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Born in the twilight zone: Birth registration in insurgent areas

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Abstract

Insurgent groups are registering births in territories which they control, and yet States do not recognize insurgent birth registration, resulting in a legal vacuum with harsh consequences for children. Based on international human rights and humanitarian law provisions related to birth registration, this article argues that insurgent groups have an inherent power to register births in order to fulfil their obligations under international humanitarian law, and that State obligation to ensure the right to recognition as a person under the law should require States to recognize insurgent birth registration in order to prevent harm to children.

Keywords: birth registration, insurgent groups, armed opposition groups, customary international law, child rights in armed conflict.

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Introduction

More than ever before, large numbers of civilians live for extended periods in areas affected by non-international armed conflict (NIAC); of the forty-nine active conflicts in 2016, only two were inter-State, while the rest were armed conflicts within States.[1] Conflicts are also increasingly protracted in duration.[2] Populations living in insurgent contexts, out of the effective reach of any *de jure* authority, are covered only by the limited set of provisions regulating NIAC (common Article 3 to the Geneva Conventions, and Additional Protocol II to the Geneva Conventions (AP II)[3]); as a result, understanding the legal basis and regulation of governance functions exercised by insurgent groups in control of territory has become increasingly urgent and relevant.

Birth registration is one of the casualties of thwarted access to justice experienced by populations in areas controlled by insurgent groups. The infant inhabitants in these territories risk disappearing into a legal black hole, as the territorial State can claim that it has lost effective control over those territories, and other States supporting the insurgent groups may deny (or may truly lack) decisive influence, yet the insurgent administration is typically not recognized by States as an authority for the human rights obligation of registration at birth.

Birth registration is a human right enshrined in the International Covenant on Civil and Political Rights (ICCPR)[4] and the United Nations (UN) Convention on the Rights of the Child (CRC),[5] but it is also a practical necessity, as it is often a precondition for exercising other rights. In other words, without proof of a child's name and age, it is not possible to obtain travel documents, to enrol in school or even to register for humanitarian aid, including family reunification, and social protection entitlements. The impact of lacking identity documents can be devastating and irreparable. In Rwanda, despite years of State efforts including photo and radio tracing in cooperation with the International Committee of the Red Cross (ICRC), in 2001, without birth documents, 3,500 unaccompanied children remained unidentified.[6] In Sierra Leone, many children rescued from forced recruitment could not remember their birth names; due to lack of

1 Margareta Sollenberg and Erik Melander, "Patterns of Armed Conflict, 2007–2016", *SIPRI Yearbook 2017*, 2017.

2 International Committee of the Red Cross (ICRC), *Protracted Conflict and Humanitarian Action: Some Recent ICRC Experiences*, Geneva, 2016.

3 "Common Article" refers to a provision that is common to all four of the Geneva Conventions. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 1 October 1950) (GC IV); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

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

5 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990).

6 Rwanda, *Initial Report to the Committee on the Rights of the Child under the Optional Protocol on the Involvement of Children in Armed Conflict*, UN Doc. CRC/C/OPAC/RWA/1, 6 December 2011, para. 146.

documentation, the identity of those children was never restored.[7] In Iraq, due to only possessing insurgent birth certificates, families were not able to receive medical care, food rations or school enrolment for their children.[8]

The precise number of unregistered children in insurgent areas is unknown because these children are invisible in respect of the law. They are vulnerable to being trafficked, smuggled or forced into underage armed recruitment since they do not possess a valid legal identity for the purpose of prevention or rehabilitation.[9] Nonetheless, the number of affected children is clearly substantial, in the tens of thousands in the past decade alone. Quilliam and the Romeo Dallaire Child Soldiers Initiative estimated that by March 2016 there were 31,000 pregnant women living under the Islamic State (IS) group, who only had access to IS birth certificates.[10] According to media reports, in the insurgent-controlled area of Donetsk region in eastern Ukraine, in 2017 alone more than 12,000 infants were born and issued birth certificates by the insurgent group in control of the area.[11]

International human rights law (IHRL) and international humanitarian law (IHL) in international armed conflict (IAC) have dedicated provisions defining the content of the right to identity registration from birth.[12] However, there is no black-letter regulation of birth registration by insurgent groups, and this vacuum has attracted little attention from human rights treaty bodies, the only bodies with a mandate to monitor the right to legal identity. For example, in Iraq, due to insurgent control of territory by Al-Qaeda from 2004 to 2009, and IS from 2014 to 2017, thousands of children did not have access to State-run birth registration systems, a concern highlighted by civil society groups and by duty bearers.[13] The situation of these children was not mentioned by any of the six treaty body Concluding Observations issued on Iraq in 2015.[14] CRC observations on birth registration in Iraq focused only on barriers faced by children belonging to

7 UNICEF, *Innocenti Insight: Birth Registration and Armed Conflict*, Florence, 2007, p. 16.
8 International Rescue Committee (IRC), "Born under ISIS, the Children Struggling in Iraq", *Reliefweb*, 19 January 2018, available at: https://reliefweb.int/report/iraq/born-under-isis-children-struggling-iraq (all internet references were accessed in March 2020).
9 UNICEF, *Every Child's Birth Right: Inequities and Trends in Birth Registration*, New York, 2013.
10 Noman Benotman and Nikita Malik, *The Children of Islamic State*, Quilliam and Romeo Dallaire Child Soldiers Initiative, March 2016, p. 47.
11 "Over 500 Babies Born in DPR Since Early 2018", *DONi News Agency*, 19 January 2018, available at: https://dninews.com/article/over-500-babies-born-dpr-early-2018.
12 CRC, Art. 7, and ICCPR, Art. 24(2); GC IV, Arts 24, 50, and AP II, Art. 78(3).
13 Daluvan Barwari and Salam Gehad, "Children of Al-Qaeda Fighters in Iraq Face Legal Strife, Social Stigma", *Al-Monitor*, 1 April 2013, available at: www.al-monitor.com/pulse/culture/2013/04/iraq-children-al-qaeda-fighters-legal-problems.html.
14 *Concluding Observations on the Fifth Periodic Report of Iraq*, UN Doc. CCPR/C/IRQ/CO/5, 3 December 2015; *Concluding Observations on the Combined Fifteenth to Twenty-First Periodic Reports of Iraq*, UN Doc. CERD/C/IRQ/CO/15-21, 22 September 2014; *Concluding Observations on the Initial Report of Iraq*, UN Doc. CAT/C/IRQ/CO/1, 7 September 2015; *Concluding Observations on the Report Submitted by Iraq under Article 29(1) of the Convention*, UN Doc. CED/C/IRQ/CO/1, 13 October 2015; *Concluding Observations on the Fourth Periodic Report of Iraq*, UN Doc. CESCR.12IRQCO4, 9 October 2015; *Concluding Observations on the Combined Second to Fourth Periodic Reports of Iraq*, UN Doc. CRC/C/IRQ/CO/2-4, 3 March 2015.

minority groups.[15] The Committee for the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict mentioned the weak Iraqi birth registration system as a serious concern for age verification in armed recruitment, but no mention was made of insurgent-issued identity documents.[16]

Significant academic attention has been devoted to practices of insurgent groups and the possible content of their duties or powers under human rights and humanitarian law,[17] but in these treatments, insurgent birth registration has languished in obscurity.[18] This article will examine the considerable but largely overlooked body of practice of insurgent groups in registering the identity of children from birth. Insurgent or armed opposition groups, as defined in Article 1(1) of AP II, are "dissident armed forces … which, under responsible command, exercise [stable] control over … territory"; this article will use the terms "insurgents" and "insurgent groups" interchangeably throughout to reference the concept of a group meeting the AP II criteria.[19] The main characteristics of these groups for the purposes of this article are organization, effective control of a population and territory, political opposition to the government of the territorial State, and independent existence (i.e. not a *de facto* organ of another State).[20] Groups which do not exercise effective control over territory and do not have an organizational apparatus will not be addressed in this analysis, which focuses, as defined in Article 1(1) of AP II, on groups which have the capacity to "implement this Protocol".

15 UN Doc. CRC/C/IRQ/CO/2-4, above note 14, para. 31.

16 *Concluding Observations on the Report Submitted by Iraq under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, UN Doc. CRC/C/OPAC/IRQ/CO/1, 5 March 2015, paras 21–24, 35–38; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002).

17 For example, Antonio Cassese, "The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts", *International Comparative Law Quarterly*, Vol. 30, No. 2, 1981; Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", *International Review of the Red Cross*, Vol. 88, No. 863, 2006; Aristotle Constantinides, "Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council", *Human Rights & International Legal Discourse*, Vol. 4, No. 1, 2010; Zakaria Dabone, "International Law: Armed Groups in a State-Centric System", *International Review of the Red Cross*, Vol. 93, No. 882, 2011; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017; Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart Publishing, Oxford, 2016; Sandesh Sivakumaran, "Binding Armed Opposition Groups", *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006.

18 An exception being Sandesh Sivakumaran, "Courts of Armed Opposition Groups: Fair Trials or Summary Justice?" *Journal of International Criminal Justice*, Vol. 7, No. 3, 2009, with a passing mention of insurgent birth certificates on p. 511.

19 AP II, Art. 1(1); see also Yves Sandoz, Christophe Swinarski and Bruno Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (Commentary on the APs), paras 4460–4470.

20 For discussion of the term "armed opposition group", see A. Constantinides, above note 17, p. 90; Veronika Bilkova, "Treat Them as They Deserve? Three Approaches to Armed Opposition Groups under Current International Law", *Human Rights & International Legal Discourse*, Vol. 4, No. 1, 2010, pp. 113–114; Lisbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, pp. 3–4; D. Murray, above note 17, Part 1.2.

