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Intersex Activism, Medical Power/Knowledge and the Scalar Limitations of the United Nations

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ABSTRACT

This article considers the extent to which human rights mechanisms can ameliorate intersex rights at a sub-national, or medico-local, level. It engages with both intersex activism and the academy where the UN has become understood as a key mechanism through which to challenge day-to-day practices of healthcare practitioners and bring an end to nontherapeutic surgical and hormonal interventions on intersex infants and children. Using the UK as an example, this article examines how and why the UN's engagement with intersex has had little effect on the medical regulation of intersex people. To do so, the article draws on legal geography to examine how *scale* prevents the UN from having a clear and lasting impact on domestic issues – particularly those in healthcare settings. The different ways in which intersex bodies are recognised and regulated at different scales, coupled with the UN's inability to form dialogue with the institutions of the state, such as the healthcare profession, are problematic barriers to challenge practice at the medico-local scale.

KEYWORDS: intersex, activism, scale, human rights mechanisms, state response

1. INTRODUCTION

Although the UN has been very receptive to intersex concerns, there has been a disjuncture between human rights discourse on one hand, and governmental practice and response on the other. This article critically considers the extent to which such State disengagement reveals that these international human rights mechanisms are incapable of bringing about change at the medico-local level. It also engages with the continued optimism about the role of human rights from within activism and the academy in spite of State non-implementation.[1]

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Our analysis is two-fold. First, we examine *how* certain States are able to disengage from these human rights mechanisms arguing that this is not simply a case of States ignoring their international obligations. Accordingly, we focus on the state (as primary interlocutor of international human rights mechanisms) and its ability to frame issues within or outside the scope of human rights. By paying close attention to how states frame potential human rights issues we demonstrate the importance of scale in frustrating the effective implementation international human rights law. Understanding scale, we argue, is crucial within human rights as it reveals how issues become sidelined, and conversations become impossible. We use the UK as an example of how the state constructs intersex issues as falling outside of their (positive) human rights obligations and funnels responsibility away from government and towards the National Health Service (NHS) (itself a public authority for the purposes of domestic human rights and equalities law). In doing so, the state limits UN, international or human rights influence on the NHS's day-to-day, as the state remains the key conduit through which this could take place.

Moreover, a scalar analysis reveals how different legal knowledges and powers are sorted and separated from each other, how responsibilities are funnelled towards or away from different institutions and how these practices are depoliticised and thus rendered invisible. Different scales recognise and regulate intersex bodies in different ways and accordingly action in one scale does not necessarily affect action in another. From this perspective we argue it is not enough to expect the recommendations of bodies such as the Committee on the Rights of the Child or the (already limited) enforcement powers of international treaties are capable of remedying violations of the rights of intersex children. The UN simply cannot mandate the changes desired by the intersex movement at national or sub-national scales as the State plays an active role in framing matters as human rights issues. Law operates as an organisational tool or technology[2], deployed by powerful Global Northern

[1] Bauer, Truffer and Crocetti, 'Intersex Human Rights' (2020) 24(6) *The International Journal of Human Rights.*
[2] Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (2015).

states, such as the UK, in order to render particular issues or causes visible or invisible to international legal norms.

Second, we consider the potential 'boomerang' effect of the UN's engagement with intersex beyond the legal mandating of States to comply with UN Resolutions. Significantly, we argue that the framing of intersex issues as breaches of human rights will not necessarily lead to liberation. Moreover, while there have been successes in other global movements (e.g. LGBT and women's rights), 'Intersex' activism is, and should remain, distinct from these movements and thus may not (nor should not necessarily) follow the same trajectory. It is important that norms which develop regarding intersex interpenetrate human rights narratives rather than become subsumed within existing norms relating to gender, sexuality and sexual orientation.

Finally, this article reflects on what this means for the future of intersex rights. Our concern is that without significant changes in their understanding of human rights, states will continue to frame intersex issues outside of the scope of their positive obligations. In response, we use scale to offer a clearer framing of the human rights aspects of intersex issues and provide an explanation of how the UK has failed to protect intersex children. This moves debates forwards in interdisciplinary intersex studies by moving away from the idea that 'intersex rights are human rights' and towards the mechanisms by which these human rights obligations are translated into state practice. Paying attention to *what* action can be achieved at *which* scale will help focus strategies of change. This dispositional shift needs to happen domestically through collaboration with government, politicians, and medical professionals. Accordingly, a multi-track activist approach is important, distinct and separate from LGBT and women's rights concerns. Our intention with this article therefore is not to advocate a scalar shift to the international to better address intersex issues. Instead, this article develops a scalar analysis to address how the terms of debate can be shifted in a way that de-privileges medical power/knowledge and frames and amplifies discursive and practical approaches grounded in the language of human rights. The significance of this is broader than intersex studies and intersex activism. Our example engages with the scalar limitations of the UN by considering the wider question of effectiveness of international action generally and UN action specifically.

The following section explores the compliance gap between UN committees, healthcare practice and intersex activists before moving to the concept of 'scale' developed within legal geography as an analytical lens for understanding the operation of international human rights law.

2. THE COMPLIANCE GAP

The main goal of the intersex movement is to end unnecessary and non-consensual medical interventions on intersex infants. However, achieving this requires a significant disruption to medical power/knowledge as, at present, intersex bodies are regulated by the medical profession who frame intersex variations biomedically as a 'disorder' in sex development that requires 'fixing'.[3] Yet, most medical interventions are non-therapeutic as nearly all intersex variations are benign.[4] Medical practitioners are therefore responding to a social rather than medical emergency and using surgery and/or hormonal therapies to 'normalize' the appearance of an intersex infant's genitalia. By intervening early (typically before 12 months old in cases of genital ambiguity)[5] and ensuring these bodies aesthetically fit the male/female binary, such medical governance has resulted in the disappearance of intersex at both cultural and institutional levels.[6]

Intersex rights advocates and organizations thus seek to challenge this dominant biomedical narrative by highlighting the problematic nature of such practices: these medical interventions lack any evidence regarding the success of long-term outcomes and instead are leading to an array of

