



KATHOLIEKE UNIVERSITEIT LEUVEN
FACULTY OF LAW
Academic year 2022 – 2023

**International Standards regarding the Right to Identity
under the Convention on the Rights of the Child
and the Protection of Intersex Children
against Forced and Coercive Surgical Treatments**

Promotor: Prof. Koen Lemmens
Coreader: Prof. Michele Panzavolta

Master's thesis submitted by Peter Alexis Cruz
Espinoza as part of the final examination for the
degree of MASTER OF LAWS LL.M.



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I confirm that this thesis is my own work, that all ideas contained in the thesis are expressed in my own words and that I have not literally or quasi-literally taken anything over from other texts, except for fragments cited between quotes for which I provided full and accurate bibliographical data.

Abstract

Domestic laws and policies around the world remain reluctant to fully guarantee intersex children's human rights during forced and coercive surgeries performed on their bodies. The right to identity has evolved as a human right but has not been the main academic concern regarding these practices. Therefore, the present study first establishes the issues involved with forced and coercive surgical interventions on intersex children based on an intersectional and gender-based approach. Then, the evolution of the right to identity is presented through international human rights instruments as well as its link to other human rights related to the central problematic of the study. Lastly, based on international obligations regarding the child's right to identity (Article 8 of the Convention on the Rights of the Child), several new international standards emerge from the production of the Committee on the Rights of the Child as the treaty body. The Committee on the Rights of the Child has shown a dynamic, expansive, and progressive interpretation of the child's right to identity. Nonetheless, this has been not concretely focused on the intersex children and has limitations based on its non-binding nature. With these results, this study aims to contribute to the academic discussion on children's human rights involved in these often-overlooked issues.

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List of Abbreviations

ACHR	American Convention on Human Rights
CAT	Committee against Torture
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CoE	Council of Europe
CRC	Committee on the Rights of the Child
CRPD	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
FGM	Female Genital Mutilation
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IE SOGI	United Nations Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity
IGM	Intersex Genital Mutilation
IHRL	International Human Rights Law
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPAC-CRC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
OPIC-CRC	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
OPSC-CRC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
PACE	Parliamentary Assembly of the Council of Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UNAIDS	United Nations Programme on HIV/AIDS
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Fund for Population Activities
UNICEF	United Nations International Children’s Emergency Fund

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Introduction

The appearance of intersex traits in children has led to the identification of specific legal questions as well as different approaches throughout history. For instance, Foucault highlighted that canonical and civil regulations regarding intersex traits during the Middle Ages authorized parents or legal guardians to set the sex of their children in correspondence with their more visible and predominant sexual genitals at the time of their baptism.¹ Nevertheless, intersex persons could choose to maintain or change their assigned sex at the time of their wedding but were prohibited to change thereafter. Thus, intersex characteristics on individuals were not punishable, but the constant change of sex was.² In contrast, the development of medical science brought a new approach to intersex persons during the 18th century.³ The predominant biological theories about sexuality rejected the idea of an individual with two sexes. In order to address the accidental or superficial nature of owing sexual characteristics which correspond to the other sex, medical science aimed to discover the unique true sex hidden behind unclear appearances.⁴ As a result, this new approach denied every possibility of free choice of the individual and reinforced the role of medical experts in assigning a sex to intersex persons.

From the beginning of the 1950s, the standard treatment protocol incorporated an ‘optimal gender’ policy for children born with ambiguous genitalia and caused a rapid increase of medical interventions such as ‘clitoral reduction, vaginoplasty, gonadectomy, and hypospadias repair’.⁵ Intersex children were subjected to secret surgeries to ‘normalize’ the cosmetic appearance of their genitals in line with the sex of their rearing.⁶ Traditions in nurturing and social norms heavily influenced these practices.⁷ Secrecy and unclear official data on the number of cases continue to pose challenges for advocates on these issues.⁸ Despite these

¹ Michel Foucault, ‘Philosophie. Anthologie’ (Arnold Davidson and Frédéric Gros ed, 1st edn, Gallimard 2004), 641.

² *ibid.*

³ *ibid.*

⁴ *ibid.*, 642.

⁵ Joycelyn Elders, David Satcher, and Richard Carmona, *Re-Thinking Genital Surgeries on Intersex Infants* (Palm Center: Blueprints for Sound Public Policy) 1, 1.

⁶ Morgan Carpenter and Organisation Intersex International Australia Limited, *Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights. Snapshot Report* (2015), 7.

⁷ Sarah Creighton, ‘Surgery for Intersex’ (2001) 94(5) *Journal of the Royal Society of Medicine* 218, 218.

⁸ Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, ‘Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions’ (16 June 2016) <www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 66.

challenges, intersex NGOs have collected testimonies to highlight the main health issues during and after medical interventions on intersex children.

Although the medical perspective is opening itself to new ways to understand sexual diversity during recent decades, domestic laws and policies around the world remain reluctant to fully guarantee intersex persons' human rights. The discussion sparks even greater controversy when it comes to the situation of intersex children. Several human rights involved in these practices have already been the topic of academic studies. However, the present research investigates the issue by looking at the current international standards regarding the right to identity under the UNCRC, which has been less studied. Thus, not overlooking remarkable achievements in the regional system for the protection of human rights, the present research is focused on the development observed in the universal system for the protection of human rights and, specifically, in the production of the CRC as treaty body of the UNCRC.

For this purpose, the present thesis is divided in three Chapters. The first Chapter, which incorporates a gender perspective and interdisciplinary approach, explains relevant concepts in forced and coercive surgical interventions on intersex children. The second Chapter focuses on the child's right to identity, addressing its evolution as human right and the challenges faced by intersex children in their enjoyment of this right. Lastly, the third Chapter presents the current legal framework in the guarantee of the right to identity of intersex children in forced and coercive surgical treatments by addressing the established international standards in light of the UNCRC.

Chapter I: Forced and Coercive Surgical Treatments on Intersex Children

1.1. LGBTIQ+ Children

Vulnerability is a foundational element in the human rights framework and, together with the recognition of human dignity, imposes several legal obligations on UN Member States such as the obligation to respect, protect, and fulfil human rights.⁹ In addition, several UN treaty bodies have expressed concern about the particular vulnerability of certain groups. For instance, in light of the ICCPR, the HRC stated that the duty to protect the right to life implies ‘to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence’¹⁰ and expressly added that these groups ‘may also include children (...), lesbian, gay, bisexual, transgender and intersex persons (...)’.¹¹

Children as a vulnerable group experience different and specific situations compared to other social groups. In this sense, there are three main elements which predispose children to vulnerability: (i) Biological and physical needs; (ii) strategic needs and the limited level of autonomy as a product of the dependence on adults; and (iii) institutional invisibility and lack of voice in policy agendas.¹² At the same time, LGBTIQ+ persons are considered a group in social vulnerability due to the structural forms of exclusion and discrimination against them. In addition, appropriately noticed by the IE SOGI, LGBTIQ+ persons are subjected to specific patterns of violence as a result of moving apart from gender parameters and displaying diverse sexuality.¹³

When addressing the challenges faced by LGBTIQ+ children, it is relevant to embrace an intersectional perspective. Coined by Crenshaw in 1989 as a study lens to highlight the bias

⁹ OHCHR and the Global Migration Group, ‘Principles and Guidelines, Supported by Practical Guidance, on the Human Rights Protection of Migrants in Vulnerable Situations’ (2018) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>> accessed 18 April 2023, 5.

¹⁰ UN Human Rights Committee, ‘General Comment No. 36. Article 6: Right to Life’ (2019) UN Doc CCPR/C/GC/36, 5.

¹¹ *ibid.*

¹² Keetie Roelen and Rachel Sabates-Wheeler, ‘A Child-sensitive Approach to Social Protection: Serving Practical and Strategic Needs’ [2012] *Journal of Poverty and Social Justice* 291, 294-296.

¹³ OHCHR, ‘Report of the Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity’ (22 July 2022) UN Doc A/77/235, 21.

and violence against black women based on their gender and race,¹⁴ the current framework about intersectionality allows to observe the overlap of different coexisting factors -such as race, gender, sexual orientation, religion, and others- that create a complex oppression faced by individuals. As children are not a homogeneous group,¹⁵ an intersectional perspective entails to guarantee equality by taking into account their diversity. For this reason, even when the UNCRC adopts the principle of equality and the obligation not to make distinctions based on race, sex, language, religion, or other status in the insurance of children's rights,¹⁶ the provision does not intend to overlook particularities of children related to additional forms of vulnerability. Furthermore, intersectionality is more than a theoretical concept and has been successfully implemented in several IHRL instruments. For instance, in the Inter-American regional system for the protection of human rights, the IACtHR, in the case *Gonzales Lluy et al. v. Ecuador*, stated that the States have reinforced obligations -in contraposition to general obligations- regarding the situation of structural discrimination against children, specifically girls.¹⁷ To arrive to this conclusion, the IACtHR for the first time expressly applied an intersectional perspective by remarking that the case victim met multiple factors -such as (under)age, gender, poverty situation, and HIV condition- that had an impact on her discrimination.¹⁸

In the binary classification of sex, there is the distinction between persons with female (related with XX chromosomes) or male (related with XY chromosomes) reproductive organs. As a label, medical staff assigns a sex by observing genitalia, hormones, and chromosomes. Despite the expressed classification, there are also persons who do not fall under typical definitions of female or male such as the intersex persons.¹⁹ Societal expectations often imposes a strict relationship between sex assigned at birth and gender identity. That is to say, a person assigned female at birth should identify her gender as female and a person assigned male at birth should

¹⁴ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Legal Forum 139, 140.

¹⁵ UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have his or her Best Interests taken as a Primary Consideration (art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14, 13.

¹⁶ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 2.

¹⁷ *Case of Gonzales Lluy et al. v. Ecuador* (Preliminary Objections, Merits, Reparations and Costs) [2015] Inter-American Court of Human Rights, 82.

¹⁸ *ibid.*

¹⁹ 'Sex and Gender Identity' (*Planned Parenthood*) <www.plannedparenthood.org/learn/gender-identity/sex-gender-identity> accessed 20 May 2023.

identify his gender as male. However, there are persons who do not identify their gender with their sex assigned at birth. A person assigned male at birth with a female gender identity can be considered as a transgender woman.²⁰ Similarly, a person assigned female at birth with a male gender identity can be considered as a transgender man.²¹ Persons who have transitioned are also included in these categories (MTF and FTM). In addition, non-binary gender or genderqueer persons consider themselves outside of the binary classification of gender identity. It is important to remark that persons with intersex characteristics does not impede them to identify with a binary or non-binary gender.²² In addition, the concept of sexual orientation has to do with the gender identity of the person to which someone destines their affection. A male or female identifying person that feels emotionally and sexually attracted to a person with a different gender identity is heterosexual.²³ A person attracted to someone of the same gender identity as theirs is homosexual, while someone who is attracted to both binary genders is bisexual.²⁴ Similarly, asexuality and pansexuality can be considered as sexual orientations.²⁵

Even when unconventional sexual identity components (sexual characteristics, gender identity, and sexual orientation) are tolerated in adults, there is still social controversy regarding the recognition of sexual diversity in children. In this context, one of the most recurrent challenges faced by LGBTIQ+ children is the lack of recognition of their sexual diversity based on the assumption that persons under 18 years old cannot be mature enough. Nonetheless, even if progressive and inclusive domestic policies regarding sexual diversity during childhood are in place, there can be other obstacles related to their LGBTIQ+ identities, such as constant bullying, gender-based violence and discrimination against LGBTIQ+ children in public and private spheres.²⁶ UNICEF has also expressed that the vulnerability of LGBTIQ+ children increases in these cases.²⁷

²⁰ ‘Transgender Terminology’ (*National Center for Transgender Equality*, May 2009) <www.courts.ca.gov/documents/Transgender_Terminology.pdf> accessed 20 May 2023.

²¹ *ibid.*

²² As an example, a 2015 study conducted by sociologist Tiffany Jones of the University of New England showed that 52% of survey intersex persons identify themselves as female, 23% identified themselves as male, and 25% selected a variety of other options: ‘Demographics’ (*Intersex Human Rights Australia*, 28 July 2016) <www.ihra.org.au/demographics/> accessed 27 May 2023.

²³ ‘Sexual Orientation’ (*Planned Parenthood*) <<https://www.plannedparenthood.org/learn/sexual-orientation/sexual-orientation>> accessed 19 May 2023.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 13.

²⁷ UNICEF, ‘Eliminating Discrimination against Children and Parents based on Sexual Orientation and Gender Identity’ (2014) 9 Current Issues <www.unicef.org/media/91126/file> accessed 29 May 2023, 1.

To summarize, current studies about sexual identity allow a new approach to sexual characteristics, gender identity, and sexual orientation that differ from social and cultural norms. At the same time, intersectionality offers a novel perspective to identify the many challenges based on age and sexual diversity, faced by LGBTIQ+ children.

1.1.1. Intersex Characteristics

Until the sixth or seventh week of gestation, every foetus owns bipotential gonads and, therefore, intersex characteristics.²⁸ This implies that intersex traits are a part of a natural phase in every foetal development. After that, the foetus passes through a sexual differentiation with the consequent development of ovaries or testes.²⁹ However, situations where there is an exceptional level of hormones or an unusual hormonal response could possibly affect the expected sexual development in foetuses.³⁰ Thus, children can be born with in-between genitalia or variations in their sexual anatomy. According to studies, approximately 1.7% of the population is born with intersex characteristics.³¹ The OHCHR accepted this calculation and highlights that this is ‘similar to the number of red-haired people’ worldwide.³² Despite their detection during prenatal testing or birth, intersex characteristics can also appear during puberty or in later stages of life. Because intersex persons are only visible in particular medical situations, the number of persons with intersex characteristics is likely to be higher than 1.7%.³³ Some research suggests that intersex persons can be up to 4% of the global population.³⁴ In addition, there are cases where individuals have no awareness of their intersex traits. In these situations, some persons can possess intersex characteristics -as catalogued by the medicine-, but they live without realizing so.³⁵

²⁸ Institute of Medicine (United States), *Exploring the Biological Contributions to Human Health: Does Sex Matter?* (National Academy Press 2001), 60.

²⁹ Dagmar Wilhelm, Stephen Palmer, and Peter Koopman, ‘Sex Determination and Gonadal Development in Mammals’ [2007] 87(1) *Physiological Reviews* <<https://pubmed.ncbi.nlm.nih.gov/17237341/>> accessed 20 January 2023, 4.

³⁰ ‘Intersex Variations’ (*Healthdirect Australia*, June 2022) <<https://www.healthdirect.gov.au/intersex-variation>> accessed 24 January 2023.

³¹ Anne Fausto-Sterling, *Sexing the Body* (1st edn, Basic Books 2000), 51.

³² OHCHR, ‘Factsheets: Intersex’ <www.unfe.org/wp-content/uploads/2018/10/Intersex-English.pdf> accessed 1 June 2023, 1.

³³ ‘Intersex Population Figures’ (*Intersex Human Rights Australia*, 28 September 2013) <<https://ihra.org.au/16601/intersex-numbers/>> accessed 27 May 2023.

³⁴ Julie Greenberg, ‘Defining Male and Female: Intersexuality and the Collision Between Law and Biology’ (1999) 41 *Arizona Law Review* 265, 267.

³⁵ ‘Intersex Variations’ (*Healthdirect Australia*, June 2022) <<https://www.healthdirect.gov.au/intersex-variation>> accessed 24 January 2023.

