has, for example, UN's Human Rights Committee adopted any general comments on Article 16 ICCPR. The early drafting on UDHR suggests, however, that the right was ought to be applicable 'everywhere', in that sense a guarantee of fundamental right mainly for non-nationals. One of the initial writings suggests that: 'Everyone has the right, everywhere in the world, to recognition as a person before the

---

<sup>122</sup> American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter- American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

<sup>123</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW).

<sup>124</sup> Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>125</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

<sup>126</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

<sup>127</sup> Council of Europe, 'Rapport Du Comité d'experts en Matière de Droits de l'homme Au Comité Des Ministres' (1970) H (70) 7 155 <<https://rm.coe.int/09000016804e0376>> accessed 24 May 2021.

<sup>128</sup> See e.g. UNCHR, 'General Comment No. 29 States of Emergency (Article 4)' (2001) CCPR/C/21/Rev1/Add11.

law and to the enjoyment of fundamental civil rights.<sup>129</sup> The procedural aspect of the right was therewith emphasized, something that some initiators were opponent to. However, the Frenchman René Cassin, strongly in favour of the right, maintained that a right which proclaims that individuals hold rights and duties may only seem unnecessary if it was not for the most recent history then had offered ‘an example of forms of slavery under which juridical personality had been withdrawn from certain individuals’.<sup>130</sup> In mind, he had the several hundred thousand human beings that had been arbitrarily deprived of their juridical personality under the Nazi regime. Subsequently, to have a realistic approach to the rights, and to put a minimum obligation on states treatment of aliens, Cassin argued was the first step to ensure that everyone is recognized as a legal subject.<sup>131</sup>

Cassin’s vision of the right still come across as valuable today as the right is famously referred to as ‘the right to have right’.<sup>132</sup> However, the right has in more recent times been underpinning arguments for discriminatory attitude on legal status. For example, the articulation of the right in the African Charter on Human and Peoples’ Rights<sup>133</sup> indicate, that the right is a part of a ‘wider commitment’: ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status [...]’.<sup>134</sup> Herewith, the recognition is pointing at the central part of the right, namely to ensure that every person has legal status.<sup>135</sup> Furthermore, the CEDAW, Article 15(2), upholds that women must have legal capacity equal

---

<sup>129</sup> William Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013) 1343.

<sup>130</sup> *ibid* 1734.

<sup>131</sup> *ibid*.

<sup>132</sup> Hanna Arendt coined this expression which today signifies the issues of political recognition for the access to rights. For a further elaboration on this, see Hannah Arendt, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt 1973). Fortin also elaborates on this, see Fortin (n 21) 48.

<sup>133</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

<sup>134</sup> Article 5 of the African Charter

<sup>135</sup> The African Commission on Human and Peoples’ Rights (the Commission), ‘General Comment No. 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’ (2017) Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia 3.

to men in different civil and procedural matters. The same is emphasized in Article 12 in the CRPD. The General Comment on CRPD even conditions that the recognition as a legal person before the law includes ‘for example having a birth certificate, seeking medical assistance, registering to be on the electoral roll or applying for a passport.’<sup>136</sup> Thus, the articles in the three conventions indicate what ‘recognition before the law’ must generally mean in more familiar and specific terms; to have legal capacity and not just to be considered a legal subject. Thus, to recognize that all humans hold rights and duties is not automatically guaranteed by ensuring *de jure* legal standing to all humans, neither to just abolish slavery.

In the literature, it is emphasized that the right to recognition before the law must for its universal purpose be understood as a freestanding right, not dependent on legal identity to be fulfilled.<sup>137</sup> Still, it has for a long time also been emphasised that without official registration of identity, a person’s rights may be substantially constrained in practice.<sup>138</sup> For example, Fortin argues that the right addressed the issues most directly to legal identity in the conflicts of Ukraine, Syria and Iraq.<sup>139</sup> Thus, the expression ‘before the law’, as we know it today, derives from government-authenticated documents. However, does this clarify a positive state obligation to *provide* legal identity? The term ‘recognizing’ in the right and the contextualised scope of the right implies, indeed, that it is not enough to simply ‘respect’ or ‘protect’ already recognized legal identity. Given the arguments that legal identity is a right included in the right to be recognized by the law, implementing legal identity for all would presuppose state action. Nonetheless, relevant legal sources have not yet clarified to what extent the right to recognition before the law amounts to implementing legal identity for those who do not have it.

---

<sup>136</sup> Committee on the Rights of Persons with Disabilities, ‘General Comment on Article 12: Equal Recognition before the Law’ (2013) CRPD/C/11/4 14.

<sup>137</sup> Manby (n 9) 2.

<sup>138</sup> See the reasoning in the previous chapter.

<sup>139</sup> Fortin (n 21) 49.

### 3.2 The right to birth registration

The right for infants to be registered immediately after birth is articulated in Article 24(2) of the ICCPR and Article 7 of the Convention of the Rights of the Child (CRC)<sup>140</sup>. Both paragraphs also stipulate that every child shall also have a name and the right to acquire nationality. Furthermore, Article 7(2) of the CRC adds that the implementation of this right shall be in accordance with obligations ‘under the relevant international instruments in this field’, especially in cases ‘where the child would otherwise be stateless.’ United Nations High Commissioner for Human Rights (OHCHR) recommends that birth registration is achieved through a ‘universal, well-managed registration system that is accessible to all and free of charge’.<sup>141</sup>

The main purpose of *immediate* registration after birth is to ensure special measures of protection. The Human Rights Committee holds in general comment No. 17 that this procedure reduces the danger of abduction, sale of or traffic in children, or of other types of treatment that are incompatible with the enjoyment of the rights provided for in the Convention.<sup>142</sup> Thus, similar to the right to be recognized before the law, the right to birth registration is distinct from legal identity. However, birth registration is widely explained as the practical mean through which one’s identity is in the first place secured. It is a process to ensure the official government recognition of a child’s existence.<sup>143</sup> Furthermore, the OHCHR describes the birth certificate as ‘the most visible evidence of the State’s legal recognition of the child.’<sup>144</sup> In this sense, birth certificates may themselves be used as a form of identity documentation. More commonly, however, are these used to facilitate access to other identity documents, such as a passport or national ID card.<sup>145</sup>

---

<sup>140</sup> The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 1990) 1577 UNTS 3 (CRC).

<sup>141</sup> OHCHR, ‘Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law’ (2014) A/HRC/27/22 13.

<sup>142</sup> UNCHR, ‘CCPR General Comment No. 17: Article 24 (Rights of the Child)’ HRI/GEN/1/Rev9 (Vol I) 8.

<sup>143</sup> Brad K Blitz and others, ‘Birth Registration and Children’s Rights: A Complex Story’ (2014).

<sup>144</sup> OHCHR (n 141) 5.

<sup>145</sup> Blitz and others (n 143) 32.

The scope and function of birth registration may vary with different domestic systems. In terms of legal identity, birth registration can therefore, beneficially, be seen as the body on which elements of identity is built around.<sup>146</sup> Furthermore, the foundation which the registration of birth sets can explain why SDG 16.9 identifies this as an indicator of its fulfilment. If birth registration – as a force and primary source of legal identity – is missing, it indicates that the registration of that individual is not ensured later either.

Thus, birth registration is central to providing legal identity. However, it does not fully acknowledge the multifaceted components of it. This can, for instance, be seen in that there is in the Child Rights Convention a separate article on (legal) identity, namely in Article 8. In fact, Manby argues that in lack of other codified rights, it is rather this article that sets out the most fundamental content of legal identity.<sup>147</sup> Furthermore, most forms of legal identity, such as national ID cards or driver’s licenses, are obtained with the support of a range of documents and the importance of a birth certificate also diminishes in many states once other forms of legal identity are obtained.<sup>148</sup> The right to birth registration may, therefore, be seen as a right just one kind of legal identity.

### **3.3 The right to nationality and specific rights for non-nationals**

The historical record shows that a group who particularly suffer from the ‘identification gaps’ are the aliens in a state.<sup>149</sup> Citizenship or nationality have indeed considerable connections to legal identity. It is the government

---

<sup>146</sup> *ibid* 38.

<sup>147</sup> Bronwen Manby, “‘Legal Identity for All’ and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law’ (2020) 2 *Statelessness and Citizenship Review* 248, 271.

<sup>148</sup> Ladner, Jensen and Saunders (n 89) 62.

<sup>149</sup> González López and others (n 93) 79; Claire Cody and Plan, ‘Count Every Child: The Right to Birth Registration’ (Plan 2009) 25,30,38  
<<https://reliefweb.int/sites/reliefweb.int/files/resources/56D4BFF27FE425B249257671001C075C-Count%2520Every%2520Child%2520report%25202009.pdf>>.

authorized identification documents, such as national ID card or passport, that are arguably the most common examples of legal identity. Furthermore, these documents are symbols of nationality. Thereby, nationality is not only an element that may form a part of one's legal identity. Nationality – to have it or the type of it – is also a decisive factor for the character, or one's actual holding, of it. Therefore, it is argued, especially in light of statelessness, that the right to nationality includes the right to legal identity.

