

2021

## Who Decides "The Best Interests of the Child?": Strengthening Legal Protections for Intersex Persons against Sexual and Gender-Based Violence

Lucette Moran

Follow this and additional works at: <https://digitalcommons.wcl.american.edu/hrbrief>



Part of the [Human Rights Law Commons](#), and the [Law and Gender Commons](#)

---

### Recommended Citation

Lucette Moran (2021) "Who Decides "The Best Interests of the Child?": Strengthening Legal Protections for Intersex Persons against Sexual and Gender-Based Violence," *Human Rights Brief*. Vol. 24 : Iss. 3 , Article 7.

Available at: <https://digitalcommons.wcl.american.edu/hrbrief/vol24/iss3/7>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Human Rights Brief by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact [kclay@wcl.american.edu](mailto:kclay@wcl.american.edu).

# WHO DECIDES "THE BEST INTERESTS OF THE CHILD?": STRENGTHENING LEGAL PROTECTIONS FOR INTERSEX PERSONS AGAINST SEXUAL- AND GENDER-BASED VIOLENCE by Lucette Moran\*

This summer, the Ann & Robert H. Lurie Children's Hospital of Chicago "bec[a]me the first hospital in the United States" to publicly apologize for its part in the "abusive" practice of "cosmetic genital surgeries on intersex infants."<sup>1</sup> The hospital announced it would end these nonconsensual and "irreversible"

\* Lucette Moran is a J.D. Candidate at American University Washington College of Law (2021) and a M.A. in International Affairs Candidate at American University School of International Service (2021). She is a member of the Human Rights Brief, Administrative Law Review, and WCL International Refugee Assistance Project. During her final year in law school, she is also serving as a student attorney in the WCL Immigrant Justice Clinic.

<sup>1</sup> Kyle Knight, *First US Hospital Pledges to End Intersex Surgeries: Historic Apology a Step Toward Respect for Bodily Autonomy*, HUM. RTS. WATCH (July 30, 2020, 11:56 PM), <https://www.hrw.org/news/2020/07/30/first-us-hospital-pledges-end-intersex-surgeries>; Nora Neus, *Major Children's Hospital Apologizes for Performing Cosmetic Genital Surgeries on Intersex Infants*, CNN: CNNHEALTH (July 29, 2020, 8:29 PM), <https://www.cnn.com/2020/07/29/health/intersex-surgeries-chicago-hospital/index.html>; *Intersex Justice Project's #EndIntersexSurgery Campaign Receives Unprecedented Promise of Action from a U.S. Hospital*, INTERACT (July 29, 2020), <https://interactadvocates.org/lurie-intersex-surgery/>.

surgeries on intersex children after the Intersex Justice Project's tireless protests and advocacy.<sup>2</sup> Intersex persons are individuals who have internal or external "sex traits or reproductive anatomy," or both, which are not solely associated with either female or male sexes.<sup>3</sup> For decades, medical professionals in the United States have subjected intersex children to surgeries intended to "normaliz[e]" their sex traits to fit the expectations set by binary gender norms, including their "gonads, genitals, or internal sex organs."<sup>4</sup> Prejudice and misconceptions surrounding so-called "atypical sex characteristics" lead parents and doctors to take drastic measures that often serve no medical purpose; these decisions can result in future complications for people who do not identify with the sex and gender that was chosen for them.<sup>5</sup>

Furthermore, these invasive surgeries violate the human rights of intersex persons, especially intersex

<sup>2</sup> Knight, *supra* note 1; Neus, *supra* note 1; *Intersex Justice Project's #EndIntersexSurgery Campaign Receives Unprecedented Promise of Action from a U.S. Hospital*, *supra* note 1.

<sup>3</sup> *Frequently Asked Questions about Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>; *FAQ: What Is Intersex?*, INTERACT (last updated May 18, 2020), <https://interactadvocates.org/faq/>.

<sup>4</sup> *A Changing Paradigm: US Medical Provider Discomfort with Intersex Care Practices*, HUM. RTS. WATCH (Oct. 16, 2017), <https://www.hrw.org/report/2017/10/26/changing-paradigm/us-medical-provider-discomfort-intersex-care-practices> (internal quotation marks omitted) [hereinafter *A Changing Paradigm*]; Neus, *supra* note 2 (noting that this Chicago hospital is the "first . . . in the nation" to make such an apology, and that the hospital maintains an exception for "medically necessary" cases); Arlene M. Baratz, *When It Comes to Intersex Children, Doctors Do Not Always Know Best*, THOMSON REUTERS FOUND. NEWS (Oct. 17, 2018, 1:54 PM), <https://news.trust.org/item/20181017135437-3klqp>; Graeme Reid, *Doctors Should Stop Defining Sexual 'Normality'*, HUM. RTS. WATCH (Feb. 5, 2018, 11:55 AM), <https://www.hrw.org/news/2018/02/05/doctors-should-stop-defining-sexual-normality>; *FAQ: What Is Intersex?*, *supra* note 3.