[3] Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (2000); Griffiths, 'Shifting Syndromes: Sex Chromosome Variations and Intersex Classifications' (2018) 48 *Social Studies of Science* 125; Griffiths, 'Diagnosing Sex: Intersex Surgery and "Sex Change" in Britain 1930–1955' (2018) 21 *Sexualities* 476; Karkazis, *Fixing Sex: Intersex, Medical Authority and Lived Experience* (2008); Holmes, 'Straddling Past, Present and Future' in Holmes (ed.), *Critical Intersex* (2009); Feder, *Making Sense of Intersex: Changing Ethical Perspectives in Biomedicine* (2014); Davis, *Contesting Intersex: The Dubious Diagnosis* (2015).
[4] Zillén et al., 'The Rights of Children in Biomedicine: Challenges Posed by Scientific Advances and Uncertainties' (2017) at https://rm.coe.int/16806d8e2f [last accessed 2 April 2020] 42.
[5] Lee et al., 'Consensus Statement on the Management of Intersex Disorders' (2006) 118 *Pediatrics* 488; Meoded Danon, 'Time matters for intersex bodies: Between socio-medical time and somatic time' (2018) 208 *Social Science and Medicine* 89; Garland and Travis, 'Temporal Bodies: Emergencies, Emergence, and Intersex Embodiment' in Dietz, Thomson and Travis (eds), *A Jurisprudence of the Body* (2020).
[6] Garland and Travis, 'Legislating Intersex Equality: Building Resilience through Law' (2018) 38 *Legal Studies* 587.

lifelong negative consequences both physically (including sterilisation[7] and vaginal stenosis[8]) and psychosocially.[9] Despite these associated harms, it has proved extraordinarily difficult for intersex embodied individuals to open up meaningful dialogue with medical practitioners.[10] A large power imbalance exists between the two on account of resources, perceived expertise and difficulties in terms of mobilizing an intersex community.[11] Many intersex individuals are afraid to speak out against the medical profession given the trauma arising from their own medical experience; their fear of being 'outed' to friends and family; and an on-going dependence on the medical profession to provide the now-necessary follow-up treatment/s that arise out of these unnecessary interventions.[12] Consequently, the medical profession has been able to widely discredit and thus depoliticise intersex embodied individual's concerns, portraying such persons as rogue troublemakers and marginalizing patient knowledge.[13]

To counter this imbalance and "level the playing field", intersex advocates and organisations have increasingly turned to international legal frameworks as a strategy to challenge medical power/knowledge.[14] Since at least the 1990's intersex activists have framed these issues through a human rights lens.[15] This conceptualisation has gained some cultural purchase, and the United Nations has become a key institution in the acceptance and dissemination of this approach. Human rights have thus become an important narrative through which intersex issues are understood. Morgan Carpenter,

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[7] Creighton et al., 'Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood' (2001) 358 *The Lancet* 124; Crouch et al., 'Sexual Function and Genital Sensitivity Following Feminizing Genitoplasty for Congenital Adrenal Hyperplasia' (2008) 179 *Journal of Urology* 634; Minto et al., 'The Effects of Clitoral Surgery on Sexual Outcome in Individuals Who Have Intersex Conditions with Ambiguous Genitalia: A Cross-Sectional Study' (2003) 361 *The Lancet* 1252.

[8] Wand and Poppas, 'Surgical outcomes and complications of reconstructive surgery in the female congenital adrenal hyperplasia patient: What every endocrinologist should know' (2017) 165(A) *The Journal of Steroid Biochemistry and Molecular Biology* 137.

[9] These surgeries damage relationships with key institutions including the family which can have lifelong consequences in terms of social participation. See for example, Garland and Travis 'Making the State Responsible: Intersex Embodiment, Medical Jurisdiction, and State Responsibility' (2020) 47(2) *Journal of Law and Society* 298.

[10] Greenberg, *Intersexuality and the Law: Why Sex Matters* (2012) at 107; Garland and Travis, supra n 9.

[11] Garland and Travis, supra n 6.

[12] Ibid.

[13] Garland and Travis, supra n 5.

[14] Bauer, Truffer and Crocetti, supra n 1; Monro, Yeadon-Lee and Crocetti, 'Intersex/variations of sex characteristics and DSD citizenship in the UK, Italy and Switzerland' (2019) 23(8) *Citizenship Studies* 780.

[15] Rubin, *Intersex Matters: Biomedical Embodiment, Gender Regulation and Transnational Activism* (2017); Bauer, Truffer and Crocetti, supra n 1.

for example, highlights how human rights can offer a positive alternative to the approaches currently offered by domestic law and medicine.[16] Dan Christian Ghattas likewise frames their understanding of intersex through ideas of 'human rights violations.'[17]This narrative has led some commentators such as Monro, Yeadon Lee and Crocetti to view international human rights enforcement mechanisms as a capacity for change where: 'The issues facing people with [variations of sex characteristics] could be *remedied* at an international level in human rights frameworks…'.(emphasis added)[18] In particular, over the past decade, intersex rights activists have engaged with United Nations Human Rights mechanisms to frame such medical interventions as a violation of fundamental human rights.[19] To this end, the strategy has had significant success; since 2009 there have been over 40 reprimands from UN Treaty bodies and a total of 23 States have been condemned for allowing unnecessary and non-consensual medical interventions to take place.[20] A typical example can be found in the UN's Committee on the Rights of the Child's 2016 Concluding Observations to the UK:

> 45. The Committee welcomes the enactment of the Serious Crime Act (2015) in England and Wales which enabled the courts to issue protection orders to protect potential or actual child victims of female genital mutilation. However the Committee is concerned at:
>
> ….
>
> b. Cases of medically unnecessary surgeries and other procedures on intersex children before they are able to provide their informed consent, which often entail irreversible consequences and can cause severe physical and psychological suffering, and the lack of redress and compensation in such cases.
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> ….

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[16] Carpenter, 'The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities' in Scherpe, Sutta and Helms (eds), *The Legal Status of Intersex Persons* (2018).
[17] Ghattas, 'Standing up for the Human Rights of Intersex People' in Scherpe, Sutta and Helms (eds), *The Legal Status of Intersex Persons* (2018) at 430.
[18] Monro, Yeadon-Lee and Crocetti, supra n 14.
[19] Including the right to the security of person, right to bodily and mental integrity, freedom from torture and ill-treatment, and freedom from violence, right to health (including a right to free and informed consent), a right to legal capacity, and a right to non-discrimination, the right to privacy, the protection of all children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, freedom from experimentation. See UN Human Rights Office of the High Commissioner 'Background Note on Human Rights violations against Intersex People' (2019) available at www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf [last accessed 13 June 2022].
[20] See generally Stop Genital Mutilation, 'Fifty Reprimands for Intersex Genital Mutilations – and Counting…', 26 Oct 2016, available at: www.stop.genitalmutilation.org/post/IAD-2016-Soon-20-UN-Reprimands-for-Intersex-Genital-Mutilations [Last accessed 2 April 2020].

46. With reference to its general comment No. 18 on harmful practices (2014), the Committee recommends that the State party:

….

c. Ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to children concerned, and provide families with intersex children with adequate counselling and support.