The right to nationality is originated from the existence of a genuine and effective link between an individual and a State.<sup>150</sup> It is universally codified in the Universal Declaration of Human Rights, Article 15. Furthermore, group-specific conventions prescribe equal rights of nationality in for example the Convention on the Elimination of All Forms of Racial Discrimination<sup>151</sup>, Article 5, the International Covenant on Civil and Political Rights, Article 24, and the Convention on the Elimination of All Forms of Discrimination against Women, Article 9. As seen in the previous subchapter, the right to nationality is as well implied in Article 7 of the Convention of the Rights of the Child. Finally, the articles of the Convention on the Reduction of Statelessness<sup>152</sup> also aim to avoid statelessness at birth.

Legal identity is a direct benefit from having nationality; all persons who have nationality are documented as such.<sup>153</sup> Thus, the right to nationality indirectly prescribes a right to legal identity. This argument can be found especially amongst them how use goal 16.9 to support the reduction of statelessness.<sup>154</sup> Still, registering, for instance, a birth of a migrant in a foreign state does not per se confer the nationality of the host state on the child.<sup>155</sup> Nor, does legal

---

<sup>150</sup> 'Genuine and effective link', made manifest by birth, residency, and/or descent, are principles on ground to decide nationality. These were first reflected in the case *Nottenbohm case (Liechtenstein v Guatemala)* [1955] ICJ Rep 1955 P 4 Gen List No 18 (ICJ).

<sup>151</sup> International Convention on the Elimination of All Forms of Racial Discrimination (adopted 1 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD).

<sup>152</sup> Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175.

<sup>153</sup> Institute on Statelessness and Inclusion (n 97) 9.

<sup>154</sup> *ibid.*

<sup>155</sup> Dahan and Gelb (n 13) 5.



identity require a genuine and effective link between an individual and a State for which it provides legal identity, as is often the case with nationality.<sup>156</sup> Furthermore, nationality would be a fragile basis for obtaining legal identity as the nationality assessment is well-reserved to states' sovereign powers. To not stretch 'providing legal identity' further than to nationals would magnify the risk for certain groups which is in the risk of statelessness. It would also reduce the recognition of children as legal subjects if a process of establishing the nationality of a child is drawn out. Nonetheless, legal identity would in practice be limited to a national right instead of a human right. As legal identity is central for establishing nationality, a settlement of the right to nationality as a right to legal identity could potentially intensify the struggle for stateless people to enjoy rights.

The legal vacuum which is often the case for non-nationals is indeed reflected in the many conventions on the protection of these groups. In fact, the rights are rarely as specific on legal identity issues as it is in the Convention Relating to the Status of Refugees (Refugee Convention)<sup>157</sup> and The Convention relating to the Status of Stateless Persons<sup>158</sup>. Articles 27-29 in the respective conventions impose an obligation on states to issue identity papers to *any* refugee/stateless 'in their territory who does not possess a valid travel document' (Article 27). For the purpose of travel, the state is also obliged to issue either identity papers or travel documents for those who lawfully stay in their country, or are unable to obtain this from the country of their lawful residence (Article 28). The service must not impose different charges, taxes or duties than what is regulated for their nationals (Article 29). Furthermore, in relation to migrant workers, Article 8 in ICRMW prohibits states to destroy the passport or identity document of a migrant worker or a member of his or her family.

---

<sup>156</sup> Compare *Nottenbohm case (Liechtenstein v. Guatemala)* (n 150).

<sup>157</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>158</sup> The Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 1081 UNTS 283.

### 3.4 The right to private life in ECtHR's Article 8 case law

The European Convention on Human Rights lacks rights similar to those described in the previous sections. However, the European Court of Human Rights has in several cases examined issues of legal identity under Article 8, the Right to respect for private and family life. This right has in general a broad scope and the state is allowed with a large margin of appreciation in cases concerning this article and the article is consequently of a non-absolute character.<sup>159</sup>

The link between 'legal identity' and Article 8 is not explicitly declared by the European Court. However, it has repeatedly been explained that in the meaning of 'private life', an element of a 'right to identity and personal development', or 'personal identity'.<sup>160</sup> 'Private life' has also been held to 'embrace multiple aspects of [a] person's physical and social identity'.<sup>161</sup> Herewith, the right to name and a right to identity documents inherent in Article 8 have been practical outcomes of this jurisprudence.<sup>162</sup>

One of the main issues in the cases of legal identity has been the degree of control and influence individuals, as opposed to the State, have over how their (legal) identity and is recorded in civil status documentation.<sup>163</sup> In the case *Burghartz v. Switzerland*, the authorities of the state had refused to register the applicant's surname since the family surname had been recorded as his wife's surname. As the reverse was accepted under Swiss law, the court found no justification for this discriminatory treatment, and the court therefore found a violation of Article 8.<sup>164</sup>

---

<sup>159</sup> ECtHR, 'Guide on Article 8 of the European Convention on Human Rights' (2020) 2 <[https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf)> accessed 24 May 2021.

<sup>160</sup> See e.g. *Goodwin v the UK* [2002] ECtHR App No. 28957/95 90; *Odievre v France* [2003] App No 4232698 (ECtHR) 29.

<sup>161</sup> ECtHR (n 159) 68.

<sup>162</sup> *ibid* 234–237.

<sup>163</sup> *Aktaş and Aslaniskender v Turkey* [2019] App Nos 1868407 2110107 (ECtHR) 42–50.

<sup>164</sup> *Burghartz v Switzerland* [1994] App No 1621390 (ECtHR) 24.

The nature of identity in law is not the only aspect the European Court has addressed in Article 8 cases. An individual's need for identification documents has also been inferred to 'private life'. For example, the court has recognized that the consequences of a lack of civil status documentation places individuals in a position of 'vulnerability and legal insecurity'.<sup>165</sup> A violation of Article 8 was also found in the case, *Smirnova v. Russia*, as a result of a domestic court's withholding of identity papers. The court found that the documents needed to maintain an everyday life and the seizure of identity documents did not have a legitimate aim which is necessary in a democratic society.<sup>166</sup> Rather, the court emphasized that Article 8 not only forces states to refrain from practices that deprive individuals of their documentation but also place positive obligations upon States to ensure legislative structures and procedures that enable individuals the possibility of obtaining their documents.<sup>167</sup>

As seen in the previous section, Article 8 is, contrary to 'recognition before the law in ICCPR, a limited right'.<sup>168</sup> The court has mainly given attention to the fair balance for the state to strike between its interests and the individuals' before infringing on the right. For instance, in a case considering a refusal of an application for the change of name 'of Turkish language', the court conducted a violation solely on the ground that a formalistic examination was made without taking into account the arguments and the specific and personal situations of the applicants.<sup>169</sup> Moreover, negative implications for the individual's private life or family life, which for example the failure of issuing passports will have, does not necessarily displace interests like public safety.<sup>170</sup>

---

<sup>165</sup> *Kurić and Others v Slovenia [GC]* [2012] App No 2682806 (ECtHR) 302, see also partly concurring, partly dissenting opinion of Judge Vučinić, 356.

<sup>166</sup> *Smirnova v. Russia* (n 1) 95–97.

<sup>167</sup> *ibid* 96.

<sup>168</sup> ECtHR (n 159) 14–27.

<sup>169</sup> *Aktaş and Aslaniskender v Turkey* (n 163) 42–50.

<sup>170</sup> *Affaire M v Suisse* [2011] App No 4119906 (ECtHR) 60.

From the jurisprudence of the European court, it becomes clear that legal identity forms a part of ‘private life’. Therefore, the concept of identity in law is something more than simply an acknowledging mechanism in favour of the individual. Legal identity embodies the links between the state and the individual. Thus, it allows for the state to interfere with the individual’s private sphere, therefore potentially violate the right to one’s private life. This interplay has been reflected by the court. However, the persistence of balancing the interest in the most critical questions for an individual’s personhood is arguable. Fortin questions if this balancing is rational in the cases where the result is a total denial of personhood.<sup>171</sup> This is also contradicting since heavy arguments as ‘human dignity’ is explained to motivate the central role of the right to be recognized as a person before the law. In practice, the difference between the issues arising on legal identity regarding ‘recognition before the law’ contra Article 8 ECHR is possibly small. Thus, it is an unfortunate circumstance that legal identity is solely just connected to Article 8 of ECHR and its flexible character as a right.

