

RIGHT TO IDENTITY

INTERNATIONAL HUMAN RIGHTS LAW CLINIC

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INTRODUCTION

This article defines the right to identity as a distinct and autonomous right explicitly and implicitly protected by international law. The right to identity is associated with several other rights, such as the rights to a name,¹ nationality,² juridical personality,³ family,⁴ and culture,⁵ but does not precisely equal any one of these rights.⁶ Nevertheless, commentators widely recognize a lack of consensus as to the right to identity's meaning and scope.⁷ Here, we propose a unifying definition of the right to identity. This task becomes all the more pressing in light of an initiative to achieve universal civil registration in the Americas by 2015 as a means for guaranteeing the right to identity.⁸

Articulating a definition of the right to identity is an essential first step in establishing the key principles that should inform its application and enforceability under international human rights law. The definition, as elaborated in this article, is premised on

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¹ See, e.g., International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 24(2), 999 U.N.T.S. 171 (hereinafter "ICCPR"); American Convention on Human Rights, Nov. 22, 1969, art. 18, 1144 U.N.T.S. 123 (hereinafter "ACHR").

² See, e.g., ICCPR, art. 24(3); ACHR, art. 20.

³ See, e.g., Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc. A/810 at 71, art. 6 (1948) (hereinafter "UDHR"); ACHR, art. 3.

⁴ See, e.g., Convention on the Rights of the Child, Nov. 20, 1989, art. 8, 1577 U.N.T.S. 3 (hereinafter "CRC"); ACHR, art. 17.

⁵ See, e.g., ICCPR, art. 27.

⁶ See OAS, Comisión de Asuntos Jurídicos y Políticos, *Reflexiones preliminares sobre la universalidad del registro civil y el derecho a la identidad*, OEA/Ser. G, CP/CAJP-2482/07 corr. 1 (April 17, 2007) (hereinafter "Reflexiones preliminares"); *Hermanas Serrano Cruz v. El Sal.*, 120 Inter-Am. Ct. H.R. (ser. C) at 70, ¶ 117 (2005) (hereinafter "*Hermanas Serrano Cruz*").

⁷ *Reflexiones preliminares*, *supra* note 6 at 2 (observing that "there still is no unified or generalized consensus over the definition of the right to identity").

⁸ OAS, Secretariat for Political Affairs, Report on the Permanent Council Meeting of Dec. 13, 2006: Presentation of Memorandum of Understanding Between the OAS-IDB-UNICEF Regarding Cooperation on the Subject of Citizen Registration, 2-3.

an understanding of identity as a spectrum of significant personal characteristics and social ties.⁹ As such, we propose the following definition of the right to identity:

THE RIGHT TO IDENTITY PROTECTS AN INDIVIDUAL'S SIGNIFICANT AND KNOWABLE PERSONAL ATTRIBUTES AND SOCIAL RELATIONSHIPS.

Our construction of a working definition for the right to identity begins with a brief overview of historical violations of identity rights (Part I). In Part II, we review and interpret obligations related to identity and identity rights imposed by international treaties and examine the relevant scholarship and jurisprudence on identity rights. This analysis lays the foundation for the definition of the right to identity that we elaborate in Part III. Part IV applies our definition of the right to identity to explore emerging issues related to civil registration.

I. BACKGROUND: VIOLATIONS OF THE RIGHT TO IDENTITY

The twentieth century has witnessed horrific assaults on personal and group identity, including forced disappearances, child trafficking through illegal adoptions, and forced assimilation. These three classic identity rights violations highlight the importance of identity interests and provide context for the right to identity's ultimate codification in the Convention on the Rights of the Child. These examples likewise underscore the need for a working definition and framework for the right to identity in order to protect against future violations.

A. Forced Disappearances

Governments in the twentieth century have systematically used forced disappearances as a tool for suppressing political and armed opposition.¹⁰ The typical sequence began with an individual's kidnapping, followed by transfer to a secret location

⁹ See *infra* Part III.

¹⁰ Latin American dictators and military juntas in the 1980's systematically "disappeared" so-called subversives, including young students, union leaders, professors, and political party representatives. See GABRIELLA CITRONI & TULLIO SCOVAZZI, *THE STRUGGLE AGAINST ENFORCED DISAPPEARANCES AND THE 2007 UNITED NATIONS CONVENTION* 7 (2007).

where the individual was held *incommunicado*, interrogated, and tortured.¹¹ In most cases, the individual was summarily executed and his body disposed of in degrading ways, often dumped into the ocean from an airplane or buried in a mass grave.¹²

Forced disappearances involve multiple human rights violations,¹³ including the violation of the victims' and their next of kin's right to identity.¹⁴ Kidnappings immediately disrupt an individual's social identity, especially with respect to his family. Once in captivity, State interrogation tactics often aim to break down the individual's psychological identity.¹⁵ Summary executions and destruction of remains permanently erase the identity of the disappeared.¹⁶ Despite international efforts to end these violations, forced disappearances continue to occur in countries worldwide, from developing States ravaged by internal conflict¹⁷ to democratic nations sponsoring covert kidnappings of suspected terrorists.¹⁸

B. Children of the Disappeared, Illegal Adoption and Anonymous Births

Numerous courts and commentators have held that State interference with a child's right to know her origins violates the child's right to identity. In some countries the children of the disappeared were fraudulently adopted, sometimes by the very perpetrators responsible for their parents' disappearances.¹⁹ For example, in Argentina,

¹¹ *Id.* at 8-9.

¹² *Id.* at 10. See also CONADEP, NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 223-232 (1986) (hereinafter "NUNCA MÁS").

¹³ See, e.g., Velásquez Rodríguez v. Hon., 4 Inter-Am. Ct. H.R. (ser. C) at 33, ¶ 156 (1988) (the right to life); Caracazo v. Ven., 58 Inter-Am. Ct. H.R. (ser. C) at 14, ¶ 42 (1999) (right to personal freedom).

¹⁴ MARIA FERNANDA PÉREZ SOLLA, ENFORCED DISAPPEARANCES IN INTERNATIONAL HUMAN RIGHTS 38 (2006).

¹⁵ Many of the disappeared are held in isolation, addressed only by nicknames or numbers, and interrogated by officials and doctors who mask their own identity. CITRONI, *supra* note 10 at 9.

¹⁶ NUNCA MÁS, *supra* note 12 at 233. ("[T]he nameless bodies fit into the same way of thinking that took the initial decision to make people disappear: wiping out the identity of the corpses magnified the shadow hanging over the thousands of disappeared of whom all trace was lost after their arrest or kidnapping.).

¹⁷ CITRONI, *supra* note 10 at 62 (noting especially the role of paramilitaries in forced disappearances in Colombia and Sudan).

¹⁸ See *id.* at 56. Numerous human rights bodies have decried the United States' practice of "extraordinary rendition" as enforced disappearances. See, e.g., Report of the Five U.N. Special Mandate Holders on the Situation of Detainees at Guantánamo Bay, E/CN.4/2006/120, ¶ 55 (15 Feb. 2006). For family members who have no information regarding the whereabouts of their loved ones, their search for the "disappeared" very much parallels that of their historic counterparts in Latin America. CITRONI, *supra* note 10 at 56-57.

