



Papers di DIRITTO EUROPEO

www.papersdidirittoeuropeo.eu
ISSN 2038-0461

2023
numero speciale | special issue

DIRETTORE RESPONSABILE

Maria Caterina Baruffi (Ordinario di Diritto internazionale, Università di Bergamo).

COMITATO DI DIREZIONE

Francesco Bestagno (Ordinario di Diritto dell'Unione europea, Università Cattolica del Sacro Cuore di Milano; Consigliere giuridico presso la Rappresentanza permanente d'Italia all'UE); **Andrea Biondi** (Professor of European Law e Director of the Centre of European Law, King's College London); **Fausto Pocar** (Professore emerito, Università di Milano); **Lucia Serena Rossi** (Ordinario di Diritto dell'Unione europea, "Alma Mater Studiorum" Università di Bologna; Giudice della Corte di giustizia dell'Unione europea).

COMITATO SCIENTIFICO

Adelina Adinolfi (Ordinario di Diritto dell'Unione europea, Università di Firenze); **Elisabetta Bani** (Ordinario di Diritto dell'economia, Università di Bergamo); **Matteo Borzaga** (Ordinario di Diritto del lavoro, Università di Trento); **Susanna Cafaro** (Ordinario di Diritto dell'Unione europea, Università del Salento); **Laura Calafà** (Ordinario di Diritto del lavoro, Università di Verona); **Javier Carrascosa González** (Catedrático de Derecho Internacional Privado, Universidad de Murcia); **Luigi Daniele** (Ordinario di Diritto dell'Unione europea, Università di Roma "Tor Vergata"); **Angela Di Stasi** (Ordinario di Diritto internazionale, Università di Salerno); **Davide Diverio** (Ordinario di Diritto dell'Unione europea, Università di Milano); **Franco Ferrari** (Professor of Law e Director of the Center for Transnational Litigation, Arbitration, and Commercial Law, New York University); **Costanza Honorati** (Ordinario di Diritto dell'Unione europea, Università di Milano-Bicocca); **Paola Mori** (Ordinario di Diritto dell'Unione europea, Università "Magna Graecia" di Catanzaro); **Matteo Ortino** (Associato di Diritto dell'economia, Università di Verona); **Carmela Panella** (Ordinario f.r. di Diritto internazionale, Università di Messina); **Lorenzo Schiano di Pepe** (Ordinario di Diritto dell'Unione europea, Università di Genova); **Alessandra Silveira** (Profesora Asociada e Directora do Centro de Estudos em Direito da União Europeia, Universidade do Minho); **Eleanor Spaventa** (Ordinario di Diritto dell'Unione europea, Università "Bocconi" di Milano); **Stefano Troiano** (Ordinario di Diritto privato, Università di Verona); **Michele Vellano** (Ordinario di Diritto dell'Unione europea, Università di Torino).
Segretario: **Caterina Fratea** (Associato di Diritto dell'Unione europea, Università di Verona).

COMITATO DEI REVISORI

Stefano Amadeo (Ordinario di Diritto dell'Unione europea, Università di Trieste); **Bruno Barel** (Associato di Diritto dell'Unione europea, Università di Padova); **Silvia Borelli** (Associato di Diritto del lavoro, Università di Ferrara); **Laura Carpaneto** (Associato di Diritto dell'Unione europea, Università di Genova); **Marina Castellaneta** (Ordinario di Diritto internazionale, Università di Bari "Aldo Moro"); **Federico Casolari** (Ordinario di Diritto dell'Unione europea, "Alma Mater Studiorum" Università di Bologna); **Gianluca Contaldi** (Ordinario di Diritto dell'Unione europea, Università di Macerata); **Matteo De Poli** (Ordinario di Diritto dell'economia, Università di Padova); **Giacomo di Federico** (Ordinario di Diritto dell'Unione europea, "Alma Mater Studiorum" Università di Bologna); **Fabio Ferraro** (Ordinario di Diritto dell'Unione europea, Università di Napoli "Federico II"); **Daniele Gallo** (Ordinario di Diritto dell'Unione europea, LUISS Guido Carli); **Pietro Manzini** (Ordinario di Diritto dell'Unione europea, "Alma Mater Studiorum" Università di Bologna); **Silvia Marino** (Associato di Diritto dell'Unione europea, Università dell'Insubria); **Francesca Ragno** (Associato di Diritto internazionale, Università di Verona); **Carola Ricci** (Associato di Diritto internazionale, Università di Pavia); **Giulia Rossolillo** (Ordinario di Diritto dell'Unione europea, Università di Pavia); **Vincenzo Salvatore** (Ordinario di Diritto dell'Unione europea, Università dell'Insubria); **Andrea Santini** (Ordinario di Diritto dell'Unione europea, Università Cattolica del Sacro Cuore di Milano); **Cristina Schepisi** (Ordinario di Diritto dell'Unione europea, Università di Napoli "Parthenope"); **Martin Schmidt-Kessel** (Lehrstuhl für Deutsches und Europäisches Verbraucherrecht und Privatrecht sowie Rechtsvergleichung, Universität Bayreuth); **Chiara Enrica Tuo** (Ordinario di Diritto dell'Unione europea, Università di Genova).