### **3.5 A de facto right in the fulfilment of rights**

Legal identity is by supporters of the rights-based approach to development considered as a fundamental right of itself, along with a key to other fundamental rights.<sup>172</sup> Ladner et al. hold that this is argued since legal identity has an ‘intrinsic value [...] because official recognition of one’s existence is integral to human dignity.’ Hence, although legal identity may not be a right inherently in the rights previously described (chapter 3.1-3.4), it is nonetheless a prominent part of fulfilling human rights.<sup>173</sup> It is even argued to be fundamental for the notion of human rights. Simon Szreter, for example, claims that the ‘political rhetoric of human rights’ will at best ‘remain a set of ideals and aspirations’ if identity is not ‘legally sanctioned, secure, and

---

<sup>171</sup> Fortin (n 21) 5.

<sup>172</sup> Ladner, Jensen and Saunders (n 89) 51.

<sup>173</sup> Dahan and Gelb (n 13) 5; Cody and Plan (n 149) 9; Szreter (n 9) 68; González López and others (n 93) 75.

practically available capacity'.<sup>174</sup> The reason for this is that most civil rights enshrined in constitutional declarations and the socio-economic benefits granted by states are inaccessible to legally non-existent individuals. Thus, it would make these rights and services 'practically useless', if the state obligation to 'provide legal identity' was not considered as generally included in state obligations.<sup>175</sup>

To exemplify the reasoning further, Szreter argues that the much-needed legal identity in international human rights law is already implied by the codified rights. He argues that '[t]he international blind spot for the significance of this particular human right is all the more baffling given that it is clearly and unambiguously enshrined in the UN International Covenant on Civil and Political Rights (ICCPR).'<sup>176</sup> Even in the rights that is not the most evident for legal identity, the notion is included. For example, he finds in the right to life, Article 6 of ICCPR, that this article must be interpreted to incorporate a duty upon states to tackle infant mortality, pandemics, and to take measures to increase life expectancy. To ensure this obligation, states must have accurate and detailed information about patterns and trends of mortality and disease incidence at their disposal, which gives strong implications to have a national identity registration system in place.<sup>177</sup> Thus, the internal value of legal identity in human rights law is reflected in rights in this sense.

The reasoning of Szreter and others highlight how legal identity may play an important role in the implementation of human rights. However, it encompasses the assumption that there is no other option than ensuring most rights with legal identity as a mean. While civil registration and national ID are common examples for providing rights, it is not proved to be the only option. Hypothetically, a state may fulfil the rights more efficiently, even in a way less intrusive than for individuals to give up their identity. Thus, there is a difference between when a concept is within the scope of a right, and

---

<sup>174</sup> Szreter (n 9) 67.

<sup>175</sup> *ibid.*

<sup>176</sup> *ibid.* 68.

<sup>177</sup> *ibid.*

when something would be a potential method to fulfil an obligation. If legal identity is within the scope, actively obligating states to provide it, or if it is effectively a part of implementing human rights, is something that is argued alternately. Nonetheless, locating a legal basis is important for the implementation of legal identity as it may also have interfering effects for individuals (see in the forthcoming chapter 4). The need to argue from established rights are therefore central if, for example, one aim to have a human rights-based to the implementation of SDG target 16.9. However, this reasoning may highlight that legal identity can be a right *de facto*, also an important conclusion.

### **3.6 Chapter conclusion**

The concept of legal identity is reflected indirectly in several rights; from the right to recognition before the law to the right to private life included in Article 8 of the European Convention of Human Rights. In these rights, legal identity makes up a dominant part of what is expected of the state in fulfilling the rights, a much practical part of the implementation. For example, in Article 8 of ECHR, the European Court articulates the individual's identity as an important part of a person's private life and puts a positive obligation on states to ensure legislative structures and procedures that enable individuals the possibility of obtaining their documents. In the right to birth certification, the legal basis for 'providing legal identity' is particularly strong as the process has been interpreted as including the elements of registration and proof of legal identity, although only in the form of birth registration and birth certificate. In the Refugee Convention and the Convention relating to the Status of Stateless Persons, explicit paragraphs can be found on a right to travel and document papers. Not the least, the right to recognition before the law shows a development where an increased focus is on the practical aspects of legal capacity, thereby emphasising a need for legal identity.

Although one may not argue that legal identity is inherent in established rights, it can be seen as a crucial tool for the implementation of several rights

and a necessity for modern life. This would imply, at least, that legal identity is an important part of human rights law or that there is a right to legal identity de facto. In strictly legal terms, however, a right to legal identity is highly dependent on the purpose of the right and its context.

## **4 Legal identity in states’ implementation: an exclusionary concept**

As seen in the previous chapters, the general discourse on legal identity and the IHRL framework promote the concept as a vital tool for social inclusion. However, the way legal identity is implemented by states illustrates something different, which is presented in this chapter. Thus, this chapter aims to critically analyse states’ implementation on legal identity. This is done in a two-step process; first by a presentation of two examples (situation-based case studies) and, secondly, by an analysis of legal identity in such practices through the lens of ideas steaming from ‘différance theory’ to better understand these examples. This theory also provides a discussion of states roles in providing legal identity, the compatibility of legal identity and human rights law, as well as exposing inherent flaws of human rights.

### **4.1 States’ exclusionary practice**

Although the generally agreed purpose of legal identity does not allow for any state misuse, the procedure of implementing legal identity entails an imminent threat of abuse. History has shown that states have gained from effective registration in acts of oppression towards their own population. Both the Nazi government of Germany and the Rwandan government in 1994 are examples of this.<sup>178</sup> Thus, the implementation of legal identity requires a closer look at state practice to unpack the potential complexities of legal identity in international human rights law. The first case studies provide a description of the situations from South of Sahara and the second example particularly signifies implications arising in the Western context.

---

<sup>178</sup> Manby (n 9) 5.



### 4.1.1 ‘National security agendas’ justifying discriminatory practice

Several examples of implementation show that the primary human rights aspects of legal identity have been replaced with motives of national security and border control in implementing the new identification systems. In Nigeria, for example, a harmonization of multiple identity registers, also integrating DNA databases, was considered a ‘critical need’ also for the purpose of battle organized crimes and increase security.<sup>179</sup> Moreover, in 2018, the Ministry of the Interior in Kenya incorporated what is locally known as the ‘Huduma Namba’ (service number), with a biometrics registry and the national identity card.<sup>180</sup> This procedure was to a large extent justified on the grounds of national security and, worryingly, described to provide a ‘single source of truth’ for legal identity and personal data. This approach to the identity system raises particular concern as there are well-established patterns of discrimination to the right to nationality for certain groups in Kenya, in fact emerging from the existing civil registration systems.<sup>181</sup>

Thus, the critical part of this agenda is that questions of national security tangent to justify questions of the legal statuses which not rarely amounts to widely discriminatory practice. Indeed, Manby holds that the tendency of the new implementation systems is that they ‘reinforce existing patterns of discrimination’.<sup>182</sup> One of the most severe examples can be found in Sudan, where the employment of a new civil registration system and identity management even contributed to massive oppression. In this context, the implementation was rather mobilised as an opportunity to remove the Sudanese citizenship of those who were alleged to have South Sudanese origin.<sup>183</sup> The same pattern was also reported from Mauritania. After an

---

<sup>179</sup> Government of Nigeria, ‘Citizen Data Management And Harmonization Report’ (*Citizen Data Management And Harmonization Report*, 13 August 2020).

<sup>180</sup> ‘Huduma Namba and Our National Security Strategy’ (2019)

<<https://www.hudumanamba.go.ke/huduma-namba-and-our-national-security-strategy/>> accessed 24 May 2021.

<sup>181</sup> Manby (n 9) 5.

<sup>182</sup> *ibid* 7.

<sup>183</sup> Munzoul AM Assal, *Struggles of Citizenship in Sudan* (Routledge 2014) 196.

amendment in the nationality code to require timely birth registration as the basis for a claim to nationality, the implementation appeared to be a part of a bigger process aimed to disqualify Mauritians of citizenship. Thus, the national upgrading of the state's identification systems resulted in the protest movement 'Touche pas à ma nationalité', accusing the government of 'biometric genocide'.<sup>184</sup>

The list goes on of states using legal identity to facilitating border controls and promote national security. Manby argues that this questionable agenda can be found in almost every African state which is carrying out new systems for identity management and the economic foundlings are not rarely deriving from initiative (disguised) with sustainable development aims.<sup>185</sup> However, the political emphasis on border control and security is not limited to countries south of Sahara. The European Union (EU) has expressed support for third countries strengthened capacity to effectively use civil registries or digitalized biometrics as means to fulfil their obligations to readmit their nationals.<sup>186</sup> The aim of using legal identity in states interest seems therefore to be global.

#### **4.1.2 The undocumented as disregarded subjects in providing legal identity equally**

A reflection on the challenges of legal identity must be made in consideration to all those peoples and individuals who actively decide not to register their identity. Harbes argues that the choice to register can be 'conceptualized as a deliberate choice in which citizens weigh the costs and benefits associated with seeking documents for themselves or their children'.<sup>187</sup> There are, thus, people that gains more from not letting the state's authorities identify them. While there can be several reasons for this, the situation has been especially

---

<sup>184</sup> Zekeria Ould Ahmed Salem, '« Touche pas à ma nationalité »: Enrôlement biométrique et controverses sur l'identification en Mauritanie' (2018) 152 *Politique africaine* 77, 74.