States are required under all circumstances to ensure the right to recognition as a person under the law, a non-derogable right. In peacetime, States are obligated under IHRL to register births in order to fulfil that right for infants. In armed conflict, States may derogate from the obligation to register births under the derogation regime of Article 4 of the ICCPR, which allows them to temporarily derogate from their full obligations in regard to certain rights only if the "life of the nation" is threatened and only to the extent and for the duration which is absolutely necessary.[21] However, they will still be bound under IHL provisions to register births in domestic territories under their control whenever materially possible, in order to fulfil the non-derogable right to recognition under the law. This article will argue that in domestic territories not under State control, the obligation to ensure recognition under the law should take the form of an obligation to recognize insurgent-issued birth documents. This article will argue that insurgent groups have the inherent power to register births, in order to "take all appropriate steps" to protect children under Article 4(3) of AP II, human rights devolved on the local population, and international customary law. This article will first review existing insurgent practice of birth registration, demonstrating that many insurgent groups can and do register births, though these registrations are not recognized by States. Second, it will survey relevant IHRL and IHL provisions related to birth registration and identification of children in armed conflict in order to clarify these obligations. Lastly, the article will describe a possible legal basis for recognition of insurgent birth registration and address some common objections to State recognition.

Birth registration in practice

Insurgents' practice related to birth registration

A number of insurgent groups with effective control of populations are registering births taking place in their territories. IS issued birth certificates, recording the baby's weight, length and date of birth, and stamping the document with the seal of the "Caliphate".[22] Surveys of insurgent groups who engage in humanitarian action have uncovered goals ranging from winning the favour of the local population to demonstrating stability, increasing their legitimacy and facilitating

21 ICCPR, Art. 4; Human Rights Committee, General Comment No. 29, "Article 4: Derogations during a State of Emergency", UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

22 Rukmini Callimachi and Andrew Rossback, "The ISIS Files: Extreme Brutality and Detailed Record-Keeping", *New York Times*, 4 April 2018, available at: www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-photos.html; Nadim Houry, "Children of the Caliphate: What to Do About Kids Born Under ISIS", *Human Rights Watch*, 23 November 2016, available at: www.hrw.org/news/2016/11/23/children-caliphate; Atika Shubert, "How ISIS Controls Life, from Birth to Foosball", *CNN*, 21 April 2015, available at: https://edition.cnn.com/2015/04/21/middleeast/isis-documents/index.html; Meira Svirsky, "First Islamic State Birth Certificate: Guns and Grenade", *Clarion Project*, 28 April 2015, available at: https://clarionproject.org/first-islamic-state-birth-certificate-report-25/.

the smooth running of the local administration;[23] engaging in administration of territory is likely to have similar motives. Some insurgent groups have formed mutual agreements to recognize one another's official documents, seeking recognition from the outside world.[24] Insurgent civil documentation issuance practices are not well understood, due to the limited access of journalists and non-governmental organizations (NGOs) to insurgent-controlled areas. Nevertheless, a few trends can be identified.

The number of affected individuals is not inconsequential. Syrians in 91% of sub-districts inside Syria report that loss or lack of identity documents is one of their top three protection needs; the 2015 humanitarian situation overview by the Office of the UN High Commissioner for Refugees (UNHCR) found that less than half of the population in most areas of Syria are able to obtain documents.[25] A review of court records in 2017 indicated that just 38% of the reportedly 14,000 children born in the first two years of the "Luhansk People's Republic" in eastern Ukraine have completed the procedure to be registered by the government of Ukraine.[26] The difficulties faced by these children can last for years after territorial control has been restored. According to the Iraqi Parliamentary Committee on Human Rights, among children born during 2004 and 2009, when Al-Qaeda controlled territory in Iraq, by 2013 more than 500 of those born in insurgent areas still remained unregistered.[27] Iraq's Ministry of the Interior assessed that there are at least 250–300 children born with at least one parent as an IS member,[28] while the Norwegian Refugee Council (NRC) estimates based on existing assessments that in displacement camps alone, approximately 45,000 children in Iraq are lacking birth certificates due to being born in insurgent-held areas.[29] There are an estimated 45,000 people living in the self-proclaimed Republic of Abkhazia, which has been a contested territory since 1993; Georgia does not recognize Abkhazian birth certificates.[30]

23 Ashley Jackson, *In Their Words: Perceptions of Armed Non-State Actors on Humanitarian Action*, Geneva Call, May 2016, especially pp. 12–14, 22–23.

24 "The Pridnestrovya Parliament has Ratified an Intergovernmental Agreement on Visa-Free Regime with Abkhazia", *News Agency Novosti Pridnestrovya*, 24 January 2017, available at: https://novostipmr.com/en/news/17-01-25/supreme-council-ratifies-updated-treaty-cooperation-south-ossetia.

25 UNHCR, *Syrian Arab Republic: Whole of Syria Protection Sector – 2015 Protection Needs Overview*, 31 October 2015, available at: https://reliefweb.int/report/syrian-arab-republic/syrian-arab-republic-whole-syria-protection-sector-2015-protection-needs.

26 United Nations in Ukraine, "Briefing Note on Birth Registration", December 2017, available at: www.humanitarianresponse.info/en/operations/ukraine/document/briefing-note-birth-registration-united-nations-ukraine-december-2017-0.

27 N. Houry, above note 22.

28 Ghazwan Hassan al-Jibouri, "Sins of the Father: Extremist Fighters' Children Live in Stateless Limbo in Iraq", *Niqash*, 12 May 2016, available at: www.niqash.org/en/articles/society/5267/Extremist-Fighters'-Children-Live-In-Stateless-Limbo-In-Iraq.htm.

29 Alexandra Saieh, *Barriers from Birth: Undocumented Children in Iraq Sentenced to Life on the Margins*, NRC, 2019, p. 7.

30 Tamta Karchava, "More than 500 Abkhazians Were Granted Georgian Citizenship during the Last Year and a Half", *Abkhazia.gov*, 5 July 2010, available at: http://abkhazia.gov.ge/index.php?lang_id=ENG&sec_id=85&info_id=408.

Many insurgent groups preserve the documentation procedures of the State, continuing implementation by former civil registry staff and using government registry archives, facilities and supplies unless they are destroyed or depleted.[31] In other locations, village councils, religious leaders or religious court judges also issue documents, such as baptismal certificates or Islamic *katb al-kitab* marriage certificates, which take on a new validity due to lack of access to government-issued documents.[32] Even in insurgent-controlled areas, birth certificates are one of the required documents which must be submitted in order to access humanitarian assistance, to confirm legal status within the entity and to ensure freedom of movement through internal checkpoints.[33] Birth certificates are often required to receive local benefits such as baby food or child protection services.[34]

Affected populations living in insurgent areas express the desire to obtain valid government-issued civil documentation, but many are not able to cross to government-controlled areas to access such documentation.[35] In most cases, insurgent-issued documents are not recognized outside the limited area of insurgent control.[36] Obtaining a valid birth certificate in the government-controlled areas requires making a dangerous and highly impractical journey across checkpoints and front lines with a newborn baby.[37] People with disabilities or health issues are often physically not able to make the journey. The most progressive States offer judicial validation procedures for conversion of personal status documents issued by insurgent groups as evidence of life events such as birth; however, this procedure requires an appearance in court on the government-controlled territory, and thus a court fee and transport and accommodation costs.[38] In contrast, insurgent-issued documents are low-cost and

31 Zahra Albarazi and Laura van Waas, *Understanding Statelessness in the Syria Refugee Context*, NRC and Institute on Statelessness and Inclusion, 2016, p. 30; Ivan Watson and Raja Razek, "Rebel Court Fills Void amid Syrian Civil War", *CNN*, 26 January 2013, available at: https://edition.cnn.com/2013/01/25/world/meast/syria-rebel-court/.

32 IRC, *Identify Me: The Documentation Crisis in Northern Syria*, July 2016, available at: www.rescue-uk.org/report/identify-me-documentation-crisis-northern-syria; UNICEF, above note 7, p. 29.

33 Thomas Hammarberg and Magdalena Grono, *Human Rights in Abkhazia Today*, July 2017, p. 62, available at: www.palmecenter.se/wp-content/uploads/2017/07/Human-Rights-in-Abkhazia-Today-report-by-Thomas-Hammarberg-and-Magdalena-Grono.pdf; Nabih Bulos, "Born under a Bad Sign: Mosul Residents with Islamic State Birth Certificates Need a Do-over", *Los Angeles Times*, 7 March 2017, available at: www.latimes.com/world/middleeast/la-fg-iraq-mosul-court-20170306-story.html.

34 For example, as part of its Ani Amaalyki (Mother and Child) project, the NGO International Fund Apsny, in Transnistria, requires submission of a birth certificate to receive a child care package. See the International Fund Apsny website, available at: www.fondapsny.org/en/ani-amaalyki.

35 IRC, above note 32; NRC, *Voices from the East: Challenges in Registration, Documentation, Property and Housing Rights of People Affected by Conflict in Eastern Ukraine*, 28 October 2016, p. 7.

36 Zaina Shahlah, "Syria Undocumented: Displaced Children Struggle for Birth Certificates", *Raseef 22*, 3 July 2017, available at: https://raseef22.com/en/politics/2017/07/03/syria-undocumented-displaced-children-struggle-birth-certificates/.

