

BETWEEN A ‘SOFT’ AND A HARD PLACE: CLOSING THE GAP
BETWEEN HARD AND SOFT LAW AGREEMENTS ON BIRTH
REGISTRATION

TABLE OF CONTENTS

INTRODUCTION	90
I. BACKGROUND	92
<i>A. HUMAN RIGHTS LAW</i>	93
<i>B. LEGAL IDENTITY IS A HUMAN RIGHT</i>	95
<i>C. HARD LAW VERSUS SOFT LAW</i>	96
<i>D. HARD LAW: COMPLIANCE AND THE CONVENTION ON THE RIGHTS OF THE CHILD</i>	98
II. BIRTH REGISTRATIONS AND THE SDGS	103
<i>A. INCREASING ROLE OF NON-STATE ACTORS IN INTERNATIONAL LAW</i>	104
<i>B. PRIVATE PARTNERSHIPS IMPLEMENTING SDG 16.9</i>	105
1. <i>Country: Pakistan, Partnership: Private Company (Telenor)</i>	106
2. <i>Country: Mexico, Partnership: International Organization (The World Bank)</i>	108
3. <i>Country: Indonesia, Partnership: NGO (Plan International)</i>	109
III. REQUIRING BIRTH REGISTRATION IN INTERNATIONAL LAW	111
<i>A. OVERCOMING LACK OF COMPLIANCE</i>	112
<i>B. IMPLEMENTING AN OPERATIONAL APPROACH</i>	115
<i>C. CREATING BINDING PROTOCOLS FOR BIRTH REGISTRATION AND LEGAL IDENTITY</i>	117
<i>PROTOCOL FOR UNIVERSAL BIRTH REGISTRATION AND ESTABLISHMENT OF LEGAL IDENTITY (UnBRELI)</i>	118
CONCLUSION	122

INTRODUCTION

In Bangladesh, a 15-year-old girl visits a local government office with her birth certificate in hand, seeking to avoid an illegal marriage arranged by her own father.¹ In Sierra Leone, children as young as nine are unlawfully detained in prisons because they cannot prove their ages with

¹ PLAN INT’L, INNOVATIONS IN BIRTH REGISTRATION 9 (Oct. 16, 2017).

birth certificates.² In Kosovo, a mother without a birth certificate cannot register her two children at birth and is unable to apply for the health care assistance she needs to treat the young girls' medical conditions.³ A 5-year-old boy in North Africa remains stateless because his mother fled Sudan as a refugee and lacks proof he was born in Egypt.⁴

Children's suffering worldwide has many faces, including natural disasters, poverty, access to education, and personal safety. Additionally, the litany of human rights abuses that children are exposed to often engenders feelings of despair and resignation among those viewing this suffering from afar, who may wring their hands and ask, "what can be done?"

Protecting a child's legal identity is an actionable step that shields children from human rights abuses over the course of their lifetime.⁵ One in four children under the age of five are not registered in the world today, with many more who have little proof of their registration.⁶ The international community recognizes the importance of birth registration as a right from which other rights flow, yet much work must be done to achieve universal⁷ registration worldwide.

Well-meaning governments have signed and ratified treaties proclaiming their commitment to children's rights, yet they continue to be violated, on a massive scale.⁸ With no recourse for treaty violations of these binding, but often vaguely worded, hard law instruments, international organizations such as the United Nations have tried to step in with their own set of soft law recommendations called the Sustainable

² Cooper Inveen, *The Forgotten Child Prisoners of Sierra Leone*, AL JAZEERA (Apr. 26, 2016), <https://www.aljazeera.com/features/2016/4/29/the-forgotten-child-prisoners-of-sierra-leone>.

³ *No Legal Identity – No Existence*, U.N. KOSOVO TEAM: STORIES (Aug. 4, 2021), <https://kosovoteam.un.org/en/138537-no-legal-identity-no-existence>.

⁴ Bronwen Manby, *Birth Registration, 'Legal Identity for All', and the Prevention of Statelessness Among Migrants*, LONDON SCH. OF ECON. & POL. SCI.: MIDDLE EAST CTR. BLOG (Apr. 2, 2021), <https://blogs.lse.ac.uk/mec/2021/04/02>.

⁵ See PLAN INT'L, *supra* note 1, at 8.

⁶ UNICEF, BIRTH REGISTRATION FOR EVERY CHILD BY 2030: ARE WE ON TRACK? 6 (2019).

⁷ Throughout this Article, 'universal' is not meant to convey across borders but universal within a given nation.

⁸ See UNICEF, THE STATE OF THE WORLD'S CHILDREN 2023: FOR EVERY CHILD, VACCINATION (2023) (explaining that 67 million children missed out on routine immunizations, and 48 million children missed immunization completely); John James, *Hope After Horror in the Democratic Republic of the Congo*, UNICEF (Sept. 23, 2023), <https://www.unicef.org/blog/hope-after-horror-democratic-republic-congo> (demonstrating the violence children are exposed to in the Democratic Republic of the Congo).

Development Goals.⁹ Both hard and soft law have come up short in terms of comprehensive and actualized results.

This Article argues for drafting a new, focused international agreement on birth registration that emphasizes clear, specific targets and incentivizes governments and non-state actors to work cooperatively to advance this goal. A clear text for the new agreement is proposed, requiring (1) birth registration for every child; (2) the issuance of birth certificates; (3) a detailed plan to provide birth registration in times of emergency; and (4) a fair and inclusive plan to register children born to migrant parents. The proposed agreement includes important obligations to foster cooperation between developed and developing nations in achieving this goal.

Part I of this Article provides an overview of birth registration in international law, starting with foundational principles in human rights law that led to the concept of legal identity. Hard and soft law are defined, and their approaches to protecting legal identity are explored in depth. The Convention on the Rights of the Child and the United Nations Sustainable Development Goals are introduced and analyzed regarding their effectiveness in increasing birth registrations. Part II dives deep into an analysis of SDG 16.9 on birth registration and highlights several cases where states in strategic partnerships with non-state actors have made immense progress, showing it is possible for real gains. Part III lays out a plan to carve out the birth registration requirements from the soft law instrument of the UN SDG's into its own binding international agreement, complete with an incentive structure to encourage foreign aid and assistance, as well as non-state actor involvement. Part IV addresses why this type of agreement is needed now, and how this framework for the birth registration agreement can easily be adapted as a blueprint for other actionable SDGs that have reached stagnation as we advance closer to the 2030 deadlines.

I. BACKGROUND

While this Article focuses on birth registration, it is helpful to understand the broader landscape of human rights and international law in general, and the subsequent weaknesses of the current legal tools that seek to protect individuals from rights violations.

⁹ See *infra*, notes 64–65 and accompanying text; see also INDEP. GRP. OF SCIENTISTS, GLOBAL SUSTAINABLE DEVELOPMENT REPORT 2023: TIMES OF CRISIS, TIMES OF CHANGE: SCIENCE FOR ACCELERATING INFORMATION TO SUSTAINABLE DEVELOPMENT xvii–xix (2023).

A. Human Rights Law

Human rights and law are deeply intertwined. The question of whether human rights exist independently of international law, or law in general, goes beyond the scope of this Article.¹⁰ Whether or not they exist independently of law, human rights can certainly “be justified” as universal obligations we owe to each other as individuals and because states have accepted as binding on themselves and other states.¹¹

Modern trends in international law show a legal community seriously concerned with protecting individual rights. In response to German fascist practices of World War II, the aims of international law transformed from promoting peace and security to a much more expansive role: improving the future of states and their citizens on a shared developmental path.¹² Multiple treaties emerged in attempts to codify individual rights.¹³

A primary challenge in treaty law is codifying varying moral rights embodied in human rights philosophy.¹⁴ There is a profound global discord regarding the definition and scope of human rights, reflecting diverse

¹⁰ See ANDREW FAGAN, HUMAN RIGHTS: CONFRONTING MYTHS AND MISUNDERSTANDINGS 26 (2009) (discussing the prevalence of the myth that “human rights can ultimately be understood only as distinctly legal phenomena because human rights can really be said to exist only as legal entities”).

¹¹ David Little, *The Justification of Human Rights*, 2014 BYU L. REV. 585, 594 (arguing the idea of natural rights as a “subjective entitlement possessed by all individuals, simply as individuals, to demand (or have demanded for them) that no one of them shall be subjected to arbitrary force or arbitrary neglect under threat of sanction for noncompliance”).

¹² Sigrun Skogly, *Soft Law and Global Health Problems: Lessons from Responses to HIV/AIDS, Malaria and Tuberculosis by Sharifah Sekalala*, 45 J.L. & SOC'Y 503, 503 (2018).

¹³ See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (recognizing the ideal of free humans to enjoy civil and political freedoms free from fear and want); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (affirming the right of self-determination, that each individual may decide for himself the disposition of his natural wealth); see also International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, T.I.A.S. No. 94-1120, 660 U.N.T.S. 195 (emphasizing the repugnancy of racial barriers to the ideals of human society); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 17, 1979, 1249 U.N.T.S. 13 (affirming the dignity and worth of all persons and the equal rights of men and women); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, U.N.T.S. 93 (considering the vulnerable status of migrant workers the importance of migration); International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 (protecting all people from enforced disappearances and affirming the right of victims to know the truth behind these disappearances).

¹⁴ Frédéric Mégret, *International Human Rights Law Theory*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 199, 201, 208 (Alexander Orakhelashvili ed., 2011).

cultural, legal, and ethical perspectives.¹⁵ Another hurdle to codifying rights in international treaty law is judicial challenges to these laws, which result in the international community acknowledging the importance of pluralism.¹⁶ Additionally, concerns about sovereignty constrain the enforcement of human rights norms.¹⁷ The effect has been a wide divergence of human rights observance to avoid stepping on the toes of a state that may prioritize differing values.