<sup>185</sup> Manby (n 9) 5.

<sup>186</sup> Commission (EC), 'Communication from the Commission on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration' (Communication) COM 385 final, 7 June 2016.

<sup>187</sup> Harbers (n 81) 3.

highlighted in regards to undocumented migrants coming from the Global South to various countries in the West in the latest decade.<sup>188</sup> Their choice to remain, or become, legally invisible – without legal identity – is in fact their only option to physically exist in a country. This fear of deportation highlights a sensitive question on to what extent states are obliged to facilitate the legal operation for individuals on their territory.

The situation for undocumented migrants demonstrates that the lack of legal identity is not an issue isolated to the ‘developing world’. In for example Sweden, surveys have estimated between 10,000 and 50,000 undocumented people living in the territory. According to uncertain estimations, the group includes approximately 2,000–3,000 children. In total within the EU, all undocumented people are estimated at between almost three to eight million.<sup>189</sup> Furthermore, in the United States, the phenomenon is evident too, where the children of these undocumented groups are commonly known as ‘dreamers’.<sup>190</sup>

The question that undocumented migrants raise in terms of legal identity is to what extent one can enjoy the notion without potential state interference. In the sense it is provided in these contexts, it is highly conditioned. Accordingly, is a right or an efficient tool to guarantee rights, if some people consider themselves forced to abstain from it? Especially in the sense of providing legal identity in an equal manner, how is this fulfilled if some groups will not benefit from the effect of it, thereby just becoming a process that gives leverage to the state? Given that legal identity has a deep connection to the right to be recognized before the law and ‘human dignity’ (seen in

---

<sup>188</sup> On a search on “undocumented migrants”, 3,052 news articles had this phrase in lead or headline from 01-01-01 to 21-05-04.

<sup>189</sup> Socialstyrelsen, ‘Social Rapport 2010’ (2010) 268  
<<https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/ovrigt/2010-3-11.pdf>> accessed 24 May 2021.

<sup>190</sup> ‘What Is Daca and Who Are the Dreamers?’ *the Guardian* (14 September 2017)  
<<http://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers>> accessed 24 May 2021.

chapter 3), the discrimination of states not to provide legal identity that benefits everyone appears difficult to justify. In the USA, the Deferred Action for Childhood Arrivals (Daca) policy signifies a rare example of where undocumented migrants brought to the US unlawfully as children have been given the right (temporary) to legally live, study and work in America, instead of living in the legal shadows, fearing deportation.<sup>191</sup> However, in general, it appears that providing legal identity without the risk of expulsion for undocumented migrants is a non-question in the current debate on legal identity.

## **4.2 States' exclusionary practice through the lens of 'différance'**

The previous subchapter showed how state practice of legal identity resulted in discriminatory impacts. This may appear contradicting to the purpose and aim of the SDG target 16.9 and the concept in IHRL. However, although it is rarely acknowledged regarding legal identity, the very nature of 'identity' or 'identification' connects to 'distinctions', at least according to several theoretical explanations.<sup>192</sup> Indeed, identity is generally defined as those attributes and qualities that assist us to recognize either an individual or collective from others.<sup>193</sup> Therefore, a common understanding is that these similar concepts to legal identity often require discrimination.<sup>194</sup> This theoretical standpoint originates (for example) from the rationale of 'différance'.<sup>195</sup>

---

<sup>191</sup> U.S. Department of Homeland Security, 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children' (2012) Memorandum <<https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>> accessed 24 May 2021.

<sup>192</sup> Manby (n 9) 7.

<sup>193</sup> Al Tamimi (n 53) 285.

<sup>194</sup> Compare for instance Manby (n 9) 7. However, consider the reasoning of 'différance' in the following sections.

<sup>195</sup> Al Tamimi (n 53) 285.

‘Différance theory’ originates from Jacques Derrida’s approach to language.<sup>196</sup> Relating to this theory, it is argued that ‘language is necessarily constructed around elemental oppositions if it intends to have any meaning.’<sup>197</sup> In other words, this means that terms only make sense in relation to the differences of other, similar words. For example, ‘books’ difference itself from ‘newspaper’ and ‘magazines’, and therefore gets its meaning reciprocally constructed by the other term rather than by an essential definition. Derrida’s theory on language has offered several important explanations to the concept of identity. The most given one suggests that the identities are not fixed, just as words do not have an inherent, ‘truthful’ definition. Secondly, the theory of ‘différance’ proposes that identities take their meaning from that which they are not. This can be the differences in for instance cultural codes or societal norms. For instance, the identity of a minority group is supposedly constructed in relation to the national majority or other cultural groups. Lastly, ‘différance’ suggests that these differential identities, ‘the other’ identities, signifies an inevitable ambiguity to any creation of an identity.<sup>198</sup> For example, what gives meaning to the term ‘legal’ is, for example, the word ‘illegal’, but the first term is also threatened to blend together its meaning with the other words. Another example is the status ‘married’ that may, for instance, be given its meaning in contrast to ‘single’ or ‘divorced’.

The personal characteristics (or ‘identities’) that are described as a part of a person’s legal identity, such as legal gender, family relations, age or employment status may play a significant role in an individual’s personal reasons relationship or for its relationship to significant others and family members. Thus, a recognition of these statuses in law is vital for the functioning of legal issues in the private sphere.<sup>199</sup> In relation to IHRL, considering this ‘différance process’ of legal identity in what relationship an

---

<sup>196</sup> See e.g. Jacques Derrida, ‘A Derrida Reader: Between the Blinds, Ed’, *Kamuf, P (Harvester Wheatsheaf, Hemel Hempstead, Herts)* (1991) 59–79.

<sup>197</sup> Al Tamimi (n 53) 285.

<sup>198</sup> *ibid* 286.

<sup>199</sup> In domestic systems like common law and civil law, these kind of legal questions is referred to as private law.

individual form with the state is particularly relevant.<sup>200</sup> Specifically, this relationship has generally to do with legal statuses in terms of ‘citizenship’ or ‘residency status’, or other statuses which authorise certain benefits or rights in that state. In relation to these, the identity of the ‘illegal migrant’ gives meaning to these statuses although it is not a ‘legal identity’. Indeed, the notion of that identities ‘function just because their capacity to render some other “outside”’,<sup>201</sup> becomes very clear in the distinction of ‘legal status’ and ‘illegal status’. Furthermore, this process exemplifies how the identity of ‘illegal’ is a necessary component for there even being a ‘legal’ form, which is in this case; a legal form of residency in a state. Based on similar reasoning, Judith Butler, therefore labelled this ‘excess’ identity, ‘the other’, as a ‘constitutive outside’, although, after all, this ‘other’ is ““inside” the subject as its own founding repudiation’.<sup>202</sup>

There are particularly two important conclusions which can be drawn from ‘différance’ in relation to identity, it is argued by Yussef Al Tamimi. The first is that ‘identities can function as points of identification only because of their capacity to render some other ‘outside’’.<sup>203</sup> The one other is that this process of placing another identity ‘outside’ is a process that results from an active play of power. These conclusions are further developed on in the two following sub-chapters in what kind of terms this means for legal identity.

### **4.3 Legal identity as a mechanism reinforcing state power**

The process of ‘différance’ states that the differentiating occurs as a result of an active play of power. Hence, what becomes the ‘the excess’ to an identity, and what becomes a part of it, is not an objective fact. The critical aspect, however, is that ‘the other’ is automatically ‘reduced to the function of an

---

<sup>200</sup> Compare Ladner, Jensen and Saunders (n 89) 50.

<sup>201</sup> Al Tamimi (n 53) 286.

<sup>202</sup> Butler (n 54) 3.

<sup>203</sup> *ibid.*

accident as opposed to the essentiality of the first' by this power play'.<sup>204</sup> Thus, it emerges a hierarchy between an identity and its excess identities, inevitably assuming one to be more prevailing than the other(s). Accordingly, the political process which enables this arises from the power play positioned at the state.<sup>205</sup>

It is this power play of the state – the play which in fact creates identities – that the attention is now given to. In regards to the elements which form a part of an individual's legal identity, the state's authorization of identity can facilitate the private life with legal identity. We see this in the examples which highlight the everyday necessity of legal identity; to be able to inherit family members, to open a bank account and to register one's civil status. In providing legal identity, the state can contribute to strengthening a very central part of one's legal capacity in private matters, just as those relating to the state. Still, the state's power becomes sensitive when it simultaneously contributes to maintaining clear hierarchal orders between different identities. Evidently, providing legal identity including the element of gender will not ensure equality between genders if the gender discrimination is widespread. Indeed, the registration of certain attributes will just facilitate unjust discrimination sanctioned by the government. Thus, implementing legal identity in an equal manner requires a discussion of the information and attributes that are important for legal identity and which are not. The historical context is not an indication that we have learned the lesson, it is just proof that we need to be very conscious.