COMITATO EDITORIALE

Diletta Danieli (Ricercatore t.d. di Diritto dell'Unione europea, Università di Verona); **Simone Marinai** (Associato di Diritto dell'Unione europea, Università di Pisa); **Teresa Maria Moschetta** (Associato di Diritto dell'Unione europea, Università di Roma Tre); **Rossana Palladino** (Associato di Diritto dell'Unione europea, Università di Salerno); **Cinzia Peraro** (Ricercatore t.d. di Diritto dell'Unione europea, Università di Bergamo); **Federica Persano** (Ricercatore di Diritto internazionale, Università di Bergamo); **Emanuela Pistoia** (Ordinario di Diritto dell'Unione europea, Università di Teramo); **Angela Maria Romito** (Associato di Diritto dell'Unione europea, Università di Bari "Aldo Moro"); **Sandra Winkler** (Associato di Diritto della famiglia, Università di Rijeka).

RESPONSABILE DI REDAZIONE

Isolde Quadranti (Documentalista, Centro di documentazione europea, Università di Verona).

I contributi sono sottoposti ad un procedimento di revisione tra pari a doppio cieco (*double-blind peer review*).
Non sono sottoposti a referaggio esclusivamente i contributi di professori emeriti, di professori ordinari in quiescenza e di giudici di giurisdizioni superiori e internazionali.

2023, numero speciale | special issue

INDICE | TABLE OF CONTENTS

Maria Caterina Baruffi and Laura Calafà <i>Foreword</i>	V
Małgorzata Balwicka-Szczyrba, Anna Sylwestrzak and Dominik Damian Mielewczyk <i>Transcription of foreign civil status documents of children of same-sex parents in Polish law</i>	1
Matteo Caldironi <i>The circulation of the child's legal status in Italy: open issues</i>	15
Cristina Campiglio <i>«Recognition» of civil status records in the aftermath of Regulation (EU) 2016/1191 on public documents: a new functional identity for EU citizens</i>	29
Mădălina Cocoşatu and Claudia Elena Marinică <i>Case law of the European Court of Justice on free movement of persons and public documents: focus on Romania</i>	47
Ester di Napoli, Giacomo Biagioni, Ornella Feraci, Renzo Calvigioni e Paolo Pasqualis <i>La circolazione dello status dei minori attraverso le «frontiere» d'Europa: intersezioni tra diritto dell'Unione e diritto internazionale privato alla luce della sentenza Pancharevo</i>	67
Marco Gerbaudo <i>Public documents on the move in the Area of Freedom, Security and Justice: uniformisation or free circulation?</i>	93
Marion Ho-Dac, Elsa Bernard, Susanne Lilian Gössl, Martina Melcher and Nicolas Nord <i>Reassessing Regulation (EU) 2016/1191 on public documents in the light of EU citizenship</i>	111
Fabienne Jault-Seseke <i>Right to identity and undocumented migrants</i>	145

Eva Kaseva <i>The scope of Regulation (EU) 2016/1191 in the light of Bulgarian domestic law</i>	159
Francesca Maoli <i>Civil status and circulation of public documents in EU and worldwide: the need for a European common framework for third countries</i>	177
Guillermo Palao <i>Challenges to the codification of cross-border dimension of the digitalization of civil status records and registers</i>	195
Stefania Pia Perrino <i>«If you are a parent in one country, you are a parent in every country»: is it true for social parenthood?</i>	209
Marco Poli <i>Quo vadis mater? Motherhood, freedom of movement, and the circulation of documents</i>	229
Irena Ryšánková <i>Die Verordnung im Vergleich zu den Übereinkommen der CIEC und anderen relevanten internationalen Übereinkommen (z.B. Haager Apostille-Übereinkommen (1961))</i>	247
Brody Warren and Nicole Sims <i>The changing nature of trust: the Apostille Convention, digital public documents, and the chain of authentication</i>	269

Foreword

Maria Caterina Baruffi* and Laura Calafà**

This special issue of the journal *Papers di diritto europeo* collects the proceedings of the conference organized within the project «[Identities on the move. Documents cross borders - DxB](#)» (selected under the call for proposals «Action grants to support judicial cooperation in civil and criminal matters» – JUST-JCOO-AG-2020, co-funded by the European Union within the Justice Programme 2014-2020). The project is coordinated by the University of Verona and the Consortium is composed of the University of Graz, the Aristotle University of Thessaloniki, the European Association of Registrars (EVS) and the Italian Association of Civil Status Officers and Registrars (ANUSCA), at whose premises the final conference took place on 23 and 24 June 2022.