Tolerance of a sweeping degree of local variation may also be due to the ‘margin of appreciation’ doctrine in international law.¹⁸ This doctrine includes the idea that international bodies should defer to national authorities.¹⁹ Under this doctrine, states are left to dictate the contours of their human rights protections to a certain degree. Proponents of the ‘margin of appreciation’ reason that local-level decision-makers are in the best position to be informed on local issues and these leaders are also accountable to whom they govern; therefore, international authorities should exercise restraint when reviewing decisions made at the domestic level.²⁰ This “to each their own” attitude hinders global cooperation for justice. Although noble, human rights aspirations often fall short as legal obligations because of the ‘margin of appreciation’ mindset, with a gap between ratification and realization. One human rights scholar writes,

Legally ratified human rights are violated every day across the globe. Within some jurisdictions effective mechanisms of complaint and redress exist, which at least constitute a potential obstacle to continuing abuse. Within other jurisdictions, however, such mechanisms either do not exist or are entirely inadequate. Individuals’ legal rights may be violated but nothing follows from this. Thus, the mere existence of legally recognised human rights provides no measure of their actual realisation.²¹

¹⁵ See Mathew Davies, *An Agreement to Disagree: The ASEAN Human Rights Declaration and the Absence of Regional Identity in Southeast Asia*, 33 J. CURRENT SE. ASIAN AFFS. 107, 107 (2014) (discussing the absence of a shared regional identity despite attempts to codify human rights in a new declaration).

¹⁶ Mégret, *supra* note 14, at 206.

¹⁷ See Iryna V. Boiko et al., *Universal Human Rights and State Sovereignty*, 9 INT’L J. CRIMINOLOGY & SOCIO. 3014, 3014, 3021 (2020) (arguing that “restriction of state sovereignty is possible only in favour of the individual based on the priority of human rights” and concluding that respect for state sovereignty must be respected to ensure peace and national security).

¹⁸ Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 907, 910 (2005).

¹⁹ LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 900 (7th ed. 2019).

²⁰ See *id.*

²¹ FAGAN, *supra* note 10, at 33.

These violations include violations of children's rights—thus far, international policymakers have failed to induce compliance with the current legal obligation to register a child at birth. This Article addresses the gap between ratification and the realization of a child's right to a legal identity.

B. Legal Identity is a Human Right

The opportunity for grave human rights violations to occur is exponentially greater with a lack of legal identity, as embodied in birth registration and birth certificates. The examples in the introduction were just a few of the harms that come to children without legal documentation. The risks of not having proof of age and identity include child trafficking, exploitation, underage marriage, inability to enroll in school, denial of child support, lack of protections in the juvenile justice system, and lack of proof of a right to an inheritance.²² Legal identity offers protection against these risks and subsequent harms.

Legal identity is primarily established through birth registration.²³ Stemming from the Universal Declaration of Human Rights,²⁴ the right to birth registration is protected under two international legal instruments, the International Covenant on Civil and Political Rights (ICCPR)²⁵ and the Convention on the Rights of the Child (CRC).²⁶ The ICCPR states that “[e]very child shall be registered immediately after birth and shall have a name.”²⁷ Similar language appears in the CRC, a treaty with almost

²² Yamilée Mackenzie, *The Campaign for Universal Birth Registration in Latin America: Ensuring All Latin American Children's Inherent Right to Life and Survival by First Guaranteeing Their Right to a Legal Identity*, 37 GA. J. INT'L & COMP. L. 519, 526–28 (2009).

²³ Leah Selim, *What Is Birth Registration and Why Does It Matter?*, UNICEF (Dec. 10, 2019), <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter> (explaining that birth registration is a fundamental human right); *United Nations Legal Identity Agenda*, UN STATS. DIV., <https://unstats.un.org/legal-identity-agenda/> (last visited Sept. 4, 2024) (“Legal identity is . . . an individual's identity . . . conferred through registration and the issuance of a certificate by an authorized civil registration authority following the occurrence of birth.”).

²⁴ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 6 (Dec. 10, 1948) (“Everyone has the right to recognition everywhere as a person before the law.”).

²⁵ ICCPR, *supra* note 13, art. 24.

²⁶ See G.A. Res. 44/25, Convention on the Rights of the Child, art. 7, ¶ 1 (Nov. 20, 1989) (“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”).

²⁷ ICCPR, *supra* note 13, art. 24.

universal ratification.²⁸ The act of registering a birth establishes a child's identity. As one scholar noted,

[T]he significance of a reliable system of birth registration cannot be overstated: as the formal mechanism by which the legal existence of the child is established, it constitutes "one of the most important events in a child's life." The registration of a child's birth is vital to his place in the world and to his ability to access legal, social, and political rights. A birth certificate cannot by itself guarantee the protection of a child's rights; however, it significantly increases the child's ability to access and enforce these rights.²⁹

Unfortunately, the current tools in the legal toolbox have proven inadequate at delineating actionable measures that will protect human rights, either through soft law instruments or hard law international treaties.

C. *Hard Law versus Soft Law*

Hard law instruments are "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations and that delegate authority for interpreting and implementing the law)."³⁰ Soft law instruments, in contrast, are typically normative agreements that are not legally binding.³¹

In some cases, hard law and soft law work in a complementary manner with soft law guidelines, principles, rules and standards emerging from their hard law treaty counterpart. These soft recommendations are often drafted by the treaty's chartered, monitoring body.³² In this way, both hard and soft law establish the rules of international law and shape the behavior of international actors.³³

²⁸ See *id.* art. 7 (explaining that the United States is the only country not to ratify the Convention on the Rights of the Child); see also *Frequently Asked Questions on the Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention/frequently-asked-questions> (last visited Sept. 25, 2024) (noting that although the Convention on the Rights of the Child is the most ratified treaty in history with almost universal ratification, the United States has not ratified it).

²⁹ Mackenzie, *supra* note 22, at 526.

³⁰ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

³¹ Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL* 197, 198 (Stephen Martin ed., 1994).

³² Felicia Maxim, *Hard Law Versus Soft Law in International Law*, 2020 CONF. INT'L DR. 113, 113–14.

³³ *Id.*

There are a variety of advantages and disadvantages for using either a hard law or soft law approach when trying to influence state behavior. Hard law instruments like treaties have the advantage of broad consensus if they are widely ratified.³⁴ This ratification promotes establishing norms recognized by the global community.³⁵ Additionally, voluntary ratification through elected processes is a powerful signal of an intent to be bound and suffer consequences for a breach of the legal obligation.³⁶ This enforcement power is often delegated to a third party that can monitor compliance and impose sanctions if needed.³⁷ Critics of these instruments point out that there are various political reasons for treaty ratification, including virtue signaling, where states ratify a treaty to improve their image on the world stage, with no intent to comply with the binding law.³⁸ In some cases, the legitimacy of the third-party enforcing body has come under scrutiny, weakening the effectiveness of treaty obligations and enforcement mechanisms.³⁹

³⁴ See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 717–18 (2010) (explaining that hard law instruments, once ratified, allow states to gain credibility within the international community); Arnold N. Pronto, *Understanding the Hard/Soft Distinction in International Law*, 48 VAND. J. TRANSNAT'L L. 941, 950–51 (2015) (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

³⁵ See Jeffrey L. Roberg, *The Importance of International Treaties: Is Ratification Necessary?*, 169 WORLD AFFS. 181, 185 (2007) (“[P]rinciples enshrined in treaties—ratified or unratified—add to customary international law and norms, and states are expected to abide by them.”).

³⁶ See Uta Oberdorster, *Why Ratify? Lessons from Treaty Ratification Campaigns*, 61 VAND. L. REV. 681, 684–85 (2008) (“Treaty law is voluntary” and a “conscious decision to ratify a treaty” binds those countries); see also Eric A. Posner & Jack L. Goldsmith, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 122–27, 129, 131–36 (2003).

³⁷ Paula Blomqvist, *Soft and Hard Governing Tools*, in HANDBOOK ON THEORIES OF GOVERNANCE 285, 287 (Christopher Ansell & Jacob Torfing eds., 2d ed. 2022).

³⁸ See SEAN MOLLOY, EXPLORING POTENTIAL CONNECTIONS BETWEEN PEACE AGREEMENTS AND HUMAN RIGHTS TREATY RATIFICATION 16 (2020) (“[R]atification may have been a matter of implementation, but also a matter of virtue signalling of a new regime that it would lay aside the conflict of the past (perhaps Rwanda), or a new state signalling its sovereignty and wish to be seen as a good new member of the international community of states (Bosnia), or essentially demanded by international actors such as UN Missions responsible for implementing the Agreement (Burundi, and Bosnia) . . .”).

³⁹ See Mikael Madsen, *From Boom to Backlash? The European Court of Human Rights and the Transformation of Europe* 7, 24 (Danish Nat'l Rsch. Found., Working Paper Series, Paper No. 211, 2020) (explaining that the rise of Brazil, Russia, India, and China and other global dynamics have emboldened Russia and other countries to grant less legitimacy to the court).

In contrast to the formal ratification of hard law tools of governance, soft law tools are accepted on a voluntary basis, and non-binding.⁴⁰ These tools, as embodied in recommendations, guidelines, targets, information, or voluntary agreements, are created outside the legislative process.⁴¹ Questions of authority arise if the soft laws are drafted adjacent to the formal processes of political deliberation found in democratic decision making.⁴² Additionally, these types of agreements in international law are often vaguely worded in an effort to establish broad international norms in a participatory manner rather than an authoritative one.⁴³ In direct contrast, hard law instruments are more precise in content.⁴⁴

The differences between hard and soft law instruments allow policymakers to choose which tool can best advance their purposes and objectives. In some cases, a more precise legal rule is needed that incorporates binding obligations and solid enforcement mechanisms. In others, consensus may be difficult to achieve in an official treaty. In that case, a more high-level approach can be presented in the form of a soft law instrument that is accepted by states and non-state actors on a voluntary basis. Both hard and soft law instruments have attempted to address legal identity.

D. Hard Law: Compliance and the Convention on the Rights of the Child

The traditional method to protect human rights has been through hard law instruments, and the most commonly cited treaty encapsulating legal identity for children is the CRC.⁴⁵

⁴⁰ See *Glossary*, ECCHR, <https://www.ecchr.eu/en/glossary/hard-law-soft-law/> (last visited Oct. 16, 2024). But see Giovanna Adinolfi, *Soft Law in International Investment Law and Arbitration*, 1 ITALIAN REV. INT'L & COMPAR. L. 86, 88–89 (2021) (explaining that there is an international debate about the meaning of soft versus hard law and that some in the international community consider non-binding norms as neither hard law nor soft law).

⁴¹ Abbott & Snidal, *supra* note 30, at 422–23, 429, 443.

⁴² *Id.* at 422.

⁴³ Shaffer & Pollack, *supra* note 34, at 714–15.

