

# WHICH CHILDREN HAVE RIGHTS? THE CHILD'S RIGHT TO BODILY INTEGRITY AND PROTECTION GAPS FOR CHILDREN WITH INTERSEX TRAITS UNDER INTERNATIONAL AND NATIONAL LAWS

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## **Abstract**

This article examines protection gaps for children with intersex traits under international and national laws governing non-voluntary medicalized interventions into sexual anatomy. Various United Nations (UN) bodies, including the UN Special Rapporteur on Torture, the Office of the High Commissioner for Human Rights, human rights treaty-monitoring bodies and the Human Rights Council, have called for full acknowledgment and substantive protection of the rights of children with intersex variations—as with all children—to bodily integrity and (future) bodily autonomy in relation to their own sexed embodiment. However, these global norms generally have not been codified under international law, and most countries have not passed adequate, or any, legislation to secure these rights. We review relevant global norms, international human rights treaties and legislative developments in a range of countries to illustrate potential pathways for closing legal gaps in the protection of all children's rights to bodily integrity and (future) bodily and sexual autonomy.

**Keywords:** bodily integrity; children's rights; gender binary; non-voluntary medical interventions; human rights; intersex.

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## [A] INTRODUCTION

This article examines protection gaps under international and national laws governing medically unnecessary, non-voluntary interventions into children's bodies—including their sexual or reproductive anatomy—that fail to secure the rights of children born with congenital variations of sex characteristics or intersex traits (hereafter, "intersex children")<sup>1</sup> to bodily integrity and (future) bodily autonomy. Various United Nations (UN) bodies, including the UN Special Rapporteur on Torture, the Office of the High Commissioner for Human Rights (OHCHR), human rights treaty-monitoring bodies (2023) and the Human Rights Council (Human Rights Watch 2024), have called for recognition and protection of the rights of intersex children (irrespective of their sex designation or socially assigned gender) to physical and mental self-determination in relation to such intimate matters as identity, sexuality and sexed embodiment (eg the choice to remain genitally intact versus altered) (Bauer & Ors 2020; Carpenter 2020). Despite these normative developments within the UN, people born with intersex variations are not explicitly protected by international human rights treaties or recognized under most national legal systems (Bird 2005; Carpenter 2024).

Our primary focus is the right of children (including intersex children), defined here as legal minors under the age of 18, to bodily *integrity*. We understand the right to bodily integrity broadly as a defensive moral right against unwarranted intrusions into one's physical embodiment, where this right applies even to individuals who may lack, or who have not yet developed, the capacity for fully autonomous decision-making in the relevant sphere (eg infants) (Earp 2019; Pugh 2023; see also Mazor 2024). How this right relates to the associated but distinct right to bodily *autonomy* is a complex matter that goes beyond the scope of the present analysis. We, therefore, focus primarily on the defensive right to bodily

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<sup>1</sup> The term intersex is used to describe variations in sex traits due to one or more differences of development, including statistically atypical reproductive anatomy or sex organ morphology and distinct hormonal or sex chromosome patterns. Such variations may be evident at birth, may be recognized later in life, or may go unobserved (ILGA 2023: 11). We acknowledge at the outset diverse perspectives regarding the appropriate terminology to use when discussing this topic. Some individuals born with variations in sex characteristics describe themselves as intersex. Others prefer person-first terminology and refer to themselves as people with intersex variations. Yet others rely on medicalized labels or discourses describing intersex variations as conditions or disorders, while embracing a "binary" male or female identity (ILGA 2023: 11). Because this manuscript centres a rights-based framework seeking to advance intersex rights as human rights, we primarily rely on the language used by intersex rights advocates and organizations. Accordingly, we use the terminology "intersex" when discussing the broad class of persons born with congenital variations in sex characteristics, without thereby implying anything about the appropriate sex or gender designation of any particular individual born with such characteristics.

integrity possessed by all individuals, whether they have the relevant capacities for autonomy.