37 Z. Albarazi and L. van Waas, above note 31, p. 33.

38 European Commission for Democracy through Law, "Information Note on the Law on Occupied Territories of Georgia", Opinion 516/2009 CDL(2009)044, Strasbourg, 5 March 2009; UN Office of the High Commissioner for Human Rights, *Report on the Human Rights Situation in Ukraine*, 16 August–15 November 2016, available at: www.ohchr.org/Documents/Countries/UA/UAReport16th_EN.pdf.

available locally, while conferring the same benefits as valid documentation within non-government-controlled areas. Restrictions on freedom of movement due to lack of valid documentation can have devastating consequences on access to health care and family reunification.[39]

Even if physical barriers to accessing government registration offices were removed, many conflict-affected families fear persecution by the State and will not register in the government-controlled area in order to avoid being identified and targeted, with the result that insurgent-issued birth certificates may be the most accurate and complete form of documentation, or the only form, that they can access for their children.[40] One refugee has stated: "Many of us Syrian doctors didn't have the ability to register the births of our children in Syria because we were wanted by the regime."[41] Children of insurgent group members are disproportionately impacted. An internally displaced woman in Syria said: "I can't register my three children in a regime civil documentation center because I am the widow of a Free Syrian Army fighter."[42] Another significant group facing a disproportionate impact of the requirement to cross to government-controlled territory are single mothers whose male partners are missing, have been killed due to the conflict or detained, or are employed in insurgent structures and thus at risk of persecution by the State.[43] Issues of family separation and social protection become irresolvable for families who only have insurgent birth certificates when insurgent documentation is not a recognized form of proof of identity.

Because insurgent documents are not recognized as a valid form of documentation by States, families may be forced to resort to forged documents or to go through middlemen in order to procure documents by proxy, increasing risk of exploitation.[44] For many, even the possibility of a forged birth certificate as their only chance at proof of identity is out of reach on a subsistence budget.[45] Free legal aid offered by NGOs, which assist populations in government-controlled areas to obtain birth certificates, is often not permitted in insurgent areas. UN operational agencies, which may issue immunization or enrolment certificates that could serve as an alternative form of documentation, are often either non-operational or have a limited presence in insurgent-controlled areas.[46]

39 IRC, above note 32; NRC and International Human Rights Clinic at Harvard Law School, *Registering Rights: Syrian Refugees and the Documentation of Births, Marriages, and Deaths in Jordan*, October 2015, p. 16.

40 IRC, above note 32.

41 Sarnata Reynolds and Daryl Grisgraber, *Birth Registration in Turkey: Protecting the Future for Syrian Children*, Refugees International, 2015, p. 9.

42 IRC, above note 32.

43 NRC and International Human Rights Clinic at Harvard Law School. *Securing Status: Syrian Refugees and the Documentation of Legal Status, Identity, and Family Relationships in Jordan*, November 2016, p. 24; N. Houry, above note 22.

44 Z. Shahlah above note 36; Z. Albarazi and L. van Waas, above note 31, p. 34; NRC, *Birth Registration Update: The Challenges of Birth Registration in Lebanon for Refugees from Syria*, 2015, pp. 24–25.

45 Leila Fadel, "Children of Al-Qaeda in Iraq Pay for Sins of Their Fathers", *Washington Post*, 21 September 2010, available at: www.washingtonpost.com/wp-dyn/content/article/2010/09/20/AR2010092005696.html.

46 N. Houry, above note 22.

Post-conflict response of States to insurgent birth registration

Rigid post-conflict birth registration practices, though intended to protect children from kidnapping or trafficking,[47] prove maladapted to conflict realities.[48] Re-issuance of documents once territory is retaken or families are displaced to government-controlled areas can take months or years – a "bureaucratic nightmare"[49] – and in the meantime, children are not eligible for essential services like food ration cards, medical care[50] or primary school enrolment.[51] Some parents fear that they could be separated from their children or even accused of trafficking when crossing borders, as they have no proof of the child's identity and parentage.[52] One media report tells the story of an 8-year-old boy, still unable to regularize his identity documents after being born in an insurgent area, who is not able to enrol in school and is thus isolated from his peers.[53]

Families possessing insurgent birth documents report facing reprisals when the territory is retaken and they seek to regularize their documents, including arrest and interrogation because of the identity document,[54] insurgent birth certificates torn up in front of them,[55] harassment, threats and indefinite discriminatory "delays" in document issuance.[56] As a result of these risks, many families do not even dare to try to obtain valid documents.[57]

Absence of identity provision during NIAC has devastating consequences for children, both during and after the conflict, especially related to family separation, freedom of movement and access to services. Analysis of practice shows that insurgent groups are already issuing identity documents, which many families use as a form of identification. However, lack of clarity regarding the legal effect of those documents outside the area of insurgent control has resulted in a legal vacuum with harsh consequences for children and families.

47 Z. Shahlah, above note 36.
48 D. Barwari and S. Gehad, above note 13.
49 Linda Gradstein, "Iraq's Race to Replace Documents Issued by ISIS", *Jerusalem Post*, 14 December 2016, available at: www.jpost.com/Middle-East/ISIS-Threat/Iraqs-race-to-replace-documents-issued-by-ISIS-474968.
50 IRC, above note 32.
51 Human Rights Watch, "Iraq: School Doors Barred to Many Children Affects Thousands Who Lived Under ISIS Rule", 28 August 2019, available at: www.hrw.org/news/2019/08/28/iraq-school-doors-barred-many-children.
52 NRC, above note 29.
53 G. H. al-Jibouri, above note 28.
54 Human Rights Watch, "Iraq: Families of Alleged ISIS Members Denied IDs, Documents Needed for Movement, Welfare, Work, School", 25 February 2018, available at: www.hrw.org/news/2018/02/25/iraq-families-alleged-isis-members-denied-ids.
55 *Ibid.*
56 Amnesty International, *The Condemned: Women and Children Isolated, Trapped and Exploited in Iraq*, 2018, pp. 22–23.
57 *Ibid.*

Birth registration under international law

Birth registration and the right to recognition as a person before the law

Birth registration was a widespread practice of States long before the rule was ever codified in multilateral treaties, yet it has taken on increasing legal application in the post-war period as it has been consistently integrated into human rights and humanitarian law treaties.[58] Due to this historical practice, the obligation to ensure legal identity of children from birth as codified in treaties should be characterized as law-declaring rather than innovative.[59] This section will argue that contemporary interpretation of these widely ratified treaties may broaden the scope of application of the norm of birth registration, recognizing the inherent power of insurgent groups to register births and obligating States to recognize children's identities which are thus registered.[60]

It is clear that States have an obligation under IHRL to ensure birth registration of children. The right to recognition as a person before the law was enshrined in Article 6 of the Universal Declaration of Human Rights (UDHR),[61] though without stipulating how the right should be implemented. The 1959 UN Declaration on the Rights of the Child added the right to a name and a nationality at birth.[62] In 1966, a provision on birth registration, Article 24(2), was adopted in the ICCPR; the Human Rights Committee's General Comment No. 17 interprets Article 24(2) of the ICCPR as "designed to promote recognition of the child's legal personality", linking it with Article 6 of the UDHR.[63] The right to be registered at birth flows from Article 16 of the ICCPR, the right to recognition under the law, as "only registration guarantees that the existence of a newborn child is legally recognized".[64] A general comment of the Working Group on Enforced or Involuntary Disappearances forcefully states that denial of birth registration means that the affected individual becomes a "non-person", not recognized by the law and denied access to legal protections.[65] The Inter-American Court of Human Rights judged that even a delay by the State in issuing

58 H. L. Brumberg, D. Dozor and S. G. Golombek, "History of the Birth Certificate: From Inception to the Future of Electronic Data", *Journal of Perinatology*, Vol. 32, No. 6, 2012.

59 See R. R. Baxter, *Treaties and Custom*, Brill Njihoff, Leiden, 1971, especially pp. 99–104.

60 *Ibid.*, p. 103: "Even if all States should expressly assume the obligations of codification treaties, regard will still have to be paid to customary international law in the interpretation of those instruments, and the treaties will in turn generate new customary international law growing out of the application of the agreements."

61 Universal Declaration of Human Rights, UNGA Res. 217 A(III), 10 December 1948.

62 Principle 3, "The child shall be entitled from his birth to a name and a nationality": Declaration on the Rights of the Child, UN Doc. A/RES/1386 (XIV), 20 November 1959.

63 Human Rights Committee, General Comment No. 17, "Article 24 (Rights of the Child)", 7 April 1989, para. 7.

64 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N. P. Engel, Kehl, 1993, p. 432.

65 Working Group on Enforced or Involuntary Disappearances, "General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances", available at: www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf.

birth certificates for children of migrants amounted to a violation of the right to a name and the right to juridical personality.[66]

The Human Rights Council defines birth registration as the "continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth", and confirms that registration "establishes the existence of a person under law".[67] The procedural standard involves three processes: declaration at a civil registry, recording by the registry, and finally, issuance of a certificate that is "evidence of the State's legal recognition of the child".[68]

In 1989, the CRC added to the protections of the ICCPR; Articles 7 and 8 of the CRC provide for registration immediately after birth, the right to a name and to acquire nationality, the right of the child to be cared for by parents, and the right of the child to preserve his or her identity. The CRC is by far the most widely ratified human rights treaty.[69] There are no reservations made to the CRC related to birth registration; the three registered reservations to Article 7 relate to nationality law or the possibility of registering an anonymous birth, not the act of birth registration.[70]

Although several provisions of the CRC (such as freedom of expression, religion and association) may be limited in emergencies, Article 7, which relates to birth registration, does not contain a limitation clause. The CRC does not have a derogation regime, with the Committee on the Rights of the Child stating: "It is important to emphasize that the Convention and the Optional Protocols thereto apply at all times and that there are no provisions allowing for derogation of their provisions during emergencies."[71] Article 4(2) of the ICCPR explicitly forbids derogation from Article 16 of the ICCPR (the right to recognition as a person under the law) and permits derogation from Article 24 only in a state of emergency and only to the extent and for such a time as is strictly necessary.[72] The Human Rights Council confirms that the right to be registered at birth is found in IHL, referencing Article 50 of Geneva Convention IV (GC IV), and states that birth registration is in fact critical during states of emergency, as a crucial mechanism for prevention of underage recruitment, reintegration of child soldiers and family reunification in emergencies.[73]

Birth registration, then, is the minimum form of individual legal recognition of natural persons in international law. A registered child is able to