⁴⁴ *Id.*

⁴⁵ Convention on the Rights of the Child, *supra* note 26, pmb.; see Ramiro Álvarez Ugarte, *From Soft to Hard Law: Human Rights Impact Assessments in the Digital Services Act Era*, TECH POLY PRESS (June 20, 2024), <https://www.techpolicy.press/from-soft-law-to-hard-law-human-rights-impact-assessments-in-the-digital-services-act-era/> (noting that human rights are considered hard law; however, the states generally protected human rights through treaties, despite human rights being universally recognized, respected, and enforceable); see also *How We Protect Children's Rights with the UN Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> (last visited Oct. 12, 2024) (explaining that the Convention on the Rights of the Child is the most widely ratified human rights treaty).

While the CRC has been widely ratified as a whole,⁴⁶ the requirement for birth registration has yet to be met. The United Nations Population Fund (“UNFPA”) in 2021 estimated that the “births of tens of millions of children” globally are never registered.⁴⁷ Article 7 of the CRC places the responsibility of implementing the right of legal identity to states “in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”⁴⁸ A number of regional treaties have adopted these provisions, and some argue that the strong legal obligation includes a positive duty to ensure that children are registered.⁴⁹

The most significant consequences for states not complying with the CRC are harms realized by children themselves.⁵⁰ The failure to protect and promote the rights of children can have severe consequences for their overall development, well-being, and prospects, leading to long-term societal issues such as poverty, crime, and social instability.⁵¹ Regarding legal consequences, the international community is in a sticky spot here. Traditional means of enforcement like sanctions and refusal of aid are more likely to harm an already impoverished people, rather than nudging them toward prioritizing and enacting their positive human rights obligations.⁵² Similarly, public condemnation, or “naming and shaming,” have none of the effectiveness of real “sticks and stones;” words alone are likely not enough to galvanize violating governments into action.⁵³ In a few instances, the opposite is true, and rather than stop their behavior, naming and shaming actually causes some states to ramp up their abuses.⁵⁴ In economic terms, the costs for a state to implement a system are often much higher than the perceived benefit. As long as there are no

⁴⁶ *Frequently Asked Questions on the Convention on the Rights of the Child*, *supra* note 28.

⁴⁷ *UNFPA Ramps Up Its Support to Civil Registration and Vital Statistics – A Cornerstone of Gender Equality*, UNFPA (Sept. 29, 2021), <https://www.unfpa.org/press/unfpa-ramps-its-support-civil-registration-and-vital-statistics-%E2%80%93-cornerstone-gender-equality>.

⁴⁸ Convention on the Rights of the Child, *supra* note 26, art. 7.

⁴⁹ WOUTER VANDENHOLE ET AL., CHILDREN’S RIGHTS: A COMMENTARY ON THE CONVENTION ON THE RIGHTS OF THE CHILD AND ITS PROTOCOLS 101 (2019).

⁵⁰ *Id.*

⁵¹ See Mackenzie, *supra* note 22, at 526–27, 529.

⁵² Majid Sheikh Hared et al., *The Human Cost of Sanctions: How Economic Penalties Affect Innocent Populations*, 7 J. AFR. INTERDISC. STUD. 83, 83–84 (2023).

⁵³ Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689, 689–91 (2008).

⁵⁴ *See id.* at 691–93, 707, 710–13 (explaining that one reason for an increase in abuse, among others discussed therein, may be a government’s limited capacity in addressing human rights violations).

real consequences for breaching their obligations, states can continue in non-compliance.⁵⁵

Many states that have ratified the CRC have failed to implement the necessary infrastructure to allow birth registration.⁵⁶ Rather than enforcing treaty obligations, the international community has chosen to continue making recommendations,⁵⁷ resulting in further non-compliance as developing states in need of assistance do not act on those recommendations.

There is a growing trend to move away from treaties and other hard law instruments, for a variety of reasons, including failures to implement and enforce human rights. This lack of progress has caused some human rights advocates to turn to what they believe is a more effective tool—soft law.⁵⁸

E. Soft Law: The United Nations Sustainable Development Goals

The increase in the use of soft law instruments can be at least partly attributed to the increasing complexity of the international realm, the growing number of actors in the international legal system, and the increasing attractiveness of using soft law to “set the stage for the development of international customary law.”⁵⁹ Additionally, these agreements are easier to negotiate because of their lack of binding obligations. States are wary to enter into agreements in international law they may not be able to keep, where non-compliance could bring serious consequences.⁶⁰ Further, soft law documents can be drafted expeditiously by legal experts, bypassing the more traditional lengthy process needed

⁵⁵ See JACK DONNELLY & DANIEL J. WHELAN, *INTERNATIONAL HUMAN RIGHTS* 74–75 (6th ed. 2020). Interestingly, the Commission that drafted the ICCPR and the ICESCR incorporated a reporting procedure for economic and social rights, but not civil and political rights. A developing state could submit a report documenting their lack of resources had led to “violations,” and would subsequently trigger “assistance mechanisms . . . both from the specialized agencies of the United Nations . . . and from other states.” *Id.* at 75–77.

⁵⁶ See UNICEF, *UNICEF on Deficient Birth Registration in Developing Countries*, 24 *POPULATION & DEV. REV.* 659, 660 (1998).

⁵⁷ See generally U.N. High Commissioner for Human Rights, *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law*, U.N. Doc. A/HRC/27/22 (June 17, 2014) (observing the fundamental nature of universal birth registration and concluding with recommendations of how to achieve it).

⁵⁸ Dinah Shelton, *Commitment and Compliance: What Role for International Soft Law?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Nov. 22, 1999), <https://carnegieendowment.org/events/1999/11/commitment-and-compliance-what-role-for-international-soft-law?lang=en>.

⁵⁹ Elizabeth Ferris & Jonas Bergmann, *Soft Law, Migration and Climate Change Governance*, 8 *J. HUM. RTS. & ENV’T* 6, 12 (2017).

⁶⁰ *Id.*

for bipartisan ratification and allowing results to be manifest more quickly.⁶¹

Because of its flexible nature, soft law has been particularly popular as a device for advancing goals for both environmental and human rights.⁶² Whether addressing climate change, the right to a clean environment, or gender equality, legal experts have sought to increase their influence and mandates through soft law instruments, such as the United Nations Sustainable Development Goals.⁶³

In 2015, in an ambitious move, the United Nations General Assembly unanimously agreed on the Sustainable Development Goals (SDGs), targets meant to save the planet while still promoting economic growth, human development, and social justice.⁶⁴ This soft law approach is able to avoid traditional “top-down regulation or market-based approaches” through non-binding initiatives grounded in international law.⁶⁵

The SDGs set forth seventeen interconnected goals for global sustainability.⁶⁶ These brightly packaged documents are helpful guideposts for states looking for direction on addressing global problems like climate change, human rights, poverty, and civil unrest.⁶⁷ The seventeen goals are further elaborated in 169 targets.⁶⁸ Experts on the

⁶¹ *Id.*

⁶² *See id.* at 6–7 (“The present hard law system governing the movement of people is not equipped to handle the complexities of population movements in the context of climate change, and it is improbable that these often static legal regimes can be adequately transformed. In contrast, we argue that soft law offers a number of advantages particularly well suited to the characteristics of those who move because of the effects of climate change, especially if complemented by some of the more potent aspects of hard law.”).

⁶³ Ilias Bantekas & Katerina Akestoridi, *Sustainable Development Goals, Between Politics and Soft Law: The Emergence of “Political Normativity” in International Law*, 37 EMORY INT’L L. REV. 499, 503–05 (2023).

⁶⁴ CHRISTOPHER ANSELL ET AL., CO-CREATION FOR SUSTAINABILITY: THE UN SDGs AND THE POWER OF LOCAL PARTNERSHIP 1 (2022); *see also* G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015) (noting that countries can work together to carry out the 17 Sustainable Development Goals to make the world more sustainable in economic, social, and environmental ways).

⁶⁵ Frank Biermann et al., *Global Governance by Goal-Setting: The Novel Approach of the UN Sustainable Development Goals*, 26–27 SCIENCE DIRECT 26, 26 (2017).

⁶⁶ Transforming Our World: The 2030 Agenda for Sustainable Development, *supra* note 64; *see also* *The 17 Goals*, U.N. DEP’T ECON. & SOC. AFFS., <https://sdgs.un.org/goals> (last visited Oct. 1, 2024) (listing the 17 Sustainable Development Goals succinctly as (1) no poverty, (2) zero hunger, (3) good health and well-being, (4) quality education, (5) gender equality, (6) clean water and sanitation, (7) affordable and clean energy, (8) decent work and economic growth, (9) industry innovation and infrastructure, (10) reduced inequalities, (11) sustainable cities and communities, (12) responsible consumption and production, (13) climate action, (14) life below water, (15) life on land, (16) peace, justice and strong institutions, and (17) partnerships for the goals).

⁶⁷ *See* Bantekas & Akestoridi, *supra* note 63, at 546.

⁶⁸ G.A. Res. 70/1, *supra* note 64, ¶¶ 18–38.

matter describe the task of meeting the 17 Goals as “immense as it is urgent. At times, it may even seem overwhelming and beyond our reach.”⁶⁹

Indeed, the UN SDGs are a thorough and all-encompassing effort to achieve sustainability by 2030, yet the comprehensive nature of the goals may be working to its detriment. States adopting this aspirational soft law tool have made little progress towards the 2030 targets in the decade since its debut.⁷⁰ As one journalist remarked, “This voluntary approach is maybe not the right one.”⁷¹

Consequentially, at the 2023 United Nations General Assembly, world leaders sought to “recharge momentum” after nearly a decade of little progress.⁷² In a forward to the 2023 SDG Progress report, UN Secretary-General António Guterres said, “Unless we act now, the 2030 Agenda could become an epitaph for a world that might have been.”⁷³

Why such pessimism? Some authors have argued that the SDGs are too vague and therefore meaningless.⁷⁴ Others say that jumping to find solutions for problems that are themselves debatable is futile.⁷⁵ In terms of actual progress, an empirical study notes that progress on the goals has been severely impeded by world crises such as the Covid-19 pandemic, supply chain disruptions, the Ukraine war, and inflation.⁷⁶ Disappointingly, the SDGs have failed to reduce poverty, or facilitate cooperation between states and policy makers, both major objectives of the SDGs.⁷⁷ A news article reported,

Frank Biermann, a professor of global sustainability governance at Utrecht University in the Netherlands who has spent years researching the SDGs, said that governments have shown little

⁶⁹ ANSELL ET AL., *supra* note 64, at 1.