….

e. Educate medical and psychological professionals on the range of sexual, and related biological and physical, diversity and on the consequences of unnecessary interventions for intersex children. [21]

The Committee is not the only body to address the issue of non-therapeutic intervention on intersex children. The Committee Against Torture, the Committee on the Rights of Persons with Disabilities, the Human Rights Committee and the Committee for the Elimination of Discrimination Against Women have made similar recommendations in their Concluding Observations to various states.[22] Also in 2016, a statement calling for an end to harmful medical treatment of intersex persons was published by the UN and signed by four treaty bodies, three Special Rapporteurs, and a UN Special Representative of the Secretary General, among others. It stated, 'When …these procedures are performed without the full, free and informed consent of the person concerned, they amount to violations of fundamental human rights.'[23] The Committee has explicitly stated that non-therapeutic medical intervention should be regarded as a 'harmful practice'[24] and thus a practice that would fall under the scope of its authoritative 2014 joint General Recommendation on Harmful Practices with CEDAW.[25] The Recommendation establishes a clear link between the prevention of harmful practices

[21] Committee on the Rights of the Child, Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland, 12 July 2016, CRC/C/GBR/CO/5/Add.10-11.
[22] See generally Stop Genital Mutilation, supra n 20.
[23] See UN Human Rights Office of the High Commissioner, 'Intersex Awareness: End violence and harmful medical practices on intersex children and adults, UN and regional experts urge,' 24 Oct 2016, available at www.ohchr.org/en/2016/10/intersex-awareness-day-wednesday-26-october [last accessed 13 June 2022].
[24] Committee on the Rights of the Child, Concluding observations regarding Belgium, 28 Feb 2019, CRC/C/BEL/CO/5-6.
[25] Joint General Recommendations from the Committee on the Elimination of Discrimination Against Women, General Comment No 31 and Committee on the Rights of the Child, General Comment No 18: Harmful Practices (2014). Harmful practices are 'persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering' and states have wide ranging obligations to eliminate such practices.

and the right of the child to be free from all forms of violence, and from torture, inhuman or degrading treatment. Such recognition from the UN has been a positive result for many intersex activists who now use these UN reprimands to challenge practitioners, raise public awareness and engage with politicians.[26] In short, the UN lends an authoritative voice to those seeking to challenge the de-politicisation of intersex surgeries.

Notwithstanding the CRC and the UN's strong response, unnecessary and non-consensual medical interventions continue in the UK and globally[27] and none of the States thus far reprimanded by the UN have actually introduced legal mechanisms to prohibit such interventions until an individual is able to consent to such procedures.[28] This is despite the UN calling for specific legal prohibitions to be implemented.[29] Seemingly then, this human rights framing developing within the UN has not yet managed to penetrate the medico-local scale and individual healthcare practitioners appear oblivious to the UN's (unambiguous) declarations that these medical interventions amount to breaches of fundamental human rights. While activists continue to remain confident in the role that human rights should and could play in the search of intersex justice,[30] the lack of State engagement demands the question of *how* States are evading responsibility. Is this disengagement merely the product of States ignoring (or being able to ignore) their obligations, or something more complex? The answer to this has significant impact on the future role of the UN in terms of developing intersex justice.

This article now turns to the example of the UK to explore this matter further. It draws on the concept of scale from legal geographies to argue that States are not just evading their international responsibilities but are actively involved in the framing issues as outside of the purview of their human rights obligations. This removes responsibility from the state to take the steps that would

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[26] See for example, Stop Genital Mutilation, supra n 20.
[27] Monro et al., 'Intersex, Variations of Sex Characteristics, and DSD: The Need for Change' (2017).
[28] Malta has introduced a legal prohibition prior to UN intervention, but this prohibition has since been criticised for not going far enough. See for example, Garland and Travis, supra n 6.
[29] Only three states, Malta's *Gender Identity Gender Expression and Sex Characteristics Act* (2015) Portugal's Articles 5 and 6 *Law No. 75/XIII/2* (2018) and Germany's *Law on the Protection of Children with Variants of Gender Development* (2021) have implemented such legislation – neither were reprimanded prior to the introduction of this legislation.
[30] Bauer, Truffer and Crocetti, supra n 1; Monro, Yeadon-Lees and Crocetti, supra n 14.

mediate the scalar impasse that frustrates communication between the supranational UN and the sub-national medical bodies. Before examining the UK's experience in depth, we first set out our scalar lens.

3. SCALE, EPISTEMOLOGY AND PRACTICE

Legal systems and scales do not exist in isolation: they interpenetrate and overlap. International law, Fleur Johns notes is something of a 'moveable feast'[31]: a dynamic and moving interaction 'constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints.'[32] Under these conditions of interlegality, we are particularly interested in the dynamics of scale in intersex rights.

Scale is an often-unseen element of legal reasoning between different modes of governance. Geographical and legal geographical work on scale allows for an interrogation of how this occurs.[33] For legal geographers, scale can be understood in cartographical terms ranging from the local up to the state and beyond[34] depending, in part, upon decisions of detail.[35] Thus, in legal terms, the state, institutions and local municipalities operate at different levels and deal with distinctive, and usually clearly demarcated, issues and subjects.[36] The levels at which these institutions operate are not neutral; they are choices that 'promote the expression of certain types of interest and disputes and

[31] Johns, 'Making non-legalities in international law' in F Johns (ed.), *Non-Legality in International Law: Unruly Law* (2013)
[32] de Sousa Santos, 'Law: A Map of Misreading – Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279.
[33] Valverde, 'Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory' (2009) 18 *Social and Legal Studie*s 139; Valverde, 'The Rescaling of Feminist Analyses of Law and State Power: From (Domestic) Subjectivity to (Transnational) Governance Networks' (2014) 4 *UC Irvine Law Review* 325; Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (2015); Dorsett and McVeigh, 'Questions of Jurisdiction' in McVeigh (ed.), *Jurisprudence of Jurisdiction* (2007); de Sousa Santos, supra n 32; Dietz, 'Jurisdiction in Trans Health' (2020) 47 *Journal of Law and Society* 60; Harrington, *Towards a Rhetoric of Medical Law* (2016).
[34] Valverde (2009), supra n 33; Valverde (2014), supra n 33; Valaverde (2015), supra, n 33; Dorsett and McVeigh, supra n 33; de Sousa Santos, supra n 32.
[35] de Sousa Santos, supra n 32 at 283.
[36] In some instances they deal with the same subjects but frame/construct them in different ways and through different practices. In others the ideal subjects are different – for example, the differences between states and individual actors.