Relatedly, we are concerned only with bodily interferences (for example, by means of surgery or the administration of hormones) that are *non-voluntary* (viz, performed without the valid consent of the individual, whether due to competent refusal or a lack of consent capacity), unless the interference is medically necessary (see Brussels Collaboration on Bodily Integrity (BCBI) 2019; Wilkinson 2023; BCBI in press), that is, necessary to preserve or restore the physical health of the individual where the intervention in question cannot ethically be avoided or delayed (for example, until the individual is able to consent on their own behalf).<sup>2</sup>

Despite calls by UN agencies to protect intersex children's rights to bodily integrity, approximately 94 per cent of UN member states have not adopted adequate legal measures. According to ILGA World (International Lesbian, Gay, Bisexual, Trans and Intersex Association), only two countries—Greece and Malta—have adopted legal prohibitions and criminal liability for medically unnecessary, non-voluntary (hereafter “unwarranted”) genital interventions on intersex minors (ILGA World 2023: 18-19). Four countries—Germany, Iceland, Portugal and Spain—have passed legal prohibitions against such interventions but have not established criminal liability (*ibid*). Three additional countries, Austria, Belgium and Uruguay, have adopted weaker measures intended to restrict or reduce unwarranted genital interventions on intersex children but do not prohibit or criminalize these interventions. Similarly, some cities—Delhi (India), Geneva (Switzerland) and Austin, Texas (United States)—have sought to restrict or reduce such interventions, but these efforts have been minimally effective (*ibid* 60-61). Failed legislative efforts to advance

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<sup>2</sup> It is important to emphasize that the detection of intersex variations in infancy or early childhood can, in some cases, signal the likely existence of a physical health problem requiring urgent medical intervention (eg through hormones or surgery) to save the life of the child or otherwise prevent a likely and substantial loss to health or wellbeing (Hegarty & Ors 2021). We are not concerned with such cases here. Rather, we have in mind non-voluntary interventions whose proximate goal is to cosmetically reshape the child's anatomy to more closely conform to perceived ideals for male or female embodiment. We acknowledge that such interventions may often be intended to secure the child's future wellbeing considered from a psychosocial perspective, based on certain assumptions about how they may later identify or potentially be (mis)treated by others (Hegarty & Ors 2021). However, there is no compelling evidence that non-voluntary surgery or hormones are necessary or generally effective toward such ends, at least when compared with psychosocial-only interventions and/or voluntary surgery or hormones later authorized by the individual themselves (that is, when they are able to provide their own valid consent, or at least their morally significant assent or agreement, for example in conjunction with parental proxy permission) (Zeiler & Wickström 2009). By contrast, there is a large body of evidence suggesting that many intersex persons greatly resent, or feel harmed by, having been non-voluntarily subjected to surgeries or hormones to alter their sex characteristics (Carpenter 2016; Kennedy 2016; Munro & Ors 2017; Carpenter 2020; Carpenter 2024; BCBI, in press).

the rights of intersex children occurred in Argentina, Chile, New Zealand, the Philippines, South Africa, Spain and the United States. Even in cases where national legislation has been passed, legal loopholes, imprecise legal commitments and weak enforcement limit the effectiveness of these measures (Danon & Ors 2023).

The next section provides an overview of global norms calling for basic human rights for intersex children, with an emphasis on the right to bodily integrity, and considers the absence of such protections in binding international human rights treaties. The subsequent section outlines a typography of gaps between global norms calling for rights-based protections for intersex children and the failure of most countries to adopt such protections. Our analysis identifies potential pathways for closing legal gaps in the protection of all children's bodily integrity rights. It also sheds light on the cultural and political barriers to advancing the rights of intersex people as human rights.

## [B] INTERNATIONAL HUMAN RIGHTS LAW AND GLOBAL NORMS: CONSTRUCTING THE RIGHTS OF INTERSEX CHILDREN TO BODILY INTEGRITY

Transnational advocacy by intersex activists and organizations has been a major force driving the development of emergent global norms asserting intersex rights as human rights (Bauer & Ors 2020; ILGA 2023: 59). The UN has served as an important political site for the development and dissemination of norms advancing intersex human rights generally and the rights of intersex children to bodily integrity specifically. Intersex activists and organizations have been successful in placing intersex rights on the agendas of major UN bodies which, in turn, has elevated the visibility of intersex rights globally (Garland & Ors 2022). Although important, emerging global norms constructing a vision of intersex rights as human rights have not been codified into binding international treaties.

Our conceptualization of global norms in this section has been shaped by constructivist international relations theories focusing on how ideas and discourses can mobilize political actors and new forms of advocacy, shape state interests, shift the agendas of international institutions, and alter patterns of global politics (Finnemore & Sikkink 1998: 891-893). Global norms, often advanced by non-state actors and characterized as "soft law", are distinct from the binding international treaties forming the state-centric core of positive international law (Abbott & Snidal 2003).

The emergent soft law calling for the rights of intersex children to bodily integrity is non-binding and has not been formally codified by states into human rights treaties. As we will see in the subsequent section, the substantial gaps between UN normative frameworks, international human rights treaties, and national laws governing non-voluntary medicalized interventions into sexual anatomy help explain the pervasive absence of concrete legal protections globally for intersex children's right to bodily integrity.