⁷⁰ Brian Osgood, *UN Sustainable Development Goals in Spotlight at General Assembly*, AL JAZEERA (Sept. 18, 2023), <https://www.aljazeera.com/news/2023/9/18/un-sustainable-development-goals-in-spotlight-at-general-assembly>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ António Guterres, U.N. DEPT’N ECON. & SOC. AFFS., *THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2023: SPECIAL EDITION 1, 2* (2023).

⁷⁴ See Erik Stokstad, *Sustainable Goals from U.N. Under Fire*, SCIENCE, (2015), at 702–03 (quoting Richard Horton, who called the SDGs, “fairy tales, dressed in the bureaucratism of intergovernmental narcissism”); Erling Holden et al., *The Imperatives of Sustainable Development*, 25 SUSTAINABLE DEV. 213, 213–14 (2017).

⁷⁵ Sándor Kerekes, *Chasing the Impossible. Sustainable Development Is a Wicked Problem, but It Can Be and Should Be Tamed!*, 79 WORLD FUTURES 394, 394–96 (2023).

⁷⁶ Walter Leal Filho et al., *When the Alarm Bells Ring: Why the UN Sustainable Development Goals May Not Be Achieved by 2030*, 407 J. CLEANER PROD. 1, 3–4 (2023).

⁷⁷ See Osgood, *supra* note 70 (explaining that the U.N. estimates about 575 million people will be living in extreme poverty by 2030 if trends continue).

interest in treating the goals as a priority or translating them into concrete policy changes. “The SDGs are not doing well,” Biermann told Al Jazeera. “We [a group of researchers] set out to determine whether they were changing the way that governments operate, and the answer we found was, essentially no.”⁷⁸

Given the recent reports, it can be concluded that the SDGs’ soft law implementation has largely failed to catalyze states into action to meet the UN targets by 2030.⁷⁹

Failure of the SDGs to impose meaningful obligations regarding birth registration in international law, along with lack of compliance with the registration requirements outlined in the CRC, has left millions of children without the important protection afforded by a legal identity.⁸⁰ There remains a gap between the human rights aspirations of both hard and soft law and actual rights protection. The CRC and the SDGs are steps in the right direction, parsing out what the law should be. However, effective legal instruments must go further. In practice, states need concrete plans and mechanisms to fulfill their legal obligations, not an overwhelming mass of nebulous targets. To see real progress, the targets themselves must be actionable and achievable.

II. BIRTH REGISTRATIONS AND THE SDGS

Birth registration is an actionable target, capable of greatly advancing the protection of human rights by solidifying a person’s legal identity. In some areas, significant barriers to birth registration persist, including lack of infrastructure, ignorance of the importance of legal identity, parents who themselves are undocumented, complex registration processes, and lack of access for children born in rural areas.⁸¹

These barriers were at the forefront of drafters’ minds when writing SDG 16. The targets of Goal 16 are meant to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”⁸²

⁷⁸ *Id.*

⁷⁹ See Filho et al., *supra* note 76, at 16.

⁸⁰ Bronwen Manby, *Birth Registration, 'Legal Identity for All,' and the Prevention of Statelessness Among Migrants*, LONDON SCH. ECON. (Apr. 2, 2021), <https://blogs.lse.ac.uk/mec/2021/04/02/birth-registration-legal-identity-for-all-and-the-prevention-of-statelessness-among-migrants/>.

⁸¹ Mackenzie, *supra* note 22, at 529–32.

⁸² *Goal 16*, U.N. DEPT ECON. & SOC. AFFS., <https://sdgs.un.org/goals/goal16> (last visited Oct. 9, 2024).

While many of the targets in SDG 16 are broadly worded to encompass the aspirations of peace and stability⁸³ in an ideal society, there are a few concrete targets within the goal. Specifically, 16.9 states, “By 2030, provide legal identity for all, including birth registration.”⁸⁴ One author called this a “function” target, as opposed to those targets in the SDG that focus more on “form.”⁸⁵ Function targets “focus on improving performance on key functions that are important for development and for citizens.”⁸⁶ To its advantage, 16.9 is clear and concrete. By implementing the organizational structures needed to meet its goals, states can facilitate the creation of other adjacent programs, thereby amplifying its effects.⁸⁷

As a functional goal, rather than a form goal, SDG 16.9 has seen some progress and success as countries have sought to meet the target.⁸⁸ Though still far from universal registration, clear and actionable rules can lead to easier and more effective implementation. A primary factor contributing to the success in these goals has been the cooperation and partnership of states and non-state actors in meeting the goals.

A. Increasing Role of Non-state Actors in International Law

In every area of international law, the increasing influence of non-state actors is visible. These actors include non-governmental organizations, multinational corporations, investors, celebrity ambassadors, and even armed opposition groups.⁸⁹ The presence of these

⁸³ See *id.* The first four targets demonstrate these broad aspirations. Target 16.1 intends to “reduce all forms of violence . . . everywhere.” Target 16.2 intends to “[e]nd abuse, exploitation, trafficking and all forms of violence and torture against children.” Target 16.3 intends to “ensure equal access to justice for all.” Lastly, Target 16.4 intends to “combat all forms of organized crime.” *Id.*

⁸⁴ *Id.*

⁸⁵ Mary E. Hilderbrand, *Good Governance and the Sustainable Development Goals: Assessing Governance Targets*, in *PRIORITIZING DEVELOPMENT: A COST BENEFIT ANALYSIS OF THE UNITED NATIONS’ SUSTAINABLE DEVELOPMENT GOALS* 475, 486 (Bjørn Lomborg ed., 2018).

⁸⁶ *Id.*

⁸⁷ *Id.* at 488 (expounding on the positive spinoff effects of creating an effective registration system by “making sure all citizens have a legal identity” as it “helps the government reach citizens for other programs.” This “legal identity for citizens supports their ability to claim their rights and is an element of other dimensions of governance, including participation, inclusiveness, and rule of law. . . . although a narrow function, it catches several dimensions and can serve as an indicator across governance more broadly.”)

⁸⁸ See *id.* at 487–89; *SDG Target 16.9 on Legal Identity*, GET EVERY ONE IN THE PICTURE (Dec. 14, 2015), <https://getinthepicture.org/news/sdg-target-169-legal-identity>.

⁸⁹ See MARKUS KORNPBST, *Non-State Actors in International Relations: Actors, Processes, and an Agenda for Multifaceted Dialogue*, in *NON-STATE ACTORS IN INTERNATIONAL LAW* 295, 297 (Math Noortmann et al. eds., 2015).

actors in international law is crucial to bridging the gap between law in theory and law in practice.⁹⁰ One scholar has even called this increase in non-state actor participation a new “global institutionalized normative web” where states are no longer the primary actors.⁹¹ Another scholar has argued for a more inclusive legal system that treats states, governments, and NGOs equally.⁹²

While these non-state actors are unlikely to achieve a legal status equal to states, they can play an important role in affecting change on a grand scale. Non-state actors use resources often unavailable to states to engage in policy advocacy, monitoring, and evaluation.⁹³ On the ground, they perform the vital functions of implementing development programs, service delivery, outreach, and education.⁹⁴ More and more non-state actors are entering the enforcement arena through fact-finding reports and litigation.⁹⁵ It is clearly evident from the variety of functions performed by non-state actors that NGOs and transnational companies are well-suited to advance human rights policy goals like legal identity.⁹⁶

B. Private Partnerships Implementing SDG 16.9

Where hard and soft law addressing birth registration has thus far been ineffective, it is time to integrate SDG target 16.9 more fully into hard law, with support from non-state actors being the key to success.⁹⁷ With a focused, binding agreement that incentivizes the participation of

⁹⁰ See MATH NOORTMANN ET AL., *Introduction to NON-STATE ACTORS IN INTERNATIONAL LAW*, *supra* note 89, at 1, 1–2.

⁹¹ See Ramses A. Wessel, *Institutional Lawmaking: The Emergence of a Global Normative Web*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 179, 181 (Catherine Brölmann & Yannick Radi eds., 2016).

⁹² See MATH NOORTMANN, *Non-Governmental Organisations: Recognition, Roles, Rights, and Responsibilities*, in NON-STATE ACTORS IN INTERNATIONAL LAW, *supra* note 89, at 222, 224.

⁹³ See THOMAS W. DALE, TRACKING PROGRESS ON THE GROUND: GUIDANCE AND GOOD PRACTICES FOR INTEGRATING SUBNATIONAL AND NON-STATE ACTORS INTO M&E SYSTEMS FOR NATIONAL CLIMATE CHANGE ADAPTION POLICIES 1–3 (Henry Neufeldt ed., 2023).

⁹⁴ *Id.*; see generally DONNELLY & WHELAN, *supra* note 55, at 212–29 (addressing transnational human rights advocacy and non-governmental agencies' roles in human rights advocacy).

⁹⁵ Mette Eilstrup-Sangiovanni & J.C. Sharman, VIGILANTES BEYOND BORDERS: NGOS AS ENFORCERS OF INTERNATIONAL LAW 13 (2022).

⁹⁶ DALE, *supra* note 93; see also *Human Rights Activism and the Role of NGOs*, COUNCIL OF EUR., <https://www.coe.int/en/web/compass/human-rights-activism-and-the-role-of-ngos> (last visited Oct. 12, 2024).

⁹⁷ See Jean d'Aspremont, *Introduction to PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW* 1, 8 (Jean d'Aspremont ed., 2011) (“Despite most of the time being deprived of any legal personality, non-state actors generate a social practice that is very instrumental to the meaning of our law-ascertainment criteria.”).

governments and non-state actors in public/private partnerships, states can close the gap in birth registration that has not been adequately addressed in international law.⁹⁸

In order to achieve effective implementation of function goals like birth registration, states have much better results when they partner with private industries, international organizations, and NGOs for a bottom-up approach.⁹⁹ Successful examples of each type of partnership are outlined below.

1. Country: Pakistan, Partnership: Private Company (Telenor)

According to the United Nations Children's Fund (UNICEF) in 2019, 9% of the world's 166 million unregistered children live in Pakistan.¹⁰⁰ While the number of unregistered children in 2021 was a staggering 60 million,¹⁰¹ the government and private industry have introduced an innovative solution to establish legal identity in arguably one of the greatest areas of need. In 2014, when this project started,¹⁰² the registration rate in Pakistan was around 30%.¹⁰³ Mobilized by threats accompanying a lack of legal identity, Telenor, the second-largest cellular service provider in Pakistan decided to pilot an efficient and effective birth registration system.¹⁰⁴

Partnering with UNICEF, this private company developed an app to place in the hands of health workers and marriage registrars who were already in the habit of visiting families in their homes.¹⁰⁵ They would

⁹⁸ Marcelo Dias Varela, *Building International Law from the Inside Out: The Making of International Law by Infra-State and Non-State Actors 12–13* (July 1, 2013) (unpublished manuscript) (on file with the Regent University Journal of Global Justice and Public Policy).