The categorization of intersex traits has shifted over time mostly due to developments related to hormonal and genetic science.³⁶ For this reason, intersex characteristics nowadays include a wider range of natural variations related to external genitals (physical features), gonads (hormonal) and/or chromosome (genetic) patterns.³⁷ What these variations -such as ambiguity or incongruency- share is that they do not fit in typical notions of female or male bodies.³⁸ Consequently, some intersex persons only possess external genitals that cannot be medically classified as female or male, whereas other intersex persons possess external genitals which fall into a female or male category, but their gonads and/or chromosomes cannot be medically considered as female or male.

As expressed by the CoE Commissioner for Human Rights, ‘the term “hermaphrodite” was widely used by medical practitioners during the 18th and 19th centuries before “intersex” was coined as a scientific and medical term in the early 20th century’.³⁹ Today ‘intersex’ is an umbrella term used to describe the spectrum of possible natural variations.⁴⁰ Nevertheless, the current medical term to denominate variations of sex characteristics is called ‘disorder of sex development’ (DSD).⁴¹ Academics and specialized organizations consider this term to be pejorative because it identifies intersex traits as a ‘disorder’ that should be treated, fixed, and eradicated. Lately, medical literature has been using ‘different sex development’ as a more acceptable term to refer to intersex traits on individuals.⁴² Despite terminological changes in the medical field, in recent years a more immutable use of the term ‘intersex’ can be found in the production of the IE SOGI and several UN treaty bodies as a result of an human rights-

³⁶ InterACT Advocates for Intersex Youth, ‘What is Intersex?’ (26 January 2021)

<<https://interactadvocates.org/faq/#definition>> accessed 10 January 2023.

³⁷ OHCHR, ‘Factsheets: Intersex’ <www.unfe.org/wp-content/uploads/2018/10/Intersex-English.pdf> accessed 1 June 2023, 1.

³⁸ Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, ‘Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions’ (16 June 2016)

<www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 65.

³⁹ Council of Europe Commissioner for Human Rights, ‘Issue Paper: Human Rights and Intersex People’ (September 2015) <<https://rm.coe.int/16806da5d4>> accessed 20 February 2023, 15.

⁴⁰ OHCHR, ‘Factsheets: Intersex’ <www.unfe.org/wp-content/uploads/2018/10/Intersex-English.pdf> accessed 1 June 2023.

⁴¹ For instance, the 11th version of the International Statistical Classification of Diseases and Related Health Problems (ICD), published by the World Health Organization, incorporates ‘malformative disorders of sex development’(LD2A), ‘46,XX disorders of sex development induced by androgens of maternal origin’ (5A71.1), and ‘46,XX disorders of sex development induced by androgens of fetal origin’ (5A71.0). More information can be found in: <https://icd.who.int/en>

⁴² Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 9.

based approach rather than medical definitions.⁴³ Recognizing that the term ‘DSD’ is not in line with human rights standards, the present work as well prefers use of the term ‘intersex’.

1.1.2. Intersex Children

The UNCRC defines a child, as general rule, to every person under 18 years old.⁴⁴ As an exception, majority can be obtained before 18 years old if domestic legislation expresses so.⁴⁵ LGBTIQ+ children are a diverse sub-group of underage persons whose sexual identity does not comply with conventional roles and relationships between women and men based on traditional social and cultural norms: Intersex children are linked to diverging sexual characteristics, while transgender, queer, and non-binary children are linked to gender identity and gay, lesbian and bisexual children to sexual orientation.

Most parents with intersex children do not want to disclose this information or have it as part of official data because intersex traits are usually unexpected. Therefore, testimonies collected by intersex organizations and advocacy groups frequently come from adults addressing the harmful consequences of non-consensual treatment on their bodies during youth.⁴⁶ Nevertheless, with increased awareness of intersex characteristics on children in recent years, there has been a growth in support groups by parents of intersex children that aim to look for alternatives to corporal treatments and improve parenting aspects related to their children’s bodies.⁴⁷

1.2. Medical Intervention on Intersex Children

The medical approach to intersex traits on children has evolved in the last decades. There are currently two opposing medical approaches: The ‘optimal gender’ policy encourages specific

⁴³ ‘What is Intersex?’ (*Intersex Human Rights Australia*, 2 August 2013) <<https://ihra.org.au/18106/what-is-intersex/>> accessed 13 February 2023.

⁴⁴ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 1.

⁴⁵ *ibid.*

⁴⁶ In this regard, it is recommended to read ‘#MyIntersexStory – Personal accounts by intersex people living in Europe’, publication by the Organisation Intersex International Europe (OII Europe) which contains multiple testimonies about intersex persons and their families: <https://www.oii-europe.org/myintersexstory-personal-accounts-by-intersex-people-living-in-europe/>

⁴⁷ In this regard, it is recommended to read ‘Handbook for Parents’, publication by the Consortium on the Management of Disorders of Sex Development intended as a guide for parents of intersex children: <https://dsdguidelines.org/files/parents.pdf>

actions on the child's body as soon as intersex attributes are found, while the 'informed consent' policy prioritizes providing information and a decision-making process that involves the child.⁴⁸ Both of these medical approaches have their merits and valid criticism. For instance, experts have expressed their concerns regarding the 'optimal gender' policy. Even when interventions on genital appearance are performed with the aim of maximising a specific gender identity to reduce stigma,⁴⁹ children's self-perception can be seriously damaged because the recognition of their status as persons depends on prior surgical interventions on them.⁵⁰ As a newer approach in medicinal interventions on children, the 'informed consent' policy lacks evidence of the benefits to wait for the child's decision. Most of scholars opposing the 'informed consent' policy focus their attention on possible psychological issues that untreated children might have in relation to their gender.⁵¹ In addition, other scholars highlight possible difficulties in the interaction with their social environment before treatment.⁵²

The bioethical debate surrounding the 'optimal gender' policy caused a recent paradigm shift in medical literature. Today, the approach to intersex traits on children is more frequently in line with the 'informed consent' policy.⁵³ This, however, does not negate the fact that the 'optimal gender' policy has been consistently practiced in the last decades with continued consequences for treated persons.

1.2.1. Surgical Treatment

Intersex children are subjected to surgical treatments and other procedures to modify the appearance of their sexual genitalia or for their physical development to be in accordance with societal expectations on sex and gender.⁵⁴ As a consequence of the 'optimal gender' policy,

⁴⁸ Ute Thyen and others, 'Deciding on Gender in Children with Intersex Conditions: Considerations and Controversies' (2005) 4 *Treatments in Endocrinology* 1.

⁴⁹ John Money, Joan Hampson, and John Hampson, 'Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex, and Psychological Management' [1955] *Bull Johns Hopkins Hospital* 284.

⁵⁰ Morgan Holmes, 'Mind the Gaps: Intersex and (Re-productive) Spaces in Disability Studies and Bioethics' *Journal of Bioethical Inquiry* [2008] 169, 170.

⁵¹ Claire Nihoul-Fékété, 'Does Surgical Genitoplasty affect Gender Identity in the Intersex Infant?' *Hormone Research* [2005] 23.

⁵² Tatiana Prade and others, 'Controversies on Timing of Sex Assignment and Surgery in Individuals With Disorders of Sex Development: A Perspective' (2019) 6 *Frontiers in Pediatrics* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6335325/>> accessed 15 February 2023, 3.

⁵³ Caroline Sanders, 'Parents of Children with Ambiguous Genitalia: Stories of Experiences of Reconstructive Genital Surgeries and Finding Harmony' (PhD thesis, University of Central Lancashire 2008), 23.

⁵⁴ OHCHR, 'Human Rights Violations Against Intersex People. A Background Note' (24 October 2019) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>> accessed 23 October 2022, 13.

these surgeries are performed at every stage and age of the child. Following the binary system, these interventions aim to ‘masculinizing’ or ‘feminizing’ bodies of intersex persons. ‘Feminizing’ surgeries aim to change intersex genitalia in order to make them as similar as possible to typical XX female genitalia through labiaplasty, vaginoplasty, clitoral ‘recession’, or other forms of clitoral cutting or removal.⁵⁵ ‘Masculinizing’ surgeries aim to change intersex genitalia to make them as similar as possible to typical XY male genitalia through gonadectomy, hypospadias ‘repair’, mastectomy, phalloplasty, penile augmentation surgery, or other forms of urogenital surgery.⁵⁶ In addition, interventions can also incorporate dilation, repeated genital examinations before and after surgical treatment, post-sensitivity testing, and medical photography of intersex patients.⁵⁷

Children can form and express their views in favour or not with surgical interventions on their bodies, depending on their maturity and age.⁵⁸ It should thus be highlighted that there are also cases where treatments are supported by the informed consent of intersex children and their parents or legal guardians. In this regard, the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health indicated 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’.⁵⁹ As a result, not every surgical intervention on intersex children creates a legal controversy regarding the guarantee of their human rights.

1.2.2. Hormonal Treatment

Prenatal and postnatal hormonal treatments for intersex characteristics on individuals are more common nowadays. Current technology allows for widespread prenatal testing and hormone treatment to avoid the emergence of intersex traits on new-borns. For instance, a female foetus with Congenital Adrenal Hyperplasia (CAH) can be treated through the mother with ‘dexamethasone’, a risky steroid that prevents the further development of intersex

⁵⁵ Morgan Carpenter, ‘Intersex Variations, Human Rights, and the International Classification of Diseases’ [2018] 20(2) Health and Human Rights Journal <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6293350/>> accessed 8 February 2023, 4.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ UN Committee on the Rights of the Child, ‘General Comment No. 12 (2009). The Right of the Child to be Heard’ (20 July 2009) UN Doc CRC/C/GC/12, 11.

⁵⁹ OHCHR, ‘Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health’ (10 August 2009) UN Doc A/64/272, 14-15.

characteristics.⁶⁰ As intersex traits can also appear after birth at later stages of personal development, there are also postnatal hormonal treatments specially focused on intersex children. The NGO ‘Nederlandse Organisatie voor Seksediversiteit’ expressed that ‘as a result of removing gonadal material that produces sex hormones, intersex people regularly require access to hormone treatment provided by health workers’.⁶¹ Nonetheless, as a way to promote protocols with lesser harmful consequences, medical experts suggest that hormonal induction during puberty should only replicate a ‘normal pubertal maturation to induce secondary sexual characteristics, a pubertal growth spurt, and optimal bone mineral accumulation, together with psychosocial support for psychosexual maturation’.⁶²

1.2.3. Psychological Treatment

Psychological treatment for intersex children is linked to the development of their gender identity. The earliest age to assess gender identity on children still remains unclear and should be approached cautiously. As concluded by specialists, ‘converging evidence suggests that gender identity may emerge between 18 and 24 months of age, but this hypothesis has yet to be directly evaluated’.⁶³ Nevertheless, ‘atypical gender role behaviour is more common in children with DSD than in the general population but should not be taken as an indicator for gender reassignment’.⁶⁴ In addition, intersex persons frequently encounter situations of a lack of arousability and an aversion to intimate relationships due to fear of rejection.⁶⁵ For this reason, it is recommended that the health care staff adopts a flexible individual-based approach focused on interpersonal relationships, rather than sexual function or activity with other individuals.⁶⁶

⁶⁰ Alice Dreger, Ellen Feder, and Anne Tamar-Mattis, ‘Prenatal Dexamethasone for Congenital Adrenal Hyperplasia’ [2012] 9 *Bioethical Inquiry* <<https://pubmed.ncbi.nlm.nih.gov/22904609/>> accessed 14 April 2023, 1-2.

⁶¹ Nederlandse Organisatie voor Seksediversiteit, ‘Intersex and Medicalized Rape’ (30 December 2020) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/RapeReport/CSOs/177-intersex.pdf>> accessed 31 May 2023, 7.

⁶² Ieuan Hughes and others, ‘Consensus Statement on Management of Intersex Disorders’ [2006] 91 *Archives of Disease in Childhood* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2082839/>> accessed 23 November 2022, 557.

⁶³ Carol Lynn Martin, Diane Ruble, and Joel Szkrybalo, ‘Cognitive Theories of Early Gender Development’ [2002] 128 *Psychological Bulletin* <<https://pubmed.ncbi.nlm.nih.gov/12405137/>> accessed 8 February 2023, 922.

⁶⁴ Ieuan Hughes and others, ‘Consensus Statement on Management of Intersex Disorders’ [2006] 91 *Archives of Disease in Childhood* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2082839/>> accessed 23 November 2022, 557.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

1.3. Forced and Coercive Surgical Treatment on Intersex Children

When addressing forced and coercive surgical treatments, the problem should be limited to those interventions that strictly lack consent of the intersex children involved. Furthermore, these treatments have the following characteristics:

- (i) Forced and coercive surgeries are mainly performed during early childhood.⁶⁷ This means that no sufficient efforts are made to obtain the child's opinion or the child's opinion is disregarded and ignored by medical staff, parents, or legal guardians.⁶⁸ These situations can be a consequence of the absence of human rights-based medical protocols⁶⁹ and a lack of specialized medical training on intersex characteristics.⁷⁰
- (ii) Forced and coercive surgeries are unnecessary or none-live-saving procedures. In other words, the main aim of these surgeries is focused on the non-vital or cosmetic appearance of individuals.⁷¹ The 'normalization' of genital appearance decided by intersex children's parents or legal guardians, which tends to bring the anatomical sex of individuals as much as possible in line with their assigned sex, is strongly supported and reinforced by customs related to medical confidentiality and secrecy.⁷²
- (iii) Forced and coercive surgeries are not reversible.⁷³ Forced surgeries -at different levels of intervention- look for the intersex traits not to appear again in the person.

⁶⁷ Cathren Cohen, 'Surgeries on Intersex Infants are Bad Medicine' (*National Health Law Program*, 1 July 2021) <<https://healthlaw.org/surgeries-on-intersex-infants-are-bad-medicine/#:~:text=Rather%2C%20intersex%20surgeries%20—%20most%20of,inaccurate%20gender%20assignment%2C%20and%20trauma.>> accessed 10 February 2023.

⁶⁸ InterACT Advocates for Intersex Youth, 'What is Intersex?' (26 January 2021) <<https://interactadvocates.org/faq/#definition>> accessed 10 January 2023.

⁶⁹ OHCHR, 'Human Rights Violations Against Intersex People. A Background Note' (24 October 2019) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsAgainstIntersexPeople.pdf>> accessed 23 October 2022, 57.

⁷⁰ Dan Ghattas, 'Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist' (*OII Europe*, May 2019) <www.oii-europe.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 23-24.

⁷¹ Organisation Intersex International Europe (OII Europe), 'IGM' (4 February 2021) <<https://www.oii-europe.org/igm/>> accessed 13 October 2022.

⁷² Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, 'Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions' (16 June 2016) <www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 66.

⁷³ Human Rights Watch, 'I Want to Be Like Nature Made Me. Medically Unnecessary Surgeries on Intersex Children in the US' (25 July 2017) <<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#8624>> accessed 19 November 2022, 62-64.

1.3.1. Consequences

Consequences experienced by intersex people after forced and coercive surgical treatments have not yet been adequately documented. One important challenge is the substantial absence of data documenting these practices and their different outcomes.⁷⁴ For instance, some hospitals are prohibited to reveal information about surgical treatments performed if there is no legal obligation. In other cases, even when medical data can be obtained, it is often unclear whether the interventions were consensual or not.⁷⁵

Despite the lack of official data, some research suggests that forced and coercive surgical treatments on intersex children, mostly performed on children under two years old,⁷⁶ bring a variety of harmful life-long harmful consequences.⁷⁷ According to Human Rights Watch these include ‘scarring; incontinence; loss of sexual sensation and function; psychological trauma - including depression and post-traumatic stress disorder-; the risk of anesthetic neurotoxicity attendant to surgical procedures on young children; sterilization; need for lifelong hormonal therapy; and irreversible surgical imposition of a sex assignment that the individual later rejects’.⁷⁸ ⁷⁹ Likewise, forced and coercive surgical treatments can have long-term adverse effects on mental health such as post-surgical depression and trauma, which in many cases are similar to the experience of rape.⁸⁰ Moreover, the many deficiencies in the health care of older intersex adults require further research and follow-up.⁸¹ Based on these past traumatic medical

⁷⁴ OHCHR, ‘Human Rights Violations Against Intersex People. A Background Note’ (24 October 2019) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>> accessed 23 October 2022, 19.