<sup>5</sup> *A Changing Paradigm*, *supra* note 4; Knight, *supra* note 1.

children,<sup>6</sup> contradict contemporary medical ethics,<sup>7</sup> and nearly always result in physical and psychological trauma.<sup>8</sup> To comply with international human rights standards that protect bodily autonomy on the basis of sex and gender, the United States must expand its domestic law.<sup>9</sup> However, international prohibitions on sexual- and gender-based violence<sup>10</sup> are not yet fully inclusive due to outdated gender norms that conflate sex identity and gender identity to the detriment of intersex individuals, and thus must also undergo critical changes by States Parties to the relevant international agreements to recognize the rights of intersex persons.

<sup>6</sup> *Promoting Intersex Human Rights Internationally*, INTERACT, <https://interactadvocates.org/promoting-intersex-rights-internationally/> (last visited Sept. 19, 2020); *First, Do No Harm: Ensuring The Rights of Children Born Intersex*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/> (last visited Sept. 19, 2020).

<sup>7</sup> See generally Rachel Hajar, *The Physician's Oath: Historical Perspectives*, 18 HEART VIEWS 154-159 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5755201/> (providing an overview on the ethical concepts of informed consent and the Hippocratic Oath in the medical field).

<sup>8</sup> *A Changing Paradigm*, *supra* note 4; Neus, *supra* note 1; Baratz, *supra* note 1; Reid, *supra* note 4.

<sup>9</sup> Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Juan E. Méndez (Special Rapporteur on Torture), *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E. Méndez, ¶ 77, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf); *First UN Resolution on the Rights of Intersex Persons: UN Calls to End Discrimination of Women and Girls in Sports, Including Women Born with Variations of Sex Characteristics*, INTL. LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N (Mar. 22, 2019, 5:58 AM) <https://ilga.org/first-un-resolution-rights-intersex-persons-women-sport>; *A Step Forward for Intersex Visibility and Human Rights*, OFF. OF THE HIGH COMM'R FOR HUM. RTS. (Sept. 25, 2015), <https://www.ohchr.org/EN/NewsEvents/Pages/Astepforwardforintersexvisibility.aspx>; see also *Intersex Legislation & Regulation*, INTERACT, <https://interactadvocates.org/intersex-legislation-regulation/> (last visited Sept. 27, 2020).

<sup>10</sup> In this article, the author will use the term "sexual- and gender-based violence" to address violence perpetrated on account of one's sex identity or gender identity or both, whereas other sources may use "gender-based violence" to refer to either type of violence or just violence based on gender identity.

## I. INTERNATIONAL STANDARDS ON SEXUAL- AND GENDER-BASED VIOLENCE ARE UNNECESSARILY EXCLUSIVE

International human rights law should be expanded to improve protections for intersex persons. The Convention against Torture (CAT),<sup>11</sup> the Convention on the Rights of the Child (CRC),<sup>12</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>13</sup> offer a foundation upon which states can build greater protections for intersex individuals because of these instruments' more gender-inclusive language than the leading instruments on sexual- and gender-based violence.<sup>14</sup> It is important to note that although intersex is not synonymous with transgender or nonbinary gender identities, intersex persons may identify as any gender (e.g., transgender woman, transgender man, nonbinary person, woman, or man).<sup>15</sup> And since the language used in these legal instruments often perpetuates the conflation of sex and gender identities, improving gender inclusivity in the law can push back against binary presumptions of gender and sex identities and subsequently increase intersex persons' access to legal protections.<sup>16</sup> For example, the CAT refers to victims of torture as a "person," which is gender-inclusive term (despite the treaty's continued use of the outmoded and so-called "gender neutral" "he," which is misleading because its use prioritizes

<sup>11</sup> Convention against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT].

<sup>12</sup> Convention on the Rights of the Child arts. 1-3, *opened for signature* Nov. 20, 1989, 1477 U.N.T.S. 3 [hereinafter CRC].