⁹⁹ Lorenzo Cotula, *Between Hope and Critique: Human Rights, Social Justice and Re-Imagining International Law from the Bottom Up*, 48 GA. J. INT'L & COMPAR. L. 473, 476 (2020).

¹⁰⁰ BIRTH REGISTRATION FOR EVERY CHILD BY 2030: ARE WE ON TRACK?, *supra* note 6, at 16.

¹⁰¹ *Insight & Strategy: Naming the Invisible by Digital Birth Registration*, WORLD FED'N ADVERTISERS (Oct. 13, 2021), <https://wfanet.org/knowledge/diversity-and-inclusion/item/2021/10/13/Insight--Strategy-Naming-the-Invisible-by-Digital-Birth-Registration>.

¹⁰² Note that this was prior to the release of the 2015 SDGs.

¹⁰³ *Giving Pakistani Children an Identity*, TELENOR GRP., <https://www.telenor.com/sustainability/digital-inclusion-and-diversity/social-innovation/digital-birth-registration/giving-pakistani-children-an-identity/> (last visited Oct. 18, 2024).

¹⁰⁴ *Insight & Strategy: Naming the Invisible by Digital Birth Registration*, *supra* note 101.

¹⁰⁵ *Giving Pakistani Children an Identity*, *supra* note 103.

input data into the app that was then sent to authorities, who would review the information and officially register the child.¹⁰⁶

Telenor was uniquely positioned to offer this service because of the infrastructure they already had in place for providing cellular service. Their distribution centers served as access points for the health workers and others who gathered the data.¹⁰⁷ Additionally, by providing cellular coverage to rural areas, they were able to reach the most commonly unregistered children easily.¹⁰⁸

With a 200% increase in birth registrations in the pilot areas in Pakistan, the program was incredibly successful: 90% of children in participating provinces were registered after introducing the Telenor Digital Birth Registration (DBR) project.¹⁰⁹ The DBR transformed a process that normally took three days down to ten minutes.¹¹⁰ Telenor then handed the system over to the government of Pakistan to continue its use.¹¹¹ Telenor has plans to implement the same model in other countries in South Asia and is currently replicating the project in Myanmar.¹¹²

What is remarkable about the Pakistan/Telenor partnership for birth registration is its value driven approach. In this case, Telenor had a specific goal of connecting people to what matters—very on-brand for a cell phone company.¹¹³ But in a larger sense, Telenor also aimed to create meaningful change in individual lives with technology, and the DBR project was the perfect way to fulfill that vision.

The innovative approach taken by Telenor and the Pakistani government is an excellent model of the impressive gains that can be accomplished through private partnerships working in tandem with governments to meet international law goals. Telenor referenced the SDGs as they sought how best to achieve their goal of community outreach.¹¹⁴ The SDG goal of birth registration was more of a guidepost for creative innovation than a rule needing to be complied with.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Insight & Strategy: Naming the Invisible by Digital Birth Registration*, *supra* note 101.

¹⁰⁹ *Giving Pakistani Children an Identity*, *supra* note 103; *Insight & Strategy: Naming the Invisible by Digital Birth Registration*, *supra* note 101.

¹¹⁰ *Insight & Strategy: Naming the Invisible by Digital Birth Registration*, *supra* note 101.

¹¹¹ *Social Innovation*, TELENOR GRP., <https://www.telenor.com/sustainability/digital-inclusion-and-diversity/social-innovation/> (last visited Nov. 13, 2024).

¹¹² *Insight & Strategy: Naming the Invisible by Digital Birth Registration*, *supra* note 101.

¹¹³ *See id.*

¹¹⁴ *Giving Pakistani Children an Identity*, *supra* note 103; TELENOR, HOW TELENOR HELPS EMPOWER SOCIETIES: SDG IMPACT 1–3 (2019).

Unfortunately, the “Telenors” of the world are few and far between. While the noble intentions of Telenor made the partnership possible, most developing countries lack the infrastructure and the idealism of the telecom company and will need more of a push towards compliance.

2. Country: Mexico, Partnership: International Organization (The World Bank)

In Mexico, government officials were seeking to comply with the goal of universal birth registration in SDG 16.9.¹¹⁵ In 2016, approximately 800,000 children under the age of five did not have their births registered.¹¹⁶ A report on overall registration levels in Latin America indicated that the challenge would be reaching the last 2–3% of unregistered children. Closing this gap would require focusing on that group, mostly children from indigenous populations.¹¹⁷

Lacking a private partnership like the telecom giant in Pakistan, Mexican officials proposed a plan to update their registration process to the World Bank.¹¹⁸ Securing a \$225 million loan from the bank, Mexico updated the registration process in seventy-one hospitals through its civil registry agency RENAPO, registering children shortly after birth instead of at a later date.¹¹⁹

¹¹⁵ Cesia Chavarría, *A Birth Certificate Changes Lives of Mexican Children of Foreign Born Parent*, IOM UN MIGRATION (Nov. 11, 2022), <https://storyteller.iom.int/stories/birth-certificate-changes-lives-mexican-children-foreign-parents>.

¹¹⁶ UNICEF, *BIRTH REGISTRATION IN LATIN AMERICA AND THE CARIBBEAN: CLOSING THE GAPS* (2016).

¹¹⁷ See Karen Mercado Asencio, *The Under-Registration of Births in Mexico: Consequences for Children, Adults, and Migrants*, MIGRATION POL’Y INST. (April 12, 2012), <https://www.migrationpolicy.org/article/under-registration-births-mexico-consequences-children-adults-and-migrants> (“Under-registration of births in Mexico mainly affects marginalized sectors of the population, including street children; children from single-parent families in rural areas; indigenous children; children of internally displaced persons or refugees; and the children of migrants, especially unauthorized migrants and minorities like the indigenous and Afro-Mexicans. . . . all of the aforementioned groups face barriers to birth registration such as extreme poverty, social exclusion, ignorance and/or illiteracy, ethnic discrimination, and language barriers. The fact that these groups are also among the most vulnerable to abuse and exploitation underscores their need for birth certificates.”).

¹¹⁸ WORLD BANK, REPORT NO. ESRSC01307, *CONCEPT ENVIRONMENTAL AND SOCIAL REVIEW SUMMARY CONCEPT STAGE 2* (2020).

¹¹⁹ WORLD BANK, REPORT NO. PAD4044, *INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT: PROJECT APPRAISAL DOCUMENT ON A PROPOSED LOAN IN THE AMOUNT OF US \$225 MILLION TO THE UNITED MEXICAN STATES FOR A MEXICO NATIONAL DIGITAL IDENTITY SYSTEM TO FACILITATE INCLUSION 1* (2020) [hereinafter REPORT NO. PAD4044]; *Development Projects: Mexico National Digital Identity System to Facilitate Inclusion – P172647*, WORLD BANK (Sept. 12, 2023), <https://projects.worldbank.org/en/projects-operations/project-detail/P172647>.

Through this agency, the Mexican government used the remainder of the World Bank loan to specifically target under-registered populations.¹²⁰ As a result of these efforts, since 2019, there have been 119,000 people registered, bringing Mexico's registration rate to 95% of the population under five years old.¹²¹ That last 5% will continue to be the target of the outreach that visits rural communities and indigenous populations.

Recognizing the advantages of achieving universal birth registration, Mexico proactively sought to improve its government infrastructure and outreach. Their success was likely predicated on the loan they received from the World Bank to implement this vision. When states secure loans, the assistance from international organizations can bridge the gap between ratification and realization by investing in the infrastructure needed to implement functional goals. In this way, powerful international organizations like the World Bank facilitate implementation on function goals like birth registration.

3. Country: Indonesia, Partnership: NGO (Plan International)

The last form of partnership valuable to achieving function goals is with non-governmental organizations (NGOs). Initiated by private citizens or groups of individuals, NGOs occupy a large space in international human rights law, and are often formed to fulfill a social goal.¹²² NGOs work in every corner of the world to relieve children's suffering and protect their rights, including the right to a legal identity.¹²³ In Indonesia, low birth registration rates are attributed to the confusing

¹²⁰ See *Development Projects: Mexico National Digital Identity System to Facilitate Inclusion – P172647*, *supra* note 119 (noting that the bank approved the loan so that the Mexican government can carry out the goals of the Proposed Development Project); see also REPORT NO. PAD4044, *supra* note 119, at 11 (registering the poor and vulnerable was a key aspect of the Proposed Development Project).

¹²¹ Registro Nacional de Población, *Acciones de Coordinación Entre Renapo y Registros Civiles de las Entidades para el Registro de Nacimiento Universal, gratuito y oportuno* [Coordination Actions Between RENAPO and Civil Registries for the Entities for Universal, Free and Timely Birth Registration], GOBIERNO DE MÉXICO (Sept. 10, 2024) (Mex.), <https://www.gob.mx/segob%7Crenapo/articulos/acciones-de-coordinacion-entre-renapo-y-registros-civiles-de-las-entidades-para-el-registro-de-nacimiento-universal-gratuito-y-oportuno-344896?idiom=es> (reporting that 119,000 people have been registered since 2019, and only 5% of children under five remain unregistered).

¹²² See PATRICIA BRANDER ET AL., COMPASS: MANUAL FOR HUMAN RIGHTS EDUCATION WITH YOUNG PEOPLE 426 (Rui Gomes et al. eds., 2d ed. 2023).