¹⁹ PÉREZ SOLLA, *supra* note 14 at 15, 19.

officials knowingly falsified birth records in order to facilitate adoptions of orphaned children by military personnel.²⁰

Illegal adoptions have recently gained international attention as a form of human trafficking.²¹ For example, in Guatemala, “extreme poverty, a high birthrate, and a lack of effective control and supervision of adoption proceedings” have made the inter-country adoption system a lucrative black market business involving kidnappings, falsified documents, and the buying and selling of children.²²

Many European countries, including France, Spain, and Italy, provide for anonymous birthing²³—that is, mothers may deliver a child anonymously or renounce parental rights in certain prescribed ways. Likewise, male gamete donors enjoy anonymity in varying degrees in most countries.²⁴ The European Court of Human Rights has on numerous occasions ruled on the appropriate balance between the privacy interests of parents and the right of children to know their birth parents.²⁵

While these three examples vary considerably in terms of State culpability and intent, all involve children who, by State action or inaction, are prevented from knowing their biological origins or enjoying a relationship with their birth family. This lack of information and access affects the child’s ability to “develop a full sense of identity”²⁶ and in all cases implicates the right to identity.

²⁰ *Id.* at 17.

²¹ See, e.g., UNICEF, *Combating Child Trafficking*, in HANDBOOK FOR PARLIAMENTARIANS No. 9, at 12 (2005).

²² Report of the Special Rapporteur on the sale of children, child prostitution, and child pornography, Add. 2, Report on the Mission to Guatemala, E/CN.4/2000/73/Add.2, ¶¶ 10-13 (27 Jan. 2000).

²³ In France, this right is known as ‘*accouchement sous X*’ and allows women to give birth anonymously by placing an “X” in lieu of the their name on the child’s birth certificate. See Katherine O’Donovan, *Interpretations of Children’s Identity Rights*, in REVISITING CHILDREN’S RIGHTS: 10 YEARS OF THE UN CONVENTION ON THE RIGHTS OF THE CHILD 79-80 (ed. D. Fottrell).

²⁴ See generally Ruth Landau, *The Management of Genetic Origins: Secrecy and Openness in Donor Assisted Conception in Israel and Elsewhere*, 13 HUMAN REPRODUCTION 3268 (1998).

²⁵ See, e.g., *Jäggi v Switzerland*, 58757/00 [2006] ECHR (13 July 2006) (holding that identity constitutes part of the inner core of one’s right to private life); *Ebrü v. Turkey*, 60176/00 [2006] ECHR (30 May 2006) (calling for a closer review of the balancing between the right to know birth origins and privacy interests at the national level).

²⁶ Landau, *supra* note 24 at 3269. See also O’Donovan, *supra* note 23 at 82 (noting that abandoned children “are not necessarily seeking a filiation tie but genetic and social identity formation”).

C. *Forced Assimilation and Social Engineering*

States have historically manipulated individual identities in order to promote racial and ethnic superiority by forcibly assimilating children of disfavored ethnicities into the dominant culture. During the twentieth century, many states forcibly separated nearly a third of Native American children from their families and attempted to integrate them into white households.²⁷ Responding to the profound effect that these involuntary removal policies had on the identity of Native American children, the U.S. Congress enacted the Indian Child Welfare Act in 1978 which aimed to protect the best interests of the children by requiring that they be placed in a home reflective of their “unique traditional values.”²⁸ Throughout the nineteenth and twentieth centuries, British authorities and private charities exported hundreds of thousands of orphans, street children, and Irish infants to the British colonies and the United States in a misguided attempt at social engineering with similar traumatic results for the children.²⁹

II. THE RIGHT TO IDENTITY IN INTERNATIONAL LAW

The right to identity is not a novel concept. The Convention on the Rights of the Child (CRC)³⁰ explicitly recognized the human right to identity almost eighteen years ago, and the right has existed implicitly in treaties and constitutions for much longer.³¹ Thus, our task is not to create a right, but rather to interpret an existing right that, although invoked and applied repeatedly, still lacks clear and complete definition.

²⁷ B.J. Jones, *The Indian Child Welfare Act: The need for a separate law*, 12 GPSOLO 4 (1995) (detailing the history of forced assimilation of Native Americans into non-Indian homes by state agencies in the United States).

²⁸ Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 Marq. L. Rev. 21 (1997).

²⁹ O'Donovan, *supra* note 23 at 76-77.

³⁰ CRC, art. 8; OAS, Inter-American Committee of Jurists, *El alcance del derecho a la identidad*, OEA/Ser. Q CJI/Res.137 (LXXI-O/07), ¶ 11.1 (Aug. 10, 2007) (hereinafter “CJI, *El alcance del derecho a la identidad*”); George A. Stewart, *Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child*, 26 FAM. L. Q. 221 (1992).

³¹ E.g. *Hermanas Serrano Cruz*, Voto Disidente de Trindade, J., ¶ 20; *Deyanhira Pintos Gomez v. Corporación Social para las Comunicaciones—Centro T.V.*, Colombia Const. Trib., T-090/96 (Mar. 6, 1996) (“Even if the Constitution does not expressly include a ‘right to identity,’ one may deduce such a right from its principles and positively recognized rights.”); *Muller, Jorge s/denuncia*, Corte Suprema de Justicia de Argentina, M. 537.XXII (Nov. 13, 1990) (Voto Disidente de Petracchi, J.).

The Statute of the International Court of Justice recognizes four sources of international law: international instruments, customary international law, general legal principles drawn from national law, and, as supplementary sources, judicial decisions and the teachings of expert publicists found in international legal scholarship.³² Our analysis relies principally on international instruments, such as the CRC and the ACHR (Part II.A, *infra*); the jurisprudence of tribunals, such as the Inter-American Court of Human Rights and national constitutional courts; and the writings of expert publicists, including the comments of the United Nations Human Rights Committee and the Inter-American Committee of Jurists (Part II.B, *infra*). We have also examined States' laws and practices for general principles and customary law. Because we focus on the right to identity in the Inter-American System, we draw chiefly on sources from the Americas, though we have also looked to other regions for guidance. At all times, we recognize the importance of an inductive approach that reflects the practice and experience of the Americas, as opposed to a deductive approach relying on foreign formalisms.

A. Treaty Interpretation

The right to identity appears explicitly and implicitly in several international instruments as an independent right imposing positive and negative obligations on States, though the exact content of these rights and obligations has remained ambiguous even to the drafters. This section interprets the relevant treaties and their drafting histories (*travaux préparatoires*) according to the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties.³³ Under the Vienna Convention, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁴ When a term remains ambiguous, “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty.”³⁵

³² Statute of the International Court of Justice, 15 U.N.C.I.O. 355, art. 38 (June 26, 1945).

³³ 1166 U.N.T.S. 331 (May 23, 1969) (hereinafter “Vienna Convention”).

³⁴ Art. 31.

³⁵ *Id.*, art. 32.

In defining the right to identity, the most relevant instrument is the Convention on the Rights of the Child (CRC), since it explicitly protects the child's right to identity.³⁶ Article 8(1) provides:

States parties undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without unlawful interference.³⁷

The statement that identity "includ[es]" nationality, name, and family relations suggests that identity relates conceptually to these aspects, but not exclusively, and thus identity must have content beyond these three enumerated examples.³⁸ Moreover, the principle of effectiveness—the preference for interpretations that do not render provisions meaningless or superfluous³⁹—leads to the conclusion that, because Article 7 already protects the child's rights to a nationality, name, and family relations, Article 8 must protect an independent right.⁴⁰

Article 8(1)'s elastic formulation of State responsibility ("States parties undertake to respect") implies a relatively weak, negative level of State obligation.⁴¹ However, Article 8(2) adds a State duty to "provide appropriate assistance and protection" to those "illegally deprived" of their identity "with a view to speedily re-establishing [their] identity,"⁴² thereby suggesting that the right to identity imposes on States the obligation

³⁶ Although the CRC sets down children's rights, the Committee of Jurists has noted that "obviously[,] [the right established in article 8] accompanies the person permanently through all his phases of life." CJI, *El alcance del derecho a la identidad*, ¶ 11.1.

³⁷ CRC, art. 8(1).

³⁸ CJI, *El alcance del derecho a la identidad*, ¶ 14.3; 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, 265.