suppress that of others.'[37] It is important to note here that while our analysis of scale is drawn from geography, we are not suggesting that there is a singular view within geography or legal geography about how scale should be defined or used.[38] It is generally agreed that scales are socially constructed[39], but beyond this, scale is deployed in a variety of ways across different forms of analysis.[40]

For the purposes of this article, we wish to avoid falling into the trap of paying lip service to the social construction of scale while treating scales as ontological givens. Instead, we follow Adam Moore in suggesting that scale can be usefully treated as epistemology – and thus not as 'categories of analysis' but as 'categories of practice'.[41] This approach allows an exploration of how 'scalar narratives, classifications and cognitive schemas constrain or enable certain ways of seeing, thinking and acting.'[42] In short, we are interested in how scale shapes narratives, knowledge production and resulting forms of action. In particular, we are interested in scales as practice in the context of an international legal terrain in which scales overlap, interpenetrate and influence each other in different ways. Luis Eslava has traced the way in which international law operates and is embodied in national and, increasingly, local spaces: 'Local jurisdictions across the South have been reimagined…by international institutions, international associations of local governments, development donors, national governments and local elites, as the new key sites of global ordering.'[43] Significant in Eslava's analysis is his insistence on the uneven nature of this interpenetration - the global south and those states dependent on development aid are subject to greater pressure to 'internationalize', while richer states, including the UK, as analysed in this article, have more room to resist or deflect

[37] de Sousa Santos, supra n 32 at 297.
[38] Moore, 'Rethinking Scale as a Geographical Category: from Analysis to Practice' (2008) 32 *Progress in Human Geography* 203.
[39] Marston, 'The Social Construction of Scale' (2000) 24 *Progress in Human Geography* 219.
[40] Moore, supra n 38.
[41] Ibid.
[42] Ibid.
[43] Eslava, supra n 2.

international intrusions. We explore below the modes by which the UK achieves this in the context of intersex rights.[44]

By treating scale as an epistemology and practice therefore, we can understand how activists act to seek out new narratives of interactions of law and space[45] and bring new narratives to bear upon unresponsive legal orders or scales. Yet the nature of scalar interaction means that this process is dynamic, uneven and sometimes reductive as the details, narratives, and registers of the international may overcode or underplay significant aspects of the national or local. In short, becoming visible to the international often extracts a significant price.[46] Moreover, at the international scale, activists are not the only actors capable of seeking out or deploying particular forms of knowledge production about scale or space. The interaction of national and local does not obfuscate the unique empowerment of states as international actors and for our purposes, states too will deploy spatio-legal narratives as they interact with other scales.

These complexities necessitate a more careful analysis of the scope, potential and dynamics of scale jumping in the context of intersex rights. In this case, we follow Annelise Riles in insisting that 'legal knowledge is not a flourish or a detour; it is a very serious thing. The legal techniques at work in doing state work are real. They are consequential. And thinking of the state as the practice and effects of knowledge work does not trivialize it, but specify it.'[47] We are interested in the technicalities of law, the legal mechanisms through which intersex rights are given form at the UN and the mechanisms by which they are translated to other scales. With Riles we argue that the 'tools' of law matter[48] and with Eslava, that law has become 'a fundamental technology in the organization of the world'.[49] As such, if scale is a practice, the legal tools, techniques and narratives through which

[44] Eslava's analysis highlights the specificity and locatedness of our case study, focusing on the UK as a powerful Global northern state. The implications of this are discussed in the final section of the article.
[45] In Delaney's analysis, they might be viewed as 'nomospheric technicians'. Delaney, *The Spatial, the Legal and the Pragmatics of World-Making: Nomospheric Investigations* (2010).
[46] Eslava, supra n 2.
[47] Cited in Braverman et al., (eds) *The Expanding Spaces of Law: A Timely Legal Geography* (2014).
[48] Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities' (2005) 53 *Buffalo Law Review* 973.
[49] Elslava, supra n 2 at 253.

rights are expressed at different scales bear closer examination, particularly in cases where these legal techniques and knowledges become axiomatic or taken for granted.

A particularly important aspect of this examination is the analysis of the work of jurisdiction in ensuring that 'legal powers and legal knowledges appear to us as always already distinguished by scale.'[50] Such scalar distinctions are coded as an inevitability of the juridical system belying the fact that these parameters are set by the state and legal institutions themselves. Acknowledging this leads Mariana Valverde to write that, 'Legal governance… is always already itself governed: and the governance of legal governance is the work of jurisdiction.'[51] The potential of legal institutions to effect change is thus curtailed through the parameters and limitations encoded into their scalar and jurisdictional foundations. The boundaries of governance are thus based not on institutional size but are qualitatively constructed through 'the kind of priorities it implicitly sets'[52] or are explicitly set for it by the state. Such boundaries are important, therefore, in how they may invisiblise, or otherwise render impractical, the operation of individual or collective rights.[53] Scale is imperative, consequently, for questioning the artificiality of jurisdiction and the ways these demarcations can be used to delimit social justice.

Jurisdiction and scale interact but operate differently. While scales may interpenetrate and influence each other, 'the machinery of jurisdiction'[54] sorts and separates, setting boundaries and ascribing authority.[55] We are particularly interested in the 'blackboxing' or 'technical bracketing'[56] function of jurisdiction in intentional human rights law. Riles draws on STS studies, where the black box is 'that which, although once contested, has become part of the common sense of scientific practice such that it is just a fact and no longer open for debate.'[57] We explore how the taken for granted operation of jurisdiction prevents scalar incompatibilities of knowledge and power erupting

[50] Valverde (2009), supra n 33 at 141.
[51] Ibid. at 141.
[52] Ibid., de Sousa Santos, supra n 32.
[53] Dorsett and McVeigh, supra n 33; Valverde (2009), supra n 33 at 142.
[54] Valverde (2009), supra n 33 at 150.
[55] Ibid.
[56] Ibid; Riles, supra n 48; Blomley. 'The Ties that Blind: Making Fee Simple in the British Columbia Treaty Process' (2015) 40 *Transactions of the Institute of British Geographers* 168.
[57] Riles, supra n 48 at 999.

into conflict and explore how the arrangement and assertion of jurisdiction inhibits practices of scale jumping. As Valverde writes,

> 'The conflicts between the constitutional rights that operate at the level of the nation-state and the legal governance processes that operate at the local/urban scale very seldom erupt into view. Why? Because of the blackboxing of both scales and jurisdictions that is an integral, constitutive part of 'interlegality'.'[58]