¹²³ Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3; see, e.g., *Our Organization*, CHILD RTS. CONNECT, <https://childrightsconnect.org/organization> (last visited Sept. 4, 2024) (explaining this NGO's work influencing children's rights and United Nations treaties).

formal processes for birth and family registration.¹²⁴ The Indonesian government sought to create a robust family registration system before the SDGs.¹²⁵ However, with two tracks of registration, one for births and one for families, the state created complexities that reduced the incentives for families to register their child's birth.¹²⁶

As a result, in 2013, between half and three-quarters of all Indonesian children were unregistered.¹²⁷ Plan International, an NGO dedicated to children's rights, stepped in to partner with the government of Indonesia to reform the birth registration process.¹²⁸ As a well-organized enterprise, Plan International took a methodical approach of first identifying the barriers to birth registration, then crafting innovative solutions to address each challenge. Plan International provided detailed recommendations to the Indonesian government who, with the help of \$80 million in philanthropic donations, implemented the recommendations.¹²⁹

As a result of carrying out the detailed plan to reform their Civil Registration and Vital Statistics (CRVS) system, Indonesia saw the number of children under five who had been registered increase from 65% to 71% in 2018, with a target of reaching 90% registration by 2024.¹³⁰ This seems like a modest jump, but the data indicates that in 2017 and 2018, the number of registered births were 100.4% and 113% respectively.¹³¹ This increase of over 100% registration reflects the backlog of registrations resolved after implementing the recommendations from Plan International.¹³² As Indonesia continues to register more than 100% of children born in a given year, they will likely meet their 2024 target and be closer to the 2030 SDG of 100% registration.

Indonesia is an example of an NGO having a lasting and significant impact on a state's CRVS system and closing the gap for children who lack legal identity. This partnership worked well because it drew on the

¹²⁴ See CATE SUMNER, INDONESIA'S MISSING MILLIONS: ERASING DISCRIMINATION IN BIRTH CERTIFICATION IN INDONESIA 2 (Ctr. For Glob. Dev., CGD Pol'y No. 064, 2015).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ CATE SUMNER & SANTI KUSUMANINGRUM, AIPJ BASELINE STUDY ON LEGAL IDENTITY: INDONESIA'S MISSING MILLIONS 21 (2014).

¹²⁸ CATE SUMNER, BIRTH REGISTRATION FOR ALL IN INDONESIA: A ROADMAP FOR COOPERATION 2, 6 (2016).

¹²⁹ See *id.* at 6–7, 16 (noting that while a majority of the philanthropic donations would be used to study tuberculosis, malaria and AIDS, such research would make sure people would be receiving medical attention by “strengthening linkages” between these medical programs and the Unique ID number written on each person's birth certificate).

¹³⁰ See U.N. ECON. & SOC. COMM'N FOR ASIA & THE PACIFIC, ASIAN AND PACIFIC CRVS DECADE 2015-2024: MIDTERM QUESTIONNAIRE ON THE IMPLEMENTATION OF THE REGIONAL ACTION FRAMEWORK ON CRVS IN ASIA AND THE PACIFIC (2020).

¹³¹ *Id.*

¹³² *Id.*

expertise of Plan International, whose mission is to improve children's lives globally.¹³³ NGOs are optimally positioned to work in tandem with governments struggling to register children at birth because of their ability to specialize in policy recommendations.

The above three examples show how crucial it is to form meaningful partnerships if the goal is for lasting and effective change. Matching state governments with private companies, international organizations, and NGOs often feels secondary to enforcing international law. Still, the success of these three countries shows that integrating these organizations into international agreements is paramount to achieving real, measurable results.

III. REQUIRING BIRTH REGISTRATION IN INTERNATIONAL LAW

It is clear from the in-depth analysis on birth registration that states recognize this as a problem of significant importance and are taking some steps to remedy the situation.¹³⁴ Many states have achieved near-universal registration.¹³⁵ However, in some areas of the world, including Africa and parts of Southern Asia, registration rates for children under five remain dismally low at 40%–60%.¹³⁶

Further, current realities around the globe place the legal identity of many children in jeopardy as they have been displaced by natural disasters or forced to flee from their country because of violence and war.¹³⁷ The disparity between developing and developed countries is glaringly apparent, and the lack of registration is likely not brazen

¹³³ See *What We Do*, PLAN INT'L, <https://plan-international.org/what-we-do/> (last visited Nov. 11, 2024).

¹³⁴ Julia Clark et al., *850 Million People Globally Don't Have ID—Why This Matters and What We Can Do About It*, WORLD BANK BLOGS (Feb. 6, 2023), <https://blogs.worldbank.org/en/digital-development/850-million-people-globally-dont-have-id-why-matters-and-what-we-can-do-about>.

¹³⁵ See *Birth Registration*, UNICEF (June 1, 2023), <https://data.unicef.org/topic/child-protection/birth-registration/#data> (showing that only South Asia and Africa have less than 90% of children under age five registered).

¹³⁶ According to Region: Eastern and Southern Africa: 41%, Sub-Saharan Africa: 51%, West and Central Africa: 59%. *Id.*

¹³⁷ See PLAN INT'L, *supra* note 1, at 15 (“An emergency such as a refugee crisis brings to light the urgency of improving birth registration systems to be able to cope with emergencies, both in the country where the emergency took place as well as the countries receiving refugees. A birth certificate can help provide an appropriate lasting solution for refugees by allowing them to claim legal identity. Many refugees do not have their births registered or do not have the ability to prove registration due to paper records being destroyed or lost.”). This author notes the 2023 earthquake in Morocco, the flooding in Libya, and the estimated one thousand children born during Israel’s raid of Gaza in October 2023 as instances in which protocols should be in place to ensure a new child’s legal identity is registered and recognized.

noncompliance but a lack of infrastructure and resources available to craft a robust and inclusive system. What legal tools are best used to overcome these challenges? The solution for birth registration must be multidimensional and specifically tailored to the needs of those nations that have not implemented an effective national system.

A. *Overcoming Lack of Compliance*

Once again, we are confronted with the hard/soft law problem, where compliance with hard law treaties, and even soft law instruments like the SDGs, in some states, is impossible. In these developing states, the traditional means of enforcement will likely do more harm than good.¹³⁸ Therefore, a balancing act must weigh their domestic economic needs against the costs of breaching an international agreement. Often, international law's positive obligations are too costly to implement compared to more pressing local interests.¹³⁹

Historically, to address a lack of legal identity, states used multilateral agreements to translate norms into legal obligations.¹⁴⁰ This normative approach would classify legal identity as a moral right, the deprivation of which is *malum in se* (bad in itself). Policymakers traditionally see a norm-based approach as ideal for tackling human rights and environmental issues¹⁴¹ because they subscribe to the post-WWII idea that the law should play a significant role in improving the lives of every individual.¹⁴²

These rights advocates argue that states have positive obligations to register children at birth as part of the “special protection that [children]

¹³⁸ Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195, 219–20 (2021) (summarizing the “bleak picture on costs and effectiveness of sanctions” that includes increased poverty, corruption, decrease in life expectancy, and higher infant mortality rates).

¹³⁹ See ERIC POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* 21 (2013).

¹⁴⁰ Elena Baylis, *The International Law Commission's Soft Law Influence*, 13 FIU L. REV. 1007, 1008 (2019).

¹⁴¹ See INETA ZIEMELE, *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ARTICLE 7: THE RIGHT TO BIRTH REGISTRATION, NAME AND NATIONALITY, AND THE RIGHT TO KNOW AND BE CARED FOR BY PARENTS* 8–9 (Andre Alen et al. eds., 2007) (arguing that States should have birth registration processes that are not only inclusive of children born to their own nationals, but also designed to ensure and protect the human rights—in particular, the right to nationality—of any individual, both at the time of registration and beyond). Realizing Ziemele's vision means that the birth registration system should be universally accessible, that is, accessible to every individual, at every step in the process; see also ERLING HOLDEN ET AL., *THE IMPERATIVES OF SUSTAINABLE DEVELOPMENT: NEEDS, JUSTICE, LIMITS* (2017) (“We claim that sustainable development is an ethical statement, from which we can derive three equally important moral imperatives . . .”).

¹⁴² Skogly, *supra* note 12.

are entitled to.”¹⁴³ However, to be effective and lead to compliance, policymakers often enforce legal obligations using a combination of coercion and persuasion.¹⁴⁴ To date, coercion has not been on the table because, in addition to the ‘margin of appreciation’ doctrine, policymakers agree that states should not be punished for their good faith efforts, even if those efforts often fall short of complete compliance with their legal obligations.¹⁴⁵ However, the law should still drive nations closer to compliance. As for persuasion, the entire premise of the UN SDGs was to persuade states to implement sustainability measures. Far from being persuasive, the SDGs, in some respects, have simply been ignored by states with other pressing domestic concerns.¹⁴⁶ While soft law undertakes to consolidate norms in international law through an iterative approach,¹⁴⁷ there remain challenges to a normative approach defining legal obligations.

The downside to legal drafters transplanting norms into policy, which eventually creates legal obligations, is that norms are often not uniformly accepted; they may be regional but not global.¹⁴⁸ The ‘margin of appreciation’ doctrine mentioned earlier also encompasses the idea that “certain international norms are open-ended or unsettled.”¹⁴⁹ Normative flexibility makes compliance even more difficult, as states may adopt their unique interpretation of their obligations regarding a particular norm.¹⁵⁰ When “legal normativity is a matter of degree with varying scales,”¹⁵¹ compliance will also vary, in some instances significantly.

In contrast to policymakers using norms as a basis for an already ineffective policy, an operational approach to birth registration sets up

¹⁴³ See ZIEMELE, *supra* note 141, at 9 (stating “in view of the vulnerability of children and the special protection that they are entitled to as a result, the State not only has the obligation to establish a legal framework that allows for the registration of a child after the birth, but it also has to actively ensure that children are registered, since this helps to provide their security and guarantees the enjoyment of other rights.”).

¹⁴⁴ EMILIE M. HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY* 62–65 (2013).

¹⁴⁵ Van Aaken & Simsek, *supra* note 138, at 202 (arguing that reciprocity, retaliation and reputation are not the only tools to garner compliance, but incentives, positive assistance and constructive cooperation can bring about compliance more effectively).

¹⁴⁶ TONY PIPA, *THE SUSTAINABLE DEVELOPMENT GOALS AND THE UNITED STATES: TURNING U.S. COMMITMENTS ON SUSTAINABILITY AND EQUITY FROM RHETORIC TO ACTION* 50 (Env’t L. Inst. 2023) (noting how the U.S. “generally ignored [the SDGs] as having any relevance to U.S. domestic or foreign policies.”).

¹⁴⁷ Baylis, *supra* note 140, at 1025. “While soft law norms ‘do not impose legally binding obligations,’ they ‘may . . . lay the ground, or constitute the building blocks, for the gradual formation of customary rules or treaty provisions.’” *Id.* at 1010.

¹⁴⁸ Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 892 (1998).

¹⁴⁹ DAMROSCH & MURPHY, *supra* note 19.

¹⁵⁰ Finnemore & Sikkink, *supra* note 148, at 914.