In contrast, Patrick McCarthy argues, on the basis of the CRC's *travaux préparatoires*, that "identity" is limited to nationality, name, and identity. *Making the Most of International Law on the Right to Identity: An Analysis of Article 8 of the United Nations Convention on the Rights of the Child*, [2004] C.O.L.R. III, 8. For the reasons explained in the text, we find the view of Hodgson, Cerda, and the Committee of Jurists more persuasive. *Travaux préparatoires* are supplementary means of interpretation, available only when the ordinary meaning of the treaty terms in their context remains ambiguous, *see* Vienna Convention, art. 32, and we think that the term "includes," when taken in context with Article 7, is not ambiguous. Preparatory works can also be invoked to confirm an interpretation, and we therefore note that the U.N. Secretariat recommended inserting the word "including" specifically "so that other elements of identity will not be excluded." *Technical Review of the Text of the draft Convention on the Rights of the Child*, E/CN.4/1989/WG.1/CRP.1, ¶ 22 (15 Oct. 1988).

³⁹ *See* OPPENHEIM'S INTERNATIONAL LAW, Vol. I, § 633 (explaining the principle of effectiveness as a form of the interpretive maxim *ut res magis valeat quam pereat*).

⁴⁰ Stewart, *supra* note 30 at 223-24.

⁴¹ Hodgson, *supra* note 38 at 265-66; C.P. Cohen, *Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child*, 3 CONN. J. INT'L L. 71, 78-80 (1987).

⁴² CRC, art. 8(2).

to protect that right. The inclusion of the qualifying adverbs “appropriate” and “illegally,” in light of the *travaux préparatoires* discussed *infra*,⁴³ has been interpreted to afford States parties some discretion in applying identity rights in their own national and cultural context, especially with respect to adoption.⁴⁴

According to the CRC’s *travaux préparatoires*, Article 8 originated as the Argentine delegation’s response to that country’s experience with children of disappeared persons.⁴⁵ The Polish delegation seconded the proposal to address the separation of children from their families in the wake of World War II.⁴⁶ The original proposal framed the right to identity as the child’s right to retain a “true and genuine personal, legal, and family identity.”⁴⁷ An array of concerns informed subsequent revisions to the right. They included a desire not to obstruct artificial insemination, genetic engineering, or abortion; delegates’ uncertainty over political feasibility of the implementation of new rights; and confusion as to the content of the right to identity.⁴⁸

Article 8’s drafting history suggests that the CRC drafting committee did not have a solid, concrete definition of identity or identity rights. However, two concepts were central to the original proposal: a principle of authenticity (“true and genuine”) and the multi-dimensionality of identity (“personal, legal, and family”). Moreover, despite the specific contexts behind Article 8, the drafters of the CRC opted for an expansive vision of the right to identity.⁴⁹ Though nationality, name, and family relations were seen as essential elements of identity, they were not intended to serve as limiting parameters.⁵⁰

⁴³ See *infra* note 38 and accompanying text.

⁴⁴ Hodgson, *supra* note 38 at 266; accord Jaime Sergio Cerda, *The Draft Convention on the Rights of the Child: New Rights*, 12 HUM. RTS. Q. 115, 117 (1990).

⁴⁵ Cerda, *supra* note 44 at 116; Stewart, *supra* note 30 at 221-22.

⁴⁶ Cerda, *supra* note 44 at 116.

⁴⁷ Report of the Working Group on a Draft Convention on the Rights of the Child, U.N. Doc. E/CN.4/1986/39.

⁴⁸ Cerda, *supra* note 44 at 116; Stewart, *supra* note 30 at 223; see also *supra* note 38.

⁴⁹ See Cerda, *supra* note 44 at 116-117 (noting that the examples of identity in article 8 are “purely illustrative” and recommending a “positive” interpretation of article 8, independent of the drafters’ specific intentions); Hodgson, *supra* note 38 at 265 (noting that “a number of aspects of Article 8(1) remain open-ended, to be interpreted as a matter of discretion in light of national practices and needs”).

⁵⁰ See *supra* note 38.

Other treaties address identity rights at a less abstract level, and impose specific obligations on the State. The ICCPR and the CRC mandate registration for newborns,⁵¹ the Hague Convention on inter-country adoption requires the collection and preservation of vital adoption information;⁵² and several anti-human-trafficking conventions provide for secure identity documents and restored documentation for trafficking victims.⁵³ These instruments provide concrete protections to identity and imply a State duty to take positive measures to protect and promote the preservation and development of an individual's identity.

B. Current Scholarship and Jurisprudence

The current section briefly reviews the judicial decisions and the work of experts discussing identity and the right to identity. No unified scholarship or jurisprudence has yet emerged around identity rights broadly; rather, our research surveys several disparate concentrations of scholarship and case law on identity-related issues, including children's rights, filiation law, cultural identity, and even social science and political theory. Our summary extracts common, unifying themes and elements from these diverse perspectives and describes a cohesive vision of identity and identity rights. This summary reveals first, that commentators believe identity to be *self-determined*⁵⁴ and *dynamic*,⁵⁵ and second, that in complying with the duty to respect, protect, and promote identity, a State must authentically reflect individual identity.

⁵¹ ICCPR, art. 24(2); CRC, art. 7(1); *see also* International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. G.A.O.R. Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), art. 29 (Dec. 18, 1990).

⁵² Hague Convention, arts. 9, 16, 30.

⁵³ *See, e.g.*, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, U.N. Doc. A/RES/55/25 at 4 (2001), arts. 8, 11; Council of Europe Convention on Action Against Trafficking in Human Beings, E.T.S. 197, arts. 8, 10, 11, 16 (2005); Protocol against the Smuggling of Migrants by Land, Sea and Air, U.N. Doc. A/55/383 (2001), arts. 12, 13; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, 75 U.N.T.S. 31, art. 17 (obligating States parties to conflicts to ensure proper identification of the dead prior to burial).

⁵⁴ *Self-determination* means that the individual is ultimately responsible for deciding and fashioning her own identity, however much influence family, society, and the State may exert on her. The principle of self-determination necessarily indicates that an individual's identity is "pre-legal," in that it exists "independent of any positive juridical recognition." *See* FRANCISCO CÓRDOBA ZARTHA, LA CARTA DE DERECHOS Y LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA 28 (1995) (discussing the pre-legal bases of juridical personality).

⁵⁵ *Dynamism* refers to the continuous evolution of an individual's identity: thus, an individual may change his religion, or his family, or his name.

1. Identity Defined

Any attempt to define the right to identity must begin with a nuanced understanding of the concept of identity itself. While there is no prevailing legal definition of identity,⁵⁶ scholars of law, social science, and philosophy emphasize the importance of an individual's personal and social realities in the formation of a stable yet dynamic identity.⁵⁷ This "social context" understanding defines identity in terms of the individual's uniqueness *vis-à-vis* others.⁵⁸ In this sense, personal identity begins from the moment of conception,⁵⁹ but comprehends far more than mere identifying information such as a date of birth.⁶⁰ While identity encompasses relatively "static" personal attributes, such as biographical data and physical traits, it also extends to an individual's outward expression⁶¹ and the establishment of a web of significant social relations,⁶² such as ties to family members, cultures, or religion.

⁵⁶ See Samantha Besson, *Enforcing the Child's Right to Know his Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L J. L. POL'Y & FAM. 137, 141 (2007).

⁵⁷ See CARLOS FERNÁNDEZ SESSAREGO, DERECHO A LA IDENTIDAD PERSONAL 113-114 (1992); Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J. L. POL'Y & FAM. 147, 157 (2004); Andrew J. Weigert & Viktor Gecas, *Symbolic Interactionist Reflections on Erikson, Identity, and Postmodernism*, IDENTITY: AN INTERNATIONAL JOURNAL OF THEORY AND RESEARCH, 5(2), 161-171 (2005); Jeffrey Weeks, *The Value of Difference* in IDENTITY—COMMUNITY, CULTURE, DIFFERENCE 88 (ed. J. Rutherford 1990) ("At its most basic, [identity is] . . . the stable core to your individuality. But it is also about your social relationships, your complex involvement with others.").