⁷⁵ Human Rights Watch, ‘I Want to Be Like Nature Made Me. Medically Unnecessary Surgeries on Intersex Children in the US’ (25 July 2017) <<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#8624>> accessed 19 November 2022.

⁷⁶ Cathren Cohen, ‘Surgeries on Intersex Infants are Bad Medicine’ (*National Health Law Program*, 1 July 2021) <<https://healthlaw.org/surgeries-on-intersex-infants-are-bad-medicine/#:~:text=Rather%2C%20intersex%20surgeries%20—%20most%20of,inaccurate%20gender%20assignment%2C%20and%20trauma.>> accessed 10 February 2023.

⁷⁷ Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 23.

⁷⁸ Human Rights Watch, ‘I Want to Be Like Nature Made Me. Medically Unnecessary Surgeries on Intersex Children in the US’ (25 July 2017) <<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us#8624>> accessed 19 November 2022, 89.

⁷⁹ Similar consequences have been addressed by Cathren Choen and Dan Gattas.

⁸⁰ GATE, ‘Intersex Issues in the International Classification of Diseases: A Revision’ (2015) <<https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>> accessed 6 February 2023, 4.

⁸¹ Surya Monro and others, ‘Intersex Variations of Sex Characteristics, and DSD: The Need for Change. Research Report’ [2017] University of Huddersfield <<https://eprints.hud.ac.uk/id/eprint/33535/>> accessed 20 April 2023, 6.

experiences, their continued dependence on health care services can be particularly challenging.⁸²

1.3.2. Intersex and Female Genital Mutilation

FGM, female circumcision or female genital cutting is the ‘practice of partially or wholly removing the external female genitalia or otherwise injuring the female genital organs for non-medical or non-health reasons’.⁸³ In addition, FGM is a practice supported by a sense of social obligation to shape the behaviour of individual community members, even when they personally do not agree with these practices.⁸⁴ Based on the usual association between assigned sex at birth and gender identity, FGM generally affects underage women.

Academics and intersex organizations introduced the term IGM for the forced and coercive surgical interventions on healthy intersex bodies when, according to social and medical notions, a person’s genitals are not ‘normal’ enough to be considered as female or male.⁸⁵ This is meant to demonstrate a clear opposition against these practices, highlighting the aspect of ‘mutilation’ which jeopardises intersex bodies; to reflect parallels motives in both FGM and IGM, including the socio-cultural norms and beliefs as justification for procedures lack of urgent medical necessity;⁸⁶ and to raise IGM as a similar concern to FGM, which has been widely addressed by IHRL during the last decades.⁸⁷ IGM, however, is not often mentioned in comparison to FGM, which is explicitly condemned in several international and domestic instruments. For some experts, ‘this legal differentiation, though, is largely arbitrary, and based in the same cultural assumptions and stereotypes that threaten the rights of intersex people to begin with’.⁸⁸ This persistent differentiation weakens the eradication of IGM and even allows

⁸² Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 23.

⁸³ UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, ‘Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices’ (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, 6.

⁸⁴ *ibid*, 14.

⁸⁵ Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 11.

⁸⁶ *ibid*, 13.

⁸⁷ *ibid*, 12.

⁸⁸ *ibid*, 12.

for scenarios in which the legal prohibition of FGM is sometimes overturned when these practices are performed on intersex children.⁸⁹

1.3.3. Abuses, Harmful Practices, and Degrading or Inhuman Treatment

The present section looks at the legal approach to these practices as abuses in health care settings, harmful practices, and degrading or inhuman treatment through complementary and specialized relevant instruments. Despite their differences, numerous IHRL instruments show a clear consensus in how the characteristics of these practices can be considered as human rights violations.

Firstly, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly stated that irreversible sex assignment, involuntary sterilization, or genital normalizing surgery performed on children born with intersex characteristics, without their informed consent, are forms of abuse in health care settings.⁹⁰

Secondly, with the concluding observations on the fifth periodic report of Germany, the CAT was the first treaty body to expressly recommend the strengthening of medical standards to guarantee consent in surgical treatments of intersex persons through proper information given to patients and relatives.⁹¹ In joint general recommendation No. 31 of the CEDAW Committee and general comment No. 18 of the CRC, the aforementioned committees similarly expressed concerns about the situation of FGM and explicitly addressed this practice as a harmful practice.⁹² Despite important developments regarding harmful practices against girls, these committees did not mention forced and coercive surgical treatments on intersex children. Nevertheless, in the concluding observations on the combined second to fourth periodic reports

⁸⁹ Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, 'Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions' (16 June 2016) <www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 74.

⁹⁰ OHCHR, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez' (1 February 2013) UN Doc A/HRC/22/53, 18-19.

⁹¹ UN Committee against Torture, 'Consideration of Reports submitted by States Parties under Article 19 of the Convention. Concluding Observations of the Committee against Torture' (12 December 2011) UN Doc CAT/C/DEU/CO/5, 7.

⁹² UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child, 'Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the Committee on the Rights of the Child on Harmful Practices' (14 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18, 6.

of Switzerland, with a clear reference to joint general recommendation No. 31 of the CEDAW Committee and general comment No. 18 of the CRC, the CRC for the first time expressed concern about the matter by recommending to ‘ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to the children concerned, and provide families with intersex children with adequate counselling and support’.⁹³

The CAT also later addressed the lack of proper investigation, sanction, or reparation of unnecessary and irreversible surgical procedures on intersex persons without their informed consent⁹⁴ and, referencing the recommendations of the CRC to Switzerland, highlighted the obligations of the State regarding the physical integrity and autonomy of intersex persons.⁹⁵ Furthermore, the CAT recommended to postpone any decision related to those treatments until the children concerned are sufficiently mature to decide by themselves and participate in the decision-making process⁹⁶. Similarly, in the concluding observations on the sixth periodic report of Australia, the HRC recommended to end these practices unless it is an absolute medical necessity.⁹⁷

In September 2015, twelve UN entities (International Labour Organization, OHCHR, UNDP, UNESCO, UNFPA, UN High Commissioner for Refugees, UNICEF, UN Office on Drugs and Crime, UN Women, World Food Programme, World Health Organization, and UNADIS) released an unprecedented joint statement to call on States to act urgently to end every form of violence and discrimination against LGBTIQ+ adults, adolescents, and children.⁹⁸ The statement also explicitly stated that unnecessary surgeries and treatments on intersex children without their consent constitute forms of abuse in medical settings.⁹⁹

⁹³ UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland’ (26 February 2015) UN Doc CRC/C/CHE/CO/2-4, 9.

⁹⁴ UN Committee against Torture, ‘Concluding observations on the seventh periodic report of Switzerland’ (7 September 2015) UN Doc CAT/C/CHE/CO/7, 7.

⁹⁵ *ibid.*

⁹⁶ UN Committee against Torture, ‘Concluding observations on the sixth periodic report of Austria’ (27 January 2016) UN Doc CAT/C/AUT/CO/6, 8.

⁹⁷ UN Human Rights Committee, ‘Concluding Observations on the Sixth Periodic Report of Australia’ (1 December 2017) UN Doc CCPR/C/AUS/CO/6, 5.

⁹⁸ OHCHR, ‘UN-wide Work to Combat Discrimination and Violence against LGBTI People’ <<https://www.ohchr.org/en/sexual-orientation-and-gender-identity/un-wide-work-combat-discrimination-and-violence-against-lgbti-people>> accessed 23 October 2022.

⁹⁹ *ibid.*

Resolution 2191 (2017), adopted by the PACE to eliminate discrimination against intersex people, can be considered as another regional milestone. In this resolution, the Assembly called on the CoE Member States to prohibit unnecessary ‘sex-normalizing’ surgeries carried out on children without their informed consent, unless the life of the children is at risk.¹⁰⁰ The resolution also mentioned that any treatment related with children’s gonads or genitals should be delayed until they are able to participate in the decision based on their right to self-determination.¹⁰¹

Thirdly, even when the previous instruments allow to classify forced and coercive surgical treatments as abuses or harmful practices, the ECtHR has taken a different approach. In the case of *M v. France*, about an intersex person who during childhood was subjected to ‘feminising’ surgical treatment, the ECtHR stated that ‘an act of a medical nature carried out without therapeutic necessity and without the informed consent of the person subjected to it is likely to constitute ill-treatment within the meaning of Article 3 [ECHR]’.¹⁰² These practices can be considered as degrading and inhuman treatment, which is covered by Article 3 ECHR,¹⁰³ when there is no ‘convincingly demonstrated’ medical necessity to perform them.¹⁰⁴ Finally, the ECtHR established that genital mutilation performed on children, incompatible with the respect to human freedom and dignity, is a practice contrary to Article 3 ECHR.¹⁰⁵

¹⁰⁰ Council of Europe, ‘Promoting the Human Rights of and Eliminating Discrimination against Intersex People’ Parliamentary Assembly Resolution 2191 (2017) (Strasbourg 12 October 2017).

¹⁰¹ *ibid.*

¹⁰² *M v. France* App no 42821/18 (ECtHR, 26 April 2022), para 61.

¹⁰³ Article 3 ECHR: Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*, para 62.

Chapter II: Child's Right to Identity

2.1. Identity as Human Right

On the one hand, in sociology, the study of identity entails the relationship of an individual with a community. 'Collective identity' refers to the membership of a group, the processes within the same group and the behaviour with other groups.¹⁰⁶ In psychology on the other hand, the study of identity investigates which qualities make an individual unique and different from others.¹⁰⁷ For this reason, 'personal identity' deals with idiosyncratic attributes and personal relationships which individualize a person in a society.¹⁰⁸ Collective as well as personal identity have a static and dynamic dimension. The static dimension of identity is related to aspects of the individual that do not change over time, while the dynamic dimension of identity is related to changing aspects that depend on the evolution and maturity of the person.¹⁰⁹

2.1.1. Evolution in International Human Rights Law

Traditionally, static identity incorporates factors such as genetic heritage, date and place of birth, identity of parents, physically unchangeable features, among others.¹¹⁰ Meanwhile, dynamic identity has often been formed by variable attributes of individuals such as philosophical and religious beliefs, profession, opinions, morals, psychological profile, among others.¹¹¹ As a consequence of this distinction, domestic legislations addressed the static dimension and classic 'identification' aspects of personal identity.

The right to identity, as it is understood today, was not expressly incorporated in the UDHR. Nevertheless, components of the right to identity can be found in the legal treatment of the right to a nationality¹¹² and right to life liberty and security of person.¹¹³ In the universal system for

¹⁰⁶ Michael Hogg, 'Social Identity Theory' [2006] Contemporary Social Psychological Theories 111.

¹⁰⁷ Jonathan Cheek, 'Identity Orientations and Self-Interpretation' [1989] Personality Psychology. Recent Trends and Emerging Directions 275.

¹⁰⁸ Michael Hogg, 'Social Identity Theory' [2006] Contemporary Social Psychological Theories 111.

¹⁰⁹ Michelle Giroux and Mariana De Lorenzi, "'Putting the Child First": A Necessary Step in the Recognition of the Right to Identity' (2011) 27(1) Canadian Journal of Family Law 53, 60.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA A/RES/217(III) (UDHR) art 15.

¹¹³ *ibid.*, art 3.

the protection on human rights, the ICCPR incorporates and recognizes the child's right to be registered after birth, right to have a name, and a nationality, which now are currently considered as inherent parts of the human right to identity.¹¹⁴ Furthermore, Article 8 UNCRC expressly recognizes the child's right to identity and lists the right to nationality and name as elements of identity.¹¹⁵ Nevertheless, the CRC provided a broader interpretation by mentioning that 'the identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality'.¹¹⁶

In the regional system for the protection on human rights, two main international treaties similarly recognize the right to identity. Firstly, Articles 18 and 20 ACHR recognize the right to a name and nationality, respectively. In addition, the IACtHR expressed that the human right to identity is closely related to the dignity of individuals, the free development of personality, and the right to protection of private life (Article 11 ACHR).¹¹⁷ Furthermore, '[t]he concept of private life encompasses aspects of social and physical identity'.¹¹⁸ Secondly, Article 8 ECHR recognizes the right to respect for private and family life. In this regard, the ECtHR mentioned that this provision secures a sphere where individuals can freely pursue development and fulfilment of their personality.¹¹⁹ Likewise, the principle of personal autonomy falls within the scope of Article 8 ECHR.¹²⁰ In the case of *Christine Goodwin v. the United Kingdom*, the ECtHR issued a further interpretation of Article 8 ECHR by stating that violating important aspects of personal identity can cause serious interferences with private life.¹²¹

To summarize, even when the ICCPR was the first international treaty that incorporated the human right to identity, the initial interpretation of this provision was limited to the right to a name and nationality. Nevertheless, in recent decades, a broader understanding of components of the right to identity allows to include identity aspects related to sexual diversity during

¹¹⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 24.

¹¹⁵ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC), art 8.

¹¹⁶ UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have his or her Best Interests taken as a Primary Consideration (Art. 3, para. 1)' (29 May 2013) UN Doc CRC/C/GC/14, 7.

¹¹⁷ Inter-American Court of Human Rights, 'Advisory Opinion OC-24/17' (San José de Costa Rica 24 November 2017), 42-43.

¹¹⁸ *ibid.*, 42.

¹¹⁹ European Court of Human Rights, 'Guide on Article 8 of the European Convention on Human Rights. Right to Respect for Private and Family Life, Home and Correspondence' (Strasbourg 31 August 2022), 66.

¹²⁰ *ibid.*

¹²¹ *Christine Goodwin v. the United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 77.

childhood. As expressed by the Argentinean Ministry of Justice, Security and Human Rights and UNICEF, the right to identity implies a dynamic historical period of time which extends and evolves from birth until death of persons and, therefore, cannot be considered or reduced to civil registration at birth.¹²² In other words, identity becomes an inherent element of human existence because, during life, a person develops their own identity. In this regard, addressing the individual and social context where a child is involved, the right to identity also needs to be guaranteed during this particular stage of life.¹²³

2.1.2. Relation with other Human Rights

According to the principle of interdependency and interrelatedness, the fulfilment of every human right often depends -wholly or in part- on the fulfilment of others.¹²⁴ Having addressed the main issues identified by IHRL in the protection of LGBTIQ+ persons, it must be observed that the child's right to identity is strictly related with the right to free development of the personality and right to integrity.

A. Right to Free Development of Personality

Article 22 UDHR expressly mentions that dignity and free development of the personality are indispensable goals to be guaranteed in every person through the satisfaction of economic, social, and cultural rights. In addition, the UDHR also states that free and full human development is the aim of the right to education¹²⁵ and can be only possible to guarantee in a community where individuals have legal duties.¹²⁶ Despite not being a binding instrument, the UDHR served as inspiration for several international human rights treaties. For instance, both

¹²² Argentinean Ministry of Justice, Security and Human Rights and UNICEF 'Derechos de Niños, Niñas y Adolescentes. Seguimiento de la Aplicación de la Convención sobre los Derechos del Niño. Derecho a la Identidad: Dimensiones, Experiencias y Políticas Públicas' (March 2009) <<https://www.corteidh.or.cr/tablas/r26889.pdf>> accessed 5 June 2023, 11.