Unwarranted (ie medically unnecessary, non-voluntary) interventions, including surgical procedures, into the sexual anatomy of children implicate numerous human rights, including the right to be free from torture, the right to equality under the law without discrimination, the right to the highest attainable standards of physical and mental health, and rights to (future) bodily autonomy, bodily integrity and self-determination. These rights have been codified in numerous international human rights treaties, including the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the Convention on the Elimination of All Forms of Discrimination Against Women 1979, the Convention on the Rights of the Child 1989 and the Convention on the Rights of Persons with Disabilities 2006. Although a right to bodily integrity for intersex children might be read into these codified rights, international human rights law does not formally recognize people with intersex traits as a protected category. The non-discrimination clauses of major human rights treaties include sex as a category for which discrimination is proscribed but do not expressly cover variations in sex characteristics. Instead, international human rights treaties traditionally have interpreted sex as referring to biological sex categorized according to a male/female binary (O'Connor & Ors 2022).

Despite these legal gaps, there has been significant development of global norms articulating intersex rights as human rights. The evolution of the Yogyakarta Principles illustrates the progressive development of such global norms. Developed in 2006 by a coalition of human rights and SOGIESC (sexual orientation, gender identity, expression and sex characteristics) advocacy organizations, the Yogyakarta Principles are a non-binding set of 29 Principles aligning SOGIESC rights with human rights standards under international law (Vance & Ors 2018). Without explicitly identifying variations in sex characteristics as a protected category, the Yogyakarta Principles laid a normative foundation for claiming bodily integrity and autonomy rights for intersex people. Principle 18 calls for states to ensure full protection against "harmful medical practices based on sexual orientation or gender identity". This

Principle calls upon states to take measures “to ensure that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child”. Additionally, Principle 18 criticizes state policies condoning or allowing practices treating diverse sexual orientations and gender identities as medical conditions in need of correction or treatment.

The Yogyakarta Principles plus 10 (YP+10), adopted in 2017, extend protections to intersex people by expanding the list of protected categories to include sex characteristics as well as SOGIESC. Principle 32 articulates rights to bodily autonomy and integrity and calls for non-discrimination on the basis of sex characteristics:

Everyone has the right to bodily and mental integrity, autonomy and self-determination, irrespective of sexual orientation, gender identity, gender expression or sex characteristics. Everyone has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of sexual orientation, gender identity, gender expression, and sex characteristics. No one shall be subjected to invasive or irreversible medical procedures that modify sex characteristics without their free, prior and informed consent, unless necessary to avoid serious, urgent and irreparable harm to the concerned person.

Importantly, Principle 32 links bodily integrity and autonomy rights with the right to be free from torture and cruel, inhuman, or degrading treatment.

Drawing partly on the normative standards set by the Yogyakarta Principles, the transnational intersex advocacy movement has worked within the UN system to amplify advocacy for intersex rights as human rights (ILGA 2023: 43). A wide array of UN bodies has been involved in the development of global norms articulating human rights for intersex people. Treaty-monitoring bodies for the core human rights treaties have played a leading role in interpreting codified principles of international law in ways that advance the human rights of intersex people. The Committee on the Elimination of Discrimination Against Women (CEDAW) was the first treaty-monitoring body to formulate intersex rights as human rights. In its 2009 concluding observations on Germany’s sixth periodic report, CEDAW recommended that Germany “enter into dialogue with non-governmental organizations of intersexual and transsexual people in order to better understand their claims and to take effective action to protect their human rights” (CEDAW 2009: paragraph 62).

The Committee on the Rights of the Child (CRC) has interpreted Article 19 of the Convention on the Rights of the Child 1989, which calls for states parties “to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation” in a manner affirming bodily integrity rights for children with variations in sex characteristics. In General Comment No 13, the CRC identified a range of harmful practices, including corporal punishment, female genital cutting/mutilation and violent and degrading initiation rites, which constitute a form of violence under article 19 (CRC 2011: paragraph 29). Building on this interpretation, the CRC characterized non-voluntary, medically unnecessary interventions on intersex children as violations of the right to bodily integrity and of the “emerging” autonomy of the child in General Comment No 20. The CRC emphasizes “the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy” and “condemns the imposition of so-called ‘treatments’ to try to change sexual orientation and forced surgeries or treatments on intersex adolescents” (CRC 2016: paragraph 34).