66 Inter-American Court of Human Rights, *Case of the Yean and Bosico Children v. The Dominican Republic*, Series C, No. 130 (Merits), 8 September 2005, para. 260(3).
67 Human Rights Council, Resolution of the 27th Session, "Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law", UN Doc A/HRC/27/22, 17 June 2014, para. 4.
68 *Ibid.*, para. 5.
69 The CRC has 196 States Parties, representing all eligible States except for the United States. The next most ratified treaty is the International Convention on the Elimination of All Forms of Racial Discrimination, with 182 States Parties. See Jaap E. Doek, "The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges", *St. Louis University Public Law Review*, Vol. 22, No. 2, 2003.
70 CRC, Reservations and Declarations.
71 Committee on the Rights of the Child, "General Comment No. 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights", UN Doc. CRC/C/GC/16, 17 April 2013, para. 49.
72 ICCPR, Art. 4(2).
73 Human Rights Committee, above note 63, paras 15, 33–35.

access the minimum protections offered by the legal system of the territorial State.[74] The right to birth registration is separate from other aspects of legal status such as nationality, in order that legal uncertainties, such as those arising from changes in territorial control, do not affect birth registration as a minimum guarantee.[75] International organizations have prioritized birth certificates as the "preferred standard in legal identity" because birth certificates establish age, place of origin, name, and family relationships, all needed for issuing other identity documents.[76]

The right to legal identity from birth is reinforced through other human rights treaties. The CRC's wording is echoed in Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[77] and Article 18(2) of the Convention on the Rights of Persons with Disabilities,[78] as well as in regional human rights treaties, as seen in Article 6 of the African Charter on the Rights and Welfare of the Child, Article 7 of the Covenant on the Rights of the Child in Islam, and Article 18 of the American Convention on Human Rights.[79] Article 25(1)(b) of the International Convention for the Protection of All Persons from Enforced Disappearance adds an obligation to criminalize the falsification or destruction of identity documents of disappeared children, and Article 25(5) of that convention applies the Article 3(1) CRC principle – the best interests of the child – to the re-establishment of a child's identity.[80]

Birth registration as a right under customary international human rights law

The presence of identical birth registration provisions in many international and regional treaties, and in the historical practice of States which preceded these treaties,[81] serves as evidence of the uniform content of the customary norm which they codify – that is, the obligation to ensure that children can exercise their right to birth registration, in accordance with the best interests of the

74 Ineta Ziemele, *Article 7: The Right to Birth Registration, Name and Nationality and the Right to Know and Be Cared For by Parents*, Martinus Nijhoff, Leiden, 2007, para. 43.
75 *Ibid.*, paras 6, 44.
76 Debra Ladner, Erik G. Jensen and Samuel E. Saunders, "A Critical Assessment of Legal Identity: What It Promises and What It Delivers", *Hague Journal on the Rule of Law*, Vol. 6, No. 1, 2014, p. 48.
77 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2220 UNTS 3, 18 December 1990 (entered into force 1 July 2003).
78 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008).
79 African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49, 11 July 1990 (entered into force 29 November 1999); Covenant on the Rights of the Child in Islam, OIC/9-IGGE/HRI/2004/Rep. Final, June 2005; American Convention on Human Rights, 1144 UNTS 123, 22 November 1969 (entered into force 18 July 1978).
80 International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/67/180, 20 December 2006 (entered into force 23 December 2010).
81 See H. L. Brumberg, D. Dozor and S. G. Golombek, above note 58.

child.[82] There are currently no States in the world which do not have any birth registration system, although in a few countries birth registration is not mandatory.[83] In industrialized countries and in many countries in Eastern Europe, Central Asia, Latin America and the Caribbean, birth registration rates are above 90%.[84] In countries where birth rates are lower, birth registration has been prioritized in achieving Sustainable Development Goal 16, "Promote peaceful and inclusive societies for sustainable development", as one of the key indicators is "Proportion of children under 5 years of age whose births have been registered with a civil authority, by age".[85] The CRC is also cited as an important source for determining child-protective customary norms in conflict and directly incorporates IHL protections for children in Article 38.[86] Furthermore, when human rights norms become customary law,[87] it has been argued, "parallel norms in the Geneva Conventions with identical content" also become customary,[88] thus reinforcing consistent protections across branches of international law. Though IHRL provisions apply concurrently during conflict,[89] the law on IAC and the law of belligerent occupation also have specific provisions related to ensuring the identity of children in conflict situations.

Birth registration under international humanitarian law

Treaty law in international armed conflict

Article 24 of GC IV confirms that children affected by IAC are entitled to special protection. The parties to the conflict are encouraged to issue "identity discs" for children under the age of 12, recognizing the vital importance of the identity of children during conflict.[90]

82 ICJ, *North Sea Continental Shelf*, Judgment, *ICJ Reports 1969*, para. 74. For methodologies for determining provisions of IHRL and IHL customary law, see Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, Chap. 2.
83 UNICEF, *Progress of Nations 1998*, 1998, p. 6.
84 UNICEF, above note 9, p. 14.
85 UN General Assembly, *Transforming Our World: the 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1, 21 October 2015.
86 I. Ziemele, above note 74, para. 49. See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 135, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul; CRC, Art. 38(1): "States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child."
87 For extensive discussion of the customary nature of the Geneva Conventions and certain human rights provisions, applied to States, see also T. Meron, above note 82.
88 Theodor Meron, "The Geneva Conventions as Customary Law", *American Journal of International Law*, Vol. 81, No. 2, 1987, p. 368.
89 Human Rights Committee, General Comment No. 31 [80], "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11.
90 GC IV, Art. 24. Identity is a key condition of other Geneva Convention protections – for example, Article 122 of Geneva Convention III on information bureaux, which requires records to be kept on the identification of all prisoners of war who are detained. Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

> The identity discs used should be made of non-inflammable material and should bear the surname, date of birth and address of the child and its father's first name. These markings should either be engraved on the disc or inscribed in indelible ink. Further particulars might be useful, to reduce the danger of mistakes arising: finger prints, a photograph, an indication of the child's blood group, Rhesus factor, etc.[91]

The ICRC's 1960 Commentary to the Geneva Conventions (1960 Commentary)[92] notes that the age limit of 12 was recommended at the 17th International Conference of the Red Cross and Red Crescent because an older child would be able to state his or her identity independently.[93] Although the obligation for material support applies only to unaccompanied and separated children, the recommendation to provide identity discs applies to all children, as it is "essential" to be able to identify all children during conflict; the 1960 Commentary recalls that after World War II, thousands of children were irreparably lost to their families due to lack of identification.[94] According to the Commentary, some delegates were concerned that children would lose or exchange their discs, and others were concerned that wearing discs might facilitate persecution of targeted groups. Ultimately, States are free to determine the form of identification they deem best.[95]

Examples of State practice are limited. Mexico, the United Kingdom and the United States all include Articles 24 and 50 of GC IV in their military manuals,[96] while Ireland and Guinea have included provisions related to child identification in conflict in their domestic legislation, with Ireland incorporating the Geneva Conventions into domestic law and Guinea, though without citing

91 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1960 (1960 Commentary), pp. 189–190.

92 *Ibid.* The original ICRC commentaries were edited by Jean Pictet, based on the experience of World War II and on the negotiating history of these treaties; similarly, after the adoption of the Additional Protocols, ICRC lawyers drafted commentaries based on the unique mandate of the ICRC in IHL development. See Commentary on the APs, above note 19. The ICRC is now updating these commentaries; as of the time of writing of this article, the ICRC had issued new commentaries for Geneva Conventions I and II. See Jean-Marie Henckaerts, "Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century", *International Review of the Red Cross*, Vol. 94, No. 888, 2012. In 2017, a new scholarly commentary edited by Andrew Clapham, Paola Gaeta and Marco Sassòli was issued; however, its chapters related to the identity of children in conflict mainly cite the 1960 Commentary without going into further detail. See Heike Spieker, "Maintenance and Re-establishment of Family Links and Transmission of Information, Part II: Specific Issues and Regimes", and Hans-Joachim Heintze and Charlotte Lulf, "Special Rules on Children", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015.

93 1960 Commentary, above note 91, p. 189.

94 *Ibid.*, p. 189.

95 *Ibid.*, p. 189.

96 Mexico, *Manual de Derecho Internacional Humanitario para el Ejército y la Fuerza Área Mexicanos*, Ministry of National Defence, June 2009, Section 163; United Kingdom, *The Law of War on Land being Part III of the Manual of Military Law*, The War Office, HMSO, 1958, para. 36; United States, *Field Manual 27-10, The Law of Land Warfare*, US Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976; United States, *Department of Defense Law of War Manual*, Department of Defense, June 2015, updated December 2016, codified in 10 USC §140b (2012) (DoD Manual), p. 165.

specific IHL provisions, stating that such obligations also apply in internal conflict.[97] The United Kingdom issued identity discs for British children evacuated to Commonwealth countries during the Children's Overseas Reception Scheme.[98] There were informal efforts to issue identity discs for children in Australia during World War II[99] and in the United States during the Cold War.[100] Although there is no recent State practice, which could indicate that the norm has fallen into desuetude, conflict-affected States with pre-war birth registration systems are often able to implement birth registration systems in territory which they control, with the main impact limited to conflict-affected areas;[101] this indicates that State capacity surpasses the limited requirements of black-letter law due to technological advances in information management. States without pre-existing birth registration systems may not even be able to issue identity discs, but efforts of the international community have focused on building capacity to administer modern civil registration systems rather than to issue identity discs, also a technological advancement not anticipated by GC IV.[102]

Article 78(3) of Additional Protocol I to the Geneva Conventions (AP I) updated the identity disc to a paper-based photo identification card, for which the ICRC would maintain a registry.[103] Article 78(3) of AP I proposes that the card should include not only the name, place and date of birth, parents' names, and next of kin, but also nationality, language, health condition, and other details relevant for an evacuation scenario, as long as "it involves no risk of harm to the child". The identity disc of GC IV Article 24 and identity card of AP I Article 78 (3) are *lex lata* which illustrate how States may fulfil their obligations to identify children in the context of IAC, when materially possible.