¹²³ *ibid.*

¹²⁴ UNFPA, 'Human Rights Principles' (2005) <<https://www.unfpa.org/resources/human-rights-principles#:~:text=Interdependence%20and%20Interrelatedness%3A%20Human%20rights,physical%2C%20psychological%20and%20spiritual%20needs.>> accessed 28 November 2022.

¹²⁵ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA A/RES/217(III) (UDHR) art 26.2.

¹²⁶ *ibid.*, art 29.1.

the ICESCR¹²⁷ and the UNCRC¹²⁸ recognize the right of every person to education and remark that education shall be directed to the full development of the personality and a sense of dignity. Moreover, recognizing that every child has the inherent right to life, the UNCRC highlights that States parties shall guarantee the survival and development of children to the maximum extent possible.¹²⁹ Article 6 UNCRC not only lists mere human rights granted to children, but also constitutes a general principle of the UNCRC. In this respect, the CRC states that ‘development’ should be interpreted as the broadest holistic concept and, for this reason, must include a range of aspects such as ‘the child’s physical, mental, spiritual, moral, psychological and social development’.¹³⁰

As noted in the aforementioned instruments, special attention is given to guarantee the right to free development of the personality in its relationship with the right to education in childhood. Nevertheless, in recent years, important instruments in the Inter-American and European systems for the protection of human rights have embraced a broader understanding of the right to free development of personality. For instance, the Preamble of the ACHR recognizes that attributes of the human personality are foundations of human rights. Accordingly, ‘the ultimate objective of protection of children in international instruments is the harmonious development of their personality and the enjoyment of their recognized rights’.¹³¹

In the case of *Chaparro Álvarez y Lapo Íñiguez vs. Ecuador*, the IACtHR expressed that the right to liberty (Article 7 ACHR) encompasses the right of every person to lawfully organize their personal and social life in accordance with their own convictions, which is closely related to the freedom to develop their personality.¹³² Furthermore, underlining the Preamble of the ACHR, the IACtHR concluded that the right to liberty is an inherent attribute of individuals.¹³³ In addition, in the case of *Artavia Murillo et al. v. Costa Rica*, the IACtHR remarked that the

¹²⁷ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 13.

¹²⁸ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 29.1.

¹²⁹ *ibid.*, art 6.

¹³⁰ UN Committee on the Rights of the Child, ‘General Comment No. 5 (2003). General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6)’ (27 November 2003) UN Doc CRC/GC/2003/5, 4.

¹³¹ Inter-American Court of Human Rights, ‘Advisory Opinion OC-17/2002’ (San José de Costa Rica 28 August 2002), 57.

¹³² *Case of Chaparro Álvarez y Lapo Íñiguez vs. Ecuador* (Preliminary Objections, Merits, Reparations and Costs) [2007] Inter-American Court of Human Rights, 12.

¹³³ *ibid.*

protection of private life implies the guarantee of factors associated with individual dignity such as the ability of individuals to develop their own personality and to determine their own identity.¹³⁴ As a result, the IACtHR expressed that the right to personal autonomy, to personal development, and to establish relationships are aspects of the physical and social identity of persons.¹³⁵ Likewise, in the Advisory Opinion OC-24/17, the IACtHR firmly expressed that the right to identity ‘arises from recognition of the free development of the personality and the protection of the right to privacy’¹³⁶ and ‘understands individuals as masters of themselves and of their own acts’.¹³⁷

In the European system, the ECHR does not explicitly mention the right to free development of the personality. The CoE Commissioner for Human Rights, however, indicate that the notion of personal autonomy is an important principle to guarantee Article 8 ECHR (right to respect for private and family life).¹³⁸ Hence, the ECtHR ‘has stressed that elements such as gender identification, name, sexual orientation and sexual life fall within the personal sphere protected by Article 8’.¹³⁹ For instance, in the case of *Dudgeon v. the United Kingdom*, the ECtHR catalogued sexual orientation of persons as an essentially private manifestation of the personality.¹⁴⁰ A similar reasoning was given in the case of *Modinos v. Cyprus* where the ECtHR found a breach of Article 8 ECHR in domestic legislation criminalizing homosexual conducts.¹⁴¹

B. Right to Bodily Integrity

Even when there is no explicit mention of integrity, the ICCPR implicitly incorporates its protection by prohibiting acts of torture, cruel, inhuman or degrading treatment, punishment, or subjection to medical or scientific experimentation without free consent.¹⁴² According to the

¹³⁴ *Case of Artavia Murillo et al. v. Costa Rica* (Preliminary Objections, Merits, Reparations and Costs) [2012] Inter-American Court of Human Rights.

¹³⁵ *ibid.*

¹³⁶ Inter-American Court of Human Rights, ‘Advisory Opinion OC-24/17’ (San José de Costa Rica 24 November 2017), 43-44.

¹³⁷ *ibid.*

¹³⁸ Council of Europe Commissioner for Human Rights, ‘Issue Paper: Human Rights and Intersex People’ (September 2015) <<https://rm.coe.int/16806da5d4>> accessed 20 February 2023.

¹³⁹ *ibid.*, 32.

¹⁴⁰ *Dudgeon v. the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981).

¹⁴¹ *Modinos v. Cyprus* App no 15070/89 (ECtHR, 22 April 1993).

¹⁴² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 7.

HRC, ‘the aim of the provisions of article 7 of the [ICCPR] is to protect both the dignity and the physical and mental integrity of individual’.¹⁴³ Moreover, the HRC remarked that the scope of Article 7 ICCPR relates to acts that cause physical and mental suffering to victims.¹⁴⁴ More specifically, these provisions particularly protect children and patients in medical institutions from corporal punishment.¹⁴⁵ Furthermore, as mentioned by the HRC, the right to security of person (Article 9 ICCPR) requires for States to take appropriate measures in the protection of individuals from foreseeable threats to life or bodily integrity.¹⁴⁶ Some situations can affect the right to security of person and the right to life (Article 6 ICCPR), which equally includes the right to protection of life. Nevertheless, as a broader concept, the guarantee of the right to personal security also incorporates protection against injuries that are not life-threatening.¹⁴⁷

Differing from other international treaties, the UNCRPD explicitly mentions the right to integrity and recognizes that persons with disabilities have the right to be respected in their physical and mental integrity.¹⁴⁸ Moreover, addressing concern about violence against persons with disabilities, the CRPD mentioned that the right to integrity (Article 17 UNCRPD) is violated in situations such as ‘forced placement in institutions; deprivation of liberty; torture or cruel, inhuman or degrading treatment or punishment; violence; and the forced treatment of persons with disabilities inside and outside of mental health facilities’.¹⁴⁹ Furthermore, the CRPD stated that the scope of Article 7 UNCRPD, about children with disabilities, obliges States to apply the concept of best interests of the child (Article 3 UNCRC) with a careful consideration of their circumstances and cannot be interpreted to impede children from exercising their right to bodily integrity.¹⁵⁰ Consequently, the best interests of the child should ensure that children with disabilities are informed and consulted on their views in every process related to their situations.¹⁵¹

¹⁴³ UN Human Rights Committee ‘CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)’ (10 March 1992), 1.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ UN Human Rights Committee ‘General Comment No. 35. Article 9 (Liberty and Security of Person)’ (16 December 2014) UN Doc CCPR/C/GC/35, 2-3.

¹⁴⁷ *ibid.*

¹⁴⁸ Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (UNCRPD) article 17.

¹⁴⁹ UN Committee on the Rights of Persons with Disabilities, ‘General Comment No. 6 (2018) on Equality and Non-discrimination’ (26 April 2018) UN Doc CRPD/C/GC/6, 14.

¹⁵⁰ *ibid.*, 10.

¹⁵¹ *ibid.*, 10.

The inherent relationship between identity and integrity was noted by the IE SOGI in the report ‘Practices of So-Called “Conversion Therapy”’. This document explained that ‘sexual orientation and gender identity are a fundamental part of the personal integrity of such persons and part of the furtherance of their life plans and the pursuit of happiness’.¹⁵² In addition, the IE SOGI clearly emphasized that ‘practices of “conversion therapy”, based on the incorrect and harmful notion that sexual and gender diversity are disorders to be corrected, are discriminatory in nature’.¹⁵³ Furthermore, the IE SOGI, in explicit accordance with the CRC, recalled international obligations regarding the primary consideration of the best interests of the child in the guarantee of the child’s right to identity, physical and psychological integrity, health, and freedom of expression when discussing ‘conversion therapies’.¹⁵⁴ In the report entitled ‘Law of Inclusion’, the IE SOGI also highlighted the inextricable connection between the right to physical and mental integrity, bodily autonomy, and agency of individuals. Situations where LGBTIQ+ persons are violently hammered into stereotypical moulds of sex or gender directly violate the right to bodily integrity, or freedom from non-consensual physical acts.¹⁵⁵ For this reason, the IE SOGI concluded that the respect of the physical and mental integrity of LGBTIQ+ persons, which includes the freedom from undue interference in bodily integrity, must be taken into account by States through guaranteeing freedom and the principle of equality.¹⁵⁶

2.2. Right to Identity of Intersex Children

Having explored the relationship of the right to identity to other human rights, it is now important to study the recognition of the right to identity of intersex children in more detail. In order to determine current challenges in the guarantee of the right to identity, previously explained information must briefly be recalled. The concept of identity -which includes sexual and gender identity- has been evolving in recent decades based on a gender and children rights-based approach in specialized literature. The right to identity is also related to other human rights such as the right to free development of personality and the right to integrity. In addition,

¹⁵² OHCHR, ‘Practices of So-Called “Conversion Therapy”’. Report of the Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity’ (1 May 2020) UN Doc A/HRC/44/53, 16.

¹⁵³ *ibid*, 21.

¹⁵⁴ *ibid*, 17.

¹⁵⁵ OHCHR, ‘The Law of Inclusion. Report of the Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity’ (3 June 2021) UN Doc A/HRC/47/27, 12.

¹⁵⁶ *ibid*.

because of their age, intersex children are protected by the UNCRC. Therefore, the human right to identity (Article 8 UNCRC) must be guaranteed to LGBTIQ+ children in view of their specific challenges.

2.2.1. Challenges in Civil Registration and Legal Personhood

Civil registration, in a more traditional approach as a means and a goal of the right to identity, has been a constant legal preoccupation in international and domestic legislation during recent years. For instance, in 2008, the OAS General Assembly approved the Resolution AG/RES. 2362 (XXXVIII-O/08) which noted the importance of the right to identity as ‘one of the means through which observance of the rights to legal personhood, a name, a nationality, civil registration, and family relationships is facilitated’.¹⁵⁷ In addition, the Inter-American Juridical Committee expressed that identity is inherent to a register and, for that reason, an effective, accessible and universal registration mechanism -which incorporates data related to identity- is the starting point to guarantee the autonomous character of the right to identity as a goal.¹⁵⁸ Furthermore, the CoE demonstrated a more progressive approach to the legal recognition of sex and gender.¹⁵⁹ The CoE addressed the most significant challenges faced by intersex persons in registration such as non-binary sex/gender markers on identification documents, registration of sex on birth certificates, and flexibility in assigning and re-assigning legal sex/gender.¹⁶⁰

Firstly, as mandatory information on the birth certificates, the binarism in sexual markers can trigger the necessity of medical interventions in order to fit intersex children at birth into one of the female or male categories. There is still a current debate about the potential name or indication of the third category in identification documents. For instance, Ghattas provides some minimum standards that must be followed in the adoption of a third classification in sex/gender registration such as (i) the third option must be available to all people and only used

¹⁵⁷ Organization of American States, ‘Inter-American Program for Universal Civil Registry and the “Right to Identity”’ General Assembly Res AG/RES. 2362 (XXXVIII-O/08) (Washington DC 3 June 2008), 1.

¹⁵⁸ Inter-American Juridical Committee, ‘Opinion Approved by the Inter-American Juridical Committee about the Right to Identity’ (10 August 2007) <http://www.oas.org/es/sla/cji/docs/CJI_RES_137_LXXI-O-07.pdf> accessed 3 April 2023, 10.

¹⁵⁹ Council of Europe Commissioner for Human Rights, ‘Issue Paper: Human Rights and Intersex People’ (September 2015) <<https://rm.coe.int/16806da5d4>> accessed 20 February 2023, 37.

¹⁶⁰ *ibid.*

on voluntary basis;¹⁶¹ (ii) parents must not be obliged to register their intersex children with a third gender category because intersex persons can also identify themselves as female or male;¹⁶² and (iii) to register a person with a third option implies that all the Statal mechanisms should work together to ensure that persons with third option are treated equally as the ones registered as female or male.¹⁶³ Similarly, some specialized organizations suggest that third classifications should be labelled as ‘X’, ‘indetermined’ or ‘non-specified’ and avoid the term ‘intersex’ in order to prevent the involuntary assignment of intersex persons in a third sex/gender classification.¹⁶⁴ In addition, these organizations recommend to adopt policies to eventually achieve that sex or gender -just like race and religion- no longer appears on birth certificates.¹⁶⁵ Moreover, if blank sex/gender markers are set to be established in official documents, Ghattas emphasizes that this selection should be obligatory for all children in spite of their sex characteristics until their age of maturity.¹⁶⁶ Once maturity is reached, the person can have the option to register a sex/gender out of multiple options or keep it as blank.¹⁶⁷

Secondly, regarding the generalized policy aimed to guarantee the identification of children, there are cases where birth certificates are denied to intersex children because of the necessity to decide between a female or male category. As a result, intersex children who do not follow prior medical intervention are often denied to promptly obtain birth certificates and, subsequently, the emission of public official identification documents.¹⁶⁸ Various testimonies

¹⁶¹ Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 33.

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ Intersex Human Rights Australia (OII Australia), ‘Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report’ (6 February 2015) <<https://ihra.org.au/wp-content/uploads/2015/01/OII-Australia-SOGII-Submission-2015.pdf>> accessed 14 October 2022, 15.

¹⁶⁵ Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, ‘Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions’ (16 June 2016) <www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 83.

¹⁶⁶ Dan Ghattas, ‘Protecting Intersex People in Europe: A Toolkit for Law and Policymakers with Digital Appendix and Checklist’ (*OII Europe*, May 2019) <www.oiiurope.org/wp-content/uploads/2019/05/Protecting_intersex_in_Europe_toolkit.pdf> accessed 16 November 2022, 34.