In the research presented on the implementation of legal identity (previous chapter) the focus has been more on the legal status regulating the relationship between the state and the individual. In light of 'différance theory', this is a political process dominated by the state's powers as well. Accordingly, this process of clarifying legal statuses might be beneficial for some but substantially nullifying for others. Considering that many of those already

---

<sup>204</sup> *ibid* 286.

<sup>205</sup> *ibid*.

missing legal identity belong to marginalized and discriminated groups, one can speculate on to what extent this actually empower people.<sup>206</sup> For example, Manby argues that ‘A principle that that proof of legal identity should be issued to all does not avoid the task of deciding what status is recorded’. In today’s globalised world, citizens, legal residents, irregular migrants, refugees, or stateless persons have all different legal basis to enjoy rights. The unlucky ones are those given the identity with the weakest basis for rights-holding.<sup>207</sup>

Moreover, Manby also sees another pattern, which is that states are unwilling to compromise with their sovereign discretion to decide these identities. This lead to inefficiencies in the implementing process and sometimes forcing interim statuses. The provisional statuses are, however, likely to become permanent, constraining people to access rights and benefits.<sup>208</sup> Since the international development agencies are hesitant to challenge this discretion, issues like statelessness or discrimination are overlooked in the implementation stage, pushing back de facto inclusion.<sup>209</sup>

What needs to be kept in mind is that Manby’s observation is primarily focused on Africa south of Sahara. In the Western context, migration scholars would rather argue for there being a fixation of legal statuses from the state’s side. For instance, Kesby describes the instituting of, what she calls, ‘social borders’. These have emerged from states ‘temptation to shift border control to within their territory[...] as states struggle to stem the flow of undocumented migrants’.<sup>210</sup> The denial of rights becomes an alternative to external border controls. These measures rather focus on identifying those already within the state, defining some to be there ‘legal’ compared to ‘the others’ being there ‘illegal’. The border control is, thus, primarily focused on the regulation of the social space; the domain of rights, opportunities and

---

<sup>206</sup> Compare the reasoning of Manby (n 9) 5.

<sup>207</sup> *ibid.*

<sup>208</sup> *ibid* 7

<sup>209</sup> *ibid* 2.

<sup>210</sup> Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) 102–108.



benefits within society. The form it might take is in identity checks and highly divided access to welfare benefits between the legal statuses.<sup>211</sup> The social integration is limited and the overall purpose is to make migrants socially absent, although they are physically present.<sup>212</sup>

On the lowest level of the legal identity hierarchy belongs the undocumented migrant. For instance, human rights scholar Catharine Dauvergne argues that the legislation related to migration creates ‘the community of insiders’ and the ‘[t]he labelling of part of the population as “illegal” accomplishes this exclusion’ in situations when the border does not.<sup>213</sup> The question might just be how borders relate to legal identity. As this is explained by legal scholar Elspeth Guild, borders are as much ‘the dividing line of legal orders’, just as it is a physical protection mechanism.<sup>214</sup> It is those who are physically present yet ‘illegal’ that are to be excluded from the legal order. Thus, the legal order is for ‘those who cannot be expelled’,<sup>215</sup> which inevitably challenges everyone’s recognition before the law. Furthermore, it is also difficult to imagine how states will provide legal identity for all people on their territory when the ‘illegal’ status is necessary for states to maintain the exclusive legal statuses, e.g. the social borders. As the ‘différance’ theory would summarize this dilemma; there is no ‘legal identity’ without ‘illegal’ or ‘invisible’ people. Consequently, legal identity, just as ‘the legal order’, is for those who do not risk expulsion, forcing people to live in the shadows.

To consider the implications of legal identity in broader terms, this concept reinforces the power play situated to the state in deciding legal statuses.<sup>216</sup> The reason for this is at such a structural level that the SDG target obligating states to provide legal identity, or the rights requiring states to ensure it,

---

<sup>211</sup> *ibid.*

<sup>212</sup> John Crowley, *Where Does the State Actually Start? The Contemporary Governance of Work and Migration\** (Routledge 2017) 151 cited in Kesby (n 210) 103.

<sup>213</sup> Catharine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 184.

<sup>214</sup> *Borderscapes: Hidden Geographies and Politics at Territory’s Edge* (University of Minnesota Press 2007) 69 cited in Kesby (n 210) 104.

<sup>215</sup> *ibid.*

<sup>216</sup> A similar reasoning have been held by Bronwen Manby. Manby (n 9) 9.

cannot be explained as the source of this reinforcement. However, through its character of evidence of identity, legal identity does indeed facilitate the categorization states have shown to benefit from, whether it is to include or exclude. Furthermore, it is crucial to acknowledge the state's extended power mechanism as individuals must obey in the mere act of (legally) existing. Today, there are no other means for individuals to secure legal identity other than through a national institution. At the same time, the imbalance increases as states may have substitutes for the information generated from civil registration.<sup>217</sup>

Besides this reinforcement of states, legal identity is also a fragile ground to create for the access of all rights and benefits.<sup>218</sup> Fortin, for example, has raised the issue that it is unclear to whom the obligation of providing legal identity belongs in times of conflict and occupation within a state.<sup>219</sup> Furthermore, in some contexts where civil registration is low, the state and the community may form an alternative mechanism for people to enter into agreements or do other (what typically the Western world consider) legal acts. If legal identity is then further established as the key to these acts, and to access rights, advocates and scholars are warning that this may lead to a complete exclusion of unregistered individuals.<sup>220</sup> In Sweden, for example, the society is actively aiming towards a cash-free society, with considerable dependence on digital ID (BankID). Obtaining this digital ID as a foreigner in the country is not rarely considered to be just as important for the integration process as learning the language.<sup>221</sup> However, the digital ID and bank cards requires a bank and a bank require a legal identity. For those people who do not hold this, a complete expulsion from the monetary system is expecting; the optimal social border.

---

<sup>217</sup> Harbers (n 81) 3.

<sup>218</sup> González López and others (n 93) 79.

<sup>219</sup> Fortin (n 21).

<sup>220</sup> González López and others (n 93).

<sup>221</sup> 'Sweden – the First Cashless Society?' (*sweden.se*, 27 November 2020) <<https://sweden.se/business/cashless-society/>> accessed 18 May 2021.

## 4.4 The inherent flaws of Human Rights underpinning and demanding legal identity

For this subchapter, let us return to, and look closer on, the part of the difference which concludes that ‘identities can function as points of identification only because of their capacity to render some other “outside”’. As previously stated, this means that all identities operate in a process of exclusion, putting other identities in the margin as an ‘excess’.<sup>222</sup> This creates an expected hierarchy, where the access function as a ‘constitutive outside’.<sup>223</sup> Considering legal statuses, for example, such a hierarchy of the identities can include the citizen status, legal residency with work permit and the asylum seeker, all with a different ‘right to have rights’. Furthermore, the informal status of ‘illegal’ is a ‘constructive outside’ to all of these identities, and is therefore seen today as crucial in the states’ rhetoric considering ‘social borders’.

Given the cornerstones of identity, as explained above, the concept of providing it appears to serve the purpose of dividing, categorizing and distinguishing something from the other. While this might not be problematic on its own, it still stands in direct contrast to principles of human rights. In the words of Fortin, ‘human rights are supposed to belong to all individuals, regardless of their identity; the rights and entitlements rendered dependent (by states) on possession of legal identity, by definition, do not.’ The literature supporting further investments in legal identity often confuses this contradiction, which is reflected in statements like ‘registration entitles a child to their rights.’<sup>224</sup> However, the ‘purest’ understanding of human rights, steaming from naturalism, refers to rights-holding by the inherent virtue of being a human being.<sup>225</sup> The factor of ‘inherent’ becomes especially evident

---

<sup>222</sup> Paul Du Gay and Stuart Hall, ‘Who Needs Identity’, *Questions of Cultural Identity* (Sage 1996) 5.

<sup>223</sup> Butler (n 54) 3.

<sup>224</sup> Compare for example Cody and Plan (n 149) 6; Alan Gelb and Julia Clark, ‘Identification for Development: The Biometrics Revolution’ [2012] SSRN Electronic Journal 6 <<http://www.ssrn.com/abstract=2226594>> accessed 24 May 2021.