⁵⁸ Gonzalo Elizondo Breedy & Marcela Carazo Vicente, *Derecho a la identidad*, in PRESENTE Y FUTURO DE LOS DERECHOS HUMANOS: ENSAYOS EN HONOR A FERNANDO VOLIO JIMÉNEZ 375, 378 (ed. Lorena González Volio 1998) ("If we assume that . . . each human being [] is unique and unrepeatable, then identity is the condition of our particularity."); see also Keebet von Benda-Beckman & Maykel Verkuyten, *Introduction: Cultural Identity and Development in Europe*, in NATIONALISM, ETHNICITY AND CULTURAL IDENTITY IN EUROPE 15, 17 (1995) (finding that a positive definition of (cultural) identity as "what people conceive themselves to be, to which collectives they belong" necessitates a negative dimension to identity, namely who one is different from, "those [collectives] to whom one does not belong").

⁵⁹ *Hermanas Serrano Cruz*, Voto Disidente de Ventura Robles, J., ¶ 132. For example, an individual's parentage and genetic code are both important elements of his or her identity. FERNÁNDEZ SESSAREGO, *supra* note 57 at 113.

⁶⁰ FERNÁNDEZ SESSAREGO, *supra* note 57 at 123-28; S., C. s/ adopción, Corte Nacional de Argentina, S. 1801. XXXVIII.; 02-08-2005; T. 328 P. 2870 (hereinafter "*C. s/ adopción*").

⁶¹ FERNÁNDEZ SESSAREGO, *supra* note 57 at 113 (conceiving of personal identity as a social projection of individualizing attributes); cf. Council of Europe Doc. CAHMIN (95)16 Appendix IV, 27 (May 1995) ("Cultural identity applies to all those elements of culture through which individuals . . . wish to be recognized."). While we do not equate identity and "cultural identity" here, clearly the two concepts are related.

⁶² Ronen, *supra* note 57 at 154. These social ties follow from the individual's psychological preferences, *see id.*, as well as larger social, cultural and historical dynamics, *see* Wiegert & Gecas, *supra* note 57 at 162.

Identity is ultimately *self-defined*, at once subject to dynamic development and rooted in the individual's need for authenticity. An individual's identity evolves dynamically as she interacts with her meaningful social ties⁶³ and fashions herself in response to her socio-cultural context.⁶⁴ At the same time, identity provides a relatively stable and continuous "frame of reference" for this evolution.⁶⁵ Professor Ya'ir Ronen describes this dichotomy as "the need to become" and "need to be."⁶⁶ The first need refers to the individual's development and the constant recreation of her identity as she pursues her ambitions.⁶⁷ The second need emphasizes the principle of *authenticity*, the individual's need to be true to her own self,⁶⁸ at whatever stage in her development she finds herself, and the need for society to recognize this persona. These two needs can often conflict, in that social pressure hostile to the individual's authentic identity may beneficially refine, underscore, or even prompt change in that identity.⁶⁹

2. *Right to Identity*

Critical tensions among scholars with respect to the right to identity have grouped around two sets of questions. First, is the right to identity an independent, autonomous right that protects a distinct human interest, or is it an overarching "umbrella" or "core" right that collects and unifies several related human rights? If the latter, what

⁶³ YVONNE DONDEES, TOWARDS A RIGHT TO CULTURAL IDENTITY? 33 (2002) ("[I]ndividual identity is formed through an interchange with family, religion, society and all the other communities a person is part of.").

⁶⁴ Weigert & Gecas, *supra* note 57 at 171 (asserting that "self and society are two sides of the same coin"—neither one can be understood without the other).

⁶⁵ Stuart Hall, *Cultural Identity and Diaspora*, in IDENTITY—COMMUNITY, CULTURE, DIFFERENCE, *supra* note 37 at 223; *see also* Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM—EXAMINING THE POLITICS OF RECOGNITION 33-34 (ed. A. Gutman 1994) (asserting that identity is not only "who we are," but also "where we are coming from . . . [I]t is the background against which our tastes and desires and opinions and aspirations make sense").

⁶⁶ Ronen, *supra* note 57 at 150; *accord* DONDEES, *supra* note 63 at 32 ("Cultural identity is not only a matter of 'being,' but also of 'becoming.'").

⁶⁷ Ronen, *supra* note 57 at 150; *see also* Hall, *supra* note 65 at 222 ("[I]nstead of thinking of identity as an already accomplished fact, . . . we should think . . . of identity as a 'production,' which is never complete, always in process.").

⁶⁸ Ronen, *supra* note 57 at 149; *see also* Weeks, *supra* note 57 at 88 (stating that identity "gives you a sense of personal location").

⁶⁹ *See* Kobena Mercer, *Welcome to the Jungle: Identity and Diversity in Postmodern Politics*, in IDENTITY—COMMUNITY, CULTURE, DIFFERENCE, *supra* note 57 at 43; DONDEES, *supra* note 63 at 13 ("People become more aware of their cultural identity in situations of conflict, domination, and subordination"); FERNÁNDEZ SESSAREGO, *supra* note 57 at 18 (observing, within an existentialist philosophical framework, that the hostile, judging pressure of society—"the gaze"—reveals an individual's identity and challenges one to growth).

independent protection, if any, does a human right to identity provide? Second, given the personal, self-defined nature of identity, to what extent must a State defer to the individual's subjective interests? When, if at all, may a State disregard an individual's identity interests?

a. The Right to Identity as an Independent Human Right

In an effort to account for the range of rights implicated by identity, several commentators have attempted to define the right to identity through a relational lens, either as an overarching right that captures constitutive rights,⁷⁰ or as a core right that conceptually unifies a series of related rights.⁷¹ These constitutive or related rights include at least the rights to nationality, name and family as enumerated in Article 8 of the CRC,⁷² as well the right to juridical personality⁷³ and the rights to equal protection and to judicial protection.⁷⁴

The implications of a purely relational definition are stark. A human right that is “merely repetitive” of existing rights is not ripe for codification.⁷⁵ Thus, certain Italian commentators consider the right to identity under Italian jurisprudence⁷⁶ to be repetitive and not to merit independent protection.⁷⁷ Likewise, Yvonne Donders suggests that the right to *cultural* identity has no abstract content.⁷⁸ Rather than protect a general right to cultural identity, she proposes developing the “cultural dimensions” of the rights that protect language, property, and other specific aspects of cultural identity.⁷⁹ Similarly, one

⁷⁰ See, e.g., *Reflexiones preliminares*, *supra* note 6.

⁷¹ See Elizondo Breedy & Carazo Vicente, *supra* note 58 at 380.

⁷² See C. s/ adopción, at 2870.

⁷³ See *Hermanas Serrano Cruz*, Voto Disidente de Trindade, J., ¶ 13; *id.*, Voto Disidente de Ventura Robles, J., ¶ 134; see also *Reflexiones preliminares*, *supra* note 6.

⁷⁴ CJI, *El alcance del derecho a la identidad*, ¶ 8; see also ACHR, arts. 24 and 25.

⁷⁵ Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 615 (1984) (proposing six criteria for when a “new” human right should be codified).

⁷⁶ In Italian jurisprudence, the “right to identity” appears conceptually akin to a right against libel and the “right to publicity” in American jurisprudence. See generally FERNÁNDEZ SESSAREGO, *supra* note 57 at 53-98. The right described in Italian jurisprudence appears to be more limited than the right to identity provided by Article 8 of the CRC.