¹⁶⁷ *ibid.*

¹⁶⁸ OHCHR, ‘Human Rights Violations Against Intersex People. A Background Note’ (24 October 2019) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsAgainstIntersexPeople.pdf>> accessed 23 October 2022, 34-35.

collected by intersex organizations have addressed how the absence of birth certificates affects their enjoyment of other rights such as education and health.¹⁶⁹

Thirdly, the possibility for intersex persons to modify official identification documents with a more accurate sex/gender identification is still difficult. Focusing on intersex characteristics which appear in later stages of life or intersex persons who fully consensually perform medical interventions on their bodies, there are situations where these documents later need to adopt a more accurate identification. Specialized organizations have presented recommendations about the procedures to amend sex details in identification records. For adults, this decision should be based only on self-identification and should not require medical treatments or judicial process.¹⁷⁰ For children, taking into account the evolving capacities and best interests of the child, the self-identification should also be supported by parents or legal guardians.¹⁷¹

Lastly, all these aspects related to the guarantee of the right to identity have an impact on the recognition of legal personhood of intersex persons during different stages of their lives. In this regard, the OAS expressed that the lack of recognition of identity can only mean that a person has no legal proof of existence.¹⁷² As a consequence, this situation complicates the exercise of civil, political, economic, social, and cultural human rights.¹⁷³ Furthermore, ‘recognition before the law means having legal personhood and the legal protections that flow from that’.¹⁷⁴ Even

¹⁶⁹ For instance, NGO *Zwischengeschlecht* identified two Argentinean cases that exemplify these challenges. In the first case, despite the lack of information, the medical staff mentioned the importance for a parent to sign a document in order to authorize surgery on their intersex child. Having obtained a second medical opinion that the child could live with intersex traits, the parent did not obtain the birth certificate because of the fear that their child could be taken away and be subjected to surgery without consent. After lying about the intersex characteristics of the child, the parent finally got a birth certificate when the child was 8 years old. In the second case, a 13-year-old intersex boy did not obtain any legal registration because of his parent’s fears to be stigmatized should the information appears in official certificates. In addition, medical staff told the parents that the only way to help in his registration was to perform genital surgery on him. They did not follow this advice based on the extreme fear of the child. *Justicia Intersex and Zwischengeschlecht, ‘Intersex Genital Mutilations Human Rights Violations of Persons With Variations Of Sex Anatomy. NGO Report to the 6th and 7th Periodic Report of Argentina on the Convention against Torture (CAT)’ (March 2017)* <<https://intersex.shadowreport.org/public/2017-CAT-Justicia-Intersex-Zwischengeschlecht-IGM.pdf>> accessed 24 April 2023, 19-22.

¹⁷⁰ Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, ‘Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions’ (16 June 2016) <www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 83.

¹⁷¹ *ibid.*

¹⁷² Organization of American States, ‘Inter-American Program for Universal Civil Registry and the “Right to Identity”’ General Assembly Res AG/RES. 2362 (XXXVIII-O/08) (Washington DC 3 June 2008), 2

¹⁷³ *ibid.*

¹⁷⁴ Asia Pacific Forum of National Human Rights Institutions and United Nations Development Programme, ‘Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex

when access or modification of birth certificates and official identification documents is a way to guarantee the identity of intersex persons, there are greater challenges that come from issues regarding identification. This can even hinder the legal personhood of intersex children.¹⁷⁵

Characteristics: A Manual for National Human Rights Institutions' (16 June 2016)
<www.asiapacificforum.net/resources/manual-sogi-and-sex-characteristics/> accessed 12 January 2023, 80.
¹⁷⁵ *ibid.*

Chapter III: The Convention on the Rights of the Child and the Child’s Right to Identity in Forced and Coercive Surgical Treatments

3.1. Convention on the Rights of the Child

The UNCRC is one of the 9 core international human rights treaties in the universal system for the protection of human rights.¹⁷⁶ When the UNCRC was adopted in 1989, it sent a clear message: Children are fully-fledged holders of rights¹⁷⁷ and, therefore, cannot continue being considered as belongings of their parents or as adults in training.¹⁷⁸ In addition, the UNCRC incorporates four general principles: The right to non-discrimination (Article 2); the best interests of the child (Article 3.1); the right to life, survival and development (Article 6); and the right of the child to be heard (Article 12).¹⁷⁹ To date, the UNCRC owns three facultative protocols: OPSC-CRC (2000), related to the sale of children; OPAC-CRC (2000) related to the involvement of children in armed conflicts; and OPIC-CRC (2011) related to a communications procedure to the CRC.

3.1.1. Status

With 196 UN Member States as parties, the UNCRC is the most widely ratified human rights international treaty in history.¹⁸⁰ To date, only the United States of America is not party to the UNCRC. Nonetheless, this situation is extremely particular because even though the United States of America has not ratified the UNCRC, it has ratified the OPSC-CRC and OPAC-CRC. Moreover, notwithstanding the unprecedented success of the UNCRC, there are 40 States parties which maintain reservations to certain treaty articles or provisions.¹⁸¹ There are thus some findings regarding the membership of States parties that need to be highlighted in view

¹⁷⁶ OHCHR, ‘The Core International Human Rights Instruments and their Monitoring Bodies’ <<https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies>> accessed 10 August 2023.

¹⁷⁷ In legal literature, the term ‘subjects of rights’ can be also found to express the same idea.

¹⁷⁸ UNICEF, ‘Convention on the Rights of the Child’ <<https://www.unicef.org/child-rights-convention>> accessed 13 April 2023.

¹⁷⁹ UNICEF, ‘How We Protect Children’s Right with the UN Convention on the Rights of the Child’ <<https://www.unicef.org.uk/what-we-do/un-convention-child-rights/>> accessed 11 August 2023.

¹⁸⁰ *ibid.*

¹⁸¹ More details about the States parties with reservations to provisions of the UNCRC, including the mention of each UNCRC article, can be found in Appendix 1.

of the practice of forced and coercive surgical treatments and its relationship with the right to identity.

Firstly, some States parties did not express any explicit reservation that could directly affect rights involved in forced and coercive surgical treatments but issued a particular interpretation of UNCRC provisions. As an example, Kiribati declared that Articles 12 (right to be heard), 13 (right to freedom of expression), 14 (right to freedom of thought, conscience, and religion), 15 (right to freedom of association and freedom of peaceful assembly), and 16 (right to not be subjected to arbitrary interference in privacy, family, home, or correspondence) of the UNCRC shall be exercised in accordance with parental authority, customs, and traditions.¹⁸² Considering the importance to guarantee the right to be heard in the medical interventions on intersex children, it exacerbates concerns that Article 12 UNCRC -which also incorporates one of the general principles of the UNCRC- can only be guaranteed if it is accepted by parents or legal guardians.

Secondly, there are no explicit reservations by States parties to Article 8 UNCRC (right to identity). Nonetheless, some reservations can create direct or indirect consequences in the guarantee and enjoyment of the right to identity of intersex children. For instance, Iran, Kuwait, Mauritania, Saudi Arabia, and the Syrian Arab Republic made similar general reservations to every article or provision which could contradict Islamic Law.¹⁸³ Hence, (i) these general reservations incorporate the States parties' discretion to determine the situations where UNCRC articles or provisions will not apply; and (ii) they are founded in each State party's religion, traditions, and social values. In this regard, the IE SOGI provided some examples of State-promoted violence against LGBTIQ+ persons related to religion or belief such as 'practices of conversion and forced gender reassignment surgeries'.¹⁸⁴

Thirdly, some States parties made reservation to UNCRC provisions that incorporate other human rights, which are related to the right to identity, often linked to forced and coercive surgical interventions on intersex children. As an example, despite the 2009 partial withdrawal

¹⁸² United Nations Treaty Collection, 'Chapter IV Human Rights 11. Convention on the Rights of the Child' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mdsg_no=IV-11&chapter=4#EndDec> accessed 12 October 2022.

¹⁸³ *ibid.*

¹⁸⁴ OHCHR, 'Freedom of Religion or Belief, and Freedom from Violence and Discrimination Based on Sexual Orientation and Gender Identity. Report of the Independent Expert on Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity' (7 June 2023) UN Doc A/HRC/53/37, 6.

of the initial general reservation to every provision of the treaty which contradicts the Islamic sharia,¹⁸⁵ Qatar re-affirmed its reservation to Articles 2 and 14 UNCRC which remains to this day.¹⁸⁶ Nevertheless, Article 2 UNCRC contains the principle of equality and prohibition of discrimination, another general principle of the treaty. For this reason, there could be scenarios where discrimination based on sexual characteristics will not incur international obligations for the State party.

Regarding the child's right to information, Turkey made reservation to Article 17 UNCRC with the aim to interpret this provision according to the spirit of the Constitution of the Republic of Turkey and the Treaty of Lausanne.¹⁸⁷ Moreover, the United Arab Emirates made a reservation to Article 17 UNCRC regarding the role of mass media in the realization of the child's right to information.¹⁸⁸ However, the CRC stated that the right to information, which should be appropriate regarding age and evolving capacities, is a crucial prerequisite for the effective realization of the child's right to express views (Article 12 UNCRC).¹⁸⁹ For this reason, the child's right to information shall be guaranteed in 'any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures'.¹⁹⁰

Fourthly, regarding specific components of the right to identity, the right to nationality (Article 7 UNCRC) can be compromised in reservations made by some State parties. In this context, Malaysia made reservations so that provisions from Articles 2 and 7 UNCRC will be applicable in conformity to domestic laws and policies of the Government of Malaysia.¹⁹¹ Similarly, the United Arab Emirates formulated a reservation to Article 7 UNCRC expressing that the acquisition of nationality is an internal matter regulated by domestic legislation.¹⁹²

¹⁸⁵ As previously expressed, these reservations are still valid today for Iran, Kuwait, Mauritania, Saudi Arabia, and the Syrian Arab Republic.

¹⁸⁶ United Nations Treaty Collection, 'Chapter IV Human Rights 11. Convention on the Rights of the Child' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4#EndDec> accessed 12 October 2022.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ UN Committee on the Rights of the Child, 'General Comment No. 12 (2009). The Right of the Child to be Heard' (20 July 2009) UN Doc CRC/C/GC/12, 10.

¹⁹⁰ *ibid.*, 20.

¹⁹¹ United Nations Treaty Collection, 'Chapter IV Human Rights 11. Convention on the Rights of the Child' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4#EndDec> accessed 12 October 2022.

¹⁹² United Nations Treaty Collection, 'Chapter IV Human Rights 11. Convention on the Rights of the Child' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4#EndDec> accessed 12 October 2022.

Having mentioned that some international obligations and provisions cannot be guaranteed by States parties to the UNCRC based on their reservations, it is relevant now to study the OPIC-CRC as a formal requirement for the CRC to receive individual complaints. To date, only 50 States have ratified the OPIC-CRC and none of them have expressed reservations. For this reason, even when most UN Member States are parties to the UNCRC, only a part of them has ratified the OPIC-CRC, which impedes the CRC to address potential breaches of UNCRC provisions. It is also relevant to mention the following exceptional situations: (i) Monaco is the only State party to the OPIC-CR that expressly declared the non-recognition of competence of the UNCRC with respect to provisions under the UNCRC and its protocols;¹⁹³ and (ii) remarking the current situation of its territory, Ukraine declared that the application and implementation of obligations under the OPIC-CR is limited and cannot be guaranteed.¹⁹⁴

3.1.2. Committee on the Rights of the Child

As treaty body of the UNCRC, the CRC is composed of 18 independent experts with high moral and a recognized competence in the field of children's human rights.¹⁹⁵ The purpose of the CRC is to monitor the progress by States parties in achieving UNCRC obligations.¹⁹⁶ To examine the progress made by States parties, the CRC expresses its concerns and emits concluding observations as a result of findings in periodic reports submitted by States parties. In addition, based on thematic issues concerning the human rights of children, the CRC publishes general comments which incorporate its interpretation of the UNCRC provisions.¹⁹⁷

As previously mentioned, the OPIC-CRC allows the CRC to consider and carry out inquiries about complaints submitted by individual(s) claiming to be victims of rights violations recognized in the UNCRC and, if applicable, the two optional protocols to the UNCRC (OPSC-CRC and OPAC-CRC). The procedural requirements of admissibility can be found in Article

¹⁹³ United Nations Treaty Collection, 'Chapter IV Human Rights 11. d Optional Protocol to the Convention on the Rights of the Child on a communications procedure' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&clang=_en> accessed 13 March 2023.

¹⁹⁴ *ibid.*

¹⁹⁵ OHCHR, 'Membership. Committee on the Rights of the Child' <<https://www.ohchr.org/en/treaty-bodies/crc/membership>> accessed 19 February 2023.

¹⁹⁶ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 43.1.

¹⁹⁷ OHCHR, 'Introduction to the Committee' <<https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee>> accessed 22 May 2023.

7 OPIC-CRC. The CRC issues a decision for each complaint where it can consider the violation of articles or provisions of the UNCRC by a State party. Unlike the jurisprudence of regional human rights courts (African Court on Human and Peoples' Rights, ECtHR, and IACtHR), the views adopted by the CRC are non-binding for the State party involved. Nevertheless, their relevance is evident because they also embody interpretations of the UNCRC.

3.2. International Standards Regarding the Right to Identity of Intersex Children

International human rights standards refer to a group of various legal instruments that (i) establish international human rights obligations to States (international treaties, protocols, customary law) and (ii) contribute to precise the content and scope of these obligations (declarations, principles, treaty bodies general comments and concluding observations, among others).¹⁹⁸ The present section focuses on finding international human rights standards on the situation of the child's right to identity in forced and coercive surgical treatments in the production the CRC in its general comments, concluding observations, and views in the framework of the OPIC-CRC. Therefore, the search for international standards is approached from three main angles: The prohibition of discrimination; the protection against non-consensual treatment; and the identification of intersex children.

3.2.1. Prohibition of Discrimination

The prohibition of discrimination, as one of the general principles of the treaty, is clearly referenced in Article 2 UNCRC. Through its general comments, the CRC has expressed concern about its relationship to the enjoyment of other children's rights. For instance, in general comment No. 1, the CRC stated that 'discrimination on the basis of any of the grounds listed in article 2 of the Convention, whether overt or hidden, offends the human dignity of the child and is capable of undermining or even destroying the capacity of the child to benefit from educational opportunities'.¹⁹⁹ Furthermore, the preoccupation with discrimination against

¹⁹⁸ OHCHR, 'Estándares Internacionales sobre Derechos Humanos Aplicables a los Aspectos Centrales del Proceso Electoral' <https://www.oacnudh.org.gt/images/CONTENIDOS/Campanas/Estandares_internacionales_elecciones.pdf> accessed 14 January 2023, 1.

¹⁹⁹ UN Committee on the Rights of the Child, 'General Comment No. 1 (2001). Article 29 (1): The Aims of Education' (17 April 2001) UN Doc CRC/GC/2001/1, 4.

children in potentially vulnerable situations has been as well demonstrated by the CRC.²⁰⁰ In general comment No. 20, the CRC explicitly highlighted the potential discrimination faced by intersex adolescents in the guarantee of their right to sexual and reproductive health, education and training.²⁰¹ In addition, in general comment No. 21, the CRC identified intolerance and discrimination against intersex children as one of the structural causes of the emergence of children in street situations.²⁰² In addition, when addressing discrimination based on intersex status, the CRC expressly condemned forced surgeries on intersex children considering gender identity as one of the human rights violated in these interventions.²⁰³ For this reason, it recommended to take effective action against discrimination of intersex adolescents for example by eliminating these practices and adopting laws prohibiting discrimination based on intersex status.²⁰⁴

The CRC also expressed deep concern about situations of discrimination against children belonging to minority groups and recommended States parties to adopt legislation, policies, and programmes to combat discrimination against intersex children in recent concluding observations on periodic reports. The explicit classification of intersex children as a vulnerable group can be found in concluding observations to States parties with a more progressive domestic legislation regarding sexual diversity. For instance, in 2023, the CRC condemned discrimination against intersex children in the concluding observations on the combined fifth and sixth reports of Finland,²⁰⁵ the concluding observations on the combined fifth and sixth periodic reports of Sao Tome and Principe,²⁰⁶ the concluding observations on the combined sixth and seventh periodic reports of United Kingdom of Great Britain and Northern Ireland,²⁰⁷

²⁰⁰ For instance, in general comment No. 13 about the right of the child to freedom from all forms of violence, the CRC listed groups of children who are likely to be exposed to violence that must be mainstreamed into national coordinating frameworks. With understanding of the sexual diversity, the CRC expressly mentioned that lesbian, gay, and transgender children are in potentially vulnerable situations.

²⁰¹ UN Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence' (6 December 2016) UN Doc CRC/C/GC/20, 9.