<sup>225</sup> Kesby (n 210) 95; McConnell (n 42).

in Article 1 of the Universal Declaration of Human Rights, where it is upheld that ‘All human beings are born free and equal in dignity and rights’. Moreover, the universalism of human rights stands for a global community of humanity, where the individuals’ moral rights aim to be independent of the connection to a certain group or state.<sup>226</sup>

Besides the naturalistic basis of human rights, much in the codified frameworks implies that the basis for rights requires ‘an accurate’ legal identity. According to the UN Human Rights Committee, for example, the International Convention on Civil and Political Rights requires that each one of the rules must be guaranteed ‘without discrimination between citizens and aliens’.<sup>227</sup> Another example can be found from Committee on Economic, Social and Cultural Rights<sup>228</sup>, which affirms that ‘[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation’.<sup>229</sup> Furthermore, most human rights treaties list a general non-discrimination provision, demanding states to ensure that all persons are ‘equal before the law’, i.e. equal protection of domestic laws as well as international human rights law, in which most treaties have for example ‘nationality’ and ‘statelessness’ as recognized grounds for unlawful discrimination. Conclusively, international human rights law would rather aim to render groups to *the same* level.

Given from above, an obvious conclusion from the relationship between legal identity and international human rights law is that the former does not promote the latter. Legal identity may facilitate certain statuses for certain ‘suitable’ groups, and thereby welcome them to the legal sphere of economic transactions, rights and obligations. It does not, however, promote the

---

<sup>226</sup> Kesby (n 210) 93.

<sup>227</sup> UNCHR, ‘CCPR General Comment No. 15: The Position of Aliens Under the Covenant’ (1986) HRI/GEN/1/Rev9 (Vol I) 2.

<sup>228</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR).

<sup>229</sup> CESCR, ‘General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2009) E/C12/GC/20.

theoretical foundation of human rights in the sense that human rights prescribe rights *inherently* to every human, unconditionally of registration. This is a necessary distinction to be clarified in the implementation and research on legal identity. However, the picture of international human rights law as a contrast to identities exclusionary nature is too one-dimensional. Indeed, the power play of the states arises not rarely in the arena of international human rights law. As this law embodies what constitutes the fair and just in a society, it shapes the norms of identity. Dauvergne, for instance, argues that it is not just in national law that the illegal status is constructed, but also the international human rights law.<sup>230</sup> Moreover, Kesby describes a differencing process in the ‘construction of “human rights” on the basis of immigration status’.<sup>231</sup>

The construction of statuses, dictating the access to rights can be found in several practices in international human rights law. First, as Kesby argues, a process in IHRL which particularly work as a power mechanism is the assessment of discrimination in IHRL.<sup>232</sup> This is a central aspect in the assessment of a potential violation of all non-derogable rights. Although non-discrimination is a pillar in IHRL (compare the previous paragraphs), a difference in treatment is nonetheless permitted if it is found objectively justified; namely, that it is prescribed by law, pursues a legitimate aim and is proportionate in the means employed and the aim sought to be realized’.<sup>233</sup> In a case considering discrimination based on nationality in the European Court of Human Rights (ECtHR), it was held that ‘very weighty reasons’ would be needed for the court to regard a difference in treatment.<sup>234</sup> Still, these considerations in the assessment dictate the basis of rights and inclusion for certain legal statuses provided by legal identity.

Secondly, the power play, in which human rights law internalize the difference in treatment, does not just come across in the balancing of interests.

---

<sup>230</sup> Dauvergne (n 213) 27.

<sup>231</sup> Kesby (n 210) 103.

<sup>232</sup> *ibid* 100.

<sup>233</sup> *ibid* 100.

<sup>234</sup> *Gaygusuz v Austria* [1996] App No 1737190 (ECtHR) 42.

It is also found in the codified rights and especially in terms of certain rights or conventions of specific groups. For example, it may not be a coincidence that the Refugee Convention or the Convention relating to the Status of Stateless Persons provide specific articles on legal identity (compare chapter 3.3). Although these conventions represent vulnerable groups also in the aspect of legal identity, states do also have an interest in efficiently knowing the identity of these individuals as it enables them to separate these people from their own population. Furthermore, a particular example of IHRL reinforcing different legal statuses for right-holding can be found in the Migrant Workers Convention. In it, a crucial distinction is made between legal migrant works and those ‘in an irregular situation’, whose rights are limited to Part III of the Convention. In this regard, Gregor Noll notes that the undocumented migrant does not ‘appear’ in front of the state as a ‘human’ to whom the state has human rights obligations in current human rights law. In those aspects, the undocumented migrant worker has been allowed rights, it is rather given on the basis that it is a ‘labourer’.

Lastly, the distinctions made by the power play of IHRL can be found in that human rights law remains an ‘all-or-nothing concept’ for the undocumented migrant. Noll holds that the ‘illegal’ migrant cannot engage with the ‘welfare jurisdiction’ without it also triggering the ‘immigration jurisdiction’. The same risk exists also in an ‘illegal person’s’ private life, as for example in opening a bank account or being legally married. In the end, the deportable aliens therefore end up on the ‘nothing side’, although a IHRL framework in place in the state.<sup>235</sup>

Thus, the presented picture of human rights indicates that relying on it for making legal identity a *general* mechanism for inclusiveness, instead of exclusiveness, might be useless since human rights also dictate the social borders. It might rather point towards legal identity becoming more central for accessing human rights if the word becomes more urbanized, globalized

---

<sup>235</sup> Gregor Noll, ‘Why Human Rights Fail to Protect Undocumented Migrants’ (2010) 2 European Journal of Migration and Law 241, 248.

and bureaucratic. This leaves the ‘invisible’ person, often the illegal migrant, especially exposed to human rights violations. Finally, legal identity might also expose the weak basis of having human rights ‘inherently’, because; can a human really have human rights without the state recognizing it as a human?

## 4.5 Chapter conclusion

The two case studies demonstrate that the implementation of legal identity has in several contexts turned into agendas for social exclusion. The notion of legal identity as a mechanism crucial for economic development *for all*, for the access to rights and, nonetheless, for all individuals to be acknowledged before the law stands in direct contrast to the results of states’ practice on legal identity in the given examples. For example, the process of ensuring identity documents and civil registration resulted in a disguised process of removing citizenship, motivated by arguments as national security. Moreover, the devastating consequences for undocumented migrants seems not to be acknowledged in the question of equal legal identity.

The implementation can be seen in a broader sense in light of ideas inherent to ‘différance’. This theory explains that the ‘rendering outside’ is an inevitable part of the ‘process of différance’, meaning that (legal) identities will always be given their meaning in the binary, creating superior identities. As this process raises from power structures, states powers are reinforced as they can identify individuals (as they like). Human rights scholars see these processes when states are using ‘statuses’ as social borders, hurdling the access to rights for certain groups. Finally, this power play of the state is even occurring in the arena of IHRL, as this law regime paradoxically build its basis to rights on a person's civil status i.e. an aspect that tends to be particularly significant to legal identity. This shows that rights-bearing highly dependent on (the right kind of) legal identity is already waved into the concept of IHRL. Ensuring everyone beneficial legal identity seems therefore

impossible with the support of human rights standards, although it is argued as such a vital notion for a human's ability to legally exist.



## 5 Final conclusion

Although a scholarly conversation on legal identity in international human rights law has started as an effect of SDG target 16.9, the term lacks an official definition and the interpretations of it are sprawling. However, legal identity is not at all an unexciting concept in international human rights law. Components of legal identity are regulated in several aspects within the IHRL framework. It can be found in the ECtHR's reasoning in relation to article 8 on the right to private life, in some respects explicitly in the Refugee Convention and the the Convention relating to the Status of Stateless Persons and inherent to the right to birth registration and the right to be recognized as a person before the law. Nevertheless, legal identity can be seen as a crucial tool for the implementation of several rights and a necessity for modern life. This would imply, at least, a *de facto* right to legal identity for individuals.

Much of the policies on implementation and the discussion in the literature of legal identity results in questions of civil registration and proof of legal identity. These components can therefore be considered significant for understanding legal identity. Thus, at the most fundamental level, legal identity can be seen as a proof of personhood or legal status. However, human rights scholars highlight that legal identity is a concept not just regulating the relationship to significant others, but also to the state. The current discourse on legal identity, therefore, emphasises the concept's role in promoting inclusion amongst those lacking legal identity, which is often already marginalized groups or individuals. Thus, legal identity is in one way understood as a notion that is not just vital to ensure specific rights but also for being included as a rights-bearer in all aspects of life. This also relates to legal identity being a SDG target central to the realization of several sustainable development goals.

At the same time as there are strong indications for legal identity being a concept for social inclusion and access to rights for individuals, states'

implementation (also) show a different pattern. Indeed, the two case studies demonstrate that the implementation of legal identity has in several contexts rather turned into agendas for social exclusion. For example, the process of ensuring identity documents and civil registration resulted in a disguised process of removing citizenship. Furthermore, in the ‘developed world’, the devastating consequences of living undocumented have become an efficient measure for states to exclude unwelcomed migrants, thereby replacing territorial borders with social ones.