In General Comment No 3 (2016), the Committee on the Rights of Persons with Disabilities, the treaty-monitoring body for the Convention on the Rights of Persons with Disabilities 2006, also condemns forced medical interventions, including “treatment performed on intersex children without their informed consent”, as a violation of fundamental human rights (paragraph 44). Similarly, the Committee on Economic, Social and Cultural Rights (CESCR), interpreting the right to health under the International Covenant on Economic, Social and Cultural Rights 1966, characterized “medically unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children” as harmful practices in violation of the fundamental right to sexual and reproductive health in its General Comment No 22 (CESCR 2016: paragraph 59).

UN Special Rapporteurs have played an essential role in constructing global norms asserting bodily integrity rights for intersex children. The 2009 Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, citing Principles 17 and 18 of the Yogyakarta Principles, identified intersex people (along with other groups minoritized on SOGIESC grounds) as deserving of “special consideration regarding the protection of informed consent” (Grover 2009: paragraph 46). The report also asserted that “[h]ealth-care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is

sufficiently mature to provide informed consent” (ibid: paragraph 49).<sup>3</sup> The Rapporteur’s 2015 report called for states to “prohibit discrimination against intersex people, including by banning unnecessary medical or surgical treatment” (Pūras 2015: paragraph 112, m). The Rapporteur’s 2022 report further clarifies state obligations by indicating that state failure to prosecute or discourage harmful traditional medical or cultural practices, including “unnecessary, irreversible and involuntary surgery and treatment performed on intersex infants or children”, constitutes a violation of the right to health (Mofokeng 2022: paragraph 20). The 2022 report also called for broadening the definition of gender-based violence to encompass violence committed based on sex characteristics (ibid: paragraph 27) and characterized surgical interventions that irreversibly alter the genitals of intersex children as intersex genital mutilation (ibid: paragraph 59).

In its 2013 report, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment condemned non-voluntary medical interventions, “including forced genital-normalizing surgery” (Méndez 2013: paragraph 77). Preceding Principle 32 of YP+10, the Rapporteur characterized such interventions as a form of torture prohibited under international human rights law. The Special Rapporteur’s 2016 report reaffirmed that non-voluntary medical interventions, including “irreversible sex assignment, involuntary sterilization, and genital normalizing surgery”, may constitute torture under international law (Méndez 2016: paragraph 50).

Other UN bodies have issued statements condemning unwarranted genital interventions on children. These include a World Health Organization (WHO) statement calling for the elimination of forced, coercive and otherwise involuntary sterilization, including the loss of reproductive capabilities due to unwarranted medical interventions on intersex children (WHO 2014). The UN Free & Equal Initiative, launched by the OHCHR in 2013, affirms that human rights belong to all people, without distinction based on sexual orientation, gender identity, gender expression, or sex traits.<sup>4</sup> One of the initiative’s major campaigns

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<sup>3</sup> Paragraph 49 also states: “Safeguards should be in place to protect children from parents withholding consent for a necessary emergency procedure.” This provision suggests that consent and the best interests of the child are the human rights standards that should guide decision-making. This provision offers guidance on how to potentially reconcile the interests of different groups of children with different health needs vis-à-vis medical interventions. For example, the best interests of intersex children may be served by being protected from non-voluntary medical interventions. In contrast, the interests of transgender adolescents or young adults seeking gender affirming care might allow for medical interventions based on their health needs and preferences (Grimstad & Ors 2023).

<sup>4</sup> See [UN Free & Equal](#) (the United Nations’ Global Campaign for LGBTIQ+ Equality).

focuses on raising awareness about intersex issues and the ways that unnecessary medical interventions to “normalize” the genitals of intersex children cause a range of physical, psychological and emotional harms and violate the basic rights of these children.<sup>5</sup> Most recently, in April 2024, the UN Human Rights Council passed an intersex rights resolution reaffirming that medically unnecessary surgeries performed without consent constitute a violation of fundamental human rights (Human Rights Council 2024).

The significant development of global norms framing intersex rights as human rights within UN bodies has elevated the visibility of intersex rights globally. The emergence of these norms represents an important achievement of transnational advocacy by intersex activists and organizations. However, this emergent soft law is non-binding and has not been codified by states into formal treaties. Additionally, significant legal gaps exist between global norms framing intersex rights as human rights and the status of intersex rights under national laws. An analysis of these gaps between global norms and national laws is the focus of the next section.