²⁰² UN Committee on the Rights of the Child, 'General Comment No. 21 (2017) on Children in Street Situations' (21 June 2017) UN Doc CRC/C/GC/21, 4-5.

²⁰³ UN Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence' (6 December 2016) UN Doc CRC/C/GC/20, 10.

²⁰⁴ *ibid.*

²⁰⁵ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Reports of Finland' (2 June 2023) UN Doc CRC/C/FIN/CO/5-6.

²⁰⁶ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Sao Tome and Principe' (23 June 2023) UN Doc CRC/C/STP/CO/5-6.

²⁰⁷ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Sixth and Seventh Periodic Reports of the United Kingdom of Great Britain and Northern Ireland' (22 June 2023) UN Doc CRC/C/GBR/CO/6-7.

the concluding observations on the combined sixth and seventh periodic reports of Sweden,²⁰⁸ and the concluding observations on the combined fifth and sixth periodic reports of Ireland.²⁰⁹

Despite the fact that to date, there is no explicit mention of the discrimination of intersex children in the enjoyment of their right to identity, the CRC has stated its position about discrimination of intersex children regarding their right to education and health. Firstly, the CRC stated that States parties must adopt necessary proactive measures to end discrimination in the access to education of adolescents in marginalized situations, such as intersex adolescents.²¹⁰ For instance, in the concluding observations on the combined fifth and sixth periodic reports of Croatia, the CRC expressed concern about the current situation of discrimination and harassment against intersex children in education settings and recommended the State party to fully implement laws prohibiting discrimination and strengthen public educational campaigns to promote awareness on issues of discrimination against intersex children.²¹¹ Another constant concern regarding the right to education can be observed in the preoccupation with violence directed at intersex children by peers. For example, in the concluding observations on the combined fourth to sixth periodic reports of Cambodia, the CRC recommended the State party to prevent, create intervention protocols and combat bullying -including cyberbullying- in schools, specifically for intersex children.²¹² A similar treatment can be found in the concluding observations on the combined fifth and sixth periodic reports of Switzerland.²¹³

Secondly, the CRC remarked that an unequal guarantee in the access to information, commodities, and services for adolescents regarding their sexual and reproductive health could lead to discrimination.²¹⁴ The CRC stated that States parties must perform specific efforts to overcome barriers of stigma and fear by intersex adolescents, as access to healthcare cannot be

²⁰⁸ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Sweden' (7 March 2023) UN Doc CRC/C/SWE/CO/6-7.

²⁰⁹ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ireland' (28 February 2023) UN Doc CRC/C/IRL/CO/5-6.

²¹⁰ UN Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence' (6 December 2016) UN Doc CRC/C/GC/20.

²¹¹ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Croatia' (22 June 2022) UN Doc CRC/C/HRV/CO/5-6.

²¹² UN Committee on the Rights of the Child, 'Concluding Observations on the Combined fourth to sixth periodic reports of Cambodia' (27 June 2022) UN Doc CRC/C/KHM/CO/4-6.

²¹³ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined fifth and sixth periodic reports of Switzerland' (22 October 2021) UN Doc CRC/C/CHE/CO/5-6

²¹⁴ UN Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence' (6 December 2016) UN Doc CRC/C/GC/20.

subject to conditions.²¹⁵ Similar statements can be found in several recent concluding observations on periodic reports. For example, in the concluding observations on the combined sixth and seventh periodic reports of Sweden, the CRC recommended strengthening mental health services for children, which should be adapted to address specific needs of intersex children.²¹⁶ In the concluding observations on the sixth periodic report of New Zealand, the CRC recommended to address inequalities of intersex children in order to prioritize their access to mental health counselling services.²¹⁷ Also, in the concluding observations on the combined fifth and sixth periodic reports of the Plurinational State of Bolivia, the CRC encouraged to develop specific healthcare protocols for intersex children.²¹⁸

In its jurisprudence, the majority of cases are related to the deportation or repatriation of children where the CRC carefully studies the conduct of States parties regarding the best interests of the child.²¹⁹ To date, none of the cases before the CRC are specifically concerned with discrimination against intersex children.²²⁰ Nevertheless, there are two main cases where the CRC has considered a breach to the principle of non-discrimination (Article 2 UNCRC) in relation to the right to education (Article 28 UNCRC) and health (Article 24 UNCRC). Firstly, in the case of *A.B.A. et al. vs Spain* regarding the right to education of Moroccan children born and raised in Spain, the CRC remarked that the treaty provision prohibits overt or hidden discrimination or, in other words, *de jure* or *de facto* and direct or indirect discrimination.²²¹ Furthermore, the CRC concluded in this case that disproportional administrative requirements for access to public education, which led to the failure in the enrolment for a prolonged period of time, constitute discrimination based on national origin of the children, read in conjunction with Article 28 UNCRC.²²² ²²³ Secondly, in the case of *Camila vs Peru* about the access to

²¹⁵ *ibid.*

²¹⁶ UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Sweden’ (7 March 2023) UN Doc CRC/C/SWE/CO/6-7.

²¹⁷ UN Committee on the Rights of the Child, ‘Concluding Observations on the Sixth Periodic Report of New Zealand’ (28 February 2023) UN Doc CRC/C/NZL/CO/6.

²¹⁸ UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Plurinational State of Bolivia’ (6 March 2023) UN Doc CRC/C/BOL/CO/5-6.

²¹⁹ More details about the UNCRC jurisprudence used in this research can be found in Appendix 2.

²²⁰ *ibid.*

²²¹ UN Committee on the Rights of the Child, ‘Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No. 114/2020, No. 116/2020, No. 117/2020 and No. 118/2020’ (20 October 2022) UN Doc CRC/C/91/D/114/2020, CRC/C/91/D/116/2020, CRC/C/91/D/117/2020, and CRC/C/91/D/118/2020.

²²² *ibid.*

²²³ Similar reasoning can be found in the case of *H.M. vs Spain* (Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 115/2020).

therapeutic abortion of an indigenous and rural child victim of rape, the CRC developed its position about the right to health. The CRC observed that institutional re-victimization, denying of access to therapeutic abortion, and incrimination for an alleged self-abortion, as a punishment for not following gender stereotypes about her reproductive role, constituted discrimination based on age, gender, ethnicity, and social status of the author and violation to Article 2 UNCRC.²²⁴ In addition, the CRC mentioned that the child's right to the enjoyment of the highest attainable standard of health (Article 24 UNCRC) includes the right to bodily autonomy, which implies the freedom to take decisions on sexual and reproductive matters.²²⁵

There is a clear position in the international standards regarding discrimination which now without a doubt includes the protection of intersex children. In addition, the CRC has expressed a recurrent concern about the discrimination of children in their enjoyment of the right to education and health not only in general comments, but also in the specific findings on the periodic reports of States parties in their fulfilment of treaty obligations. Nevertheless, the discrimination of intersex children in the guarantee of their right to identity is a topic that still requires deeper exploration by the CRC.

3.2.2. Protection against Non-consensual Treatments

The protection of intersex children against non-consensual treatments has been developed by the CRC based on its relationship to other human rights and its classification as harmful practice by other UN treaty bodies. For instance, in general comment No. 3, the CRC remarked that States parties shall ensure the right to life, survival and development (Article 6 UNCRC) by providing careful attention to sexuality in children, even if they do not conform to societal and cultural norms.²²⁶ For the CRC, the right to access to health information is crucial in the protection of children against harmful traditional practices.²²⁷ Furthermore, in general comment No. 12, the CRC developed relevant aspects in situations of forced and coercive interventions on children. As an example, the CRC highlighted that children -including young

²²⁴ UN Committee on the Rights of the Child, 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 136/2021' (13 June 2023) UN Doc CRC/C/93/D/136/2021.

²²⁵ *ibid.*

²²⁶ UN Committee on the Rights of the Child, 'General Comment No. 3 (2003). HIV/AIDS and the Rights of the Child' (17 March 2003) UN Doc CRC/GC/2003/3.

²²⁷ UN Committee on the Rights of the Child, 'General Comment No. 4 (2003). Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (1 July 2003) UN Doc CRC/GC/2003/4.

children- have the right to express their views and participate in decision-making processes about treatments regarding their own health care, in accordance with their evolving capacities.²²⁸ For this purpose, children should obtain appropriate and accessible information about the treatment, effects, and outcomes.²²⁹ Similarly, in general comment No. 15, the CRC remarked the importance of children's participation on all aspects of health provisions and, taking into consideration age and maturity, their views shall be seriously taken into account in the access to services, participation in consultations, among others.²³⁰

A major development of the right to be heard about decisions concerning various aspects of child's life can be observed in cases before the CRC.²³¹ For instance, in the case of *Y.B. and N.S. vs Belgium* about the denial of a humanitarian visa for a child taken in under *kafalah* (fostering arrangement) by a Belgian-Moroccan couple, the CRC remarked that the right to be heard cannot be conditioned solely based on the age of the child. For this reason, there was a breach of Article 12 UNCRC when the State party denied that a 5-year-old child possesses the capacity to form views about living in Belgium, which in this case was a relevant element in the proceeding concerning a residence permit.²³² This decision is coherent with general comment No. 7 where the CRC stated that, even before being able to communicate through spoken or written language, young children can make choices and express their feelings and ideas in different ways.²³³ In addition, the CRC developed more elements of the right to be heard in cases related to the deportation of children and the age determination of unaccompanied children. For instance, in the case of *Z.S. and A.S. vs Switzerland* about the deportation of two children to Russia, where their access to essential medical care could not be guaranteed, the CRC highlighted that States parties must ensure that the right to be heard shall be seriously guaranteed to children, either directly or through representation, in any judicial or

²²⁸ UN Committee on the Rights of the Child, 'General Comment No. 12 (2009). The Right of the Child to be Heard' (20 July 2009) UN Doc CRC/C/GC/12, 20.

²²⁹ UN Committee on the Rights of the Child, 'General Comment No. 12 (2009). The Right of the Child to be Heard' (20 July 2009) UN Doc CRC/C/GC/12, 23.

²³⁰ UN Committee on the Rights of the Child, 'General Comment No. 15 (2013) on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (Art. 24)' (17 April 2013) UN Doc CRC/C/GC/15.

²³¹ More details about the UNCRC jurisprudence used in this research can be found in Appendix 2.

²³² UN Committee on the Rights of the Child, 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 12/2017' (5 November 2018) UN Doc CRC/C/79/D/12/2017.

²³³ UN Committee on the Rights of the Child, 'General Comment No. 7 (2005). Implementing Child Rights in Early Childhood' (20 September 2006) UN Doc CRC/C/GC/7/Rev.1.

administrative procedure that affects them.²³⁴ In the case of *S.E.M.A. vs France* about the determination of the age of a migrant and unaccompanied child, the CRC found a breach of Article 12 UNCRC because the alleged victim was not granted a representative or interpretation in his mother tongue (Punjabi) during the administrative procedure.²³⁵

Despite the jurisprudential development about the right to be heard, which is a neuralgic element in medical interventions on children regarding the ‘informed consent’ policy, the CRC expressed a firmer posture against forced and coercive surgical treatments on intersex children in recent concluding observations on periodic reports. The following results can be observed in their study:

- (i) There are several recommendations regarding the prohibition to perform unnecessary medical treatment on intersex children, considering them as harmful practices related to concerns about violence against children.
- (ii) Forced and coercive medical interventions on intersex children are linked to State obligations regarding FGM and Sustainable Development Goal 5.3. For this purpose, the CRC often recalls joint general recommendation No. 31 of the CEDAW Committee and general comment No. 18 of the CRC.²³⁶
- (iii) Even when there is a tendency to explicitly voice concern about harmful practices by the CRC, recommendations to eradicate forced and coercive medical interventions on intersex children can be mainly found in concluding observations to States parties with sexual diversity incorporated in domestic legislation.

In addition, there are some concluding observations with outstanding developments by the CRC. In the concluding observations on the sixth periodic report of New Zealand, the CRC provided recommendations with the explicit aim of ensuring the mental and bodily integrity, autonomy, and self-determination of intersex children.²³⁷ In this case, it is recommended to prohibit ‘non-urgent and non-essential (including feminizing or masculinizing) medical or

²³⁴ UN Committee on the Rights of the Child, ‘Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 74/2019’ (16 March 2022) UN Doc CRC/C/89/D/74/2019.

²³⁵ UN Committee on the Rights of the Child, ‘Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 130/2020’ (6 March 2023) UN Doc CRC/C/92/D/130/2020.

²³⁶ See Chapter 1.3.2. Intersex and Female Genital Mutilation.

²³⁷ UN Committee on the Rights of the Child, ‘Concluding Observations on the Sixth Periodic Report of New Zealand’ (28 February 2023) UN Doc CRC/C/NZL/CO/6, 7.

surgical treatment of intersex children before they are of sufficient age or maturity to make their own decisions and provide free, prior and informed consent'²³⁸ and to secure 'independent oversight of decision-making to ensure that medical treatments for children with intersex traits who are unable to consent are necessary, urgent and the least invasive option'.²³⁹ Another similar example can be found in the concluding observations on the combined fifth and sixth periodic reports of Canada where the CRC recommended to modify the Criminal Code in order to prohibit non-consensual and medically unnecessary surgeries on intersex children regarding the right to bodily integrity, autonomy and self-determination.²⁴⁰

To summarize, similar to other UN treaty bodies, the CRC also qualifies forced and coercive surgical interventions on intersex children as harmful practices which must be prohibited by States parties' legislation. As previously mentioned, with joint general recommendation No. 31 of the CEDAW Committee and general comment No. 18 of the CRC, these practices were linked to FGM. Nevertheless, today, the CRC addresses the specific situation of intersex children and further develops international standards pursuing the prohibition of forced and coercive medical interventions as an autonomous harmful practice against intersex children. To date, there is no indication or development about the right to identity specifically in relation to the prohibition of forced and coercive medical interventions on intersex children. Nonetheless, it is pertinent to suggest that, once awareness about harmful practices against intersex children is generalized by States parties, then the CRC will focus attention on further concerns related with the right to identity such as birth registration, sex/gender identification, and procedures to change information in identification documents.

3.2.3. Identification of Intersex Children

In recent years, there has been a visible evolution in the interpretation of Article 8 UNCRC. For instance, the CRC has recognized, stated concerns, and established parameters on issues related to the guarantee to identity during adolescence and early childhood. Regarding adolescent's identity, the CRC remarked in general comment No. 4 that the development of

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ UN Committee on the Rights of the Child, 'Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Canada' (23 June 2022) UN Doc CRC/C/CAN/CO/5-6.

individual identity and sexuality can face several challenges during this stage of life.²⁴¹ Moreover, in general comment No. 20, the CRC mentioned that during adolescence, children tend to explore and forge individual and communal identities that are related to the creation of an emergent sense of self.²⁴² Therefore, State and non-State actors should introduce measures to support adolescents to thrive, explore their emerging capacities, and help build their capacity to make free and informed decisions in life.²⁴³ Concerning identity during early childhood, the CRC also explicitly expressed the importance to realize and respect rights for young children, such as the right to identity.²⁴⁴ In general comment No. 7, the CRC mentioned that ‘young children’s earliest years are the foundation for their physical and mental health, emotional security, cultural and personal identity, and developing competencies’.²⁴⁵ Furthermore, looking at the respect for their views and feelings, ‘young children are acutely sensitive to their surroundings and very rapidly acquire understanding of the people, places and routines in their lives, along with awareness of their own unique identity’.²⁴⁶

Regarding the situation of LGBTIQ+ children, the CRC expressed in general comment No. 14 that the child’s right to preserve their identity is guaranteed by Art 8 UNCRC and includes characteristics such as sex, sexual orientation, and personality.²⁴⁷ In addition, addressing potential issues in respect of the child’s right to identity regarding religious and cultural values and traditions, the CRC expressly stated that cultural identity is no excuse or justification for authorities to deny provisions in the UNCRC and concluded that practices incompatible with treaty provision are against the best interests of the child.²⁴⁸

In the findings on reports submitted by States parties, the child’s right to identity has been a major concern of the CRC. Traditionally, the CRC had a specific approach to the right to identity with the constant promotion of registration of children at birth and the eradication of

²⁴¹ UN Committee on the Rights of the Child, ‘General Comment No. 4 (2003). Adolescent Health and Development in the Context of the Convention on the Rights of the Child’ (1 July 2003) UN Doc CRC/GC/2003/4.