The exclusionary state implementation associated with legal identity can be explained with an approach to the concept stemming from the theory of ‘différence’. From this perspective, providing legal identity is a process that inevitably constructs different civil statuses and characteristics as the ‘outside’, establishes prevailing and subordinating hierarchies. As this process results from active play of powers, states’ implementation of legal identity becomes the scene where states can formalise and justify the exclusion of certain people and individuals. The recognition of identity (including civil statuses) therefore reinforces state power. While it is not excluded that this might not be beneficial for the rights of individuals in some cases, it is a fragile ground to rely on considering central aspects of personhood and de facto rights-bearing.

Given the exclusionary notion of legal identity, it might seem like a predicament in relation to the theoretical foundation of human rights proclaiming rights-bearing on the ground that one is simply a human being. However, it is argued that IHRL shapes the norms of identity, thereby acting as a power mechanism along with the state and practicing exclusion for certain groups. The two case studies were examples of this, as human rights law also makes distinctions on the access to certain rights based on civil statuses. Relying on human rights for making legal identity a *general* mechanism for inclusiveness might therefore be pointless. This view on IHRL rather confirms that legal identity is already an integrated part of the regime with little new impact.

Finally, there are several complex understandings of legal identity in international human rights law. It has been argued as a right, as a tool to realize rights, as a concept dictating an individual's relationship with the state 'for better or for worse', as a process ranking and excluding certain legal identities, as a concept reinforcing state power and, finally, as something reflecting the power dynamics playing out in the international human rights system. Depending on which understanding that is invoked, legal identity has different impacts on rights and obligations. What needs to be acknowledged is that legal identity cannot simply be understood as a mechanism for inclusion. The ambiguous meaning of legal identity, allowing wide discretion for the state, has made it a sitting duck for different agencies to use for justifying their agenda, agencies not in line with the SDG's to 'leave no one behind'. Legal identity is therefore highly context dependent, raising questions important for the human rights regime on what ground one is, in fact, a rights-bearer.

# Bibliography

## Books and chapters

Arendt H, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt 1973)

Assal MA, *Struggles of Citizenship in Sudan* (Routledge 2014)

Bhat PI, *Analytical Legal Research for Expounding the Legal Wor(l)d* (Oxford University Press)

Bianchi A, *International Law Theories* (Oxford University Press 2016)

Butler J, *Bodies That Matter: On the Discursive Limits of Sex* (Routledge 2011)

Cassese A, *Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (Oxford Hart 2011)

Crowley J, *Where Does the State Actually Start? The Contemporary Governance of Work and Migration\** (Routledge 2017)

d'Aspremont J, *Epistemic Forces in International Law* (Edward Elgar Publishing 2015)

Dauvergne C, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008)

Derrida J, 'A Derrida Reader: Between the Blinds, Ed', *Kamuf, P* (*Harvester Wheatsheaf, Hemel Hempstead, Herts*) (1991)

———, 'Force of Law: The Mystical Foundation of Authority' in Cornell et al (Eds) *Deconstruction and the Possibility of Justice* (Routledge, 1992) 8' in Drucilla Cornell, Michel Rosenfeld and David Gray (eds), *Deconstruction and the Possibility of Justice* (Routledge 1993)

Du Gay P and Hall S, 'Who Needs Identity', *Questions of Cultural Identity* (Sage 1996)

Foucault M, 'Nietzsche, Genealogy, History', *Hommage a Jean Hyppolite* (Presses Universitaires de France 1971)

Kesby A, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012)

Schabas W, *The Universal Declaration of Human Rights: The Travaux Préparatoires* (Cambridge University Press 2013)

Shaw MN, *International Law* (8th edn, Cambridge University Press 2017)

Smith R, 'Human Rights Based Approaches to Research' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018)

Suzanne E, 'The Doctrinal Approaches to Research' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018)

## **Journal articles**

Al Tamimi Y, 'Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law' (2018) 27 *Social & Legal Studies* 283

Blitz BK and others, 'Birth Registration and Children's Rights: A Complex Story' (2014)  
*Borderscapes: Hidden Geographies and Politics at Territory's Edge* (University of Minnesota Press 2007)

Fortin KMA, 'To Be or Not to Be?: Legal Identity in Crisis in Non-International Armed Conflicts' (2021) 43 *Human Rights Quarterly* 29

González López L and others, 'Civil Registration, Human Rights, and Social Protection in Asia and the Pacific' (2012) 29 *Asia-Pacific Population Journal* 75

Harbers I, 'Legal Identity for All? Gender Inequality in the Timing of Birth Registration in Mexico' (2020) 128 *World Development* 104778

Ladner D, Jensen EG and Saunders SE, 'A Critical Assessment of Legal Identity: What It Promises and What It Delivers' (2014) 6 *Hague Journal on the Rule of Law* 47

Manby B, 'The Sustainable Development Goals and "Legal Identity for All": "First, Do No Harm"' (2021) 139 *World Development* 105343

McConnell L, 'Legal Theory as Research Methodology' in Lee McConnell and Rhona Smith (eds), *Research Methods in Human Rights* (Routledge 2018)

Mills S, Lee JK and Rassekh BM, 'A Multisectoral Institutional Arrangements Approach to Integrating Civil Registration, Vital Statistics, and Identity Management Systems' (2019) 38 *Journal of Health, Population and Nutrition* 19

Noll G, 'Why Human Rights Fail to Protect Undocumented Migrants' (2010) 2 *European Journal of Migration and Law* 241

Salem ZOA, '« Touche pas à ma nationalité »: Enrôlement biométrique et controverses sur l'identification en Mauritanie' (2018) 152 *Politique africaine* 77

Secretariat C, 'Legal Identity for All' (2017) 43 *Commonwealth Law Bulletin* 489

Sperfeldt C, 'Legal Identity and Statelessness in Southeast Asia - Cambodia' (2021) <<https://reliefweb.int/report/cambodia/legal-identity-and-statelessness-southeast-asia>> accessed 18 May 2021

——, 'Legal Identity in the Sustainable Development Agenda: Actors, Perspectives and Trends in an Emerging Field of Research' (2021) 0 *The International Journal of Human Rights* 1

Szreter S, 'The Right of Registration: Development, Identity Registration, and Social Security—A Historical Perspective' (2007) 35 *World Development* 67

## **Treaties**

### **UN treaties**

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR)

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW)

International Convention on the Elimination of All Forms of Racial Discrimination (adopted 1 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD)

Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD)

Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Statute of the International Court of Justice (adopted 26 June 1945) 993 UNTS 70 (ICJ Statute)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW)

The Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 1081 UNTS 283

Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 1990) 1577 UNTS 3 (CRC)

Vienna Convention on the Law of Treaties (adopted 3 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

### **Regional conventions**

American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992)

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter)  
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

### **UN Resolution**

UNGA Res 70/1 (21 October 2015) UN Docs A/RES/70/1

## **Case law**

### **European Court of Human Rights**

*Affaire M v Suisse* [2011] App No 4119906 (ECtHR)

*Aktaş and Aslaniskender v Turkey* [2019] App Nos 1868407 2110107 (ECtHR)

*Burghartz v Switzerland* [1994] App No 1621390 (ECtHR)

*Gaygusuz v Austria* [1996] App No 1737190 (ECtHR)

*Goodwin v the UK* [2002] ECtHR App No. 28957/95

*Kurić and Others v Slovenia [GC]* [2012] App No 2682806 (ECtHR)

*Odievre v France* [2003] App No 4232698 (ECtHR)

*Smirnova v Russia* [2019] App No 915704 (ECtHR)

### **ICJ**

*Nottenbohm case (Liechtenstein v Guatemala)* [1955] ICJ Rep 1955 P 4 Gen List No 18 (ICJ)

## **Official documents**

### **UN General comments**

CESCR, ‘General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)’ (2009) E/C12/GC/20

Committee on the Rights of Persons with Disabilities, ‘General Comment on Article 12: Equal Recognition before the Law’ (2013) CRPD/C/11/4

OHCHR, ‘Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law’ (2014) A/HRC/27/22

UNCHR, ‘CCPR General Comment No. 15: The Position of Aliens Under the Covenant’ (1986) HRI/GEN/1/Rev9 (Vol I)

———, ‘CCPR General Comment No. 18: Non-Discrimination’ (1989) HRI/GEN/1/Rev9 (Vol I)



——, ‘General Comment No. 29 States of Emergency (Article 4)’ (2001)  
CCPR/C/21/Rev1/Add11

——, ‘CCPR General Comment No. 17: Article 24 (Rights of the Child)’  
HRI/GEN/1/Rev9 (Vol I)

UNICEF, ‘Refworld | A Passport to Protection: A Guide to Birth  
Registration Programming’ (2013) UGDA Reports

### **Other UN documents**

Statistical Office of the United Nations, ‘Handbook of Vital Statistics  
Methods’ (1955) ST/STAT/SER/F17

Statement by Canada/Israel/US team on Means of Implementation; Peaceful  
Societies and Capable Institutions 2014