Thus the blackboxing work of jurisdiction ensures that for the most part, these differing legal mechanisms operate with little or no conflict between institutions and their make-ups, powers and interactions are rarely the subject of significant critique. As such, the state, its institutions (including health care) and local municipalities operate at different levels and deal with distinctive, and usually clearly demarcated issues, priorities and subjects.[59] The fact of these divisions becomes axiomatic and foundational – and thus depoliticised or even apolitical - when in fact they are the result of political decisions, historical demarcations and the evolution of legal norms over time. This scalar separation blocks dialogue between healthcare institutions and UN bodies, and the lack of space for effective communication hinders the introduction of changes demanded by intersex persons and recommended by the UN. Accordingly, while activists have criticised individual medical practitioners for failing to listen to UN condemnations of medical practices that violate intersex rights,[60] the failure to listen cannot necessarily be viewed as a problem that lies with individual practitioners, but as a structural problem by which scalar separation means that there are (at least) two scales of governance in operation and (at least) two sets of legal narratives that frame the best interests of the intersex individual. State institutions may be able to play a role in mediating communication between different scales of governance, but state action in this way is not guaranteed: indeed, in the example we develop below, the UK chooses instead to use the scalar impasse to *avoid* action and to prolong the lack of communication between different regimes of governance of intersex bodies.

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[58] Valverde (2009), supra n 33.
[59] de Sousa Santos, supra n 32 at 283.
[60] See in general, for example, Stop Genital Mutilation, supra n 20.

The result of this is that intersex individuals find themselves differently governed at different scales. While both sub-national, national and international human rights regimes may share a commitment to ensuring intersex children's health, rights and wellbeing, this concern manifests in wholly different sets of actions and legal regimes. Below we show first how intersex issues are framed through a human rights lens by the UN and then how intersex human rights obligations are sidelined by the state – in this case the UK – through deference to medical regimes. Without state recognition of the human rights aspects of intersex, this scalar impasse will likely remain and the UN may never be able to challenge medical power/knowledge in the direct way that activists desire.

Beyond this frustration of intersex activist goals, our analysis shows how bodies become enfolded into different regimes of governance from which they cannot necessarily escape. In other works, moving between different scales has been explored as a means of bypassing the state[61], or of seeking a voice when one has been silenced or ignored within a particular regime of governance.[62] As we show below however, the technicalities of legal scale mean that this option is not always available: sometimes scalar movement can result in impasse rather than significant change. Consequently, understanding scale is a key issue within human rights and is vital for interdisciplinary intersex studies, as well as human rights scholars more generally, as it allows for a deeper interrogation of how important community issues can become side-lined.

4. A CASE STUDY OF STATE DISENGAGEMENT: THE UNITED KINGDOM

Applying this scalar lens to a case study of state disengagement makes it possible to see *how* States are not only failing to follow their obligation, but are actively responsible for this community sidelining. It reveals not only the blackboxing of intersex into these jurisdictions, but more importantly examines the interrelationships between these modes of governance. Returning to the United Kingdom (UK), at the time of writing, the government has been questioned by four separate

[61] Eslava, supra n 2.
[62] Valverde (2014), supra n 33; Valverde (2015), supra n 33.

United Nations Treaty bodies in relation to the medical management of intersex bodies: the Committee on the Rights of the Child (2016); the Committee on the Rights of Persons with Disabilities (2017); the Committee on the Elimination of all Forms of Discrimination against Women (2019); and the Committee against Torture (2019).[63] Of these four sessions, this article draws mostly on the UK's response to questioning during the 72nd session of the CRC in May 2016 as it sheds the most light on the operation of governance over intersex embodied individuals within the UK.[64] As Garland and Slokenberga note, 'The CRC is of particular importance to human rights law, given that the Council of Europe, the EU, and the Inter-American Court of Human Rights consider the CRC the foundation of children's rights law in their orders.'[65]

Significantly, the CRC offers a unique opportunity to intersex activists in its paradigm shifting recognition of the child as a bearer of human rights.[66] To some extent, the CRC represents a shift from a simple paternalism where children are solely under the jurisdiction of parents to a recognition of the autonomy of the child as a 'fully fledged beneficiar[y] of human rights'.[67] This frames the intersex child's situation in terms of rights – to autonomy, health, development and freedom from ill treatment among others. In so doing, it imposes duties on both parents/caregivers and the state, moving away from a child as subject solely to the jurisdiction of parents and caregivers and placing rights alongside considerations of best interests.

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[63] This focus on intersex issues appears to be continuing. For example, the Human Rights Committee makes reference to intersex people as a vulnerable population in its 2020 List of Issues for the UK to be addressed in their forthcoming state report. See Human Rights Committee, List of Issues Prior to submission of the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland, 5 May 2020, CCPR/C/GBR/QPR/8.

[64] Indeed the UK's 2017 report to the CRPD failed to mention intersex and, when pressed on this issue during questioning, the UK's representation confused Intersex Genital Mutilations with Female Genital Mutilation. Finally, it merely responded by saying it had given £45,000 to LGBTI groups. In both the CEDAW and CAT sessions, the UK representative deflected questions regarding IGM by stating that cases were decided on a case-by-case basis and that more information was needed in this area; the UK was, and still is, awaiting the outcome of the call for evidence.

[65] Garland and Slokenberga, 'Protecting The Rights Of Children With Intersex Conditions From Nonconsensual Gender Conforming Medical Interventions: The View From Europe' (2019) 27 *Medical Law Review* 482 at 493.

[66] Invernizzi and Williams, 'Introduction Human Rights of Children: From Visions to Implementation?' in Invernizzi and Williams (eds), *The Human Rights of Children: From Visions to Implementation*, (2011); Vandenhole, Erdem Türkelli, and Lembrechts, 'Introduction: Three Decades of Children's Rights Law' in Vandenhole, Erdem Türkelli, Lembrechts (eds), *Children's Rights: A Commentary on the Convention on the Rights of the Child and its Protocols* (2019).

[67] Detrick (ed.), '*The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* (1992) at 27.

There are undoubtedly complexities to this recognition of the rights of the intersex child: the child is not completely separated from parents and families in the text of the CRC and indeed, Article 5 centralises the role of the family in the child's life and development. Instead, the Convention recognises the development of the child and that the child is both a 'being' and a 'becoming'.[68] Michael Freeman and others have noted that although there may not be general acceptance of children as autonomous rights holders, the complex situation of the child as both an autonomous individual in its own right, as well as a developing adult has meant that value and necessity of children's human rights appears to require constant re-affirmation.[69] For a variety of reasons, ranging from a cautious approach on the part of the drafters[70], to non-legal organisations taking the lead in the interpretation and implementation of the CRC[71], the affirmation of children's rights as a legally enforceable norm remains somewhat more contested than might be first expected.