Treaty law in belligerent occupation

The law on belligerent occupation recommends that the Occupying Power should ensure identification of children through registration processes, in the context of detention, evacuation and family reunification. Article 136 of GC IV mandates a registration mechanism, the information bureau, to ensure that births of protected persons are recorded. Article 50 of GC IV states that a special section

97 Ireland, Geneva Conventions Act, 1962, as amended in 1998, Sections 4(1), 4(4); Guinea, Children's Code, 2008, Arts 437–438.

98 See, for example, Imperial War Museums, "Identity Disc, Children's Overseas Reception Board", available at: www.iwm.org.uk/collections/item/object/30082130.

99 See Australian War Memorial, "Civilian Child's Identity Disc: John Hudson Fysh", available at: www.awm.gov.au/collection/REL/12781?image=1.

100 Jordan Gass-Poore, "From Toys to Tags and Terror: Children as Young as Six were Forced to Prepare for Nuclear Armageddon during the Cold War and Had DOG TAGS so Their Parents Could Identify Their Bodies in the Event of a Nuclear Fallout", *Daily Mail*, 10 August 2017.

101 See UNICEF, above note 7, p. 7.

102 See, for example, UNICEF Ethiopia, "Italy Supports Vital Events Registration in Ethiopia", 7 December 2016, available at: https://unicefethiopia.org/2016/12/08/italy-supports-vital-events-registration-in-ethiopia/.

103 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978).

of the Article 136 bureau should be dedicated to identifying children and registering their family ties. The 1960 Commentary clarifies that Article 50, like Article 24, represents a strong recommendation for parties rather than an obligation.[104] However, the Commentary pronounces the importance of birth registration in strong terms, describing the registry system as "essential to the legal life of the community" and stating that a system for identifying children is of "extreme importance", particularly for "newly born infants".[105] The 1960 Commentary mentions respect for "the inviolability of the child's personal status" as the legal principle related to the basic guarantees of Article 24 of GC IV.[106] The Commentary proposes that registration should record, at a minimum, the place and date of birth, nationality, residence, and any physically identifying marks.[107]

The drafters of GC IV did not impose an absolute obligation to register births even in the context of belligerent occupation, due to the heterogeneity of conflict contexts. The 1960 Commentary clarifies that if registration facilities were destroyed, the Occupying Power would not be obligated to establish them anew; however, if the previous registration system were still functioning, the Occupying Power is bound not to interfere, and "to allow that system to continue and to facilitate its working".[108] If similar rules were applied in situations where insurgent groups control territory,[109] they would also be bound to respect the operations of local registry offices, which is happening currently in several insurgent contexts, as we saw earlier in this article.

Treaty law in non-international armed conflict

GC IV and AP I protections only apply to IACs, in which the parties to the conflict are necessarily States. In NIACs between States and insurgent groups, only common Article 3 and AP II apply. Common Article 3 applies to "armed [conflicts] not of an international character", which are not defined, but indicate that an intensity threshold must be reached in order to trigger application, while AP II, which applies only to its 169 States Parties, contains the further requirement that the Protocol only applies when an insurgent group exercises control over territory and has an adequate level of organization to carry out sustained military operations.[110] The law on NIACs contains a limited obligation for insurgent groups to ensure recognition as a person under the law in the context of insurgent courts, with common Article 3(1)(d) prohibiting sentencing without "a regularly constituted court, affording all the judicial guarantees … recognized as indispensable"; Article 6 of AP II also categorically prohibits prosecutions

104 1960 Commentary, above note 91, p. 287.
105 *Ibid.*, p. 287.
106 *Ibid.*, p. 287.
107 *Ibid.*, p. 287.
108 *Ibid.*, p. 287.
109 K. Fortin, above note 17, p. 166. See also Tom Gal, "Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance", *Israel Law Review*, Vol. 50, No. 1, 2017, p. 27.
110 Sylvie Junod, "Additional Protocol II: History and Scope", *American University Law Review*, Vol. 33, No. 1, 1983, p. 30.

without due process and elaborates on the required elements to satisfy that obligation. These provisions represent an understanding by States that a minimum level of recognition as a person under the law should not be denied to persons under insurgent control.

In common Article 3, children are not mentioned specifically; in Article 4 (3) of AP II, the specificity of protections due to children is greatly reduced in comparison with Articles 77 and 78 of AP I. However, as AP II applies to both States and insurgent groups, the Commentary on the APs recalls that both "*de jure* and *de facto* [authorities] have the duty" to ensure protection of children.[111] The 2017 Clapham *et al.* Commentary to the Geneva Conventions confirms contemporary views on child protection in NIAC, stating that "non-state actors are not free from obligations"[112] and that "children as a distinct group are not without specific protection during NIACs".[113]

Although a separate article on child protection was originally part of an early draft of AP II during the negotiation process, in the final text only an abbreviated version was included as Article 4(3).[114] The original draft of Article 4 (3)(b), as submitted by the ICRC, had proposed that "children should be identified in the conflict zone whenever possible and necessary, and information bureaux should be established" as in Article 24 of GC IV.[115] Although delegations did not adopt these measures "from a fear that it might not be possible to apply them materially", the Commentary on the APs states that Article 24 of GC IV remains the guidance for understanding what constitutes "all appropriate steps" to reunite families under Article 4(3) of AP II.[116] The obligations of parties to a conflict towards children in Article 4(3) of AP II are education, family reunification, prohibition on underage recruitment, protection for child detainees, and evacuation. However, the list is not exhaustive[117] and the phrasing added later, "care and aid they require", is interpreted by the Commentary as warranting a case-by-case approach to assistance for children.[118] Specific measures are neither specified nor prohibited in order to implement these obligations, but birth registration is relevant to all of them, since some proof of identity is required in order to practically organize education, family reunification and evacuation.

As many insurgent groups have shown that they do indeed have the capacity to register births in the conflict zone, and since Article 24 of GC IV remains the interpretive guide for those provisions according to the 1960 Commentary, Article 4(3) of AP II contains an implied power, or permission, for insurgent groups to issue identity discs or cards, when materially possible, in

111 Commentary on the APs, above note 19, para. 4546.
112 H. Spieker, above note 92, p. 116, paras 77, 78.
113 H.-J. Heintze and C. Lulf, above note 92, p. 1306, para. 48.
114 Commentary on the APs, above note 19, para. 4519.
115 ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary*, October 1973, available at: www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf.
116 Commentary on the APs, above note 19, para. 4553.
117 *Ibid.*, para. 4545.
118 *Ibid.*, para. 4548.

order to fulfil their obligations under Article 4(3) of AP II. This power does not rise to the level of an obligation, as it is not explicitly mentioned in the text, but such a power may be exercised for the purpose of implementing the explicit obligations. Similarly, if States refuse to recognize an insurgent-issued identity card which would prove a child's identity for the purpose of family reunification and evacuation, or prove a child's age to prevent underage recruitment, that would not be in keeping with the spirit and purpose of Article 4(3) of AP II, which obligates both parties to protect children.

Customary international humanitarian law

Like the CRC, the Geneva Conventions are almost universally ratified.[119] The International Court of Justice (ICJ) has recognized provisions of the Geneva Conventions as customary law in a NIAC.[120] The Eritrea-Ethiopia Claims Commission stated that provisions of the Geneva Conventions applied as custom to the then unrecognized entity of Eritrea.[121] Although consensus is still in progress regarding the content of customary IHL, the ICRC has produced a study entitled *Customary International Humanitarian Law* (ICRC Customary Law Study)[122] which compiles and analyzes State practice in order to identify customary rules of IHL and clarify their content. Although some States, notably the United States, have objected that the ICRC Customary Law Study may relate more to States' adherence to treaty obligations rather than to creation of custom,[123] it remains the most comprehensive study to date of customary IHL and includes relevant practice of States which have not ratified the Additional Protocols.

Since this article wishes to understand the law relevant to insurgents, this section will focus on custom that is applicable in NIAC. The ICRC Customary Law Study finds that, by custom, children affected by NIAC are entitled to special protection.[124] The customary obligation to facilitate family reunification[125] and to ensure access to humanitarian aid,[126] and the customary prohibition on underage recruitment,[127] can arguably be linked to a customary obligation to provide proof of identity from birth, as fulfilment of these obligations requires that the

119 See above note 69 on CRC ratification. On Geneva Convention ratification, see T. Meron, above note 88, p. 348: "the Geneva Conventions are binding on even more States than the Charter".
120 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*.
121 Analysis by Agnieszka Szpak, "The Eritrea-Ethiopia Claims Commission and Customary International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 4, No. 2, 2013, p. 301; Eritrea-Ethiopia Claims Commission, *Partial Award: Prisoners of War – Ethiopia's Claim*, 1 July 2003, paras 27–28.
122 ICRC Customary Law Study, above note 86.
123 John B. Bellinger III and William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*", *International Review of the Red Cross*, Vol. 89, No. 866, 2007.
124 ICRC Customary Law Study, above note 86, Rule 135.
125 *Ibid.*, Rule 105.
126 *Ibid.*, Rule 55.
127 *Ibid.*, Rule 136.

authority in question be able to reliably establish the age and identity of the civilian concerned, as argued above in relation to Article 4(3) of AP II. Rule 123 of the ICRC Customary Law Study, "Recording and Notification of Personal Details of Persons Deprived of Their Liberty", describes the customary obligation in NIAC for the parties, including insurgent groups, to record the identities of civilian internees, including by recording births.[128] If State practice indicates that insurgent groups are obligated by custom to record births in detention, tacitly acknowledging that they are the only entity physically able to record those births, it is not a great leap to assert that insurgent groups are permitted to register births of non-detained persons under their effective control when materially possible, since they are the only entity able to record those births too.