## [C] GAPS BETWEEN GLOBAL NORMS AND NATIONAL LAWS IN THE PROTECTION OF BODILY INTEGRITY RIGHTS FOR INTERSEX CHILDREN

This section provides an overview of the gaps observed between relatively robust global norms claiming bodily integrity rights for intersex children and generally weak or non-existent institutionalization of those norms at the national level. The most prominent gap between global norms and national laws is *the failure of most countries to adopt legislation or other potentially protective legal measures*. At present, 181 countries have not passed any laws establishing bodily integrity rights for intersex children.

As noted in the introduction, a small number of countries offer nuance to this global picture. In 2015, Malta adopted the Gender Identity, Gender Expression, and Sex Characteristics Act which prohibits and establishes liability for performing non-voluntary medicalized interventions on intersex children (ILGA World 2023: 38-39). Following a successful campaign by intersex rights advocates, the Greek Parliament adopted Articles 17-20 in Law No 4958 of 2022; these provisions prohibit and establish criminal

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<sup>5</sup> See UN Free & Equal, “[Intersex Awareness](#)”.

liability for doctors who perform procedures proscribed under the law (ibid: 29-31).

Four countries (Germany, Iceland, Portugal, Spain) have prohibited certain interventions but without establishing criminal liability. The German Law on the Protection of Children with Variants of Sex Development 2021 prohibits medical interventions performed to modify the appearance of the sex traits of intersex minors. Despite adopting legal prohibitions, Germany allows family courts to approve such interventions in cases where they determine such procedures would be in the child's best interests. Furthermore, the German law allows for civil fines but does not establish criminal liability in cases where the law has been violated (ILGA World 2023: 73). In 2020, Iceland adopted Law No 154 which amended the Law on Sexual Anatomy 2019, Law No 80. The amendments provided that irreversible medical interventions performed on intersex children with the purpose of permanently changing their sex characteristics should "only be made in accordance with the child's will and development of gender identity, and always with the child's best interest in mind". The law further provides that legal guardians may provide consent on behalf of minor children under the age of 16 who are incapable of doing so (because of age or other reasons), following consultation with medical professionals and if such interventions are deemed to be performed for health reasons (ILGA World 2023: 75). In the Law on the Right to Self-Determination of Gender Identity and Gender Expression and the Protection of Everyone's Sex Characteristics 2018, Law No 38, Portugal prohibits medical intervention modifying the sex characteristics of intersex minors unless such interventions are performed to address proven health risks. Despite the formal prohibition of non-voluntary medicalized interventions on intersex children, the Portuguese law does not provide criminal sanctions or clear mechanisms for enforcement (ILGA World 2023: 82). In 2023, Spain passed the Law for the Real and Effective Equality of Trans People and for the Guarantee for the Rights of LGTBI People (Law No 4/2023). All genital modification practices on minor children under the age of 12 are prohibited under Article 19 of this law with the exception of procedures performed for medically indicated health reasons. The law allows genital modification practices for children between the ages of 12 and 16 with the informed consent of these children. Although Spanish law formally prohibits non-voluntary medicalized interventions on intersex children, intersex advocates have criticized Spain for failing to establish either civil or criminal liability (ILGA World: 83-84).

Several other countries have adopted partial restrictions governing non-voluntary medical interventions performed on intersex children.

In an additional seven countries, bills have been proposed that were not ultimately adopted or voted into law. The remainder of the world's countries—the vast majority—have not considered adopting legislation or protective measures to protect the bodily integrity rights of intersex children (ILGA 2023).

Even where national laws have been adopted, the *failure to fully enforce existing national-level laws* contributes to significant gaps between global norms and the realization of bodily integrity rights for intersex children in practice. For example, in Germany, Malta and Portugal, surgical interventions continue to be performed on children with variations in sex traits despite the adoption of legislation prohibiting such procedures (Garland & Slokenberga 2019; Danon & Ors 2023). A range of factors contribute to the limited enforcement of national laws prohibiting non-voluntary medicalized interventions into sexual anatomy on intersex children. In the following section, we suggest that limited enforcement of intersex children's rights reflects a broad cross-cultural commitment to the gender binary. Contraventions of intersex children's rights occur, we argue, in the fulcrum connecting legal, political and medical professionals who, in their different capacities, participate in corresponding actions (across policy and practice) that ultimately reify binary expectations that children's biological sex features should be culturally legible as *either* male or female.