The scalar approach adopted in this article is a useful way of navigating the contested legalities within the CRC. We do not suggest that the CRC can be seen solely as a political document[72], but nor do we view the legal limitations of the CRC simply as a matter of a compliance or an 'implementation gap'.[73] Instead, we attend to the technicalities of scale as a mode of legal ordering through which state responsibilities are brought into focus or rendered invisible. We argue that an understanding of state's legal obligations to intersex children illuminates the technical and scalar manoeuvres that have been used to sidestep these obligations. By placing these UN actions alongside the comments of the Committee on the Rights of the Child to the UK above, it becomes clear that within the human rights framing of the UN, the UK's responsibilities to protect the rights of intersex children are far reaching. First, at a macro level the UK has a negative responsibility not to engage in behaviour that violates the CRC. The 'state' here is taken to include 'organs and agents' of

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[68] Vandenhole, Erdem Türkelli and Lembrechts, supra n 66.
[69] Freeman, 'The Value and Values of Children's Rights' in Invernizzi and Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2011); Vandenhole, Erdem Türkelli and Lembrechts, supra n 66.
[70] Vandenhole, Türkelli and Lembrechts ibid. See also Cantwell, 'Are Children's Rights Still Human?' in Invernizzi and Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2011)
[71] Invernizzi and Williams, supra n 66 at 25.
[72] Quennerstedt, 'Transforming Children's Human Rights-From Universal Claims to National Particularity' in Freeman (ed.), *Law and Childhood Studies: Current Legal Issues Volume 14* (2012) at 105.
[73] Vandenhole, 'Children's Rights from a Legal Perspective: Children's Rights Law' in Vadenhole et al. (eds), *Routledge International Handbook of Children's Studies* (2015) at 1.

the state.[74] Indeed, as Stern notes, 'any institution which fulfils one of the traditional functions of the State, even if such functions have been privatized, should be considered as an organ of the State from the point of view of international law.[75] As she continues:

> '…the mere fact that a State confers management of its prisons or control of immigration in its airports, or even certain police functions to private entities, does not mean that the State can absolve itself from all international responsibility when those entities commit acts contrary to the State's international obligations.'[76]

As discussed below, in the UK, the NHS is the body to which the UK government defers with respect to the conducting of intersex surgeries. Yet as public authorities, NHS Trusts remain agents of the state for the purposes of international human rights law.[77]

Second, the UK under Articles 2, 3 and 4 of the CRC, has a responsibility to take all necessary legislative measures to implement rights recognised by the CRC. Thus, not only does the UK (and its state organs and agents) have a negative obligation not to violate the Convention, they also have a positive obligation to secure the rights protected in the CRC through legislative, administrative and other means.[78] Third, the UK has a general due diligence obligation to ensure that rights are respected, protected and fulfilled.[79] The protection obligation here extends to the protection of individuals from harm caused by private actors and sits alongside an explicit obligation contained within the CRC to take steps to secure the best interests of the child. In this sense, the UK's failure to

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[74] French and Stephens, *ILA Study Group on Due Diligence in International Law: First Report* (2014).
[75] Stern, 'The Elements of an Internationally Wrongful Act' in Crawford, Pellet, and Olleson (eds), *The Law of International Responsibility* (2010) at 204; Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (2012) at 518; Brown, *Regulating Aversion* (2006).
[76] Stern, ibid.
[77] Domestically, the NHS is a public authority for the purposes of s. 6 Human Rights Act 1998. With regards individual practitioners, doctors treating NHS patients are public authorities, however their treatment of private patients would not be undertaking functions of a public nature. See Hansard HL Deb, Vol 583, col *811* (24 November 8). There has however been considerable criticism of hybrid or functional public authorities in the UK. See eg Amos, 'Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?' (2009) 72 *Modern Law Review* 883 at 898-890 and Mac Amhlaigh, 'Once More Unto the (Public/Private) Breach …: s. 6 of the Human Rights Act 1998 and the Severability Thesis', UK Constitutional Law Blog, 13th December 2013, available at www.ukconstitutionallaw.org [last accessed 2 April 2020] for summaries of key issues.
[78] Garland and Slokenberga, supra n 65 at 501.
[79] French and Stephens, supra n 72.

act to prevent harm to children, to investigate harm caused and to punish those responsible for harm caused by non-therapeutic interventions is also a failure in its Convention obligations. This would be the case whether or not non-therapeutic intervention was undertaken by NHS Trusts or by private actors.

However, through the scalar lens, it becomes possible to see that this is not simply a problem of UK government refusing to acknowledge its responsibilities or even just about jurisdiction,[80] but one of *scale.* Scalar parameters of children's rights direct and arrange modes of governance prevent forms of communication that allow for the acknowledgement of intersex surgery as a form of inhuman treatment and a grave violation of children's rights. This is evident if we consider the UK's response, articulated by Flora Taylor-Goldhill (the then Director for Children, Families and Communities, Department of Health):

> NHS England are *responsible* [italics added] for specialised commissioning which covers this area. They wish to work with stakeholders to improve the services for these children and their families. NHS England are clear that the management of intersex conditions should optimise overall quality of life and that gender assignment interventions in newborns with intersex conditions should be avoided before expert evaluation. Where babies and children could be described as intersex, decisions about when and how to make medical interventions *should be taken by clinicians in consultation with the parents of the child*, [italics added] and where possible and the child is older, seeking the views of the child himself or herself or themselves. NHS England have recognised the need to engage service users and their families on this issue. The commissioning of specialised services by NHS England is heavily informed by expert and stakeholder advice via the clinical reference group that I mentioned. They use their specific knowledge and expertise to advise NHS England on the best way that specialised services should be provided. NHS England welcomes the involvement of interested people in the work of the clinical reference group and is keen to work with all stakeholders including charities, patient groups, staff from service providers, and commercial organisations. NHS England has recently consulted on the proposals for the future configuration of clinical reference groups, and in spring of 2016 it will publish details of which specialised services fall within each clinical reference groups remit. This will include details of the clinical reference group for specialist gynaecology services for children and young people.[81]

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[80] Garland and Travis, supra n 9

[81] Flora Taylor Goldhill (Director for Children, Families and Communities, Department of Health) at the Committee on the Rights of the Child, 72nd Session, 23 May 2016, CRC/C/SR.2114. Transcription available at http://stop.genitalmutilation.org/post/UK-Questioned-over-Intersex-Genital-Mutilations-by-UN-Committee-on-the-Rights-of-the-Child [last accessed 2 April 2020].