Birth registration in the context of internal displacement

Although the human rights law obligation to register births might seem to apply exclusively to States, the UN *Guiding Principles on Internal Displacement* (Guiding Principles)[129] apply an obligation to issue birth documents to insurgent groups. The Guiding Principles were recognized by the UN General Assembly in 2005 as "an important international framework for the protection of internally displaced persons",[130] consistent with IHRL and IHL.[131] The Principles explicitly include documentation as a component of recognition as a person before the law (Principle 20(1)), including birth certificates (Principle 20(2)). Authorities "shall issue" documents, "without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence" (Principle 20(2)). The Annotations to the Guiding Principles base this obligation in Article 8(2) of the CRC and Article 24(2) of the ICCPR, stating that Principle 20 attempts to fill a gap in protection, as Article 50(2) of GC IV and Articles 20 and 25 of the Refugee Convention, which regulate issuance of identity documents, do not apply to NIAC or to internal displacement respectively.[132] Principle 2(1) explicitly directs its provisions to "all authorities, groups and persons irrespective of their legal status and applied without any adverse distinction", echoing the wording of common Article 3. Principle 20 thus reflects a degree of support by States for applying obligations related to document issuance to insurgent groups.[133] Moreover, the adoption of a growing number of national laws and regional treaties based on the Guiding Principles in the twenty years since their

128 *Ibid.*, Rule 123.
129 UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998 (Guiding Principles).
130 UNGA Res. 60/L.1, UN Doc. A/60/L.1, September 2005, para. 132.
131 See Guiding Principles, above note 129, Preamble, para. 1.
132 Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, American Society of International Law and Brookings Institution, 2000, pp. 92–94.
133 See R. R. Baxter, above note 59, p. 100, on how draft texts and other non-binding documents reflect views of States.

development lends support to the argument that the provisions in the Principles may be gradually hardening into binding international legal obligations.[134]

Insurgent birth registration and State recognition

Treaty and customary law indicate that insurgent groups have the power to register births

IHRL and IHL outline prohibitions and obligations on duty bearers, but do not always specify the exact mechanism by which these are to be fulfilled. They are "paradigmatic substantive rules on governance", which presume procedures that make implementation of rights possible.[135] Birth registration is a procedural right which secures the substantive right to recognition as a person under the law. Recognition under the law is a non-derogable right under IHRL, applicable in peace and conflict. In peacetime, States are obligated to ensure children's right to recognition under the law through birth registration, and in armed conflict, States are recommended to register births whenever materially possible, including through alternative procedures such as identity discs or cards. Insurgents are obligated under IHL to respect recognition as a person under the law in the context of penal prosecution. Insurgent groups are not prohibited from identifying children under IHL, and several provisions of humanitarian law – notably Article 4(3) of AP II, which the Commentary on the APs states should be interpreted in light of Article 24 of GC IV, and Rule 123 of the ICRC Customary Law Study – strongly imply that insurgent groups have an inherent power to register births. Although not rising to the level of an obligation to register births since this obligation is not explicit in Article 4(3) of AP II, the power to register births will enable insurgents to fulfil their obligations under IHL to treat civilians humanely, take all measures to reunify families, prevent underage recruitment and facilitate safe evacuation, and are in harmony with the insurgent obligation to ensure recognition under the law in the operation of insurgent courts.

This section will consider theoretical bases explaining why insurgent groups which exercise effective control of territory may assume the power to register births in order to fulfil their obligations under IHL. The idea that insurgents possess obligations under international law may be justified by arguments based on their capacity, their effective sovereignty, domestic legislative jurisdiction, and obligations under customary international law. This article does not provide an exhaustive treatment of these theories, which are comprehensively addressed in the references cited in this section, but rather presents a range of reasonable options which support the general argument that insurgent groups

134 David James Cantor, "'The IDP in International Law'? Developments, Debates, Prospects", *International Journal of Refugee Law*, Vol. 30, No. 2, 2018, pp. 194–196.

135 Beate Rudolf, "Non-State Actors in Areas of Limited Statehood as Addressees of Public International Law Norms on Governance", *Human Rights & International Legal Discourse*, Vol. 4, No. 1, 2010, pp. 131–132.

may assume certain legal obligations. I will then counter the major objections to State recognition of insurgent birth registration, including the obligation of non-recognition, State sovereignty and lack of effective control, and the fear of inappropriately legitimizing insurgents. My counterarguments remind us that the obligation of non-recognition is not absolute, that multiple duty bearers may bear differing obligations to fulfil rights, and that engagement and legitimacy are inherently in tension in IHL.

Insurgent group capacity gives rise to obligations

Many insurgent groups have capacity far beyond common Article 3 standards, yet there are no detailed minimum standards for their treatment of the civilian population at large, leaving a legal vacuum.[136] Capacity as a trigger for insurgent obligation is well represented in the academic literature;[137] though not uncontroversial, many objections are based in scepticism that insurgent groups are materially able to implement these obligations,[138] but in fact, as we have seen earlier in this article, they are. Arguing that insurgent groups have the right to establish courts under common Article 3, Somers states that they possess "the legal capacity to exercise the rights which flow from the obligations and prohibitions of IHL".[139] Capacity may also trigger IHRL obligations; for example, the International Criminal Tribunal for the former Yugoslavia's Čelebići decision reinterprets the definition of torture in international IHRL to recognize the "official capacity" of insurgent groups, "in order for the prohibition to retain significance" in NIAC.[140] Several scholars have suggested that capacity of insurgent groups should determine their level of obligation in a manner similar to the obligation of progressive fulfilment of rights in the International Covenant on Economic, Social and Cultural Rights.[141] Capacity as a trigger for obligations

136 D. Murray, above note 17, Chap. 1.III. A UN Special Rapporteur has stated that IS "controls large swathes of territory in which millions of individuals live" and "runs a civil and a military administration … triggering application of human rights obligations": Ben Emmerson, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/HRC/29/51, 16 June 2015, paras 30–31.

137 See Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 21–23; Jonathan Somer, "Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflicts", *International Review of the Red Cross*, Vol. 89, No. 867, 2007; S. Sivakumaran, above note 18; Tilman Rodenhauser, "Human Rights Obligations of Non-State Armed Groups in Other Situations of Violence: The Syria Example", *International Humanitarian Legal Studies*, Vol. 3, 2012, p. 274; A. Constantinides, above note 17, p. 110.

138 For opposing views, see Lyndsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 194 ("Human rights obligations are binding on governments only …. Non-governmental parties are particularly unlikely to have the capacity to uphold certain rights"); L. Zegveld, above note 20, p. 152 ("Armed opposition groups rarely function as de facto governments"); M. Sassòli, above note 137, pp. 15–17.

139 J. Somer, above note 137, p. 658.

140 International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, Case No. IT-96-21-T, 16 November 1998, para. 473, cited in J. Somer, above note 137, p. 664.

141 K. Fortin, above note 17, p. 165; A. Clapham, above note 17, p. 502, D. Murray, above note 17, Chap. 8.II.A.

is a similar concept to the organizational criteria of AP II, which triggers application of obligations under the Protocol and by extension should also trigger related customary norms.

Insurgent groups' de facto *control and effective sovereignty give rise to obligations*

Combining the capacity-based approach[142] with the needs of individual rights holders, Murray proposes a "context-dependent approach" which considers both insurgent group capacity and the needs of the affected population together. Murray calls the legal basis for this approach the "*de facto* control theory", where exclusive territorial control and effectiveness trigger applicability of human rights obligations to prevent a legal vacuum.[143] The "*de facto* control theory" is similar to the principle of "effective sovereignty" over territory, by which the 1960 Commentary explains how insurgent groups are bound by common Article 3.[144] If an insurgent group controls territory, especially when the State is absent, a threshold for new powers and obligations has been reached. The *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* states that when insurgent groups maintain effective control over a territory, and when the State is not able to meet the needs of the civilian population, the insurgent group has a responsibility to meet those needs.[145] Special Rapporteurs have held that when insurgent groups exercise control over territory and political organization, these groups are bound by the "demands" and "expectations" of the international community to respect basic human rights.[146] Similarly, an analogous "agents of necessity" theory is based on Article 9 of the International Law Commission (ILC) Draft Articles on State Responsibility, whereby public governance by non-State actors is considered "an act of a State" in a situation of necessity when "state action is missing but required", for example during loss of control of territory.[147]

Schoiswohl states that insurgents controlling territory have "an implied mandate" to fulfil administrative functions in the territory which they control[148]

142 See references cited in above note 137.
143 D. Murray, above note 17, Chap. 5.1.
144 1960 Commentary, above note 91, p. 37, cited in J. Somer, above note 137, p. 661.
145 Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict*, 2016, p. 13.
146 UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Mission to Sri Lanka*, UN Doc E/CN.4/2006/53/Add.5, 27 March 2006; Human Rights Council, *Report on Human Rights Situation in Palestine and other Occupied Arab Territories*, UN Doc A/ HRC/10/22, 20 March 2009.
147 B. Rudolf, above note 135, p. 140; ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10, UN Doc. A/56/10, November 2001, Art. 9: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority."
148 Michael Schoiswohl, "De Facto Regimes and Human Rights Obligations – the Twilight Zone of Public International Law?", *Austrian Review of International and European Law*, Vol. 6, No. 45, 2001, p. 74.

and even "an inherent duty" to respect international human rights standards in fulfilling those functions.[149] Schoiswohl goes even further to speculate that *de facto* authorities may be "entitled" to assume administrative functions and that States may "inhibit the exercise" of the human rights of individuals living in insurgent-held areas if they fail to recognize the legal effect of such insurgent acts.[150] Gal similarly argues that the factual circumstance of effective territorial control by insurgent groups should extend the application of existing norms to ensure protection for the local population, for example by applying the law of occupation to such territories.[151] Although insurgent groups do not have full legal personality, due to their control of territory they become "bearers of international obligations".[152] As with capacity/organization, control of territory again relates to the criteria for triggering application of AP II obligations, and by extension, related customary norms.