¹⁵¹ Adinolfi, *supra* note 40, at 89.

states for success. By focusing on producing a clear roadmap that can easily be adopted by national governments,¹⁵² an operational agreement will induce far more compliance with legal obligations than drafting norm-based laws subject to various interpretations.

Under an operational approach, one path to garner respect for a law is to “have it reasonably identified not as a new rule but as a clarification of a preexisting rule.”¹⁵³ For birth registration, Articles 7 and 8 in the CRC have had some success in protecting a child’s right to his or her legal identity, but “weak and ambiguous” language has led to shortfalls in compliance with state legal obligations.¹⁵⁴ To remedy this, an agreement for birth registration must include well-defined objectives, technical, financial, and logistical support, and an in-depth follow-up regime.¹⁵⁵ Without this support, states are often limited in applying the recommended actions.

On a practical level, a well-defined operational protocol can authoritatively declare rules as laws¹⁵⁶ and open the door through which states can comply by defining the obligations as well as the mechanisms for meeting those obligations. This will not come without some cost to developed nations that already have implemented effective birth registration systems. Clear directives must be coupled with the resources a state needs—often, those resources will come from non-state actors or in bilateral agreements with states who possess a value-driven or strategic incentive to help.¹⁵⁷ An example of this value-driven (or humanitarian) approach is the United States’ commitment to fighting AIDS in Africa through bilateral agreements.¹⁵⁸ Since its inception, the U.S. President’s Emergency Plan for AIDS Relief (PEPFAR) has delivered more than \$90

¹⁵² Ferris & Bergmann, *supra* note 59, at 28.

¹⁵³ ROGER FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 105, 116 (1981).

¹⁵⁴ Douglas Hodgson, *The International Legal Protection of the Child’s Right to a Legal Identity and the Problem of Statelessness*, 7 INT’L J.L. & FAM. 255, 266 (1993).

¹⁵⁵ *Id.* at 265–66 (noting weaknesses in the drafting of Articles 7 and 8). For an example of an agreement with many of those traits, see *infra* Section B.

¹⁵⁶ See FISHER, *supra* note 153, at 120 (“[C]onverting an understanding into a ‘legal rule’ tends to increase the political costs of breaking it. It is easier to abandon a tacit agreement, a practice, or a moratorium than to break a legal obligation . . .”).

¹⁵⁷ See DAVID HALLORAN LUMSDAINE, *MORAL VISION IN INTERNATIONAL POLITICS: THE FOREIGN AID REGIME, 1949-1989*, at 28 (1993) (arguing that foreign aid primarily emerged from humanitarian principles and beliefs, grounded in Western values of morality. These principles and beliefs highlighted the importance of international collaboration and a dedication to alleviating poverty based on humanitarian and egalitarian motivations).

¹⁵⁸ *The U.S. President’s Emergency Plan for AIDS Relief (PEPFAR)*, HENRY J. KAISER FAM. FOUND. (Nov. 2015), <https://files.kff.org/attachment/fact-sheet-the-u-s-presidents-emergency-plan-for-aids-relief-pepfar> (Under President George W. Bush, the U.S., in what was termed “compassionate conservatism,” launched the aid campaign that has distributed funding for HIV/AIDS treatment, prevention, and research.).

billion to developing countries to eradicate the AIDS virus and has continued through four U.S. presidencies.¹⁵⁹ With a similar operational approach for birth registrations, policymakers can create a legal instrument as durable and impactful as PEPFAR.

Under the operational approach, policymakers can winnow out function goals that are actionable and achievable and craft dynamic, binding international protocols.¹⁶⁰

B. Implementing an Operational Approach

An exciting development using an operational approach is the recent WTO Agreement on Fisheries Subsidies.¹⁶¹ In 2022, the members of the 12th Ministerial Conference codified UN SDG 14.6, in a separate, multilateral agreement to prohibit harmful fishery subsidies.¹⁶² The agreement is innovative in its approach, with negotiations proceeding through a trade organization rather than the UN, the author of the SDGs. The new mandatory obligations of WTO members are key to reaching UN SDG 14.6, which aims “to prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to illegal, unregulated, and unreported fishing . . . recognizing that appropriate and effective special and differential treatment for developing country members should be an integral part of the . . . negotiation.”¹⁶³ The agreement marks a “historic achievement” for the WTO, as the first SDG target to be fully met, and “the first SDG target met through a multilateral agreement.”¹⁶⁴

This is an excellent example of the “winnowing” process this Article promotes. The Fisheries Subsidies SDG 14.6 was clearly a “function goal” that could be achieved at the operational level. The agreement benefits all

¹⁵⁹ PEPFAR, HIV.GOV (Feb. 8, 2024), <https://www.hiv.gov/federal-response/pepfar-global-aids/pepfar>.

¹⁶⁰ Winnowing is the process in which blowing a current of air through grain removes the unusable chaff. *Winnowing*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/winnowing> (last visited Sept. 9, 2024). In this case, the chaff is the aspirational form goals with little to no potential for action on the ground to make a meaningful difference.

¹⁶¹ World Trade Organization, Ministerial Decision of 17 June 2022, WTO Doc. WT/MIN(22)/33, WTL/1144 (2022) [hereinafter *Fisheries Subsidies*].

¹⁶² Press Release, Eur. Comm’n, Questions and Answers: Outcomes of the 12th World Trade Organization Ministerial Conference (June 17, 2022) (available online at https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3909).

¹⁶³ *Commission Proposal for a Council Decision on the Conclusion, on Behalf of the European Union, of the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, COM (2022) 582 final (Sept. 11, 2022).

¹⁶⁴ *Agreement on Fisheries Subsidies*, WTO, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (last visited Nov. 11, 2024).

members who are parties by recording fish catch rates and fighting illegal practices in a coordinated way.¹⁶⁵ A promising innovation in the agreement is a “voluntary funding mechanism” to support developing countries in implementing the agreement.¹⁶⁶ This fund assists members of the WTO from developing countries with “targeted technical assistance and capacity building.”¹⁶⁷ The agreement is well thought out and widely agreed upon, as nations party to the agreement have a common goal of healthier oceans and sustainable fisheries.

Fishery subsidies and birth registration could not be more different in terms of subject matter. Global responses to the two problems will also have differences. The main distinction is the common benefits achieved through the ban on fishery subsidies to all members of the WTO. In contrast to this universal benefit, an effective birth registration system, on its face, only helps developing countries with high numbers of unregistered children.

An agreement on birth registration must overcome this hurdle of unequal benefits through messaging on the meta-advantages of improved institutions in developing countries. These include increasing birth and other civil registration, which means more accurate statistics so countries can better analyze the needs of their populations.¹⁶⁸ Better registration systems also prevent fraud and promote transparency.¹⁶⁹ Increasing biometric data allows for increased efficiency in transnational travel.¹⁷⁰ Stronger civil institutions mean less corruption and are strongly correlated with more peaceful societies.¹⁷¹ Research suggests that demographically, unequal access to education is a greater factor in predicting armed violence than economic status.¹⁷² In states where documentation is required to enroll in school, the seemingly innocuous

¹⁶⁵ Fisheries Subsidies, *supra* note 161, at art. 8.

¹⁶⁶ *Id.* at art. 7.

¹⁶⁷ *Id.*

¹⁶⁸ For the benefits of CRVS on public management see B. GUY PETERS, CIVIL REGISTRATION AND VITAL STATISTICS AS A TOOL TO IMPROVE PUBLIC MANAGEMENT 4 (Inter-Am. Dev. Bank, 2016) (“Coupling big data and analytics with civil registration can enable governments to identify social patterns and proactively enhance programs and infrastructure with the aim of better serving rapidly changing populations . . .”).

¹⁶⁹ *Id.* at 12.

¹⁷⁰ See Rey Koslowski, *International Travel Security and the Global Compacts on Refugees and Migration*, 57 INT’L MIGRATION 158, 161–62 (2019) (noting that global compacts already in place expand international cooperation on travel security but more data is needed to make transnational travel easier).

¹⁷¹ See DAVID CORTRIGHT ET AL., GOVERNANCE FOR PEACE: HOW INCLUSIVE, PARTICIPATORY AND ACCOUNTABLE INSTITUTIONS PROMOTE PEACE AND PROSPERITY vii (2017).

¹⁷² *Id.* at 86.

lack of a birth certificate has farther reaching consequences than at first glance.

For developed nations who value the importance of stable institutions, protecting legal identity is a simple and cost-effective way to contribute to global peace, justice, and security.¹⁷³ Additional intangible benefits of aiding states in their quest for universal birth registration are an improved reputation on the world stage. George W. Bush's "compassionate conservatism" that led to billions in foreign aid going to Africa at the height of the AIDS crisis did more than help eradicate the disease; it promoted the image of the U.S. as a global leader in humanitarian work.¹⁷⁴ Donations to a voluntary fund that implements birth registration systems in developing countries could similarly elevate a state's status internationally.

Funding from developed states is vital to the success of a new agreement on birth registration. In addition to voluntary foreign aid, states can take the opposite approach of the Fisheries Agreement and *encourage* subsidies for private companies engaged in revamping their CRVS infrastructure. Interest-free government loans add incentives for non-state actors to join the cause of legal identity and assist developing states in creating the necessary systems.¹⁷⁵ How to incorporate these ideas in a protocol for birth registration is outlined below.

C. Creating Binding Protocols for Birth Registration and Legal Identity.

Specificity is a powerful tool when drafting rules as catalysts for change. When a treaty contains overly broad objectives and vague language, it is often limited from the outset. With no indication of the means for a state to come into compliance and a lack of direction and resources, the breach of treaty obligations protecting human rights or missed targets from soft law goals is unsurprising. The popular self-help author James Clear has written, "Forget about goals, focus on systems."¹⁷⁶ In the case of the SDGs, sustainable development should prioritize

¹⁷³ SDG Goal 16 seeks to "[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels." *Goal 16*, *supra* note 82.

¹⁷⁴ See *Fact Sheet: Compassionate Conservatism*, GEORGE W. BUSH WHITE HOUSE ARCHIVES (Apr. 30, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/04/20020430.html>; see also Melody Schreiber, *George W. Bush's Anti-HIV Program is Hailed as 'Amazing' – and Still Crucial at 20*, NPR (Feb. 28, 2023 12:10 PM), <https://www.npr.org/sections/goatsandsoda/2023/02/28/1159415936/george-w-bushs-anti-hiv-program-is-hailed-as-amazing-and-still-crucial-at-20>.