The final event has provided the opportunity to deepen the analysis of Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, which was at the core of the research and scientific activities of the DxB project. The idea of focusing on this Regulation comes from the limited knowledge that both practitioners and citizens still have of it, despite its being a valuable instrument to bring people closer and make the European Union more integrated thanks to the simplification of administrative formalities. The issues related to the mutual recognition of public documents and their circulation across Member States are among the most important and urgent challenges in a globalized society. The aim of the project, then, is to raise awareness among registrars and legal practitioners and gain a more extensive expertise on how and to what extent the Regulation is actually applied in national practices, ultimately ensuring a better understanding of this tool.

Against this background, the conference's speakers contributed to give an extensive overview of this EU act in the context of national civil status systems, the free movement of persons and the Charter of fundamental rights of the European Union. Presentations also provided specific information regarding how the Regulation addresses the problematic aspects and deficiencies of the current legal framework, under both interpretative and operational perspectives.

The conference has been a truly international event that effectively encouraged the development of a concrete cooperation among the participants, i.e. scholars, registrars,

* Full Professor of International Law, University of Bergamo (Italy); editor in chief of *Papers di diritto europeo* and staff member of the DxB Project.

** Full Professor of Labour Law, University of Verona (Italy); coordinator of the DxB Project.

public administrators, and practitioners from all over Europe. To all of them goes our gratitude for accepting to taking part in the DxB project as well as to the authors of this special issue. We are also thankful to Alexander Schuster for his input in managing the project and organizing the conference. Thus, the proceedings collected in the following pages represent both a final output and a starting point to further debates and exchange of views on the application of the Public Documents Regulation.

Lastly, the contents of all the papers, which are published in alphabetical order, are the sole responsibility of the respective authors and do not reflect the views of the European Commission.

Right to identity and undocumented migrants

Fabienne Jault-Seseke*

CONTENTS: 1. Introduction. – 2. Context. – 2.1. Current situation. – 2.2. Reasons for the phenomenon. – 2.3. Loss or destruction of the documents in migration cases. – 3. Ways to prevent the lack of documents. – 3.1. Compulsory birth registration. – 3.2. Limiting the risk of fraud by improving civil status services. – 3.2.1. Making civil status services compulsory and facilitating their operation. – 3.2.2. Development aid. – 3.2.3. The use of digital tools. – 3.2.4. Biometric identity. – 4. Compensation for the lack of documents. – 4.1. The case of unaccompanied minors. – 4.2. The case of refugees need for new civil status documents. – 4.2.1. The UNHCR's profile global registration system. – 4.2.2. The reconstitution of civil status documents. – 5. Final remarks.

1. Introduction.

By focusing on the circulation of public documents, one is likely to forget that the individual often has no documents. Whatever the cause, the situation of people without documents needs to be addressed.

Firstly, it is necessary to clarify what is meant by the term «undocumented» in this report. The term is polysemous. Often it refers to people who are staying illegally on the territory of the host country, i.e. without a residence permit. This is not the meaning that will be used here. We focus on issues of civil status and therefore, by «undocumented» migrants, we mean people who are without valid civil status documents or (it could be discussed) without identity documents.

The causes of this mere situation are various: lack of birth registration, lack of recognition, loss of documents during the migration process, individual's desire to erase his or her traces.

This situation is not in line with the fundamental right to a legal identity, as enshrined in Art. 6 of the Universal Declaration on Human Rights¹ and Art. 16 of the International Covenant on Civil and Political Rights². In accordance with these texts, «being documented» is a prerequisite for exercising all other rights. Therefore, the lack of documentation must be fought to enable everyone to be recognised as a person before the law. In this way, the UN's Sustainable Development Goals for 2030 include «ensuring

* Professor, Institut universitaire de France, University of Paris Saclay (France).

¹ According to this provision of the [Universal Declaration of Human Rights](#) of 10 December 1948, «[e]veryone has the right to recognition everywhere as a person before the law».

² According to this provision of the [International Covenant on Civil and Political Rights](#) of 16 December 1966, «[e]veryone shall have the right to recognition everywhere as a person before the law».

legal identity for all, including through birth registration»³. A number of texts translates this objective. Consideration must always be given to limiting the number of undocumented persons. Not having documents poses specific difficulties when dealing with the situation of migrants. For example, the Global Compact on Refugees (para. 82) sees civil and birth registration as a major tool for protection⁴.

Significant efforts have already been made at various levels. There should be continued. Moreover, whatever the cause of lack of documents, the possibility of reconstituting civil status should be considered. It already exists in some Member States and should inspire the European legislator in order to guarantee the right to identity. The subject is very broad and the sole aim of this article is to draw attention to the difficulties encountered by migrants in the field of civil status and to suggest that the European Union should engage in the search for common solutions.

2. Context.

2.1. Current situation.

Today, one in four children under the age of 5 are not registered at birth, according to UNICEF data. And even when they are registered, they may not have proof of registration. An estimated 237 million children under 5 years old worldwide are currently without a birth certificate.

Even where documents exist, their effectiveness is often questioned. Not being able to prove the validity of a document is tantamount to not proving one's civil status and identity and therefore to not having an identity⁵.