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>14</sup> *Promoting Intersex Human Rights Internationally*, *supra* note 7; *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement*, WORLD HEALTH ORG. (2014), [https://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325\\_eng.pdf;jsessionid=7760F8ED9E1F2370F9C44E51133BC0D4?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/112848/9789241507325_eng.pdf;jsessionid=7760F8ED9E1F2370F9C44E51133BC0D4?sequence=1).

<sup>15</sup> *Frequently Asked Questions about Transgender People*, *supra* note 4; *FAQ: What Is Intersex?*, *supra* note 3.

<sup>16</sup> *Frequently Asked Questions about Transgender People*, *supra* note 4; *FAQ: What Is Intersex?*, *supra* note 3.

men).<sup>17</sup> Moreover, the CRC employs gender-inclusive language by defining “a child” as “every human being below the age of eighteen years.”<sup>18</sup> Further, the ICESCR calls on states to ensure “the healthy development of the child” and to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>19</sup>

While not flawless, the aforementioned international treaties demonstrate that gender-inclusive language is already in common usage and can be reasonably extended to other international human rights treaties. However, intersex individuals are often excluded from the legal protections that directly address sexual- and gender-based discrimination and violence because they are shoehorned into outdated international human rights standards.<sup>20</sup> For example, the leading international human rights treaty on sexual- and gender-based violence, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), refers to women as “the female half of humanity” and uses the phrase “both sexes.”<sup>21</sup> This language excludes protections for intersex persons due to its reliance on binary gender norms that presume certain sex traits presume a certain gender identity, and vice versa. Further, the Declaration on the Elimination of Violence against Women (DEVW) references “either of the sexes” and “men and women,” and it applies “gender-based violence” narrowly to women and “female children.”<sup>22</sup>

<sup>17</sup> CAT art. 1, *supra* note 11; *see also A Brief History of Gender Neutral Pronouns*, BBC NEWS (Sept. 22, 2019), <https://www.bbc.com/news/newsbeat-49754930>.

<sup>18</sup> CRC arts. 1-3, *supra* note 12.

<sup>19</sup> ICESCR art. 12, *supra* note 13.

<sup>20</sup> *See, e.g.*, CEDAW, *supra* note 8; G.A. Res. 48/104, Declaration on the Elimination of Violence Against Women, (Dec. 20, 1993) [hereinafter DEVW]; Juan E. Méndez, *supra* note 9, ¶ 77; *see also* Rikki Holtmaat & Paul Post, *Enhancing LGBT[QI][A+] Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?*, 33 NORDIC J. HUM. RTS. 4 (2015).

<sup>21</sup> CEDAW, *supra* note 8.

<sup>22</sup> DEVW, *supra* note 20.

## II. U.S. LAW IS INSUFFICIENT TO PROTECT INTERSEX PERSONS

Despite the inherent flaws in the international human rights law regime on sexual- and gender-based violence, these international standards still provide greater access to legal rights for intersex individuals than current U.S. law. Domestic law in the United States will require broad changes to protect the rights of intersex persons. U.S. law provides protections against sex or gender discrimination in the workplace, school, housing, or other public spaces.<sup>23</sup> And the Violence Against Women Reauthorization Act of 2013 offers expanded protections based on sex and gender identity, although focuses specifically

<sup>23</sup> *Know Your Rights: Sex Discrimination*, ACLU, <https://www.aclu.org/know-your-rights/sex-discrimination/#im-experiencing-sex-based-discrimination-in-housing>, (last visited Oct. 14, 2020); *Know Your Rights: Public Accommodations*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/public-accommodations> (last visited Mar. 28, 2021); *State Public Accommodation Laws*, NAT'L CONF. STATE LEGIS. (Apr. 8, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx>.

on domestic violence.<sup>24</sup> Moreover, the United States has signed but not ratified CEDAW.<sup>25</sup> Thus, U.S. law lacks comprehensive protections for the type of sex-