¹⁷⁵ See Shena Ashley, *The Impact of Government Funding on Competition in the Nonprofit Sector: An Integrative Model and Review of Empirical Research*, 5 *NONPROFIT POL'Y F.* 289, 294 (2014).

¹⁷⁶ JAMES CLEAR, *ATOMIC HABITS* 32 (2018).

systems, not goals themselves. A focused approach to development allows policymakers to methodically outline the systems essential to successful change. It's crucial to include a requirement for developed nations to form partnerships, and to provide developing states with a roadmap for involving private corporations and international organizations. This approach will significantly enhance the efforts to meet set targets.

This model can be applied to SDG 16.9 and other function goals that have the potential to realize actual gains. Following the WTO Agreement on Fisheries Subsidies, a protocol for birth registration must (1) be specific, (2) be succinct, (3) appeal to both developed and developing countries with differentiated responsibilities and obligations based on registration rates, and (4) emphasize cooperation and inclusion of non-state actors.

In the case of birth registration, a specific agreement would not only address birth registration but adjacent concerns like birth certificates, emergency protocols for births in natural disasters, and preventing the statelessness of migrant children with an inclusive and fair policy. Additionally, the agreement's limited focus means it will be easily navigable by signatories. The agreement on birth registration would offer differentiated obligations to those states in need of foreign aid for implementation and those states that have largely met the commitment for universal birth registration in their country. Lastly, an underlying theme of the agreement would be multifaceted cooperation between developed and developing countries with a voluntary funding mechanism and through increasing the role of non-state actors, or those "on the ground," who can make birth registration a reality.

A sample text of a specific protocol for birth registration could read as follows:

**PROTOCOL FOR UNIVERSAL BIRTH REGISTRATION AND
ESTABLISHMENT OF LEGAL IDENTITY (UnBRELI)¹⁷⁷**

Preamble

In recognition of the importance of protecting the rights and well-being of children, parties hereby commit to establishing a comprehensive framework for efficient birth registration, a fundamental step in establishing legal identity.

Article 1: Universal Birth Registration

¹⁷⁷ The abbreviation is aptly similar to 'umbrella'—birth registration offers broad protections from the myriad threats to children's rights.

1.1 All parties to this protocol agree to birth registration for every child under 5 in their state, regardless of their economic, social, or geographical status.

1.2 Signatory states will allocate adequate funding to ensure proper resources are directed towards building infrastructure, conducting mass registration campaigns, and training of health personnel in pursuit of the 100% registration target.

1.3 Funding for implementation may come from international organizations, non-state actors, and states that have already achieved high registration rates and are party to this agreement, as noted below in Article 6.

Article 2: Birth Certificates

2.1 Official, certified birth certificates shall be provided at registration to every child, with care given to eliminate any barriers making registration more difficult, including costs, travel considerations, and discrimination.

2.2 Digitalization of birth certificates may be used to allow easy access and verification of data, as well as protection from lost documents.

Article 3: Emergency Preparedness¹⁷⁸

3.1 Each party to this protocol shall draft and maintain an emergency preparedness plan with respect to birth registrations to be executed in the case of emergencies such as natural disasters or civil unrest.

3.2 The plan should prioritize the registration of children born during natural disasters, and signatories shall create an efficient and easy method to restore lost birth certificates in the case of an emergency that destroys an individual's documents.

Article 4: Strategy for Registration of Migrant Children¹⁷⁹

4.1 Under this protocol, states shall draft procedures for the fair and inclusive registration of children born to migrants and refugees, carefully avoiding situations where a child is rendered stateless and without documentation.

¹⁷⁸ See generally Lilian Yamamoto, *Climate Relocation and Indigenous Culture Preservation in the Pacific Islands*, 21 GEO. J. INT'L AFFS. 150 (2020); JENNIFER MARSHALL, NATURAL AND MANMADE DISASTERS: VULNERABLE POPULATIONS (2020).

¹⁷⁹ See generally Jazmine Hesham Elmolla, *Birth Registration in Crisis: Exploring a Rights-Based Approach to Birth Registration through the Experience of Syrian Refugees*, 31 INT'L J. REFUGEE L. 541 (2019); Allison J. Petrozziello, *Bringing the Border to Baby: Birth Registration as Bordering Practice for Migrant Women's Children*, 27 GENDER & DEV. 31 (2019).

4.2 Participating states shall collaborate to create a standardized procedure for registering births of migrant children, considering the specific challenges and vulnerabilities faced by migrant communities.

Article 5: Implementation and Reporting

5.1 If such an authority does not already exist, signatory nations shall establish a domestic authority or body responsible for the coordination, implementation, and oversight of this protocol.

5.2 Periodic reporting from signatories will be required to an UnBRELI oversight committee, established at the ratification of this protocol, detailing their progress in achieving the targets in Articles 1–4.

5.3 International organizations and agencies may provide technical assistance and support to signatory nations in the implementation of the objectives of this protocol, as expounded in Article 6 and Article 7.

Article 6: Aid and Assistance for Developing Nations

6.1 Signatory nations with a birth registration rate of over 98% recognize the importance of supporting and assisting developing nations in achieving universal birth registration for every child under the age of five and agree to contribute voluntarily to a fund established for the sole purpose of carrying out the provisions of this agreement.

6.2 These nations commit to partnering with the World Bank and other relevant international organizations and/or private actors to provide the necessary monetary assistance to support initiatives in countries with a birth registration rate of less than 98%.¹⁸⁰

6.3 Monetary assistance provided shall be for the upgrade of infrastructure, training of health/government records personnel, and the implementation of effective birth registration systems in developing nations as they seek to fulfill their commitments to the above protocols.

6.4 In addition to financial aid, signatory states capable of doing so agree to provide technical assistance and capacity building to developing nations in the swift and effective implementation of modern birth registration systems.

¹⁸⁰ Developing countries have committed to offering 0.7% of their national GDP in Official Development Aid (ODA). See George Ingram, *What Every American Should Know About US Foreign Aid*, BROOKINGS INST. (Oct. 2, 2019), <https://www.brookings.edu/articles/what-every-american-should-know-about-u-s-foreign-aid/>. While many countries have not met their quotas (the average developed nation contributes 0.4%, with the U.S. giving 0.2% in 2019), well defined agreements such as the UnBRELI proposed here could garner support from developed nations who are giving below their commitments, because the ODA could be clearly earmarked for valuable and impactful measures like birth registration and protecting legal identity. *Id.*

6.5 Technical assistance means the provision of computer hardware, tablets, and cell phones to allow developing nations the equipment they need to implement a robust registration system.

6.6 Capacity building includes training on policy formulation, legal drafting, or understanding international legal obligations related to birth registration as well as support for setting up regulatory frameworks. Capacity building also includes providing resources or training to improve monitoring and follow-up on birth registrations.

Article 7: Incentives for Non-State Actor Participation

7.1 Signatory nations agree to implement relevant financial or other incentives to induce the cooperation of relevant non-state actors with the ability to design, implement, and monitor new birth registration programs.

7.2 Financial incentives may include tax credits, subsidies, or other programs to allow private companies and other interested parties¹⁸¹ to participate in the effective and efficient implementation of new programs.

The signatory nations reaffirm their commitment to the principles outlined in this protocol and shall take all necessary measures to ensure the successful implementation of aid and assistance programs for advancing birth registration in all nations.

This is an example of the level of specificity needed to ensure compliance and adequate coordination between developing and developed nations.

IV. WHAT DIFFERENCE DOES A NEW TREATY MAKE?

While some may not see the need for yet another agreement for birth registration when it is already codified in the CRC and UN SDG 16.9, it may be argued that states have already agreed to this with nearly universal consensus. So, why add another treaty unnecessarily to the international landscape of children's rights obligations?

What sets this new treaty apart is the straightforward, operational approach that creates specific legal obligations and a realistic means to fulfilling those obligations. In contrast to the overly broad UN SDGs, it is precise and detailed regarding one discrete category: birth registration.

¹⁸¹ Other interested parties could include religious organizations interested in preserving and protecting legal identity. For example, The Church of Jesus Christ of Latter-Day Saints has spearheaded many programs in the interest of preserving and making genealogical records available worldwide, as well as philanthropic endeavors meant to strengthen civil institutions in developing countries. See *Humanitarian Resources*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <https://philanthropies.churchofjesuschrist.org/humanitarian-services/> (last visited Sept. 18, 2024).

Unlike the CRC, it lays out a mandate to provide legal identity to children and the way to achieve that mandate. The new agreement does this by laying out four clear targets for states to meet to protect their young populations' legal identity. It incentivizes developed states to voluntarily share resources to a common fund as well as technical assistance. It adds transparency to voluntary foreign aid by earmarking the funds to strengthen civil registries and establish the legal identity of children. Lastly, by including provisions for tax credits and subsidies for non-state actors, the agreement paves the way for partnerships that are crucial to the success of any birth registration project.

Birth registration is just one example of how a move toward more precise and practical treaties in international law could result in significant gains over time, as other function goals in the UN SDGs or treaty regime can similarly be expounded in a specific and laser-focused manner that yields real positive results. The WTO Fisheries Subsidies Agreement paved the way, birth registration can quickly follow, and other function goals can be singled out to amplify change across a variety of sectors.

CONCLUSION

The importance of birth registration as a child's "passport to protection"¹⁸² cannot be overstated. In certain respects, the current hard and soft instruments in international law have proven inadequate in protecting the rights of children to obtain a legal identity at birth. The soft law recommendations of the UN SDGs have buried function goals in an admirable, yet perhaps too ambitious set of nonbinding targets. Hard law instruments like the Convention on the Rights of the Child have often been ignored, not because they are not clear legal obligations, but because they offer no guidance on protecting the rights they codify. However dire the current state of things, there is still hope for change.

The international community should produce focused, binding multilateral agreements which emphasize enlisting non-state actors to achieve their targets. In the case of birth registration, a succinct and specific agreement provides a roadmap for struggling states to implement a far-reaching and effective system while incentivizing developed states to funnel aid and assistance into these well-founded aims. Progress is possible, and developing nations subject to poverty, civil unrest, and the lasting effects from destructive natural disasters can get the help they

¹⁸² UNICEF, *PASSPORT TO PROTECTION: A GUIDE TO BIRTH REGISTRATION PROGRAMMING* (2013).

need to protect their most valuable and vulnerable citizens—their children.

--*Stacy Runia**

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