²⁴² UN Committee on the Rights of the Child, ‘General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence’ (6 December 2016) UN Doc CRC/C/GC/20.

²⁴³ *ibid.*

²⁴⁴ UN Committee on the Rights of the Child, ‘General Comment No. 7 (2005). Implementing Child Rights in Early Childhood’ (20 September 2006) UN Doc CRC/C/GC/7/Rev.1, 2.

²⁴⁵ *ibid.*, 3.

²⁴⁶ *ibid.*, 7.

²⁴⁷ UN Committee on the Rights of the Child, ‘General Comment No. 14 (2013) on the Right of the Child to Have his or her Best Interests taken as a Primary Consideration (art. 3, para. 1)’ (29 May 2013) UN Doc CRC/C/GC/14, 7.

²⁴⁸ *ibid.*

barriers such as fees and sanctions to parents or legal guardians for delayed registration.²⁴⁹ In addition, the CRC maintained a clear position against anonymous abandonment of children and urged several States parties to eradicate ‘baby hatches’ or ‘baby boxes’ from domestic legislations.²⁵⁰ Nevertheless, based on topics concerning assisted reproduction technologies - such as surrogacy and donor arrangements- and the recognition of gender identity on children, new approaches about the fulfilment of Article 8 UNCRC can be found in recent concluding observations. As shown in the concluding observations on the combined fourth to sixth periodic reports of Greece, the CRC urged to ensure the child’s right to identity through access to information about their origin through assisted reproduction technologies and adoption.²⁵¹ Likewise, as shown in the concluding observations on the combined fifth and sixth periodic reports of Ireland, the CRC recommended the legal recognition of gender identity to children aged 16 and 17 through a simplified procedure.²⁵² In addition, the CRC stated that the recognition of gender identity for children under 16 years old should be conducted in close consultation with them, including transgender children, and should be implemented ‘in line with children’s rights, including the right to be heard and the right to identity, in accordance with their evolving capacities, to free and informed consent and with appropriate safeguards’.²⁵³ Furthermore, in the concluding observations on the combined fifth and sixth periodic reports of Iceland, the CRC recommended the State party to provide training on gender-neutral registration to professionals who work with children.²⁵⁴

The jurisprudence where the CRC has found breaches of Article 8 UNCRC are mainly based on the determination of the age of unaccompanied children.²⁵⁵ For instance, among others, in

²⁴⁹ As an example, in the concluding observations on the combined fifth and sixth periodic report of Azerbaijan (CRC/C/AZE/CO/5-6), the CRC expressly recommended to implement a free of charge late registration of births and eliminate any administrative or judicial sanction against parents as a result.

²⁵⁰ As an example, in the concluding observations on the combined fifth and sixth periodic reports of Germany (CRC/C/DEU/CO/5-6), the CRC recommended that confidential hospital births should only be promoted as a last resort. At the same time, access to information on their biological origins should be ensured to children in order to finally eliminate the use of ‘baby boxes’. Similar concern and recommendations were given by the CRC in the concluding observations on the combined fifth and sixth periodic reports of Poland (CRC/C/POL/CO/5-6).

²⁵¹ UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Greece’ (28 June 2022) UN Doc CRC/C/GRC/CO/4-6.

²⁵² UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Ireland’ (28 February 2023) UN Doc CRC/C/IRL/CO/5-6.

²⁵³ *ibid*, 6.

²⁵⁴ UN Committee on the Rights of the Child, ‘Concluding Observations on the Combined Fifth and Sixth periodic Reports of Iceland’ (23 June 2022) UN Doc CRC/C/ISL/CO/5-6.

²⁵⁵ More details about the UNCRC jurisprudence used in this research can be found in Appendix 2.

the cases of *C.O.C. vs Spain*,²⁵⁶ *S.E.M.A. vs France*,²⁵⁷ and *J.A.B. vs Spain*,²⁵⁸ the CRC expressed that the date of birth and age are part of identity. For this reason, in order to respect the child's right to identity, States parties shall preserve their identity without depriving any of its elements.²⁵⁹ In pending decisions on cases communicated to the CRC on the breach of Article 8 UNCRC, there is also case 119/2020 against Paraguay about delays in the judicial process about a child's access to paternal filiation.²⁶⁰

²⁵⁶ UN Committee on the Rights of the Child, 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 63/2018' (24 February 2021) UN Doc CRC/C/86/D/63/2018.

²⁵⁷ UN Committee on the Rights of the Child, 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 130/2020' (6 March 2023) UN Doc CRC/C/92/D/130/2020.

²⁵⁸ UN Committee on the Rights of the Child, 'Views Adopted by the Committee under Article 10 of the Optional Protocol, Concerning Communication No. 22/2017' (9 July 2019) UN Doc CRC/C/81/D/22/2017.

²⁵⁹ UN Committee on the Rights of the Child, 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 63/2018' (24 February 2021) UN Doc CRC/C/86/D/63/2018; UN Committee on the Rights of the Child, 'Views Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 130/2020' (6 March 2023) UN Doc CRC/C/92/D/130/2020; UN Committee on the Rights of the Child, 'Views Adopted by the Committee under Article 10 of the Optional Protocol, Concerning Communication No. 22/2017' (9 July 2019) UN Doc CRC/C/81/D/22/2017.

²⁶⁰ OHCHR, 'Table of Pending Cases before the Committee on the Rights of the Child' (23 February 2022) <<https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/TablePendingCases.pdf>> accessed 24 March 2023.

Conclusion

Even today, intersex children are subjected to forced and coercive surgical interventions to ‘normalize’ their bodies in order to fit the female and male binary. These practices -which can be considered as abuses in health care settings, harmful practices, and degrading or inhuman treatment- are strongly supported by the ‘optimal gender’ policy. Regarding the harmful consequences of medical interventions and the lack of free and informed consent, the ‘informed consent’ seems better aligned with a gender and child rights-based approach. Nevertheless, due to challenges in the legal recognition of personhood, intersex children cannot fully enjoy their right to identity.

The CRC has been neuralgic actor in the evolution of the legal framework regarding the right to identity of intersex children in forced and coercive surgical interventions. It is clear that Article 8 UNCRC imposes explicit obligations to States parties such as the obligation to ‘respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference’.²⁶¹ Additionally, the international human rights standards developed by CRC in its various instruments permit to adopt a broader implicit understanding of obligations related to the prohibition of discrimination based on intersex status, protection of intersex children against non-consensual treatments, and identification of intersex children in birth certificates and official identification documents.

Firstly, CRC international standards go further than the formal principle of equality. The CRC also aims to take effective action against the discrimination of intersex children by encouraging the adoption of a prohibition of discrimination based on intersex status in domestic laws. In addition, States parties shall ensure the enjoyment of civil, political, economic, social, and cultural rights of intersex children by addressing and eradicating structural causes of discrimination within their jurisdiction. Even when there is room for a future development by the CRC, it is possible to prevent discrimination based on intersex status in the guarantee of the child’s right to identity.

²⁶¹ United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 8.

Secondly, regarding the protection of intersex children from non-consensual treatments, the CRC has produced a more profound output compared to other UN treaty bodies. For instance, CRC international standards encourage the legal eradication of these practices and stimulate the training of medical staff on sexual diversity of children. Focusing on the right to be heard, States parties shall guarantee the access to sexual and reproductive information. Related to this, there are international standards regarding their age and maturity, to guarantee that children can form and express their free and informed opinion about medical interventions on their bodies.

Thirdly, intersex children's issues related to identification, as part of the right to identity, are still being developed by the CRC. Nevertheless, as expressed in the UNCRC, States parties have the obligation to guarantee the right to identity during every stage of childhood. In addition, CRC international standards tend to recognize the right to gender identity of children as part of the evolving interpretation of Article 8 UNCRC. This might lead to a future explicit inclusion of intersex children's identity elements on birth certificates and official identification documents.

Finally, despite this progressive interpretation of Article 8 UNCRC by the CRC, as part of expanding and complementary international standards, it has to be observed that these instruments are part of soft law and in principle non-binding for States parties. In addition, it is necessary to take into account the reservations made by several States parties to the UNCRC and the limited accession to the OPIC-CRC. This weakens the guarantee of the right to identity of intersex children. Nevertheless, the interpretations made in these various instruments might be crystalized into hard law with clear international obligations, strengthened by increasing societal awareness of LGBTIQ+ issues.

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Appendix 1

Table with UNCRC States Parties and Reservations

	State Party with Reservations	Articles of the UNCRC
1	Argentina	Article 21 (b), (c), (d) and (e)
2	Australia	Article 37 (c)
3	Bahamas	Article 2
4	Bangladesh	Article 14.1
5	Brunei Darussalam	Articles 14, 20.3 and article 21 (b), (c), (d) and (e)
6	Canada	Articles 21 and 37 (c)
7	China	Article 6
8	Colombia	Article 38
9	Cook Islands	Articles 2 and 10
10	Croatia	Article 9.1
11	Denmark	Article 40.2 (b) (v)
12	France	Article 30
13	Holy See	Articles 24.2, 13, 28, 14, 15, 16
14	Iran	Reservation to every article or provision which may be contrary to Islamic Laws and international legislation in effect
15	Iraq	Article 14.1
16	Japan	Article 37 (c)
17	Jordan	Articles 14, 20 and 21
18	Kuwait	Reservation to every article or provision which may be contrary to Islamic Shari'a and the local statutes in effect
19	Liechtenstein	Article 10
20	Luxembourg	Articles 3, 6, 7, 15
21	Malaysia	Articles 2, 7, 14, 28.1 (a), 37
22	Maldives	Articles 14 and 21
23	Mali	Article 16
24	Mauritania	Reservation to every article or provision which may be contrary to the beliefs and values of Islam

25	Monaco	Article 40.2 (b) (v)
26	Netherlands (Kingdom of the)	Articles 26, 37 and 40
27	New Zealand	Articles 32.1, 32.2 and 37 (c)
28	Oman	Article 14
29	Qatar	Articles 2 and 14
30	Republic of Korea	Articles 21 (a) and 40.2 (b) (v)
31	Samoa	28.1 (a)
32	Saudi Arabia	Reservation to every article or provision which may conflict with Islamic Law
33	Singapore	Articles 32 and 28.1 (a)
34	Somalia	Articles 14, 20 and 21
35	Switzerland	Articles 10.1, 37 (c) and 40
36	Syrian Arab Republic	Reservation to every article or provision which are not in conformity with the Syrian Arab Republic legislation and with Islamic Shariah's principles, in particular article 14
37	Thailand	Article 22
38	Türkiye	Articles 17, 29 and 30
39	United Arab Emirates	Articles 7, 14, 17 and 21
40	Uruguay	Article 38.2 and 38.3

The present table was made by the author with the information provided on the official website of the United Nations Treaty Collection (www.treaties.un.org) by March 13rd, 2023. It does not include details about the withdrawal of previous reservations by States parties.

Appendix 2

Table with Overview of CRC Communications (Jurisprudence)

Communication Number	UNCRC Articles Involved	Author(s) of the Communication	State Party	Title of the Document	Subject of the Communication	Relevance in the Study
1	3 and 9	F. M. A. and H. K. A.	Denmark	CRC/C/93/D/140/2021	Deportation of a child to Somalia, where she would suffer FGM	(i) FGM as torture, inhuman and degradant treatment; (ii) principle of precaution during risk to suffer FGM regarding the protection from abuse and neglect
2			Switzerland	CRC/C/93/D/128/2020		
3			Switzerland	CRC/C/93/D/192/2022		
4	2, 6, 12, 13, 16, 17, 24, 37 a), 39 and 40	Camila	Peru	CRC/C/93/D/136/2021	Denied access to therapeutic abortion of a child victim of sexual violence by her father	Discrimination in the access to healthcare, including information about sexual and reproductive health
5	3 and 9	S. S. F.	Denmark	CRC/C/90/D/96/2019	Deportation of a child to Somalia, where she would suffer FGM	(i) FGM as torture, inhuman and degradant treatment; (ii) principle of precaution during risk to suffer FGM regarding the protection from abuse and neglect
6			Spain	CRC/C/90/D/42/2018		
7			Ireland	CRC/C/93/D/158/2021		
8			Finland	CRC/C/93/D/194/2022		
9			Chile	CRC/C/93/D/91/2019		
10			Luxembourg	CRC/C/93/D/138/2021		
11			Switzerland	CRC/C/92/D/102/2019		
12			Switzerland	CRC/C/92/D/101/2019		
13	3, 8, 12, 20 (1) and 37 (a)	S.E.M.A.	France	CRC/C/92/D/130/2020	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) age and date of birth as elements of the right to identity
14			Spain	CRC/C/92/D/134/2020		
15			Switzerland	CRC/C/92/D/110/2020		
16			Chile	CRC/C/92/D/129/2020		

17	DECISION/VIEWS (INADMISSIBLE) COMMUNICATION NO. 147/2021: (DISCONTINUANCE)			Spain	CRC/C/92/D/147/2021		
18	Communication No. 126/2020			Switzerland	CRC/C/92/D/126/2020		
19	Communication No. 20/2017: DECISION (DISCONTINUANCE)			Spain	CRC/C/90/D/20/2017		
20	Communication No. 94/2019 (INADMISSIBLE)			Ireland	CRC/C/91/D/94/2019		
21	Communication No. 85/2019 (DISCONTINUANCE)			Denmark	CRC/C/91/D/85/2019		
22	Communication No. 99/2019	3, 6, 22 and 37 (a)	H.K.	Denmark	CRC/C/90/D/99/2019	Deportation of a child to India, where she could face domestic violence	Not relevant for the study
23	Communication No. 100/2019	2, 6, 19, 20, 24, 27, 28, 37, 39 and 40	P.N., K.K. and O.M.	Finland	CRC/C/91/D/100/2019	Deportation of children with parents linked to terrorist activities to the Syrian Arab Republic	Not relevant for the study
24	Communications No. 114/2020, 116/2020, 117/2020-118/2020: DECISION/VIEWS	2, 3, 28 and 29	A.B.A. and F.Z.A. (No. 114/2020); F.E.M. and S.E.M. (No. 116/2020); S.E.Y. and M.E.Y. (No. 117/2020); and N.L., R.A. and M.A.A. (No. 118/2020)	Spain	CRC/C/91/D/114/2020, CRC/C/91/D/116/2020	Education enrolment procedure of Moroccan children in Spain	Discrimination based on national origin in the access to education
25	Communication No. 141/2021 (DISCONTINUANCE)			Switzerland	CRC/C/91/D/141/2021		
26	Communication No. 93/2019 (DISCONTINUANCE)			Slovakia	CRC/C/90/D/93/2019		
27	Communication No. 84/2019	2, 12 and 19	N.B.	Georgia	CRC/C/90/D/84/2019	Investigation of possible violence against a child in educational environment	Not relevant for the study
28	Communication No. 121/2020: DECISION/VIEWS	3, 9, 11 and 23	N.E.R.Á.	Chile	CRC/C/90/D/121/2020	Return of a child with disability to Spain	Not relevant for the study
29	Communication No. 55/2018: DECISION/VIEWS	3, 9, 24, 27, 28, 29, 31 and 37	E.B.	Belgium	CRC/C/89/D/55/2018	Deportation of a child to Serbia	Not relevant for the study
30	Communication No. 73/2019: DECISION/VIEWS	3, 24, 27, 28, 29, 31 and 37	K.K. and R.H.	Belgium	CRC/C/89/D/73/2019	Deportation of a child to Armenia	Not relevant for the study
31	Communication No. 74/2019: DECISION/VIEWS	2, 3, 4, 6 (2), 8 (2), 11-13, 14, 16, 17, 19, 20, 22-29, 31, 32, 34, 36 and 37 (a)	Z.S. and A.S.	Switzerland	CRC/C/89/D/74/2019	Deportation of a child to the Russian Federation, where access to medical care would not be guaranteed	The child's right to be heard to be seriously guaranteed by the State
32	Communication No. 122/2020 (DISCONTINUANCE)			Spain	CRC/C/89/D/122/2020		
33	Communication No. 127/2020 (DISCONTINUANCE)			France	CRC/C/89/D/127/2020		
34	Communication No. 41/2018 (DISCONTINUANCE)			Spain	CRC/C/89/D/41/2018		