<sup>24</sup> Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13701, Sec. 3(a)(18) (defining “underserved populations” to include people who “face barriers in accessing . . . victim services” based on “gender identity”) [hereinafter Reauthorization Act of 2013]; Reauthorization Act of 2013, 42 U.S.C. § 13701, Sec. 3(b)(4) (amending Violence Against Women Act of 1994, 42 U.S.C. 13925(b) ¶ 11 by including a nondiscrimination clause that enumerates “sex” and “gender identity”) (referencing 18 U.S.C. § 249(c)(4) (defining gender identity as “actual or perceived gender-related characteristics”)); *H.R. 1581 - Violence Against Women Reauthorization Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/1585/text> (last visited Feb. 28, 2021) (showing that the 2019 reauthorization passed in the House of Representatives but has not proceeded to the Senate). See also *Know Your Rights: Survivors of Violence*, NAT’L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/know-your-rights/survivors-violence> (last visited Oct. 14, 2020); *Frequently Asked Questions About VAWA and Gender*, NAT’L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN (2006), [http://www.ncdsv.org/images/FAQ\\_VAWA%20and%20Gender.pdf](http://www.ncdsv.org/images/FAQ_VAWA%20and%20Gender.pdf); Kate Miller, *LGBT People Will Receive First-Ever Domestic Violence Protections Under VAWA*, THINKPROGRESS (Feb. 28, 2013), <https://archive.thinkprogress.org/lgbt-people-will-receive-first-ever-domestic-violence-protections-under-va-wa-f3ebfe1d946a/> (please note that the source uses the term “LGBT” as opposed to the more inclusive LGBTQIA+); Emily Cochrane, *Transgender and Gun Rights Are Sticking Points for Violence Against Women Act*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/politics/violence-against-women-act-transgender-guns.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>; Ashley Killough, *House Passes Reauthorization of Violence Against Women Act*, CNN: POLITICS (Apr. 4, 2019, 2:59 PM), <https://www.cnn.com/2019/04/04/politics/house-passes-violence-against-women-act-reauthorization/index.html>.

<sup>25</sup> *Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en) (status as at Mar. 1, 2021, 3:15 AM) (demonstrating that the United States has signed but not ratified CEDAW); *Status of Treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en) (status as at Mar. 1, 2021, 3:15 AM) (demonstrating that the United States has not signed the Optional Protocol). International law defines “ratification” as a state’s manifestation of its “consent to be bound by a treaty” after signing the treaty. Vienna Convention on the Law of Treaties arts. 2(1)(b), 11, 14(1), 16, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

ual- and gender-based violence inflicted by nonconsensual, sex-altering surgeries on children.

Unfortunately, the U.S. District Court for the Northern District of Texas ultimately quashed a recent attempt by the U.S. Department of Health & Human Services (HHS) to expand legal protections in medical and health care to all persons regardless of gender or sex.<sup>26</sup> Under a rule promulgated by HHS in 2016, it would have been possible for intersex individuals to file a civil rights complaint under Section 1557 of the Affordable Care Act and the Civil Rights Act of 1964.<sup>27</sup> In the 2016 rule, HHS expanded the definition of sex discrimination to include “one’s internal sense of gender, which may be male, female, neither, or a combination of male and female.”<sup>28</sup> However, the rule was “preliminarily enjoined, on a nationwide basis” that same year, and in 2019 after litigation, the court found that the HHS 2016 rule “exceeded the Department’s statutory authority.”<sup>29</sup> As a result, HHS removed these inclusive and so-called “overbroad

<sup>26</sup> *Section 1557 of the Patient Protection & Affordable Care Act*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last visited Oct. 14, 2020); *Civil Rights FAQs*, U.S. DEP’T OF HEALTH & HUM. SERVS.: OFF. FOR CIV. RTS., <https://www.hhs.gov/civil-rights/for-individuals/faqs/index.html> (last visited Oct. 14, 2020); *Discrimination on the Basis of Sex*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/sex-discrimination/index.html> (last visited Oct. 14, 2020); InterACT & Lambda Legal, *Providing Ethical & Compassionate Health Care to Intersex Patients: Intersex-Affirming Hospital Policies 5* (2018), <https://interactadvocates.org/wp-content/uploads/2018/09/interACT-Lambda-Legal-intersex-hospital-policies.pdf>.

<sup>27</sup> *Section 1557*, *supra* note 26; *Civil Rights FAQs*, *supra* note 26; *Discrimination on the Basis of Sex*, *supra* note 26; InterACT & Lambda Legal, *supra* note 26.

<sup>28</sup> *Section 1557*, *supra* note 26; *Fact Sheet: HHS Finalizes ACA Section 1557 Rule*, DEP’T OF HEALTH & HUM. SERVS.: OFF. FOR CIV. RTS. 1-2 (Jun. 12, 2020), <https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf> (internal quotation marks omitted). See also Part I n. 15 and accompanying text (explaining how pursuing gender-inclusivity can increase access to legal protections for intersex persons); *Frequently Asked Questions about Transgender People*, *supra* note 3.