⁷⁷ FERNÁNDEZ SESSAREGO, *supra* note 57 at 118 (citing Sergio Fois, *Il diritto alla identità personale nel quadro dei diritti dell'uomo*, in IL DIRITTO ALLA IDENTITÀ PERSONALE 48 (1981) (conceiving of the right to identity as a further iteration of the right to privacy)); *id.* at 119 (citing Alessandro Pace, *Il c.d. diritto alla identità personale e gli art. 2 e 21 della Costituzione*, in IL DIRITTO ALLA IDENTITÀ PERSONALE 38 (conceiving of the right to identity as a limitation on free expression)).

⁷⁸ DONDEERS, *supra* note 63 at 336.

⁷⁹ *Id.*

might propose developing and protecting the “identity dimensions” of existing rights (name, nationality, family, etc.) rather than a general right to identity.

At the other end of the spectrum, legal experts assert that the right to identity is not only independent and autonomous from other rights, but fundamental, non-derogable, and rooted in human dignity.⁸⁰ The Inter-American Committee of Jurists states that the right to identity cannot be understood merely in relation to the rights with which it is traditionally associated.⁸¹ Even where there is no explicit reference to the right to identity in a national constitution, the Committee argues, the right’s non-derogable and essential nature implies its guarantee.⁸² The Argentine jurist Fernández Sessarego reasons that, because the individual’s identity is a distinct “existential interest,” the right to identity is likewise distinct from other rights.⁸³

The difficulty in this position lies in articulating a distinct content for identity rights. If the right to identity protects one’s personal attributes and social ties,⁸⁴ and the rights to privacy, family, religion, culture and others already protect these interests,⁸⁵ what more does the right to identity offer? Many experts fall somewhere in the middle of the above spectrum: Dr. Cerda, Article 8’s intellectual author, asserts an independent right but defers to future courts to articulate its content positively,⁸⁶ while the OAS Juridical and Political Affairs Committee characterizes identity rights as emergent from the rights established in the American Convention.⁸⁷

We find that the CRC, as an international treaty, sufficiently decides the matter.⁸⁸ Under the principle of effectiveness,⁸⁹ Article 8 creates an independent, non-repetitive

⁸⁰ CJI, *El alcance del derecho a la identidad*, ¶ 12.

⁸¹ *Id.* at ¶¶ 14.1, 15.

⁸² See *supra* note 31 and accompanying text.

⁸³ *Supra* note 57 at 124-28.

⁸⁴ See *supra* note 57 and accompanying text; see also *infra* Part III.

⁸⁵ See *Mónaco Gallichio v. Argentina*, Comm. No. 400/1990, U.N. Doc. CCPR/C/53/D/4000/1990 (1995) (right to a name); *Coeriel et al. v. The Netherlands*, Comm. No. 453/1991, ¶ 10.5, U.N. Doc. CCPR/C/52/D/453/1991 (1994) (right to privacy); *Boodoo v. Trinidad & Tobago*, Comm. No. 721/1996, ¶ 6.7, U.N. Doc. CCPR/C/74/D/721/1996 (2002) (holding various “attacks on privacy and dignity,” including the forcible shaving of a Muslim prisoner’s beard, violated petitioner’s privacy rights); *Mikulic v. Croatia*, 53176/99 [2002] ECHR 27 (7 Feb. 2002) (right to know one’s origins); *Trevorrow v. Australia* [2007] SASC 285. (1 Aug. 2007) (right to culture); *Awas Tingni v. Nic.*, 79 Inter-Am. Ct. H.R. (ser. C) (2001) (right to property).

⁸⁶ See *supra* note 44.

⁸⁷ See *Reflexiones Preliminares*, *supra* note 6 at 2.

⁸⁸ The United States and Somalia are the only countries to date that have not ratified the Convention on the Rights of the Child. Status of Multilateral Treaties Deposited with the Secretary-General (last updated:

right. While the right to identity's content may overlap significantly, or even totally, with the content of other rights, identity rights carry distinct legal consequences for State obligation and action.⁹⁰ We develop these consequences further in Part III.

b. The Role of Subjectivity

The second area of concern for many commentators is how a State can formulate policies that protect a dynamic, self-determined identity interest. First, there is the question of how to determine what is an individual's "authentic" identity in cases of dispute.⁹¹ Second, one must wonder how a State can make broad policy around the unique, ever-changing, subjective "personal truths" of its individual citizens.⁹² Fernández Sessarego suggests two limitations on the subjectivity of identity: first, only objectively discoverable identity—that which could be perceived "through normal diligence and subjective good faith"⁹³—merits protection;⁹⁴ second, interference with an individual's identity must be sufficiently grave "as to modify the social representation of the person" in order to constitute a violation.⁹⁵

III. DEFINITION

As stated earlier, the goal of our analysis is to unify the disparate perspectives on identity and identity rights into a cohesive principle and analytical framework. In this

November 15, 2007), available at

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>.

⁸⁹ See *supra* note 39 and accompanying text.

⁹⁰ See, e.g., Nuria Piñol Sala, *Los delitos del art. 146 del CP al la luz del derecho a la identidad y la jurisprudencia de la Corte Suprema de Justicia de la Nación*, in *DERECHO A LA IDENTIDAD Y PERSECUCIÓN DE CRÍMENES DE LESA HUMANIDAD 205* (ed. A. Madariaga) (noting specific advantages of an identity-rights framework in litigating the human rights of disappeared persons and their children).

⁹¹ E.g. FERNÁNDEZ SESSAREGO, *supra* note 57 at 117 (citing Angelo Falzea, *Il diritto alla identità personale*, LA LESIONE DELL'IDENTITÀ PERSONALE E IL DANN O NON PATRIMONIALE 89 (1985) (opining that the individual's identity will inevitably be what the judge perceives it to be)).

⁹² See, e.g., FERNÁNDEZ SESSAREGO, *supra* note 57 at 117 (citing Michele Marchesiello, *Persona, gruppi, comunità in cerca di un diritto alla identità personale*, IL DIRITTO ALLA IDENTITÀ PERSONALE, *supra* note 77 at 9 (finding the concept of identity too fragile, obscure, and indefinable a target)); *id.* at 118 (citing Corrado De Martini, *Il diritto alla identità personale nella speranza operativa*, LA LESIONE DELL'IDENTITÀ PERSONALE, *supra* note 91 at 91 (asserting that identity is a matter for philosophy or psychology, not legal science)).

⁹³ Vincenzo Zeno-Zencovich, Commentary on the Ruling of the Italian Court of Cassation of 22 June 1985, *NUOVA GIURISPRUDENZA CIVILE COMMENTATA* 1985-I-653.

⁹⁴ *Supra* note 57 at 102.

⁹⁵ *Id.* at 272.

vein, we propose the following definition: the right to identity protects an individual's significant and knowable personal attributes and social relationships. We explore each of the key terms and concepts of our definition in turn below.

A. Personal Attributes and Social Relationships

Identity is the individual's "social profile" that individuates and distinguishes the person from other human beings.⁹⁶ Within this profile are both personal traits—such as genetic code,⁹⁷ medical history,⁹⁸ or biological sex⁹⁹—and social or external ties,¹⁰⁰ including inter-personal ties such as family relations, as well as, ties to a culture,¹⁰¹ religion,¹⁰² or geographical place.¹⁰³ These two categories, the personal and social, describe a spectrum rather than a dichotomy: for example, a person's name is both a highly personal attribute and an identifying social tie between that person and her family, her peers, and the State.¹⁰⁴ Often, a 'personal' trait will have important social dimensions, such as a beard grown for religious reasons.¹⁰⁵ Rather than attempt to distinguish between the personal and social, we recognize that identity spans the spectrum of personal attributes and social ties.