Different challenges should be addressed. We will focus on fraud and on the competent authority.

Fraud is often presumed, which leads to the refusal to recognise documents. Some elements of comparative law help to understand the difficulties.

In France, Art. 47 of the civil code states that «[f]ull faith must be given to acts of civil status of French persons and of aliens made in a foreign country and drawn up in the forms in use in that country, unless other records or documents retained, external

³ See [Sustainable Development Goals](#) – Target 16.9.

⁴ [Global Compact for Refugees](#) affirmed by the UN General Assembly on 18 December 2018. See also the [Global Compact for Migration](#): objective 4, para. 20 commits «to fulfil the right of all individuals to a legal identity by providing all (...) nationals with proof of nationality and relevant documentation, allowing national and local authorities to ascertain a migrant's legal identity» and «to ensure (...) that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration, as a means to empower migrants to effectively exercise their human rights».

⁵ More in detail, see S. DEN HAESSE, *Crossing borders: proving your personal status, Interactions between Private International Law and Human Rights Law*, Ghent, 2021.

evidence, or elements drawn from the act itself establish, after all useful verifications if necessary, that the act is irregular, forged, or that the facts declared therein do not square with the truth». Under the guise of recognising the probative value of documents drawn up abroad, it allows them to be set aside quite easily⁶. Moreover, this provision emphasises indirectly on legalization, a process whose usefulness remains to be demonstrated⁷.

In Belgium, on one hand, Art. 34 of the *code consulaire* focuses also on legalization and allows the Belgian authorities to investigate the regularity and content of the act; on the other hand, Art. 27 of the *Code de droit international privé* which makes the recognition of the act subject to conflict of laws reasoning. This reasoning would often lead to a foreign law which is very difficult to apply by the different authorities concerned. In a nutshell, due to fear of fraud, the obstacles to the rapid circulation of documents are extremely numerous.

In the Netherlands, a presumption of fraud was even introduced between 1996 and 2006 for documents originating from certain States. The Dutch Council of State put an end to this derogatory procedure.

Such examples could be multiplied. Document verification procedures are very often time-consuming. During the whole procedure, the person concerned cannot assert these rights. This situation is aggravated by the fact that the authorities responsible for checking these documents are very diverse. They do not necessarily have the knowledge to carry out the check effectively. However, the right to good administration as enshrined in Art. 41 of EU Charter of Fundamental Rights should be guaranteed⁸.

2.2. Reasons for the phenomenon.

Many people do not have any documents. Sometimes they never had. Sometimes they no more have it. Even where valid documents have existed, they may have been lost or destroyed. These are not uncommon in migration situations. So, the reasons for being undocumented are various.

Here is a list, with illustrations. This list does not intend to be exhaustive.

Lack of birth registration:

⁶ See for example F. JAULT-SESEKE, *Nationalité et fraude en matière d'état civil*, in E. RALSER, J. KNETSCH (direction), *La nationalité française dans l'Océan indien*, Paris, 2017, pp. 227-241.

⁷ D. PRADINES, T. JANICOT, *Légaliser, est-ce déjà prouver?*, in *Actualité juridique du droit administratif*, 2022, pp. 1503-1508.

⁸ Comp. European Court of Human Rights, judgments of 10 July 2014, application [no 52701/09](#), application [no 2260/10](#), application [no 19113/09](#), and application [no 23851/10](#); see also P. KLÖTGEN, S. CORNELOUP, L. D'AVOUT, *Nationalité. Condition des étrangers*, in *Revue critique de droit international privé*, 2015, pp. 355-388, at p. 373.

- cost/usefulness: host States are «obsessed» with dates and documents when in many countries of origin, people do not need identity documents for their daily life. Many people do not know their date of birth. Many vital events do not involve public authority⁹. In many countries, civil status services are still to be organized¹⁰;

- cultural barriers (Roma, etc.);

- discrimination organized by the law;

- gender discrimination¹¹: in some countries it is fathers or another male family member who are assigned the legal responsibility of registering a child's birth. If the father does not register the birth, the child may go unregistered. In others, doctors, midwives, or tribal chiefs who attend a child's birth are prioritized over the mother in the list of community members who have the right to register the birth. In addition, there are countries where a mother's legal right to register her child's birth depends on her ability to prove that the child was born in wedlock;

- discrimination on the basis of nationality: in the Republic of Korea (RoK), the current system does not allow for birth registration of children born in the RoK when both parents have foreign nationality(ies). Instead, parents with foreign nationality(ies) are expected to register the birth of their children at the embassies of their nationality(ies). This situation constitutes a challenge for some population, notably refugees and asylum-seekers, as well as undocumented migrants, and other groups of migrants who may be unwilling to approach their embassies, for protection related reasons, or those who are unable to register their children's birth or are faced with practical obstacles that prevent them from doing so, including gaps in the legislation of their countries of origin or lack of their countries' embassy in the RoK;

- fear;

- ethnic discrimination: in Rwanda, during the genocide in 1994, birth certificates were used to identify the ethnic origins of children and adults for extermination;

- war: in Eritrea, registers were used to identify young people who were likely to be forcibly recruited into the army;

- technical obstacles;

- distance from registration offices-

Lack of recognition:

- lack of reliability of civil registration systems in States of origin;

⁹ See S. CORNELOUP, J. VERHELLEN, *Providing legal identity for all – A means to empower migrants to exercise their rights*, in R. MICHAELS, V. RUIZ ABOU-NIGM, H. VAN LOON (eds), in *SDG 2030 and Private International Law*, Intersentia, 2020.