Several additional factors help to explain the significant gap between global norms establishing the right of intersex children to bodily integrity and the minimal incorporation of such norms into national law. Active resistance among many medical practitioners and professional medical societies has played a role in impeding the development of national laws (Garland & Slokenberga 2019; Cuadra & Ors 2024). Additionally, deference to parents in medical decision-making has limited the adoption of national laws that would restrict presumed parental authority to make decisions in the "best interests of their children" as they see it (Greenberg 2011; Greenberg 2017; Garland & Slokenberga, 2019). Furthermore, political opposition, often by conservative or anti-LGBTQIA+ political forces, has played a role in blocking the development of national legislation protecting the bodily integrity rights of intersex children (Danon & Ors 2023; Hegarty & Ors 2021). Concerns that restrictions on intersex surgeries might end up limiting routine or religious male circumcision may also serve as a potential obstacle to laws establishing bodily integrity rights for intersex children. In both cases, a perceived or actual tension may arise between (a) the claim that children have a right to be free from medically unnecessary, non-voluntary surgical intervention into their sexual anatomy, and (b) the

claim that parents should be free to authorize such interventions in accordance with their cultural or religious commitments or judgments of the child's best interests (which may include consideration of those very same commitments). In many countries, these tensions shape political and sociocultural debates over genital-cutting practices involving children and contribute to the application of inconsistent legal standards to boys, girls and intersex children (Shweder 2013; see also Reidy 2017).<sup>6</sup>

At a macro level, the dominance of a binary body-gender model in prevailing medical discourses and practices pathologizes variations in sex traits and contributes to the conceptualization of "genital normalizing" surgeries as medically appropriate interventions in many contexts. Relatedly, the lack of effective communications between medical providers and parents clearly delineating health versus sociocultural rationales leads many parents to opt for medical interventions to be performed on their children with variations in sex traits (Greenberg 2011; Greenberg 2017; Liao & Ors 2019). In general, there is an absence of consistent,

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<sup>6</sup> As medical historian Elizabeth Reis (2013) notes, both non-therapeutic (eg, routine or religious) penile circumcision, when performed on children who cannot consent, and medically unnecessary, non-voluntary intersex surgeries can be understood as "gendering" practices designed to physically shape the child's anatomy into what is considered socially normative for persons of their designated sex. They are thus both instances of a broader category of socio-cultural interventions into the body which anthropologist Michela Fusaschi (2023) calls "gendered genital modifications", a category that also includes (primarily non-voluntary) ritual female genital cutting and (primarily voluntary) so-called female genital "cosmetic" surgeries, including labiaplasty. Increasingly, scholars argue that *all* genital modifications performed on minors must be analysed together, both morally and legally, irrespective of the particular sex traits of the child, with special attention paid to procedures that are neither voluntary nor medically necessary (Van Howe & Cold 1997; Van Howe & Ors 1999; Ehrenreich & Bar 2005; Van Howe 2011; DeLaet 2012; Antinuk 2013; Svoboda 2017; Coene 2018; BCBI 2019; Kehrer 2019; Townsend 2020; Earp 2022; Bootwala 2023; Buckler 2023; Earp & Ors 2023a; Earp & Ors 2023b; Higashi 2023; Lempert & Ors 2023; Townsend 2023a; Townsend 2023b; BCBI in press). Since all such procedures performed on non-intersex females are already considered to be human rights violations (irrespective of harm-level, parental religious beliefs, or degree of medicalization), as well as contrary to national and international law, it stands to reason that similarly non-voluntary, medically unnecessary procedures performed on children with intersex traits, whether designated female or male at birth, as well as non-intersex children designated as male at birth, must also be in conflict with human rights principles and should be similarly legally prohibited. Aware of this, some defenders of non-voluntary religious penile circumcision have begun to argue in favour of broad parental rights to authorize (without fear of criminal punishment) genital modifications for their children (of any sex) that are neither voluntary nor medically necessary, just so long as they do not pass an arbitrary and ill-defined harm threshold as judged by parents and medical professionals (eg Arora & Jacobs 2016; Jacobs & Arora 2017; Shweder 2022a; Shweder 2022b; Duivenbode 2023). In this, they seem to suggest that children—including intersex children—*do not* have a right to bodily integrity according to which medically unnecessary, non-voluntary interventions into their sexual anatomy are necessarily impermissible, insofar as the parents judge the intervention to be consistent with, or at least not too seriously contrary to, the child's "all things considered" best interests (eg including perceived psychosocial interests) (see eg Mazor 2013; Mazor 2021, for discussion). Relevant to this, it is notable that some recent state-level efforts in the United States to prohibit certain hormones and surgeries for transgender adolescents have included explicit exceptions within the bills or laws for both intersex surgeries and newborn penile circumcision: see [Trans Legislation Tracker](#).

consensus-based standards for distinguishing between necessary and unnecessary medical interventions (Godwin & Earp 2023). Ambiguous legal terminology often fails to clarify what counts as a relevant intersex condition (eg a lack of clarity around hypospadias:<sup>7</sup> Roen 2023; Roen & Sterling 2023). Finally, a lack of will among law enforcement organizations to prosecute medical professionals who believe they are acting in their patients' best interests contributes to gaps in enforcement (Danon & Ors 2023).