Insurgent groups bound by treaty obligations of the territorial State

The Human Rights Committee has stated that the rights set out in the ICCPR belong not to the State, but to the individuals living in the territory of the State: "once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them".[153] In the ICJ *Genocide* case, Judges Weeramantry and Shahabuddeen stated that the treaty rights should still apply to the population, since human rights treaties represent a commitment to international norms beyond the interests of a single State, and will be needed most in times of instability.[154] The principle that rights continue to protect the local population after a transition in *de facto* authority is in harmony with the theory that insurgent groups are bound by the treaty obligations of the territorial State.[155] Indeed, States have recognized that control of territory entails responsibility related to international treaty obligations. In the US Civil War, Great Britain asked the Confederate States to fulfil US treaty obligations, and in the Spanish Civil War, the Spanish government informed the Portuguese government that the Franco rebels were responsible for international treaty obligations in the area under their control.[156] In more recent examples where territorial control has been linked with treaty obligations, the European Parliament has called upon the Transnistrian authorities to comply with

149 *Ibid.*, p. 77.
150 *Ibid.*, p. 72.
151 T. Gal, above note 109, p. 27.
152 Heike Krieger, "International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?", *Journal of Intervention and Statebuilding*, Vol. 12, No. 4, 2018, p. 567.
153 Human Rights Committee, General Comment No. 26, "Continuity of Obligations", UN Doc CCPR/ C/ 21/ Rev.1/ Add.8/ Rev.1, 12 August 1997, cited in K. Fortin, above note 17, p. 274.
154 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Separate Opinions of Judge Weeramantry and Judge Shahabuddeen, *ICJ Reports 2007*, cited in K. Fortin, above note 17, p. 275.
155 S. Sivakumaran, above note 17, p. 371.
156 K. Fortin, above note 17, p. 156.

European Court of Human Rights (ECtHR) rulings[157] and Israel has stated before the UN Committee on Economic, Social and Cultural Rights that the Palestinian Council, though not a State, is not "preclude[d from] responsibility in the sphere of human rights protection".[158] Devolution of treaty obligations explains how obligations under AP II apply to insurgent groups in States which have ratified the Protocol.

Insurgent groups are bound by customary law

Although not uncontested, direct application of customary norms as binding on insurgent groups is well represented in the jurisprudence of international tribunals, from the ICJ to the international criminal tribunals.[159] Customary international law can only bind an insurgent group if the entity possesses international legal personality.[160] Traditionally only States could be bound by international law, but in the 1949 ICJ Reparations Advisory Opinion, the ICJ recognized that the "needs of the community" influence the definition (the "nature") of entities with international legal personality, making way for the concept of different types of legal subjects.[161] Recognizing limited, functional legal personality of insurgent groups, permitting them to take on certain powers or obligations under customary law, can meet the needs of States by binding these groups to norms which States have created and recognized,[162] as well as meeting the needs of the wider community of individual rights holders by increasing protection. The Special Representative of the UN Secretary-General for Children in Armed conflict has called on insurgent groups to abide by

157 European Parliament, Resolution on Human Rights in Moldova and in Transnistria in Particular, 2006 OJ. (C 291 E), 2006, pp. 414–415, cited in Yael Ronen, "Human Rights Obligations of Territorial Non-State Actors", *Cornell International Law Journal*, Vol. 46, No. 1, 2013, p. 40.

158 UN Economic and Soc. Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Additional Information Submitted by States Parties to the Covenant Following the Consideration of Their Reports by the Committee on Economic, Social and Cultural Rights, Israel Addendum*, UN Doc. E/1989/5/Add.14, 14 May 2001, cited in Y. Ronen, above note 157, p. 41.

159 For example, Special Court for Sierra Leone, *The Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Case No. SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction, Loma Accord Amnesty, 13 March 2004, para. 47; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 25 January 2005, para. 172; ICJ, *Nicaragua*, above note 120; International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98; International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgment, 2 September 1998, para. 608, cited in S. Sivakumaran, above note 18, pp. 371–375. For further discussion of the application of customary international law to armed opposition groups, see B. Rudolf, above note 135, p. 138; Jean-Marie Henckaerts, "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law", in *Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-State Actors, 25–26 October 2002*, Vol. 27, 2003, p. 123.

160 For more about the legal personality of armed opposition groups, see V. Bilkova, above note 20; D. Murray, above note 17; M. Sassòli, above note 137.

161 ICJ, *Reparation for Injuries Suffered in the Service of the Nations*, Advisory Opinion, *ICJ Reports 1949*, para. 8.

162 Jann K. Kleffner, "The Applicability of International Humanitarian Law to Organized Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 454.

"traditional norms governing the conduct of warfare".[163] The Darfur Commission of Inquiry stated that insurgent groups meeting criteria of control of territory and organization possess international legal personality and are bound by customary international law,[164] and the Commission of Inquiry on Syria stated that the actions of insurgent groups "may be assessed by customary international legal principles".[165] This language by UN quasi-judicial bodies shows that there is increasing awareness of the urgent need to address insurgents exercising territorial control with relevant customary norms regulating their conduct, moving from a traditional State-centric understanding of legal obligation (or as Alston terms it, the "not-a-cat" approach to non-State actors[166]) to a more flexible concept recognizing different degrees of authority. Customary law applies regardless of treaty ratification; thus, in States which have not ratified AP II, relevant customary norms will apply to both States and insurgent groups.

States have an obligation to recognize insurgent birth registration

The obligation of non-recognition is not absolute

An obligation of non-recognition of unlawful exercise of authority does exist. Article 41(2) of the ILC Draft Articles on State Responsibility states that "no State shall recognize as lawful a situation created by a serious breach [of *jus cogens*]", prohibiting, for example, recognition of the administration of a territory which was seized through a violation of the prohibition on the use of force.[167] However, the obligation of non-recognition of official acts issued by an unrecognized entity is not an absolute obligation. The commentary on the draft articles clarifies that "the consequences of the obligation of non-recognition are not unqualified", citing the ICJ Namibia Advisory Opinion, which judged that the obligatory invalidity of legal acts "cannot be extended to those acts, such as the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[168] Similar jurisprudence

163 *Report of the Secretary-General on Children in Armed Conflict*, UN Doc. S/2005/72, 9 February 2005, paras 69–73, cited in Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?", in P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, Oxford, 2005, p. 18.

164 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, 25 January 2005, para. 172, cited in J. K. Kleffner, above note 162, p. 454.

165 *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/22/59, 5 February 2013, paras 106–107, cited in Andrew Clapham, "Non-State Actors", in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law*, 2nd ed., Oxford University Press, Oxford, 2014, Chap. 26, p. 546.

166 P. Alston, above note 163, p. 3.

167 ILC, above note 147.

168 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, p. 115, para. 10, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; ICJ, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 1971, *International Legal Materials*, Vol. 10, No. 4, pp. 677–829, para. 125.

recognizing administrative acts of unrecognized entities is found in national court decisions[169] and in cases of the ECtHR.[170] Therefore, Schoiswohl concludes that it is now "firmly established … in international jurisprudence that the validity [of legal acts of *de facto* regimes] derives directly from current international law and does not depend on the subjective will of States".[171]

If the obligation of non-recognition of insurgent legal acts is not absolute, while the State remains the primary duty bearer under international law for public administration, the door is opened for insurgents to become a duty bearer for certain tasks of civil administration in territories which they control. The tests for which administrative acts can be recognized by States should be drawn from the ICJ's Namibia Advisory Opinion, which notes that "non-recognition … should not result in depriving the people of any advantages derived from international cooperation"[172] and that States should continue to respect "general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people".[173]

Application of IHRL, extraterritorially and in situations where States are not in effective control of territory, can explain the concept of shared State and insurgent obligations by way of analogy. The ICJ and ECtHR have elaborated in their jurisprudence that human rights obligations are applicable both in areas not under effective control of a recognized State[174] and in areas under a State's effective control outside its own borders,[175] with duty bearers having a different share of the obligation depending on their level of effective control. This principle is also present in decisions and general comments of the Human Rights Committee.[176] The ECtHR has held that human rights, being indivisible, cannot be divided and tailored, as rights holders must be able to exercise the full spectrum of rights;[177] however, States can be held responsible to the degree that they exercise effective control, with the obligation to fulfil human rights thus "divided and tailored" between duty bearers in order to ensure full protection of

169 See Zaim Nedjati, "Acts of Unrecognized Governments", *International and Comparative Law Quarterly*, Vol. 30, No. 388, 1981.

170 ECtHR, *Loizidou v. Turkey*, ECHR 1996-VI, 1996, p. 2216; ECtHR, *Cyprus v. Turkey*, ECHR 2001-IV, 2001, paras 89–98.

171 M. Schoiswohl, above note 148, p. 76.

172 ICJ, *Namibia*, above note 168, para. 125.

173 *Ibid.*, para. 121.

174 See, for example, ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, 1 April 2011; ECtHR, *Loizidou*, above note 170; ECtHR, *Catan and Others v. Moldova and Russia*, Appl. Nos 43370/04, 8252/05, 18454/06, 2012; ECtHR, *Case of Sargsyan v. Azerbaijan*, Appl. No. 40167/06, 16 June 2015; ECtHR, *Ilascu and Others v. Moldova and Russia*, Appl. No. 48787/99, 8 July 2004.

175 See, for example, ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Appl. No. 61498/08, 30 June 2009; ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. No. 55721/07, 7 July 2011.

176 See Human Rights Committee, *Mohammad Munaf v. Romania*, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009; Human Rights Committee, above note 89.

177 ECtHR, *Bankovic, Stojanovic, Stoimedovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, and the United Kingdom*, Appl. No. 52207/99, 2001.

rights.[178] If effective control is shared, so is the obligation.[179] In this way, rights are upheld and the State retains its status as the primary duty bearer, though the implementation of that obligation takes a different form due to the loss of effective control – for example, in the form of financial support or diplomatic efforts rather than direct implementation. Regarding birth registration, the obligation should take the form of State recognition of insurgent birth registration.