<sup>29</sup> *Nondiscrimination in Health & Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (Jun. 19, 2020) (codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. pts. 86, 92, 147, 155, 156); *Fact Sheet*, *supra* note 28, at 3.

provisions" related to gender, and it returned to what the 2020 final rule calls a "plain meaning" interpretation of Congress' text.<sup>30</sup>

### III. RECOMMENDATIONS

International and U.S. law continue to offer deficient legal protections for intersex persons. The time has come to move beyond statements of disapproval<sup>31</sup> and establish renewed human rights norms protections for those suffering violence on account of their sex or gender identity by amending CEDAW and DEWV.<sup>32</sup> Amending international standards on sexual- and gender-based violence is a more pragmatic solution than campaigning for United Nations members to draft a new treaty because the amendment process is less complicated and will require fewer resources.<sup>33</sup> As discussed at a symposium at the University of Minnesota, CEDAW has a strong global reputation, and it would be counterproductive not to build upon that reputation.<sup>34</sup> Though these scholars were referring to the need to improve legal protections against violence for women,<sup>35</sup> given societal advancements since the enactment of CEDAW, these same strategies could improve protections against sexual- and gender-based violence for those who suffer such violence because their sex or gender identity do not conform to binary gender norms. Beyond that, building upon the preexisting framework would also serve to emphasize that the original exclusivity based on binary sex and gender norms was unacceptable. Ideally, updating international human rights standards on sexual- and gender-based violence will

<sup>30</sup> Nondiscrimination in Health & Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160; *Fact Sheet*, *supra* note 28.

<sup>31</sup> Juan E. Méndez, *supra* note 9, ¶¶ 38, 76, 77, 88.

<sup>32</sup> Cf. Lisa Baldez, *Why Not Amend CEDAW?*, U. OF MINN.: THE GENDER POL'Y REP. (Nov. 28, 2018), <https://genderpolicyreport.umn.edu/why-not-amend-cedaw/>.

<sup>33</sup> See Baldez, *supra* note 33; Marsha A. Freeman, *Addressing Gender-Based Violence: CEDAW and Political Will*, U. OF MINN.: THE GENDER POL'Y REP. (Nov. 28, 2018), <https://genderpolicyreport.umn.edu/addressing-gender-based-violence-cedaw-and-political-will/>.

<sup>34</sup> See Baldez, *supra* note 33; Freeman, *supra* note 34.

<sup>35</sup> See Baldez, *supra* note 33; Freeman, *supra* note 34.

also encourage broader recognition of nonbinary sexes or genders.

A good start is to update the language and definitions in the international treaties (*e.g.*, using gender-inclusive pronouns, like they/their/them in the English language,<sup>36</sup> or changing phrases like "the equal rights of men and women" to "all persons") and to explicitly include intersex persons in the list of protected populations.<sup>37</sup> Additionally, the CEDAW Committee can write a new general recommendation either to encourage the need for an amendment, or to ensure the intention of any amendments is clear.<sup>38</sup> For example, the Committee should issue an updated version of its General Recommendation No. 19, which currently defines gender-based violence as a phenomenon experienced by "women" and as "discrimination . . . on a basis of equality with men" and generally in relation to men.<sup>39</sup> Applying gender-inclusive language in international law will recognize that freedom from sexual- and gender-based violence and discrimination is a right derived from each individual's personhood (regardless of sex or gender identity)

<sup>36</sup> The author recognizes that further research is necessary to propose specific textual suggestions for these international legal instruments in languages other than English. See generally Miriam Berger, *A Guide to How Gender-Neutral Language Is Developing Around the World*, WASH. POST (Dec. 15, 2019, 6:00 AM), <https://www.washingtonpost.com/world/2019/12/15/guide-how-gender-neutral-language-is-developing-around-world/> (providing a brief introduction to "gender-neutral language" in languages other than English, as well as an explanation of the use of "they" as a "singular pronoun" in English). The Berger article addresses four out of the United Nations' "six official languages." *Official Languages*, U.N. (last visited Oct. 29, 2020), <https://www.un.org/en/sections/about-un/official-languages/index.html> (noting that "Arabic, Chinese, English, French, Russian and Spanish" are the United Nations' official languages).

<sup>37</sup> CEDAW, *supra* note 8.