⁹⁶ FERNÁNDEZ SESSAREGO, *supra* note 57 at 113; Elizondo Breedy & Carazo Vicente, *supra* note 58 at 378; CJI, *El alcance del derecho a la identidad*, ¶ 15; Acción de Tutela Julián Gustavo Giraldo Zuluaga v. El Notario 13 del Círculo Notarial de Medellín, Colombia Const. Trib., T-186-05 (Feb. 24, 2005) (observing that civil identity "permits the identification and differentiation" of an individual from the "social conglomerate"); *Hermanas Serrano Cruz*, Voto Disidente de Ventura Robles, J., ¶ 132 (conceiving of identity as "a group of attributes and characteristics that enable the individualization of every person as unique").

⁹⁷ Stewart, *supra* note 30 at 231-32.

⁹⁸ *Id.*; *Hermanas Serrano Cruz*, Voto Disidente de Ventura Robles, J., ¶ 132 (noting the right to identity protects the individual's "personal and biographical truth").

⁹⁹ See Acción de Tutela del Menor N.N., Colombia Const. Trib. T-477/95 (Oct. 23, 1995) ("Biological sex constitutes an immutable element of a person's determined *identity* and only she, with full knowledge and due information, may consent to a change of sex or even gender."). For further examples, see Perry v. United Kingdom, 39 Eur. H.R. Rep. 76, 85 (2004) (discussing personal elements protected by the right to privacy); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 385-86 (2d rev. ed. 2005) (same).

¹⁰⁰ See Ronen, *supra* note 57 at 154.

¹⁰¹ See generally Trevorrow v. State of South Australia (No. 5), [2007] SASC 285 (Aug. 1) (recognizing the importance of cultural ties to a forcibly assimilated Ngarrindjeri aboriginal).

¹⁰² See *Hermanas Serrano Cruz*, Voto Disidente de Ventura Robles, J., ¶ 132.

¹⁰³ See *Awas Tingni*, 79 Inter-Am. Ct. H.R. (ser. C) at 78, ¶ 149 (requiring recognition of "the close ties of indigenous people with the land . . . as the fundamental basis of their cultures").

¹⁰⁴ See *Giraldo Zuluaga*, T-168-05 (asserting that "the name expresses a person's singular identity *vis-à-vis* society").

¹⁰⁵ See *Boodoo*, ¶ 6.7.

We further note that the right protecting an individual's attributes and ties implies several rights already explicitly protected in international instruments. For example, the right to identity, as applied to one's name and one's ties to family, culture, and nation, give rise to the human rights to name, family, culture, and nationality, respectively.

B. Significant and Knowable

A person's identity comprises those aspects of the social profile that are *significant* to the person. Thus, a person's identity is necessarily self-defined.¹⁰⁶ In *Trevorrow v. South Australia*, a forcibly assimilated Aborigine testified to his profound psychological injuries arising from the loss of his original family and culture.¹⁰⁷ In contrast, Ya'ir Ronen cites a child custody case, *In re M*, in which a Zulu-born child preferred to stay with his Afrikaaner foster mother rather than return to his birth family.¹⁰⁸ Ronen criticizes the latter court for imposing formalistic conceptions of identity—centered around judicially determined ethnicity as the deciding factor—without consulting the significance of ethnicity *to the child*.¹⁰⁹ Furthermore, identity is often dynamic, as the significance of certain traits and ties change.¹¹⁰ For example, a person's feelings towards his traditional Dutch name may change when he pursues a religious vocation that requires a new, Hindu name.¹¹¹ Our emphasis on significance reflects the core principles of authenticity and self-determination elaborated earlier.¹¹²

The right to identity, as we conceive it, protects only those significant elements of an individual's identity that are *knowable*, i.e., objectively discoverable by society through normal diligence and good faith testimony.¹¹³ The significance of a particular element of identity must comport with the individual's objective behavior and truthful representations. For example, the significance of a devout Muslim's beard is knowable because of its religious importance.¹¹⁴ Thus, the Committee of Jurists affirms that

¹⁰⁶ See Ronen, *supra* note 57 at 149, 150.

¹⁰⁷ See *Trevorrow*, [2007] SASC at ¶ 1141.

¹⁰⁸ See Ronen, *supra* note 57 at 166.

¹⁰⁹ *Id.* at 172.

¹¹⁰ See *supra* notes 55, 57, 64, 67 and accompanying text.

¹¹¹ See *Coeriel*, ¶ 2.1.

¹¹² See *supra* Part II.B.1.

¹¹³ FERNÁNDEZ SESSAREGO, *supra* note 57 at 102.

¹¹⁴ See *Boodoo*, ¶ 2.4.

cultural particularities as well as international norms should inform the right to identity.¹¹⁵ Moreover, in order to rise to a violation of identity rights, an interference with identity must be sufficiently grave so as to “modify the social representation of the person.”¹¹⁶ These are important limitations, which afford States some guidance in the development of politically feasible policies aimed at safeguarding the right to identity.

C. State Obligations under the Right to Identity

From a rights-holder’s perspective, the right to identity is generally a right to effective State recognition of one’s authentic identity.¹¹⁷ In delineating the specific scope of State obligations under this right, we draw primarily from Asbjørn Eide’s tripartite typology of obligations to respect, protect, and fulfill.¹¹⁸ These three categories each impose both positive and negative obligations on States.

The obligation to *respect* identity means that States must refrain from actively interfering with the individual’s identity. For example, in *Mónaco de Gallicchio v. Argentina*, the State abducted the child of forcibly disappeared parents, falsified her birth certificate, and arranged for her adoption under a false name.¹¹⁹ Here, Argentina actively interfered with the child’s right to identity, namely, by forcibly changing her name and registration and disrupting her familial ties, and thus violated its duty to respect the child’s identity. A State’s arbitrary or discriminatory denial of a birth certificate also

¹¹⁵ CJI, *El alcance del derecho a la identidad*, ¶ 15.

¹¹⁶ FERNÁNDEZ SESSAREGO, *supra* note 57 at 272.

¹¹⁷ Cf. Jeffrey L. Blackman, *State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law*, 19 MICH. J. INT’L L. 1141, 1192 (1998) (noting an “emerging right to an effective nationality in that state with which an individual possesses genuine and effective links”). Like the right to identity, the right to an effective nationality is an individual’s right to State recognition of “a social fact of attachment, a genuine connection of existence, interests and sentiments.” See *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 23 (April 6).

¹¹⁸ See Report on the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1987/23, §§ 67-69 (1987); Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (20th sess., 1999), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003). We note in passing that, although Eide’s typology has been frequently applied to economic, social, and cultural rights, we do not find the dichotomy between civil and political rights and economic, social, and cultural rights useful in describing the right to identity. The right to identity arises explicitly from the CRC, which makes no such distinction, and implicitly from related rights protected in the ICCPR, the ICESCR, and the ACHR alike.

¹¹⁹ Comm. No. 400/1990, ¶¶ 2.1, 10.4, U.N. Doc. CCPR/C/53/D/400/1990 (1995).

violates the obligation to respect identity, since its actions interfere with the child's name and ties to family, place, and nation.¹²⁰

The obligation to *protect* identity means that States must take necessary measures to prevent others from interfering with the individual's identity. For example, in *Awat Tingni v. Nicaragua*, an indigenous community requested that the State demarcate their communal lands and protect these lands from outside developers.¹²¹ The State's failure to establish the boundaries of the Awat Tingni people's lands violated its obligation to protect the community's significant ties to its ancestral lands.¹²² Notably, the obligation to protect individuals against deprivations of identity requires States to register their populations,¹²³ since civil registration protects children and others against human trafficking.¹²⁴

The obligation to *fulfill* identity means that States must progressively ensure that each person has opportunities to develop her identity. Given the importance of civil registration to the individual's identity, we note that accessible, functioning registrars and registration campaigns effectively promote identity.¹²⁵ In *Yean y Bósico v. Dominican Republic*, the Inter-American Court ordered the defendant State to "adopt all necessary positive measures to guarantee that [plaintiff children] . . . can access the late registration procedure . . . and fully exercise and enjoy their right to Dominican nationality."¹²⁶ By providing an individual with a right to change or rectify collected personal data, a State likewise promotes the dynamic development of her identity.¹²⁷

¹²⁰ See *Las Niñas Yean y Bosico v. Dom. Rep.*, 130 Inter-Am. Ct. H.R. (Ser.C) at ¶¶ 168, 177-73 (2005).