State fears that recognition will inappropriately legitimize insurgent groups are misplaced

Unlike insurgent detention or facilitation of humanitarian assistance, birth registration by insurgent groups must uniquely be recognized as a legally valid act by a wide range of duty bearers in order to offer meaningful protection for rights holders. Without State recognition of insurgent birth registration, the power or capacity of insurgent groups to register births will not result in increased protection for children. Logically, there is no reason for insurgents to have the power to register births if that registration will not be recognized. The question of birth registration in insurgent-controlled areas is at the nexus of individual recognition as a person before the law, which is a non-derogable human right, and recognition of legal acts of non-State entities under international law, which is highly contested.

States are extremely wary of legal recognition of insurgent groups and therefore also avoid recognition of insurgent administrative or legal acts. One of the main characteristics of the law on NIAC as developed by States is its silence on recognition generally; for example, IHL does not authorize insurgent detention, but simply regulates applicable minimum protections, denying a clear legal basis for insurgent detention.[180] More broadly, States at times refuse to acknowledge the very existence of conflict to avoid granting insurgents status under common Article 3,[181] much less under AP II,[182] as categorization of armed conflict gives armed groups a "curious sort of international recognition".[183] However, States' reluctance to recognize insurgent status may be driven by political considerations in order to evade their obligations under IHL. As an example by analogy, in *Hamdan v. Rumsfeld*, the US Supreme Court found that the US government had violated common Article 3 by not extending the IHL protections of either civilian or prisoner-of-war status to Hamdan.[184] While not directly related to legal acts of insurgents, the *Hamdan* case shows the lengths to which States may seek to evade their obligations. States may fear that recognizing insurgent birth registration means recognizing *de facto* control of the population,

178 K. Fortin, above note 17, p. 160, citing ECtHR, *Al-Skeini*, above note 175.
179 Y. Ronen, above note 157, pp. 28–29.
180 Z. Dabone, above note 17, pp. 415–418.
181 A. Clapham, above note 17, p. 293.
182 *Ibid.*, p. 510.
183 *Ibid.*, p. 496.
184 US Supreme Court, *Hamdan v. Rumsfeld*, 548 US 557 (2006), 2006.

as registration provides feedback on population numbers. However, States may also unjustly withhold recognition in order to manipulate demographic statistics, since "exclusion [from birth registration] is an effective way of deliberately massaging population figures".[185] Recognizing State recalcitrance, the law on NIAC imposes obligations on parties to a conflict regardless of recognition of status.[186]

Furthermore, States have not always refused to recognize the validity of insurgent birth registration. The legal effect of insurgent-issued civil documents was uncontroversial in the American Civil War, with US Supreme Court cases confirming the validity of insurgent-issued civil acts,[187] even stating: "No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects [i.e. birth and marriage certificates]."[188] In contemporary examples, insurgent birth registration documents and databases have been recognized for the purpose of allowing parents and children to exercise rights, with the Russian Federation accepting Chechen birth certificates as proof of eligibility for child welfare benefits in 2001,[189] and the Angolan government recognizing information from the insurgent-run birth registration system to reunite separated children with their families after the 2002 peace agreement.[190]

Recognition of insurgent birth registration requires tackling head-on the question: at what point do the humanitarian goals of IHL outweigh concerns that States have about inappropriately legitimizing insurgent groups? Any engagement with insurgent groups, including recognition of their legal acts, may result in increased legitimacy, but the tension between the benefit of engaging with insurgent groups and the risk of inappropriately legitimizing them is already inherent in common Article 3,[191] which acknowledges insurgent groups as parties to a conflict but does not entitle them to legal status. States came to a consensus when they adopted common Article 3: the increase in legitimacy gained by insurgent groups as parties to a conflict is far outweighed by the protections resulting from engagement. The UN Secretary-General, in his 2017 report on protection of civilians in armed conflict, stated: "The focus on [insurgent] recognition and legitimacy is problematic, in that it detracts from the more serious issue of the consequences for civilians when engagement does not take place."[192]

185 UNICEF, above note 7, p. 11.
186 A. Clapham, above note 17, p. 493.
187 US Supreme Court, *Texas v. White*, 74 US [7 Wallace] (1869) 700, 1869, p. 733, referenced in S. Sivakumaran, above note 18, p. 511.
188 US Supreme Court, *Horn v. Lockhart*, 84 US [17 Wallace] (1873) 570, 1873, p. 660, cited in M. Schoiswohl, above note 148, p. 72.
189 UNICEF Innocenti Research Center, *Birth Registration: Right from the Start*, Innocenti Digest No. 9., Florence, March 2002, p. 6.
190 UNICEF, above note 7, p. 32.
191 S. Sivakumaran, above note 18, p. 512.
192 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2017/414, 2017, para. 45, cited in H. Krieger, above note 152, p. 579.

The *reductio ad absurdum* of legitimacy concerns is to hope that insurgent groups will violate IHL norms in order to decrease their legitimacy.[193] Although the "legitimizing effect" is recognized as an incentive for refusing to engage with insurgent groups, the potential for legitimacy is also a powerful motivator.[194] Recognizing the legal effect of insurgent birth registration does not put insurgents on the same level as States, but it increases protections for the civilian population under their control.[195] Parties to a conflict do not have equal legal status under IHL; rather, their equality lies in their "equal rights and obligations flowing from the international law norms regulating the subject matter of IHL".[196] States have additional rights, such as the right to grant nationality, accede to treaties and participate in multilateral bodies, as well as additional obligations, including the full range of obligations under IHRL and the UN Charter. However, under IHL, both parties have equal rights and obligations with regard to conduct of hostilities and humane treatment of non-combatants.

Conclusion

Insurgent groups who meet the criteria of Article 1(1) of AP II have the obligation to reunite families, prevent underage recruitment and facilitate evacuation under Article 4(3) of AP II, and similar customary norms apply to insurgents in States which have not ratified the Protocol. Insurgent groups are required to register births of detainees and to ensure some form of recognition as a person under the law in the context of insurgent prosecution. These obligations imply an inherent power or capacity to register births, since birth registration is instrumental in effectively fulfilling all of these obligations, though not rising to an obligation on insurgent groups to register births, since this obligation is not explicit in Article 4 (3) of AP II. According to the Commentary on the APs, the delegates who drafted AP II believed that insurgent groups would not have the capacity to register births. However, since they do in fact have that capacity and since the law on NIAC does not prohibit insurgent groups from registering births, I argue that they are permitted to do so in order to fulfil their IHL obligations. There are several legal theories which explain how both treaty and customary obligations may be binding on insurgent groups.

193 As an example of the way that States' concerns may be overemphasized in politicized discourse, in *Holder v. Humanitarian Law Project*, the US Supreme Court ruled that offering IHL training to insurgents resulted in increased funding and legitimacy for those groups, and should be considered tantamount to material support for terrorism. US Supreme Court, *Holder v. Humanitarian Law Project*, 561 US 1 (2010) 130 S.Ct. 2705, 2010, cited in Anthea Roberts and Sandesh Sivakumaran, "Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law", *Yale Journal of International Law*, Vol. 37, No. 107, 2012, p. 135.

194 Frederick Rawski, "Engaging with Armed Groups: A Human Rights Field Perspective from Nepal", *International Organizations Law Review*, Vol. 6, No. 601, 2009, p. 621.

195 A. Roberts and S. Sivakumaran, above note 193, p. 133.

196 J. Somer, above note 137, p. 663.

States have the obligation to register births under IHRL, but under the law on IAC and the law of belligerent occupation, they are not obligated to do so; Articles 24 and 50 of GC IV are not obligatory according to the 1960 Commentary. However, States are strongly encouraged to register all births of populations under their control whenever materially possible, given the grave consequences for children of not doing so. The reasons given in the Commentary for not absolutely requiring States to register births in conflict are material conditions and State lack of capacity to do so in some intense conflict contexts. Though the law on NIAC does not specifically mention birth registration, I argue that States are obligated to recognize insurgent birth registration where insurgents are registering births, in order to fulfil State obligations under Article 4(3) of AP II (family reunification, evacuation and prevention of underage recruitment), and in accordance with the non-derogable human rights obligation to ensure the right to recognition as a person under the law. Furthermore, the law on NIAC does not prohibit State recognition of insurgent birth registration. If insurgents are registering births, and State objection to recognition is merely political and is not justified by States' material incapacity to do so, then non-recognition of insurgent birth registration is not consistent with the object and purpose of the AP II Article 4(3) obligations, nor with the non-derogable obligation to ensure recognition as a person under the law. Recognition of insurgent birth registration is a matter of law, while the specific administrative mechanism for recognition and type of registration method are matters of policy that are left to States to decide.

Many insurgent groups register births in territories not under State control, though this registration is rarely recognized by States. However, lack of clarity regarding the legal effect of insurgent birth registration outside the area of insurgent control has resulted in a legal vacuum, with harsh consequences for children and families. The main arguments against recognition of insurgent birth registration do not stand, because the obligation of non-recognition is not absolute, recognition does not necessarily confer legal status, and practice of international bodies has shown that the way forward in balancing engagement and legitimacy lies in prioritizing the rights and protection of the local population.

Ultimately, insurgent groups are already registering births whether or not States choose to engage with such registration. However, greater engagement between States and insurgent groups on IHL norms, such as working together to register children for the purpose of reunification or evacuation, may offer opportunities to encourage compliance in other areas of IHL.[197] Limiting the scope of insurgent groups' powers to basic functions which are needed to fulfil IHL obligations, such as registering births, reduces aspirations of political legitimacy, and simply regulates the ongoing actions of insurgent groups.[198]

197 *Ibid.*, pp. 681, 690.
198 K. Fortin, above note 17, p. 170.