This response highlights a number of key features typical of contemporary understandings of intersex embodiment that lead to Member State inaction.[82] Notably, we see an immediate shift in responsibility from the state to the medical profession.[83]

Similar shifts in responsibility are also utilised by the medical profession to deflect responsibility from themselves and to place it onto individual healthcare practitioners and parents of intersex embodied children. This 'funnelling' of responsibility away from institutions and towards individuals enables the continuation of non-therapeutic medical interventions on children and prevents collective action against them. Such displacement of responsibility to the medico-local level preserves existing power hierarchies and allocations of responsibility at the state and sub-state level. In short, this funnelling of responsibility allows for the blackboxing of intersex in a way that preserves the separation between the human rights implications of non-therapeutic interventions and the medico-legal regime with which intersex children must engage at the domestic level.

As well as privileging a biomedical framing over that of the human rights concerns raised, the medico-legal regime to which Taylor-Goldhill defers is paternalistic: despite reference to stakeholder involvement, intersex groups are still not integrated into standard medical practice and education[84] and parents (and in some cases the children) are positioned in a purely consultative role regarding life-altering and irreversible decisions as medical interventions '*should be taken by clinicians'*. Whilst non-therapeutic medical interventions may be presented as empowering children and their parents through 'choice', parents are likely to be swayed by 'medical expertise'[85] and children will often be too young to be recognised as capacious. This ensures the retention of power with the medical professionals rather than individual intersex people and their families.

The operation of blackboxing here allows the treatment of intersex infants to sit removed from the rights-based focus of the CRC, which is underpinned by guiding principles of non-

[82] See also, Garland and Travis, supra n 5; Garland and Travis, supra n 6; Garland and Travis, supra n 9.
[83] Garland and Travis, supra n 9.
[84] Garland and Travis, supra n 6; Monro et al., supra n 27; Davis, supra n 3.
[85] Streuli et al., 'Shaping Parents: Impact of Contrasting Professional Counseling on Parents' Decision Making for Children with Disorders of Sex Development' (2013) 10 *The Journal of Sexual Medicine* 1953.

discrimination (Article 2), adherence to a child's best interests (Article 3), a right to life, survival and development (Article 6) and importantly for our purposes here respect for the views of the child (Article 12). With respect to the right to be heard, the Committee has issued a General Comment which makes clear that this right to be heard extends to health care decisions 'in a manner consistent with their evolving capacities,'[86] a view which is further confirmed in the Committee's 2013 General Comment on the right of the child to the enjoyment of the highest attainable standard of health.[87] Within the CRC, the child's views must be central to decision making about their wellbeing and healthcare – an obligation that only increases as a child's capacity, competency and responsibility to exercise rights evolves over time.[88] This approach is aligned with academic and activist arguments that medical intervention should be delayed until the child can participate in the decision making process.[89] Nonetheless, such commitments are often undercut by the construction of intersex surgeries as 'emergencies' necessitating immediate intervention preventing a full and through investigation of best interests.[90]

Moreover, and more importantly for this article, this passage highlights issues of scale in this area. Despite being questioned about the apparent breach of a number of international conventions, Taylor-Goldhill was able to deflect these questions by claiming they fell outside of the scope of human rights and, in essence, depoliticised the issues by suggesting that medicine was an apolitical and objective jurisdiction that was properly placed to govern intersex bodies without reference to healthcare's human rights obligations.[91] Here we can identify at least three errors in the state's reasoning. Firstly, we can see a category error whereby intersex embodiment is understood as a clinical issue rather than human rights issue with possible clinical implications as we have shown above. Secondly, we can identify a regulatory error resulting in a failure to regulate clinical decision-

[86] Committee on the Rights of the Child, General Comment No 12: On the Right of the Child to be Heard (art. 12), 20 July 2009.
[87] Committee on the Rights of the Child, General Comment No 15: On The Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), 17 April 2013.
[88] Committee on the Rights of the Child, General Comment No 20: On the Implementation of the Rights of the Child During Adolescence,' 6 Dec 2016.
[89] Horowicz, 'Intersex children: Who are we really treating?' (2017) 17 *Medical Law International* 183 at 207; Stop Genital Mutilation, supra n 20.
[90] Garland and Travis, supra n 5.
[91] Garland and Travis, supra n 9.

making through human rights frameworks. Thirdly, we can identify a responsibility error whereby the state fails to consider the responsibility flowing from positive obligations relating to the rights of the intersex person. These errors compound to frustrate the application of international human rights law to this area.

Accordingly, Taylor-Goldhill's attempt to present decision-making around non-therapeutic intervention as a matter outside the scope of the UK's human rights obligations is founded upon a misinterpretation of relevant international human rights principles and responsibilities. If non-therapeutic intervention constitutes inhuman treatment, interference with a child's integrity, or a harmful practice, then the fact the UK has failed to prevent its ongoing occurrence, through legislation, education and policy change, leaves the UK in breach of its obligations. These responsibilities cannot be avoided through reference to the decision making of individual NHS Trusts and nor could they now be deflected by the mere fact that the Gender Equalities Office has now issued a Call for Evidence on intersex-specific matters.[92]

Yet while we can emphasise the problematic nature of Taylor-Goldhill's response, the jurisdictional make-up of the Committee on the Rights of the Child prevents real pressure being placed on Member States to react to their Concluding Observations. Whilst Article 44 of the Convention places a duty to report to the Committee, the Committee has no power to enforce its Concluding Observations to State Reports. The state remains the central and key actor in the process of securing and protecting human rights. The jurisdictional arrangement of the UN treaty system and, perhaps, of traditional international human rights law more generally thus limits the governing rationalities of the Committee as well as its understanding of 'who' is governed. In this way, intersex efforts at the UN are caught in wider systemic weaknesses that frustrate international legal action. Despite clear and unambiguous recommendations, scalar differences and remit combine to impede intersex scale jumping in order to effect substantive change for intersex embodied persons. State

[92] It seems that the since the Call for Evidence was released in 2018, the UK representatives are using this evidence-gathering process as a way of deflecting questioning by UN Treaty Body's. See e.g. CRDP, CEDAW and CAT.

responsibility is avoided through the ease in which the state can abrogate from its supranational obligations and questions more widely the extent to which UN action is possible.