¹⁰ See further, ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE, *Deuxième guide pratique, Pour la consolidation de l'état civil dans l'espace francophone: enjeux et perspectives pour les acteurs de la Francophonie*, 2022.

¹¹ See the [UNHCR press release of 7 July 2021](#).

- fraud or fear of fraud¹²;
- insufficient cooperation between States of origin and Host State. Host states are at a loss and may tend to look suspiciously at foreign acts. They are reduced to tinkering¹³.

2.3. Loss or destruction of the documents in migration cases.

Again, the causes are diverse. The loss of documents can be explained by the conditions under which the persons concerned left their country of origin, by the need to entrust them to the authorities of transit countries, or even to smugglers. The destruction of documents, on the other hand, is due to the desire not to leave any trace in order to avoid persecution by the authorities of the country one is trying to flee. It may also be a way of circumventing the application of the rules of the host countries which the person concerned considers unfavourable, either because he or she is of age and seeks to take advantage of the rules intended to protect minors, or because he or she does not wish to be sent back to the country through which he or she entered the Union (application of the Dublin Regulation).

These developments do not claim to be exhaustive. They are nevertheless sufficient to demonstrate the need for solutions to protect the right to identity.

3. Ways to prevent the lack of document.

3.1. Compulsory birth registration.

Birth registration by national authorities establishes the existence of a person under the law and lays the foundation for the safeguarding of a person's human rights throughout their life, including access to education, health care, work, banking, social security, as well as registering the births of their own children. Birth registration is also key to reducing the risk of statelessness. While birth registration does not by itself confer nationality, it does constitute important proof of where a child was born and who the child's parents are, thus providing key information to assert the child's right to nationality based on place of birth (*jus soli*) or of descent (*jus sanguinis*).

¹² See Note on the compatibility with the ECHR of legislative and regulatory measures taking by States to combat with respect to civil status in the [Study of the International Commission of Civil Status](#), 2000, p. 38.

¹³ For example, see the practices of the French consulate in Senegal: in the absence of cooperation, the French consulate has established a database to assess the plausibility of the act (see the intervention of L. FICHOT at the seminar *La preuve de l'état des personnes*, organized by the *Centre de droit de la famille de l'Université Jean Moulin - Lyon 3* and the *Cour de cassation*, held at the French Supreme Court on 17 March 2022).

Birth registration is a fundamental right, recognised by Art. 24, para. 2, of the International Covenant on Civil and Political Rights and Art. 7 of the Convention on the Rights of the Child¹⁴.

UNHCR and UNICEF are working together to promote birth registration. They showed that States as diverse as Guinea, South Sudan, and Mozambique have taken steps to reform civil registration laws, affording equal rights to women for birth registration. They also jointly lead the «Coalition on Every Child's Right to a Nationality», established to address statelessness among children as part of the «#IBelong Campaign to End Statelessness»¹⁵.

In the Republic of Korea (see above), UNHCR has been actively involved to implement universal birth registration for children born to parents with foreign nationalities («Universal Birth Registration Network of the Republic of Korea»). UNHCR was involved in a draft legislation on birth registration and the Ministry of Justice announced its plan to propose a new Law that would allow birth registration for children born to parents with foreign nationality(ies)¹⁶.

Some regional Organisations are also deeply involved in favour of birth registration. For example, in 2008, Organisation of American States (OAS) adopted an Universal Civil Identity Program in the Americas (PUICA). This program entrusts the General Secretariat of the OAS to assist Member States in their efforts to achieve universality and accessibility of the civil registry and comply with the goal of universal birth registration by 2015.

Several levers can be used to combat the lack of birth registration. UN agencies, Regional Organisations, NGOs¹⁷ can raise awareness of the population and of the governments on the issue of civil status; dialogue to overcome cultural barriers. in the context of humanitarian operations, they can register children and beyond that help to establish proof of civil status. It is important to rely on medical structures where they exist. Several reports emphasise the essential links between civil registers and the health sector: maternity wards (for birth declarations by maternity wards or midwives who travel to the communities), and medical services for children under 5. It is suggested that birth declarations be coupled with vaccination campaigns, in the hope that the armed conflict will not lead to the suspension of these campaigns. It is also necessary to involve civil society, religious and community authorities, especially to overcome cultural barriers.