Taken together, these legal gaps suggest at least three different levels at which future advocacy and consciousness-raising may need to focus. First, legal language may need to be clarified to make it more obvious which procedures are included or not included and why. Second, there needs to be more buy-in from the medical community itself, whose failure to appreciate the implications of the laws, or active resistance to them, may reduce the perceived legitimacy of the laws. Third, there is a need for broader advocacy and education to raise public awareness about the health versus sociocultural reasons for medical interventions performed on intersex children and bodily integrity rights under national and international laws. Finally, relationship-building between intersex advocacy organizations and medical professional associations may build support for bodily integrity rights at the grassroots level.

## [D] DISCUSSION AND CONCLUSION

Despite the development of a global normative framework advancing the rights of intersex children to bodily autonomy, a profound and persistent disjuncture remains between global norms and their interpretation at a national level. In this final section, we articulate two interlinked arguments accounting for the persistence of gaps between global norms and national laws. First, we propose that the construction of a global normative framework claiming intersex rights as human rights has not penetrated broad-based, cross-cultural sociopolitical resistance to SOGIESC rights in most states. The absence of a specialized treaty codifying SOGIESC rights shows the relative thinness of support for global norms supporting the advancement of intersex rights as human rights and prefigures the absence of legal protections in national laws. Second, and relatedly, we suggest that the failure to adopt or enforce intersex rights in national legislation reflects a broad cross-cultural commitment to the gender binary globally: by working with the assumption that gender is, or ought

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<sup>7</sup> A condition in which the penile urethra opens otherwise than at the tip of the glans, along the underside of the penile shaft.

to be, a binary (and that a person's sex characteristics should conform to this normative expectation), political, legal and medical professionals in many countries are more likely to view medical interventions as central to rather than a contravention of children's human rights.

Regarding our first argument, transnational advocacy networks have successfully advanced global norms articulating SOGIESC rights generally and intersex rights particularly. In recognizing the achievement of transnational activists and advocacy networks,<sup>8</sup> we acknowledge the distance that has already been travelled, evident in the adoption of global norms supporting SOGIESC rights by various UN bodies. We also recognize the political and legal distance that has yet to be covered to institutionalize these norms at both the international and national levels. Whereas widespread support has emerged in the UN bureaucracy, the UN's primary political bodies have not endorsed norms supporting the rights of intersex children to bodily autonomy. The UN General Assembly has not issued a declaration supporting SOGIESC rights. And member states have not sought to advance a specialized treaty codifying SOGIESC rights, a major gap in the international human rights protection regime. This gap contrasts starkly with the specialized treaties established to articulate basic human rights and offer explicit legal protection to other groups of marginalized people, including women, children and persons with disabilities, who face distinct human rights challenges. This gap reveals the limitations of international human rights law in establishing formal protections for the basic human rights of intersex children, including the right to bodily integrity.

This gap in international human rights law exists despite growing recognition by international bodies, like the WHO (Langlois 2020) and the UN (Lhant 2019) that failure to address discrimination linked to SOGIESC has significant social, economic and political ramifications not only for marginalized individuals and communities but also for countries (Badgett 2020; Belmonte 2020; Badgett & Ors 2021). Despite decades of advocacy around SOGIESC rights in general, and LGBTQIA+ rights in particular, much work remains to raise awareness around the importance of securing the rights of these marginalized groups, particularly the rights of intersex children (Mills 2018; Vaast & Mills 2018; DeLaet & Cramer 2020). It follows, then, that efforts to shift national laws face a steep uphill battle. While local-level activism has certainly contributed to

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<sup>8</sup> We believe it is important to acknowledge some of the scholars and activists who have successfully campaigned for and advanced claims for legal, rights-based protections for intersex children. These scholars and activists include Anne Tamar-Mattis, Emi Koyama, Georgiann Davis and Morgan Carpenter.

national and international developments in a range of legal protections (as seen in the advocacy around access to essential medicines for people living with HIV, for instance), international human rights treaties can play an important role in catalysing changes in national laws. The absence of codified international law signals a lack of widespread political support for global norms claiming intersex rights as human rights. In this context, the failure of states to adopt national legislation providing legal protections for intersex children's rights should not be surprising.