United Nations Legal Identity Agenda Task Force, ‘Items for Discussion  
and Decision: Civil Registration and Vital Statistics’, *Overview of the  
United Nations Legal Identity Agenda* (2020)  
<[https://unstats.un.org/unsd/statcom/51st-session/documents/BG-Item3k-  
Overview-E.pdf](https://unstats.un.org/unsd/statcom/51st-session/documents/BG-Item3k-Overview-E.pdf)>

UNSDG Human Rights Working Group, ‘The Human Rights Based  
Approach to Development Cooperation Towards a Common Understanding  
Among UN Agencies’ (2003)

‘Working Document for 5-9 May 2014, Eleventh Session of the Open  
Working Group on SDGs’  
<[https://sustainabledevelopment.un.org/content/documents/3686WorkingDo  
c\\_0205\\_additional supporters.pdf](https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc_0205_additional supporters.pdf)>

### **African Commission**

The African Commission on Human and Peoples’ Rights (the Commission),  
‘General Comment No. 4: The Right to Redress for Victims of Torture and  
Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)’  
(2017) Adopted at the 21st Extra-Ordinary Session of the African  
Commission on Human and Peoples’ Rights, held from 23 February to 4  
March 2017 in Banjul, The Gambia  
<<https://www.achpr.org/legalinstruments/detail?id=60>> accessed 25 May  
2021

## EU

Commission (EC), 'Communication from the Commission on Establishing a New Partnership Framework with Third Countries under the European Agenda on Migration' COM 385 final, 7 June 2016

### **Council of Europe and the European Court of Human Rights**

Council of Europe, 'Rapport Du Comite d'experts en Matiere de Droits de l'homme Au

Comite Des Ministres' (1970) H (70) 7

<<https://rm.coe.int/09000016804e0376>> accessed 24 May 2021

ECtHR, 'Guide on Article 8 of the European Convention on Human Rights' (2020) <[https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf)> accessed 24 May 2021

### **National documents**

Government of Nigeria, 'Citizen Data Management And Harmonization Report' (*Citizen Data Management And Harmonization Report*, 13 August 2020)

U.S. Department of Homeland Security, 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children' (2012) Memorandum <<https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>> accessed 24 May 2021

'What Is Daca and Who Are the Dreamers?' *the Guardian* (14 September 2017) <<http://www.theguardian.com/us-news/2017/sep/04/donald-trump-what-is-daca-dreamers>> accessed 24 May 2021

### **Reports**

Cody C and Plan, 'Count Every Child: The Right to Birth Registration' (Plan 2009)

<<https://reliefweb.int/sites/reliefweb.int/files/resources/56D4BFF27FE425B249257671001C075C-Count%20Every%20Child%20report%202009.pdf>>

Dahan M and Gelb A, 'The Role of Identification in the Post-2015 Development Agenda' (World Bank 2015) World Bank Working Paper

<<https://openknowledge.worldbank.org/bitstream/handle/10986/22513/The0role0of0id050development0agenda.pdf?sequence=1&isAllowed=y>>

Harbitz M and Boekle-Giuffrida B, ‘Democratic Governance, Citizenship, and Legal Identity: Linking Theoretical Discussion and Operational Reality’ (2009)

<<https://publications.iadb.org/publications/english/document/Democratic-Governance-Citizenship-and-Legal-Identity-Linking-Theoretical-Discussion-and-Operational-Reality.pdf>> accessed 18 May 2021

Harbitz M and Tamargo M del C, ‘The Significance of Legal Identity in Situations of Poverty and Social Exclusion: The Link between Gender, Ethnicity, and Legal Identity’ (2009)

<<https://publications.iadb.org/en/significance-legal-identity-situations-poverty-and-social-exclusion-link-between-gender-ethnicity>> accessed 18 May 2021

Institute on Statelessness and Inclusion, “‘Legal Identity, Nationality and Statelessness’” (2018) <<https://files.institutesi.org/Legal-identity.pdf>> accessed 24 May 2021

Socialstyrelsen, ‘Social Rapport 2010’ (2010)

<<https://www.socialstyrelsen.se/globalassets/sharepoint-dokument/artikelkatalog/ovrigt/2010-3-11.pdf>>

World Bank, ‘Principles on Identification for Sustainable Development: Toward the Digital Age’

<<http://documents1.worldbank.org/curated/en/213581486378184357/pdf/Principles-on-Identification-for-Sustainable-Development-Toward-the-Digital-Age-Second-Edition.pdf>> accessed 24 May 2021

## **Blogs and other webpages**

‘About Us | Identification for Development’

<<https://id4d.worldbank.org/about-us>> accessed 26 May 2021

‘Civil Registration: Why Counting Births and Deaths Is Important’

<<https://www.who.int/news-room/fact-sheets/detail/civil-registration-why-counting-births-and-deaths-is-important>> accessed 18 May 2021

‘Data | Identification for Development’ <<https://id4d.worldbank.org/global-dataset>> accessed 24 May 2021

‘Data Visualization | Identification for Development’  
<<https://id4d.worldbank.org/global-dataset/visualization>> accessed 25 May 2021

‘Despite Significant Increase in Birth Registration, a Quarter of the World’s Children Remain “Invisible”’ <<https://www.unicef.org/press-releases/despite-significant-increase-birth-registration-quarter-worlds-children-remain>> accessed 26 May 2021

‘Différance | Linguistics’ (*Encyclopedia Britannica*)  
<<https://www.britannica.com/topic/differance>> accessed 18 May 2021

“Every SDG Target Needs a Form of Identification” – Podcast with Alan Gelb and Mariana

Dahan’ (*Center For Global Development*)  
<<https://www.cgdev.org/blog/every-sdg-target-needs-form-identification-podcast-alan-gelb-mariana-dahan>> accessed 18 May 2021

Gelb A and Clark J, ‘Identification for Development: The Biometrics Revolution’ [2012] SSRN Electronic Journal  
<<http://www.ssrn.com/abstract=2226594>> accessed 24 May 2021

Gelb A and Manby B, ‘Has Development Converged with Human Rights? Implications for the Legal Identity SDG’ (*Center For Global Development*)  
<<https://www.cgdev.org/blog/has-development-converged-human-rights-implications-legal-identity-sdg>> accessed 18 May 2021

‘Home — UN Legal Identity Agenda’ <<https://unstats.un.org/legal-identity-agenda/>> accessed 17 May 2021

‘Huduma Namba and Our National Security Strategy’ (2019)  
<<https://www.hudumanamba.go.ke/huduma-namba-and-our-national-security-strategy/>> accessed 24 May 2021

‘ICAO TRIP’  
<<https://www.icao.int/Security/FAL/TRIP/Pages/default.aspx>> accessed 25 May 2021

‘ID4Africa – Identity for All in Africa’ <<https://id4africa.com/>> accessed 18 May 2021

‘Inclusive and Trusted Digital ID Can Unlock Opportunities for the World’s Most Vulnerable’ (*World Bank*)

<<https://www.worldbank.org/en/news/immersive-story/2019/08/14/inclusive-and-trusted-digital-id-can-unlock-opportunities-for-the-worlds-most-vulnerable>> accessed 26 May 2021

‘Legal Identity: A Proxy for Inclusion’ (*Thales Group*)

<<https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/inspired/legal-identity>> accessed 25 May 2021

‘SDG Indicators — SDG Indicators’

<<https://unstats.un.org/sdgs/metadata/?Text=&Goal=16&Target=16.9>> accessed 25 May 2021

Sudhir K and Sunder S, ‘What Happens When a Billion Identities Are Digitized?’ (*Yale Insights*) <<https://insights.som.yale.edu/insights/what-happens-when-billion-identities-are-digitized>> accessed 18 May 2021

‘Sweden – the First Cashless Society?’ (*sweden.se*, 27 November 2020)

<<https://sweden.se/business/cashless-society/>> accessed 18 May 2021

‘The Criterion Problem: Measuring the Legal Identity Target in the Post-2015 Agenda’ <<https://blogs.worldbank.org/digital-development/criterion-problem-measuring-legal-identity-target-post-2015-agenda>> accessed 25 May 2021

‘The Sustainable Development Goals, Identity, and Privacy: Does Their Implementation Risk Human Rights?’ (*Privacy International*)

<<http://privacyinternational.org/long-read/2237/sustainable-development-goals-identity-and-privacy-does-their-implementation-risk>> accessed 18 May 2021

Turner C, ‘Jacques Derrida: Deconstruction’ (*Critical Legal Thinking*, 27 May 2016) <<https://criticallegalthinking.com/2016/05/27/jacques-derrida-deconstruction/>> accessed 18 May 2021

‘UNSDG | Human Rights-Based Approach’ <<https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>, <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>> accessed 26 May 2021

‘UNSDG | Leave No One Behind’ <<https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind>, <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind>> accessed 26 May 2021