¹²¹ See *Awat Tingni*, 79 Inter-Am. Ct. H.R. (ser. C) at ¶ 153.

¹²² *Id.*

¹²³ See CJI, *El alcance del derecho a la identidad*, ¶ 14.4; see also *Sawhoyamaya v. Par.*, 146 Inter-Am. Ct. H.R. (ser. C) at ¶ 193 (2006).

¹²⁴ See, e.g., UNICEF, *Birth Registration: Right from the Start*, INNOCENTI DIGEST No. 9, at 6-7 (March 2002); UN Human Rights Committee, General Comment 17, Article 24, ¶ 7 (35th sess., 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 23 (1994) ("The main purpose of the obligation to register children after birth is to reduce the danger of abduction [and] sale or traffic in children.").

¹²⁵ See CJI, *El alcance del derecho a la identidad*, ¶ 18.3.6 ("A universal, reliable, accessible and efficient civil registry is a basic guarantee so that the right to identity may materialize.").

¹²⁶ 130 Inter-Am. Ct. H.R. (Ser.C) at ¶ 171; see also *Aloeboetoe v. Surin.*, 15 Inter-Am. Ct. H.R.(ser. C) at 17, ¶ 64 (1993) (implying a State obligation to make civil registries accessible to the indigenous community plaintiffs, or at least refrain from penalizing the community for its lack of access to the registries).

¹²⁷ See *Coeriel*, ¶ 10.5 (right to change one's name); FERNÁNDEZ SESSAREGO, *supra* note 57 at 278 (right of rectification of inaccurate representations).

While the right to identity's content overlaps significantly with the content of other human rights, identity rights can often bring distinct legal consequences to scenarios already addressed by other rights. For example, in cases involving the falsified identities of kidnapped children, a court would likely characterize the violation of identity rights as ongoing (in contrast to, for example, the original deprivation of liberty).¹²⁸ Such a characterization might critically circumvent statutes of limitations and amnesty laws, or uphold a court's *ratione temporis*. Moreover, where courts balance individual rights against legitimate public interests, the right to identity may carry more normative force—i.e., interferences with identity may be subject to stricter scrutiny—than, e.g., the right to be registered. In this vein, we note that the Inter-American Committee of Jurists regards the right to identity as fundamental, *erga omnes*, and non-derogable.¹²⁹

D. Collective Identity

Although we define the right to identity primarily as an individual right, both the social nature of identity and its intimate relationship with culture necessarily implicate a collective dimension to identity rights. But before deciding whether identity rights are “individual,” “collective,” or “individual with a collective dimension,”¹³⁰ we must first ask exactly what a collective identity is. If identity is a spectrum of individualizing attributes and significant social relationships, then collective identity is 1) the network of the social relationships constituting the collective, 2) the distinguishing internal attributes of the collective itself, such as language or community traditions, and 3) the collective's significant, external ties, such as ties to specific land.

While the question warrants more study, we believe that an individual right to identity afforded to each member of a collective protects the identity rights of the collective as a whole. Since the individual's identity rights include a right to preserve the cultural dimensions of her identity, each member of the collective becomes an individual guarantor of the collective's identity.¹³¹ We note, however, that this characterization of

¹²⁸ See generally, Piñol Sala, *supra* note 90 at 219-238.

¹²⁹ *El alcance del derecho a la identidad*, ¶ 18.1.

¹³⁰ DONDERS, *supra* note 63 at 335.

¹³¹ *Acción de Tutela Ati Seygundiba Quigua Izquierdo v. Tribunal Administrativo de Cundinamarca*, Colombia Const. Trib. T-778-05 (Jul. 27, 2005) (articulating an “individual dimension” to the right to

collective identity rights resolves conflicts primarily between a community and outsiders; it does little to address conflicts between the identity interests of an individual and his own community.¹³²

IV. CIVIL REGISTRATION AND THE RIGHT TO IDENTITY

The definition of the right to identity elaborated in Part III provides a useful framework for understanding and addressing emerging issues related to identity. As a conclusion to the present article, we illustrate how the proposed definition applies to the current civil registry initiative in Latin America.

The registration of an individual's birth is the first formal and legal State recognition of that individual. A birth certificate can determine an individual's access to important rights such as education and health,¹³³ and serves as a common mechanism for the recognition of relationships with others in society, especially family.¹³⁴ Recognizing the importance of registration in a democratic society, several international human rights instruments call for State parties to register all children at birth.¹³⁵ Similar concerns and high rates of sub-registration in Latin America have motivated the OAS, the Inter-American Development Bank (IADB), and the United Nation's Children's Fund (UNICEF) to commit to improve national civil registration systems and achieve universal registration by 2015.¹³⁶

Civil registration is also a critical mechanism in fighting human trafficking. A birth certificate officially documents a child's age, which can prove crucial in protecting the child from exploitation in hazardous labor, child prostitution, and armed conflicts.¹³⁷ Children without an officially recognized identity or proven nationality are particularly

cultural identity, which affords rights to the individual to protect the community identity, and recognizing that "the protection of the individual may be necessary for the realization of the collective right").

¹³² See *infra* Part IV.A.1; see also Oswaldo Ruiz, *El derecho a la identidad cultural de los pueblos indígenas y las minorías nacionales. Una mirada desde el sistema interamericano*, 118 Boletín Mexicano de Derecho Comparado 193, 201 (Jan.-Apr. 2007) (noting that in some cases an individual will need protection from his own cultural group).

¹³³ UNICEF, *supra* note 124 at 4-5 (examining the crucial importance of a birth certificate in diverse fields such as primary and secondary education, child labor, and HIV/AIDS treatment).

¹³⁴ Caso José Arley Zuluaga López, Juzgado Décimo Tercero Penal del Circuito de Medellín, Colombia Const. Trib., T-885/05 (August 25, 2005).

¹³⁵ ICCPR, art. 24(2); CRC, art. 7.

¹³⁶ See *supra* note 8.

¹³⁷ UNICEF, *supra* note 124 at 5-6.

vulnerable to traffickers,¹³⁸ and areas suffering from sub-registration are appealing targets for trafficking operations.¹³⁹

The State obligation to register nationals therefore flows directly from the obligations to protect and promote individuals' identity, in addition to the international instruments cited above.¹⁴⁰ With this relationship in mind, we utilize an identity rights framework to address certain pressing questions inherent in the civil registration project.

A. Conflicts between Registration and Other Human Rights

The right to identity operates most often in concert with other human rights, but occasionally these rights come into conflict. In the context of civil registration, tension emerges between the duty to register and culture and privacy interests.

1. Culture Interests

Civil registries must be universal, non-discriminatory in their mission and implementation, and respectful of the rights of minorities. The ICCPR and the ACHR, *inter alia*, commit States parties to non-discrimination and equal protection.¹⁴¹ More specifically, international legal sources call for the recognition of indigenous social practices¹⁴² and a right against forced assimilation.¹⁴³

These multiculturalist concerns may complicate the project of universal registration. UNICEF reports that communities in Madagascar, Côte d'Ivoire, Ghana and Togo may resist certain registration efforts, partially or totally, due to cultural practices

¹³⁸ *Id.* (citing UN Inter-Agency Working Group on Trafficking in the Mekong Sub-region UNICEF Thailand); Team Consult Pvt. Ltd. for PLAN Nepal, *Birth Registration in Nepal: Promoting the Right to a Name and Nationality* (2000), cited in UNICEF, *supra* note 124 at 5 (citing the case of a Nepalese girl trafficked into an Indian brothel, whose kidnapping the police were unwilling to investigate because, "without a birth certificate, there was no proof of her age, nationality, or even of her existence").