35	Communication No. 44/2018 (DISCONTINUANCE)		Spain	CRC/C/89/D/44/2018		
36	Communication No. 78/2019 (DISCONTINUANCE)		Spain	CRC/C/89/D/78/2019		
37	Communication No. 50/2018 (DISCONTINUANCE)		Spain	CRC/C/89/D/50/2018		
38	Communications No. 77/2019, 79/2019 and 109/2019: DECISION/VIEWS	2, 3, 6, 19, 20, 24 and 37	F.B. et al. and D.A. et al.	France	CRC/C/89/D/77/2019 - CRC/C/89/D/79/2019	Deportation of children with parents linked to terrorist activities Not relevant for the study
39	Communication No. 157/2021: DECISIONS/VIEWS (INADMISSIBLE)		Belgium	CRC/C/89/D/157/2021		
40	Communication No. 107/2019: (INADMISSIBLE)		Germany	CRC/C/88/D/107/2019		
41	Communication No. 104/2019: DECISION/VIEWS (INADMISSIBLE)		Argentina	CRC/C/88/D/104/2019		
42	Communication No. 106/2019: DECISION/VIEWS (INADMISSIBLE)		France	CRC/C/88/D/106/2019		
43	Communication No. 108/2019 (INADMISSIBLE)		Türkiye	CRC/C/88/D/108/2019		
44	Communication No. 105/2019 (INADMISSIBLE)		Brazil	CRC/C/88/D/105/2019		
45	Communication No. 95/2019	2 (2), 3, 6, 7, 12, 16, 22, 24, 27, 28, 29, 37 and 39	A.M.	Switzerland	CRC/C/88/D/95/2019	Deportation of a child to Bulgaria Not relevant for the study
46	Communication No. 76/2019	3, 8, 12, 16, 18 (2), 20, 22, 27, 29 and 39	R.Y.S.	Spain	CRC/C/86/D/76/2019	Age determination of an unaccompanied migrant child The child's right to be heard not subjected to conditions of age
47	Communication No. 75/2019 (INADMISSIBLE)		Germany	CRC/C/87/D/75/2019		
48	Communications No. 66/2018, 67/2018 and 68/2018: DECISION/VIEWS (DISCONTINUANCE)		Spain	CRC/C/87/D/66/2018 - CRC/C/87/D/67/2018		
49	Communication No. 69/2018: DECISION/VIEWS (DISCONTINUANCE)		Spain	CRC/C/87/D/69/2018		
50	Communication No. 70/2019, 71/2019 AND 72/2019: DECISION/VIEWS (DISCONTINUANCE)		Spain	CRC/C/87/D/70/2019 - CRC/C/87/D/71/2019		
51	Communication No. 88/2019: DECISION (DISCONTINUANCE)		Spain	CRC/C/87/D/88/2019		
52	Communications No. 62/2018, 64/2018, 65/2018: DECISION/VIEWS (DISCONTINUANCE)		Spain	CRC/C/87/D/62/2018 - CRC/C/87/D/64/2018		
53	Communication No. 115/2020: DECISION/VIEWS	2, 3, 28 and 29	H.M.	Spain	CRC/C/87/D/115/2020	Education enrolment procedure of a Discrimination based on national origin in the access to education

						Moroccan child in Spain	
54	Communication No. 115/2020: DECISION/VIEWS	2, 3, 28 and 29	H.M.	Spain	CRC/C/87/D/115/2020	Education enrolment procedure of a Moroccan child in Spain	Discrimination based on national origin in the access to education
55	Communication No. 86/2019 (UNFAVOURABLE)			Switzerland	CRC/C/87/D/86/2019		
56	Communications No. 57/2018, 58/2018, 59/2018: DECISION (DISCONTINUANCE)			Spain	CRC/C/86/D/57/2018- CRC/C/86/D/58/2018		
57	Communication No. 83/2019	3 and 19	R.H.M.	Denmark	CRC/C/86/D/83/2019	Deportation of a child to Somalia, where she would suffer FGM	(i) FGM as torture, inhuman and degradant treatment; (ii) principle of precaution during risk to suffer FGM regarding the protection from abuse and neglect
58	Communication No. 51/2018	2, 3, 13, 14, 16, 17, 19, 22 and 29	A.B.	Finland	CRC/C/86/D/51/2018	Deportation of a child to the Russian Federation, where she could suffer harm or persecution	Not relevant for the study
59	Communication No. 82/2019 (DISCONTINUANCE)			Germany	CRC/C/86/D/82/2019		
60	Communication No. 46/2018: DECISION (DISCONTINUANCE)			Switzerland	CRC/C/86/D/46/2018		
61	Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the child on a communications procedure, concerning Communication No. 77/2019	2, 3, 6, 19, 20 and 37	F.B. et al.	France	CRC/C/86/D/R.77/2019	Deportation of children with parents linked to terrorist activities	Not relevant for the study
62	Communication No. 113/2020: DECISION/VIEWS (DISCONTINUANCE)			Spain	CRC/C/86/D/113/2020		
63	Communication No. 63/2018: DECISION	3, 8, 18 (2), 20 (1), 27 and 29	C.O.C.	Spain	CRC/C/86/D/63/2018	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
64	Communications No. 37/2017 and 38/2017: DECISION/VIEWS (INADMISSIBLE)			Spain	CRC/C/85/D/37/2017		
65	Communication No. 87/2019 (DISCONTINUANCE)			Finland	CRC/C/85/D/87/2019		
66	Communication No. 29/2017: DECISION/VIEWS (DISCONTINUANCE)			Spain	CRC/C/85/D/29/2017		
67	Communication No. 49/2018 (INADMISSIBLE)			Denmark	CRC/C/85/D/49/2018		
68	Communication No. 90/2019: DECISION (DISCONTINUANCE)			Argentina	CRC/C/85/D/90/2019		
69	Communication No. 31/2017	2, 3, 6, 7 and 8	W.M.C.	Denmark	CRC/C/85/D/31/2017	Deportation of children to China	Not relevant for the study
70	Communication No. 26/2017: DECISION/VIEWS	2, 3, 8, 12, 18 (2), 20 (1), 27 and 29	M.B.S.	Spain	CRC/C/85/D/26/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity

71	Communication No. 40/2018: DECISION/VIEWS	3, 8, 12, 18 (2), 20 (1), 20, 27 and 29	S.M.A.	Spain	CRC/C/85/D/40/2018	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
72	Communications No. 79/2019 and 109/2019: DECISION	2, 3, 6, 20, 24 and 37	L.H., L.H., D.A., C.D. and A.F.	France	CRC/C/85/D/79/2019	Deportation of children with parents linked to terrorist activities	Not relevant for the study
73	Communication No. 92/2019: DECISION (INADMISSIBLE)			Spain	CRC/C/85/D/92/2019		
74	Communication No. 56/2018: DECISION	2, 3, 6 (2), 12, 22, 24 and 37	V.A.	Switzerland	CRC/C/85/D/56/2018	Deportation of a child to Italy	Not relevant for the study
75	Communication No. 98/2019 (INADMISSIBLE)			Finland	CRC/C/85/D/98/2019		
76	Communication No. 111/2020: DECISION (DISCONTINUANCE)			Spain	CRC/C/85/D/111/2020		
77	Communication No. 81/2019 (INADMISSIBLE)			Switzerland	CRC/C/85/D/81/2019		
78	Communication No. 53/2018: DECISION/VIEWS (INADMISSIBLE)			Switzerland	CRC/C/85/D/53/2018		
79	Communication No. 28/2017: DECISION/VIEWS	3, 8, 12, 18 (2), 20 (1), 27 and 29	M.B.	Spain	CRC/C/85/D/28/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
80	Communication No. 34/2017: DECISION/VIEWS (INADMISSIBLE)			Belgium	CRC/C/85/D/34/2017		
81	Communication No. 52/2018: DISCONTINUANCE DECISION			Denmark	CRC/C/83/D/52/2018		
82	Communication No. 25/2017: DECISION	2, 3, 8, 12, 18 (2), 20, 27 and 29	H.B.	Spain	CRC/C/83/D/25/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
83	Communication No. 24/2017: DECISION	3, 8, 12, 18 (2), 20 (1), 27 and 29	M.A.B.	Spain	CRC/C/83/D/24/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
84	Communication No. 23/2017: DECISION (INADMISSIBLE)			Finland	CRC/C/83/D/23/2017		
85	Communication No. 30/2017: DECISION	3, 4, 5, 9 (3), 10 (2), 18 and 19	N.R.	Paraguay	CRC/C/83/D/30/2017	Right to maintain a direct contact with the father	Not relevant for the study
86	Communication N° 21/2017: DECISION	3, 8, 12, 18 (2), 20, 27 and 29	A.D.	Spain	CRC/C/83/D/21/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
87	Communication No. 60/2018: DECISION (INADMISSIBLE)			Germany	CRC/C/83/D/60/2018		
88	Communication No. 45/2018: DISCONTINUANCE DECISION			Georgia	CRC/C/83/D/45/2018		

89	Communication No. 48/2018: DECISION (INADMISSIBLE)			Panama	CRC/C/83/D/48/2018		
90	Communication No. 54/2018: DECISION (DISCONTINUANCE)			Spain	CRC/C/82/D/54/2018		
91	Communication No. 33/2017 (INADMISSIBLE)			Denmark	CRC/C/82/D/33/2017		
92	Communication No. 36/2017 (INADMISSIBLE)			Denmark	CRC/C/82/D/36/2017		
93	Communication No. 17/2017: DECISION	2, 3, 8, 12, 20 and 22	M.T.	Spain	CRC/C/82/D/17/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
94	Communication No. 27/2017: DECISION	3, 8, 12, 18 (2), 20, 22, 27 and 29	R.K.	Spain	CRC/C/82/D/27/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity
95	Communication No. 43/2018 (DISCONTINUANCE)			Denmark	CRC/C/82/D/43/2018		
96	Communication No. 32/2017 (INADMISSIBLE)			Denmark	CRC/C/82/D/32/2017		
97	Communication No. 19/2017: DECISION (INADMISSIBLE)			Spain	CRC/C/81/D/19/2017		
98	Communication No. 14/2017: DECISION (INADMISSIBLE)			Spain	CRC/C/80/D/14/2017		
99	Communication No. 16/2017: DECISION	3, 8, 12, 18 (2), 20, 27 and 29	A.L.	Spain	CRC/C/81/D/16/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) age and date of birth as elements of the right to identity
100	Communication No. 6/2016: INADMISSIBLE			Finland	CRC/C/81/D/6/2016		
101	Communication No. 22/2017: DECISION	2, 3, 6, 8, 12, 18 (2), 20 (1), 24 and 27	J.A.B.	Spain	CRC/C/81/D/22/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) age and date of birth as elements of the right to identity
102	Communication No. 15/2017: DECISION (INADMISSIBLE)			Spain	CRC/C/80/D/15/2017		
103	Communication No. 47/2017: DECISION (DISCONTINUANCE)			Switzerland	CRC/C/81/D/47/2018		
104	Communication No. 61/2018: DECISION (DISCONTINUANCE)			Switzerland	CRC/C/81/D/61/2018		
105	Communication No. 13/2017: DECISION (INADMISSIBLE)			Spain	CRC/C/81/D/13/2017		
106	Communication No. 4/2016: DECISION	3, 20 and 37	D.D.	Spain	CRC/C/80/D/4/2016	Deportation of a child to Morocco	Not relevant for the study
107	Communication No. 11/2017: DECISION	3, 8, 12, 18 (2), 20, 27 and 29	N.B.F.	Spain	CRC/C/79/D/11/2017	Age determination of an unaccompanied migrant child	(i) Representation or interpretation in the guarantee to the child's right to be heard; (ii) date of birth as element of the right to identity

108	Communication No. 12/2017: DECISION	2, 3, 10, 12 and 20	Y.B. and N.S.	Belgium	CRC/C/79/D/12/2017	Denial of humanitarian visa to a child under <i>kafalah</i> (fostering arrangement)	The child's right to be heard not subjected to conditions of age
109	Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning Communication No. 7/2016 (INADMISSIBLE)			Denmark	CRC/C/78/D/7/2016		
110	Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 39/2017 (DISCONTINUANCE)			Spain	CRC/C/78/D/39/2017		
111	Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 8/2016 (INADMISSIBLE)			Spain	CRC/C/78/D/8/2016		
112	Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, in respect of Communication No. 35/2017 (DISCONTINUANCE)			Germany	CRC/C/78/D/35/2017		
113	Communication No. 10/2017: DECISION (INADMISSIBLE)			France	CRC/C/77/D/10/2017		
114	Communication No. 3/2016	1, 2, 3 and 19	I.A.M.	Denmark	CRC/C/77/D/3/2016	Deportation of a child to Somalia, where she would suffer FGM	(i) FGM as torture, inhuman and degradant treatment; (ii) principle of precaution during risk to suffer FGM regarding the protection from abuse and neglect
115	Communication No. 18/2017: DECISION FOR DISCONTINUANCE			Spain	CRC/C/77/D/18/2017		
116	Communication No. 9/2017: M.E.B. v. Spain: (DISCONTINUANCE)			Spain	CRC/C/75/D/9/2017		
117	Communication No. 9/2017: DECISIONS/VIEWS: (DISCONTINUANCE)			Spain	CRC/C/75/D/9/2017		
118	Communications procedure No. 5/2016: J.A.B.S. v. Costa Rica (INADMISSIBLE)			Costa Rica	CRC/C/74/D/5/2016		

119	Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 2/2015: A.A.A. v. Spain (INADMISSIBLE)	Spain	CRC/C/73/D/2/2015
120	Communication No. 1/2014 - Decision adopted by the Committee at its sixty-ninth session (18 May–5 June 2015) (INADMISSIBLE)	Spain	CRC/C/69/D/1/2014
121	INADMISSIBLE	Spain	CRC/C/81/D/19/2019
122	DISCONTINUANCE	Switzerland	CRD/C/81/D/47/2018

The present table was made by the author with the information provided on the official website of the Committee on the Rights of the Child (<https://www.ohchr.org/en/treaty-bodies/crc>) and the United Nations Treaty Collection (https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Home.aspx) by June 9th, 2023. Inadmissible, discontinued, or unfavourable cases were not considered as part of the research.