<sup>38</sup> See *Committee on the Elimination of Discrimination against Women: General Recommendations*, OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx> (last visited Oct. 29, 2020); Comm. on the Elimination of Discrimination against Women, *Gen. Recommendation No. 19: Violence against Women*, U.N. Doc. CEDAW/C/GR/19 (1992) [hereinafter *General Recommendation No. 19*]; CEDAW, *supra* note 8; Baldez, *supra* note 33.

<sup>39</sup> *General Recommendation No. 19*, *supra* note 37, ¶¶ 1, 11, 23, 24(t).

and shaped by hegemonic and toxic masculinity, rather than from a binary comparison of women's rights relative to men's rights. Only then can the international legal regime on sexual- and gender-based violence advance to protect intersex persons.

Furthermore, while these improvements to international human rights law are significant in the long-term, the immediate impact of such changes will be marginal without domestic reforms and implementation of these standards. The United States should expand its protections against sexual- and gender-based violence to explicitly prohibit discriminatory and violative medical procedures such as unnecessary sex-altering surgeries on children.<sup>40</sup> The United States should also prioritize reviving the HHS 2016 rule; ratifying CEDAW, CRC, and ICESCR and adopting these treaties into U.S. law; and heeding to its pre-existing legal obligations under the CAT.<sup>41</sup> In the absence of nationwide efforts, local or state governments can take the lead — and many already have done so in regard to CEDAW.<sup>42</sup> Finally, while these legal developments are necessary to improve

<sup>40</sup> *A Changing Paradigm*, *supra* note 4.

<sup>41</sup> See Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. 92); *Status of Treaties: Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 25; *Status of Treaties: Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, *supra* note 25; *Status of Treaties: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en) (status as at Mar. 1, 2021, 3:15 AM); *Status of Treaties: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en) (status as at Mar. 1, 2021, 3:15 AM); *Status of Treaties: International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en) (status as at Feb. 28, 2021, 11:15 AM); CAT art. 1, *supra* note 11; CRC arts. 1-3, *supra* note 12; ICESCR art. 12, *supra* note 13.

<sup>42</sup> Heidi Nichols Haddad, *The U.S. Hasn't Signed the World's Foremost Women's Rights Treaty. Activists Have Gotten Local Versions Passed Instead.*, THE WASH. POST (Mar. 8, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/03/08/us-hasnt-signed-worlds-foremost-womens-rights-treaty-activists-have-gotten-local-versions-passed-instead/>.

and enforce protections for intersex persons subjected to traumatic and discriminatory medical procedures, hospitals and medical associations should not wait to comply. They can help end the violation of intersex bodies by prohibiting these nonconsensual surgeries on minors and updating medical practices and vocabulary related to intersex persons.<sup>43</sup> Doctors have a professional and moral obligation to take these actions.<sup>44</sup> Medical ethics have undergone many changes over the millennia, but core elements of these “ethical guidelines” prevail today: to “do no harm,” to treat patients “with compassion and respect for human dignity and rights,” and to ensure the patient has the capacity “to give informed consent.”<sup>45</sup> Advocacy already underway by organizations like the Intersex Justice Project,<sup>46</sup> and the steps taken by hospitals like the Chicago children's hospital to revise practices, has opened the door for lawmakers to finally take these critical steps. With reforms to international and U.S. law, as well as the medical community's willingness to respond to the demands of intersex people's rights advocates, we will move toward a more inclusive and just future for intersex persons.

<sup>43</sup> See generally *US: Doctors Need Intersex Care Standards*, HUM. RTS. WATCH (Oct. 26, 2017), <https://www.hrw.org/news/2017/10/26/us-doctors-need-intersex-care-standards>; Press Release, *Unnecessary Surgery on Intersex Children Must Stop*, PHYSICIANS FOR HUM. RTS. (Oct. 20, 2017), <https://phr.org/news/unnecessary-surgery-on-intersex-children-must-stop/>; Martine Cools et al., *Caring for Individuals with a Difference of Sex Development (DSD): A Consensus Statement*, 14 NATURE REV. ENDOCRINOLOGY 7 (2018); Morgan Carpenter, *Intersex Variations, Human Rights, and the International Classification of Diseases*, 20 HEALTH & HUM. RTS. 2 (2018), <https://www.jstor.org/stable/26542072>.

<sup>44</sup> See generally Hajar, *supra* note 7.

<sup>45</sup> *Id.*

<sup>46</sup> See *Intersex Support and Advocacy Groups*, INTERACT (last updated Jul. 20, 2020), <https://interactadvocates.org/resources/intersex-organizations/> (listing intersex rights organizations in the United States and around the world).