¹⁴ [Convention on the Rights of the Child](#) of 20 November 1989.

¹⁵ See the website: <https://www.unhcr.org/ibelong/unicef-unhcr-coalition-child-right-nationality/>.

¹⁶ See UNHCR, [Compilation of good practices on Engaging with Human Rights Systems](#), February 2022.

¹⁷ For example, see the role played by *Plan international*, specifically its report [Innovations in Birth Registration](#), 2017.

Birth registration is important. It is not enough¹⁸. Other vital events have to be registered. Moreover, the registration is not an end. It should lead to the issuance of a valid document which can be easily recognized in a State that is not the one that issued it, namely in case of migration in the transit States and in the host State.

3.2. Limiting the risk of fraud by improving civil status services.

3.2.1. Making civil status services compulsory and facilitating their operation.

The United Nations have since early 1950s developed an international set of standards and recommendations on establishing, maintaining and operating national civil registration systems¹⁹. The «United Nations Legal Identity Agenda», launched in May 2019²⁰, refers to the holistic approach to civil registration of all vital events, production of vital statistics, the establishment and maintenance of population registers and identity management apparatus from birth to death, and requires full interoperability between these functions in a simultaneous manner, according to international standards and recommendations and in compliance with the human rights of all people concerned, including the right to privacy. All United Nations Member States should adopt and implement this agenda as a systematic and perpetual mechanism for ensuring legal identity for all. The United Nations have also highlighted «good practices» for the registration, for instance by developing mobile units that travel to regions far from capital cities.

Refugees are in a special situation. For the UNHCR, births should be systematically recorded within the national civil registry in accordance with relevant legal requirements. UNHCR insists that's its own registration of births (see below) does not replace the official record made by the authorities in the country of birth. In other words, the issuance of identity documents for refugees is the primary responsibility of the government of the host state²¹. Identity documents issued by national authorities ensure that the identity and status of refugees are formally recognized in the country of asylum, facilitating access to rights, protection, services and opportunities afforded to them as refugees. If needed, UNHCR can provide technical and/or material support to enable the government to issue identity documents for refugees. A partnership between UNHCR and the host State can

¹⁸ UNICEF reports on the large gap between the number of children whose births are reported as registered and those who actually have a birth certificate.

¹⁹ UNITED NATIONS, Department of Economic and Social Affairs, Statistic Division, [Principles and Recommendations for a Vital Statistics System, Revision 3](#), Statistical Papers, Series M No. 19/Rev.3, New York, 2014.

²⁰ See <https://unstats.un.org/legal-identity-agenda/>.

²¹ [Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 convention and the 1967 protocol relating to the status of refugees](#), reissued Geneva, February 2019.

lead to joint registration but the government is the main responsible actor. Only where there is no agreement from the government to use its logo should identity cards be issued with just UNHCR's logo. In addition, host governments should register the vital events of refugees and asylum-seekers occurring on its territory and issue the related documentation.

3.2.2. Development aid.

The EU has multiplied actions to develop civil status services in countries where they are lacking²². These actions should be continued with greater emphasis on the need for child protection – currently the EU Trust Fund for Africa is mainly used to stop irregular migration and to conclude agreements with countries of origin for the return of their nationals²³ - and without necessarily favouring so-called stable countries.

France has recently adopted a Roadmap for international action in the field of civil status (2021-2027) which highlights three objectives: increasing international and European mobilisation in favour of civil status and legal identity; reinforcing the consideration of civil status in French public development aid; raising awareness on the issues of civil status and birth registration²⁴.

To meet their objectives, these different programs consider technological developments.

3.2.3. The use of digital tools.

The use of innovative technologies is part of the solution to fight the lack of document. This can be quite simple. For instance, the use of mobile phones can be sufficient to transmit birth declarations. Various experiments have already been made. Let's take a few of the many examples:

- mobile phone technology has been first used in emergencies: in Indonesia, during the aftermath of the tsunami, the NGO *Plan International* used this technology to capture birth notification data electronically and to transmit them to a central database using POIMAPPER software. Using this technology, staff could visit a household, enter

²² Following the Valetta Summit of 2015, where the EU decided to cooperate with countries of origin of migrants to address the absence of identification documents, several African countries contracted, with the help of the EU Trust Fund for Africa, with private or semi-public security companies in order to set up biometric-based identification systems and documents.

²³ See S. CORNELOUP, J. VERHELLEN, cited above, quoting also the business of Civipol in Senegal which aimed to strengthen the civil registration system and create a biometric national identity register.