Turning to our second argument around the cross-cultural commitment to the gender binary, our discussion of national laws identified a set of legal, political and medical actors who play a key role in constraining or blocking measures to protect the rights of intersex children. Pathologizing discourses, undergirded by beliefs in, and commitment to, the gender binary, contribute to the pervasive view among medical practitioners, parents and lawmakers that congenital variations of sex characteristics are abnormalities in need of medical correction. The importance of such language is supported by a rich history in medical anthropology showing how discourse fundamentally shapes sociocultural understandings of health, medical practices and national regulations of health-related policies (Danon 2018; King 2022). For instance, scholars in medical anthropology have shown how intersex variations have been pathologized through medical interventions, including the use of surgery or hormones (Feder 2009; Newbould 2014; Schwend 2020). Ellen Feder argues that the cultural commitment to what is broadly constructed as "normal" leads to the narration of "intersex variation" as a form of "disorder"—or a deviation from the norm (2009).

Writing about the implications of this cultural construction of the gender binary as the norm, Charlotte Jones describes how this narration moves into legal and medical practices (2022). In addition to having serious ramifications on children's rights, Jones found that failing to protect children's bodily integrity and (future) autonomy by insisting on surgical or hormonal interventions was a factor in their experience of long-term physical and psychological violence, including greater degrees of loneliness and isolation among intersex people. There is, we suggest, a link between the discursive construction of (and investment in) the gender binary, and the legal and medical practices built to reinforce this binary through surgical and other medical interventions. Writing about the role that medical and legal gatekeepers play in wedging open the gap between protective international measures and national legislation, Maayan Sudai (2018: 1) similarly argues that any attempt to challenge the medical standard of so-called "genital-normalizing surgeries in infancy" requires

a full reconceptualization of the gender binary and serious rethinking of the ostensibly scientific ground upon which current medical protocols have been established and continue to be legitimized through national legislation (or the absence thereof).

Given these interlinked and stubborn challenges to advancing the rights of intersex children, some intersex scholars and activists<sup>9</sup> have suggested that, in addition to seeking meaningful legislative reform, we also find new and creative ways to shift ontological and epistemological approaches to gender. This entails a commitment to tracing and unpicking the roots of the discursive construction of the gender binary in medical practices and legal discourse.

Despite international recognition of the social, economic and political ramifications of discrimination based on SOGIESC, a notable absence of explicit international human rights treaties and national laws prohibiting such discrimination reveals the limitation of international human rights law as a tool for promoting the rights of intersex children to bodily integrity. Our analysis points to a complex interplay of cultural, legal, medical and political factors hindering the effective translation of global norms into concrete protections for intersex children at the national level. Addressing these challenges requires a multifaceted approach encompassing legal reforms, increased education for medical professionals, cultural transformation and consciousness-building at a societal level. Together, this might better enable a dismantling of the socially prescribed and medically enforced gender binary to more meaningfully ensure that the rights of children with intersex traits are recognized and integrated into national laws and into the medical and legal frameworks that are guided by these laws.

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<sup>9</sup> We acknowledge that activists and scholars working in this field have a wide range of views and priorities. This plurality of perspectives is valuable, and we wish to note this. We also wish to note that this plurality may also mean that it is less possible to successfully advocate around a small number of priorities.

civil society to translate abstract global norms into concrete human rights practices within communities.

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## Legislation, Regulations and Rules

### **International Treaties**

Convention on the Elimination of All Forms of Discrimination Against Women 1979

Convention on the Rights of Persons with Disabilities 2006

Convention on the Rights of the Child 1989

Gender Identity, Gender Expression, and Sex Characteristics Act 2015 (Malta)

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social, and Cultural Rights 1966

Law for the Real and Effective Equality of Trans People and for the Guarantee for the Rights of LGTBI People 2023, Law No 4 (Spain)

Law on Sexual Autonomy 2019, Law No 80, as amended by Law No 154 2020 (Iceland)

Law on the Protection of Children with Variants of Sex Development 2021 (Germany)

Law on the Right to Self-Determination of Gender Identity and Gender Expression and the Protection of Everyone's Sex Characteristics 2018, Law No 38 (Portugal)

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***International Principles***

Yogyakarta Principles 2006

Yogyakarta Principles plus 10 (YP+10) 2017