¹³⁹ UNICEF, *supra* note 124 at 5-6.

¹⁴⁰ See *supra* note 135.

¹⁴¹ ICCPR, art. 26; ACHR, art. 24; see also International Convention for the Elimination of all Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Convention for the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁴² See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, art. 5(a), 28 I.L.M. 1382.

¹⁴³ See Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/56, art. 8 (1994); Council of Europe Framework Convention for the Protection of National Minorities, E.T.S. 157, arts. 3(1), 5(1), 11(1) (1995) (articulating the rights to cultural identity, to identify or not as a national minority, and to a minority-language name, respectively).

and beliefs.¹⁴⁴ In such cases, States must balance and adapt their registration initiatives to the cultural rights of such communities. Under the right to identity framework, it can only be counterproductive to infringe upon the cultural elements of an individual's identity in an effort to safeguard identity.

2. *Privacy Interests*

Privacy interests can likewise complicate the use of registration as an instrument for identity protection. In Iraq, for example, where sectarian violence prompts many civilians to carry false identification, increased identity registration could actually endanger lives.¹⁴⁵ In such case, an identity rights framework calls for States to balance and tailor their registration programs against the safety and preservation of life. The obligation to register must not be prioritized over privacy interests if the outcome necessarily threatens the fundamental right to life.

Not all privacy interests are so dire, however. A child's right to identity may in several scenarios conflict with a parent's asserted privacy rights, as in the case of anonymous gamete donors, anonymous birthing, abandoned children, and refused filiation.¹⁴⁶ For example, in diverse countries and cultures, a father may refuse to acknowledge a child born out of wedlock as his and subscribe his name to the birth certificate.¹⁴⁷ But the child's right to know her birth origins is a specific instance of the right to identity,¹⁴⁸ and a court may well find the reluctant father's privacy interest considerably weaker than the previous life-threatening examples. With respect to refused filiation, then, the State may have a greater obligation to accommodate the child's identity interests.¹⁴⁹

¹⁴⁴ UNICEF, *supra* note 124 at 15.

¹⁴⁵ Letter from the Electronic Privacy Information Center *et al.* to Robert Gates, U.S. Secretary of Defense, on the Collection of Iraqi Citizens' Biometric Data (July 27, 2007), *available at* http://www.epic.org/privacy/biometrics/epic_iraq_dtbs.pdf. In Rwanda, lists of Tutsis were broadcast in order to facilitate genocide. See LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE 22 (2004).

¹⁴⁶ See generally O'Donovan, *supra* note 23 at 78-84 (examining children's identity rights under CRC, art. 8, in the case of donated gametes, abandoned children, and anonymous birthing).

¹⁴⁷ UNICEF, *supra* note 124 at 15 (noting laws in Nepal and Ecuador that permit a father to refuse filiation on a birth certificate).

¹⁴⁸ See generally Samantha Besson, *supra* note 56.

¹⁴⁹ States accommodate the child's right to know her origins in diverse ways. For example, Peru now permits an extramarital child to be registered under the father's name without his explicit consent or

B. Right of Rectification

The State obligation to respect identity requires that States recognize an individual's identity as both self-determined and dynamic. For this reason, whenever an individual refashions her identity with sufficient seriousness and gravity (i.e., the change is sufficiently *significant* to the individual and such significance is *knowable*), the State must appropriately recognize the change in the individual's registered personal data.¹⁵⁰

Name changes illustrate a useful application of the "the right of rectification." An individual who pursues a priestly vocation in a religion that requires a name change has a right to State recognition of his new identity.¹⁵¹ His investment in his vocation and the discoverable practices of his religion sufficiently show the knowable significance of his identity change, as well as the grave distortions of his social identity should the request be denied.¹⁵² However, an individual who requests a whimsical or otherwise inexplicable new name will likely not have a right to a public record name change without more to show the gravity and significance of this new identity. This is not to say that the State cannot grant the name change request anyway, but only that the right to identity does not oblige the State to do so.

C. Authenticity and Integrity

The State obligation to protect and promote identity indicates that civil registries must register vital information accurately and guarantee both the physical and juridical security of this information, including security against falsification, adulteration and destruction. Several international instruments explicitly require States to ensure the

presence. Informe de la Republica del Perú sobre la Situación de la Mujer (2006), Comisión Interamericana de Mujeres, OEA/Ser.L/II.2.33, ¶4 (1 Aug. 2006). In contrast, Sweden provides that a child born from donated gametes may learn the donor's identity upon reaching a sufficient maturity. O'Donovan, *supra* note 23 at 79.

¹⁵⁰ Cf. FERNÁNDEZ SESSAREGO, *supra* note 57 at 278 (discussing the "right of rectification" as a tool for judicially protecting identity rights).

¹⁵¹ See generally *Coeriel et al. v. The Netherlands*.

¹⁵² Under a similar analysis, an individual who changes her social gender and/or biological sex has a right to change her publicly registered gender and sex under the identity rights framework. See, e.g., *Giraldo Zuluaga*, T-168-05. For a review of laws respecting the right of rectification for transgender and intersex persons, see, e.g., Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

integrity of vital information.¹⁵³ The Hague Convention on the Protection of Children and Cooperation in Respect of Inter-Country Adoption similarly mandates the collection and preservation of adoption information.¹⁵⁴ In *Mónaco de Gallicchio v. Argentina*, the Human Rights Council found that the falsification of an abducted child's birth certificate and a ten-year judicial delay in issuing accurate identity papers, *inter alia*, violated the child's right to a name.¹⁵⁵ These sources and others confirm that a State bears obligations under the identity rights framework to provide faithful and secure documentation of an individual's identity.¹⁵⁶

CONCLUSION

The right to identity is an independent and fundamental human right protected explicitly and implicitly in international law. International treaties, jurisprudence, and scholarship conceptualize identity as the individual's profile of significant and knowable personal attributes and social ties, and oblige States to protect these interests through both positive and negative duties. In particular, this identity rights framework provides important guidance to States and organizations in registering their populations.

We hope our analysis serves as a useful resource and point of departure for the development of an identity rights framework by States, international organizations and tribunals, and civil society. Such a framework is essential for developing initiatives to protect the right to identity in an effective and responsible manner and to resolve tensions between these efforts and other human rights. States and international organizations may find such a framework particularly useful for engaging the human rights community in their identity rights initiatives and determining the missions and responsibilities of public and private actors in this endeavor. Given the diversity of identity interests, we hope that

¹⁵³ See, e.g., United Nation's Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children U.N. Doc. A/55/383 at 25 (2000), U.N. Doc. A/RES/55/25 at 4 (2001), 40 I.L.M. 335 (2001), art. 12 (States parties must secure travel and identity documents against forgery and misuse); Council of Europe Convention on Action Against Trafficking in Human Beings, E.T.S. 197 (2005), art. 8 (same).

¹⁵⁴ See Hague Convention, arts. 9(a), 16, 30.

¹⁵⁵ Comm. No. 400/1990, ¶¶ 10.4-5.

¹⁵⁶ See, e.g., UNICEF, Rachel Hodgkin and Peter Newell, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 113 (1998) (noting that "preserve" implies "both the non-interference in identity and the maintenance of records relating to genealogy, birth registration and details relating to early infancy that the child could not be expected to remember.").

multiple constituencies from across the world contribute to the development of this crucial human right.