²⁴ See https://www.diplomatie.gouv.fr/IMG/pdf/feuille-de-route_etat-civil_2021_cle0b1cb5.pdf.

coordinates, obtain required data and a photograph and upload the information onto a central website²⁵;

- the startup iCivil Africa develops iCivil™, in order to enable African States to set up civil status registers. SMS declaration leading automatically to the issuance of verifiable authentic acts, from a bubble bracelet of identification/digital self-identification of newborns (an unbreakable interphase link provided by the bubble code). SMS messages are encrypted to transmit information quickly without moving. The SMS is received instantly on the server of the national registry office, which automatically leads to the drafting of a birth certificate that will be ready to be printed and signed by the competent authority. Authentic and verifiable birth certificates are obtained on presentation of the bracelet (token), given on the day of delivery. Any civil status center in the country will be able to consult, print and deliver the extracts on request. The authorities, security forces and administrations will also be able to check the authenticity of any civil status document in circulation, instantly online. The control is done on the dedicated governmental web portal (Experimentation underway in Burkina Faso). The contractual model iCivil is based on a licensing agreement with the government.

Innovative technology allows to compensate for the absence of civil status services but also to replace paper (for a better preservation of information, for a greater speed of operations, for a reduction in costs, to allow declarations/consultations to be carried out at a distance, etc.).

There is a need for the establishment of a legal framework providing the necessary guarantees, in order to cover the three stages: declaration of the birth, registration, and the issue of a birth certificate. Dematerialisation also has an interest in improving the delivery of copies and extracts, which often takes a long time, during which the child is deprived of proof of his or her civil status²⁶.

3.2.4. Biometric identity.

Biometrics refer to technologies for the physical or biological recognition of individuals, based on different data that are «unique». These data are various: the most widely used are fingerprints and genetic fingerprints; today they are joined by facial photography or iris capture; tomorrow it will be blood pressure or ear shape, before the relevance of other data will be revealed.

The use of biometrics to facilitate authentication (checking the accuracy of claimed identity) and identification (determining identity by comparing biometric data with those in databases) of foreigners is already common. Files processing biometric data, more or

²⁵ PLAN INTERNATIONAL, *Birth registration in emergencies: a review of best practices in humanitarian action*, 2014, p. 33, available [online](#).

²⁶ See G. PALAO, *Challenges to the codification of cross-border dimension of the digitalization of civil status records and registers*, in this [Special issue](#).

less specific to third country nationals, have multiplied. While the use of biometrics may in some ways appear to be a miracle solution, its reliability is not indisputable (complicated fingerprinting for the youngest, the oldest, the disabled, or even impossible for people who regularly use corrosive products, alteration of the reliability of the data linked to the ageing of the body; in addition, there is the risk of computer security).

The solution must be surrounded by guarantees. Too often legal identity using biometrics is addressed through the lens of security and identity control²⁷.

4. Compensation for the lack of documents.

The need to address the lack of documentation is based not only on practical considerations but also on the fight against human trafficking and on the preservation of fundamental rights, be it the right to identity or the best interests of the child.

Undocumented children are deprived of their fundamental rights: without a birth certificate, a child is at greater risk of statelessness and exclusion from essential services including health care and education. Undocumented children on the move raise overarching difficulties. Often the host State emphasizes the need to control immigration. With the UNICEF, it should be recalled that children on the move are children first. The issue of unaccompanied minors is a sensitive one. The situation of refugees regarding their right to identity should also be considered.

4.1. The case of unaccompanied minors.

Doubts may exist regarding the age of unaccompanied minors seeking protection in host countries. Fraud is often alleged to the detriment of the best interests of the child.

Many States have specific age assessment procedures. They are various. Some are based on interviews with the child. Still often, medical examinations and bone tests are done.

Regarding the best interests of the child (and according to EU asylum law), minority should be presumed when it is not possible to determine the child's age with sufficient certainty. This solution often remains theoretical. In practice, authorities conclude easily that the child is over the age of majority.

The principle of giving the benefit of the doubt to the child should be implemented.

There are some positive evolutions. For example, in France, Art. 388 of the civil Code states that the findings of bone X-ray examinations for age determination purposes, in the absence of valid identity documents, which must specify the margin of error, cannot

²⁷ On this topic, see F. JAULT-SESEKE, *L'identité biométrique de l'étranger*, in H. FULCHIRON (sous la direction de), *La famille du migrant*, Strasbourg, 2020, pp. 262-273.

alone determine whether the person concerned is a minor. It adds that doubt benefits the person concerned²⁸.

Moreover, in a recent and important judgment, the European Court of Human Rights has linked the primary importance of the best interests of the child with the principle of presumption of minority in respect of unaccompanied migrant children reaching Europe²⁹. This movement which takes into account the vulnerability of the migrant child must be continued.

4.2. The case of refugees: need for new civil status documents.

4.2.1. The UNHCR's profile global registration system.

The UNHCR plays a key role in the process of identifying refugees. In 2002, UNHCR developed an IT case management tool called proGres (Profile Global Registration System). The proGres tool provides a common source of information about individuals that is used by different work units to facilitate protection of persons of concern to the organization. proGres is the main repository in UNHCR for storing individuals' data. It has now rolled-out additional IT tools which are complementary to progress. The new system is named PRIMES for «Population Registration and Identity Management EcoSystem». While proGres stored data locally – around 500 data bases worldwide – PRIMES consolidates all UNHCR data in a single database that can be accessed via the web. It encompasses all interoperable UNHCR registration, identity management and caseload management tools and applications (existing ones, such as proGres and BIMS, as well as those developed in the future. PRIMES will be interoperable with IT systems used by governments (mainly in the area of civil registration and population registries) and partner organizations, such as WFP (SCOPE) and Unicef (Primero)³⁰.

A separate process, where required by governments or service providers, will offer «validation» or authentication of identities (on the basis of available evidence and interaction with UNHCR over time), giving high, substantive or moderate assurance of the claimed identity.

²⁸ For an application, see recently *Cour de Cassation*, judgment of 12 January 2022, [no 20-17.343](#). The case concerned a boy born in Guinea having a suppletive judgment, an extract from the civil status register and a passport but these documents were not considered conclusive and an expertise was ordered. The Court of Appeal which had not put the doubt in favour of the boy is censured.

²⁹ European Court of Human Rights, judgment of 21 July 2022, application [no 5797/17](#), *Darboe*.

³⁰ Rapid Application (RApp) – which allows an offline data collection of refugees (later uploaded to proGres), IDPs, and others; BIMS – the Biometric Identity Management System that captures biometrics; CashAssist – that enables registered refugees to receive cash assistance; GDT or Global Distribution Tool, allowing registered refugees to receive in-kind assistance (food, NFI, etc.).

4.2.2. The reconstitution of civil status documents.

The reconstitution of civil status documents exists already. It has to be generalized.

In France, two provisions are of interest. The first is the Art. L 121-9 of the CESEDA. It provides that the French Office for the Protection of Refugees and Stateless Persons (OFPRA) is authorised to issue to refugees and beneficiaries of subsidiary protection or stateless status, after investigation if necessary, the documents necessary to enable them either to carry out the various acts of civil life, or to have the provisions of domestic legislation or international agreements concerning their protection applied, in particular documents in lieu of civil status certificates. The Director General of the Office shall authenticate the acts and documents submitted to him. The acts and documents he draws up shall have the value of authentic instruments. These various documents shall make up for the absence of acts and documents issued in the country of origin. The second provision is the Art. 46 of the civil code. It states that «where no registers exist, or where they are lost, proof shall be received both by titles and by witnesses; and, in such cases, marriages, births and deaths may be proved both by the registers and documents emanating from deceased fathers and mothers, and by witnesses». Until the reconstitution or restitution of the registers has been carried out, all civil status records whose originals have been destroyed or have disappeared as a result of a disaster or acts of war may be replaced by notarial deeds. These notarial deeds are issued by a notary. The notarial deed is drawn up on the basis of the statements of at least three witnesses and any other documents produced which attest to the civil status of the person concerned. The notarial deed is signed by the notary and the witnesses.

Other countries also authorize the reconstitution of documents. For example, in Belgium, the commissariat for refugee establishes an attestation that will serve as basis for a new certificate (civil register). Only the refugees and not the beneficiaries of subsidiary protection benefits from this solution.

Thus, in specific situations, the law provides for the reconstitution of documents. Shouldn't the reconstitution be increased, or even generalized as the Court of Appeal of Paris several times suggested it³¹?

5. Final remarks.

³¹ French case law: when a person has no known civil status, one must be established for him or her by a declaration of birth (Paris, 3 November 1927, D.P. 1930, 2, 25, D.C. 1930, 2, 25, note Savatier). There is a public policy interest in any person habitually living in France, even if he or she was born abroad and has a foreign nationality, being provided with a civil status (Paris, 24 February 1977, D.S. 1978, 168; Paris, 2 April 1998, in *Revue trimestrielle de droit civil*, 1998, p. 651). *Adde* C. BIDAUD, H. FULCHIRON, under *Cass., Ass. Plén., 3 juill. 2015, D., 2015, p. 1819* and C. BIDAUD, *La transcription des actes de l'état civil étrangers sur les registres français*, in *Revue critique de Droit International Privé*, 2020, p. 247 suggesting the creation of an *ad hoc* claim.

Different ways exist to enforce the right to identity which must be recognised for every person and which is particularly threatened in situation of migration.

Until now, each Member State has been dealing with the issue without real EU coordination. The European Union has a role to play. The European Union has competence and not only in the frame of the development aid. Its action is also a matter of Asylum and Migration Policy (Arts. 78 to 80 TFEU). It has to cooperate with existing relevant organisations, namely the Hague conference of Private International Law, the United Nations, and the International Commission on Civil Statute. The existence of this *ad hoc* international organisation is an asset that should be used rather than weakened.

ABSTRACT: In various cases, migrants have no documents or no valid documents. Their right to identity is therefore threatened. There are various solutions to combat this risk. On the one hand, the improvement of civil status services in countries of origin, namely through digitalization or biometric techniques, is to be explored. On the other, reconstitution of civil identity in transit and host countries should also be considered.

KEYWORDS: Migration; right to identity; documents; birth registration; digitalization.