5. SCALE, STATE RESPONSIBILITY AND THE LIMITATIONS OF THE UNITED NATIONS

While Garland and Travis identified how the State uses jurisdiction to refute its responsibility for intersex people by compartmentalizing the governance of intersex squarely within the medical profession's remit,[93] scalar dimensions also play an important part in demarcating the legal disjunctions and lacunas that continue to exist in this area. States are (arbitrarily) deferring responsibility to a medical jurisdiction which in turn funnels responsibility down to individual healthcare practitioners. The result is a clear scalar disjuncture between the inter-state bodies previously mentioned and the medico-localized practices in which non-therapeutic medical interventions take place. These agencies condemn (or make recommendations) at a state-level and have failed to penetrate the workings of professional medical bodies, let alone individual healthcare practitioners as they rely on the state as the subject and sole disseminator of their recommendations. As Valverde notes, 'rights protections gained at one scale are often invisible at other scales.'[94] Rights protections at the scale of the international are not necessarily implemented at the scale of the state or the sub-state. This is particularly stark given that for intersex activists, institutional power to effect change does not correlate with ease of access to that institution. In the case of the CRC, NGOs were heavily involved in the Convention's drafting process and continue to participate in the state reporting process. Accordingly, intersex activists have relatively direct access to the Committee for the purposes of communicating grievances.

However, the institutional framework which most directly governs the lives of intersex individuals – at least with regards the issue of non-therapeutic intervention – is not the human rights bodies of the UN but the domestic and local regimes of medical-legal governance. Yet, it becomes

[93] Garland and Travis, supra n 9
[94] Valverde (2009), supra n 33. Here Valverde is drawing on de Sousa Santos' argument that taking scale for granted renders invisible contradictory regimes of legal governance.

increasingly difficult for activists to engage with these regimes and at the individual level there seems to be an unwillingness to discuss the legal intricacies and ethical problems surrounding intersex. Without explicit guidance from (in the UK) the General Medical Council, or the National Institute for Clinical Excellence it is unlikely that healthcare practitioners will engage with soft law recommendations on human rights standards on an individual ad-hoc basis.[95] Nor does the Committee on the Rights of the Child have significant capacity to speak to the professions or institutions that exist within the apparatus of the state – let alone compelling them to particular types of action. The NHS may be a state actor in the sense that it is a public authority, but the prevailing arrangement of international human rights law is that communication occurs between treaty body and government.[96]

The mediating factor in all these closed avenues of communication is the state, and as we show above, the state has proved itself unwilling to act and keen to sidestep its legal responsibilities. Moreover, scale can further frustrate change particularly where the State must act as an interlocutor between scales. Even if the State becomes willing to act, it must be able to adapt the recommendations from the UN in a way that is able to interpenetrate with medical governance. Thus, the State must be/come aware of the manifest differences that exist in these modes of governance and how processes of classification and sorting occur. Not understanding differences in terminology, for example, where medicine uses 'disorders of sex development' in comparison to the UN's use of 'intersex' could render any action by the State meaningless. Thus, what occurs here is an act of classification, sorting and separation of actions under different jurisdictional umbrellas in a way that inhibits or allows the recognition of particular injustices. It is notable for example, that the question to the UK on intersex

[95] Although see the statement from Physicians for Human Rights, 'Unnecessary Surgery on Intersex Children Must Stop,' 20 October 2017, available at http://physiciansforhumanrights.org/press/press-releases/intersex-surgery-must-stop.html [last accessed 2 April 2020]. International medical organisations, such as the World Health Organisation continue to recommend non-therapeutic medical interventions for intersex variances. This adds further evidence to the failure of the medical professional to consider the human rights implications of these practices. See further Carpenter, Intersex Variations, Human Rights, and the International Classification of Diseases (2018) 20 *Health and Human Rights* 205.

[96] Our focus in this article is the UN human rights bodies and intersex rights, as this has been a key element of intersex activist practice and within the literature. However, in focusing on the limits of the UN, the possibilities of seeking redress at other scales must be anticipated particularly with regards domestic human rights frameworks. A detailed consideration of Articles 3 and 8 of the ECHR and the possibility a claim under the Human Rights Act 1998 are beyond the scope of this article, but domestic human rights remedies reman as an underexplored avenue of redress for British intersex activists.

children was posed almost simultaneously with a question about whether the measures taken by the UK to prevent female genital mutilation were proven to be effective.[97] This elision of these two issues is telling: Valverde argues that 'governing projects are always differentiated by how they select certain features and de-select or ignore others'[98] and that the question of who rules over a space or a particular type of event is a key issue of jurisdictional disputes. In this case, it appears that while FGM and non-therapeutic interventions on intersex children both involve the medical alteration of a child's genitals by sub state actors, the nexus of knowledge/power that governs these two sets of practices are clearly differentiated by the UK's power to classify and separate different forms of legal governance.[99] FGM as a 'harmful cultural practice' governed in the UK by systems of criminal justice,[100] non-therapeutic intervention on intersex children is governed by the paternalistic authority of the NHS.[101] This results in profoundly different mechanisms of governance operating to regulate practices that are treated very similarly by the human rights knowledge/power framing of the UN. The difference emerges here not in the specificity of action or practice, but in the jurisdictional nexus of power/knowledge that classifies and delineates what is in the best interests of the child.[102]

It is beyond the scope of this article per to comment on the criminalisation of FGM. What the contrast between these two issues demonstrates however is the state's role in certifying 'who governs' or who has authority of a particular set of practices and what responsibilities follow from this. The UK government can and has legislated in a way that recognises FGM as a harmful practice and human rights abuse. Its actions against FGM have placed direct responsibilities on NHS Trusts and healthcare practitioners.[103] Similarly, the UK government could legislate to compel practitioners and Trusts to act differently with regards to intersex. Indeed, the Committee's framing of intersex issues as a harmful practice under CRC art. 24(3) is intended to trigger non-derogable rights. Certainly, other

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[97] Committee on the Rights of the Child, 72nd Session, 23 May 2016, CRC/C/SR.2114 at para 46.
[98] Valverde (2015), supra n 33 at 61.
[99] Earp, Hendry and Thomson, 'Reason and Paradox in Medical and Family Law: Shaping Children's Bodies' (2017) 25 *Medical Law Review* 604.
[100] Female Genital Mutilation Act 2003; Serious Crime Act 2015. See also Krivenko, 'Rethinking Human Rights and Culture Through Female Genital Surgeries' (2015) 37(1) *Human Rights Quarterly* 107.
[101] Garland and Travis, supra n 9.
[102] Earp, Hendry and Thomson, supra 93.
[103] Female Genital Mutilation Act 2003 s.5B

jurisdictions like Malta and Portugal have done just this, criminalising unnecessary medical interventions on intersex infants.[104] However, the UK has not done so and instead the jurisdictional blackboxing evident in Taylor-Goldhill's statement has a depoliticising effect.[105] It functions to designate the nexus of power-knowledge through which decisions about intersex children are taken as 'always already' decided. Scale here becomes reified as a structure of obfuscation rather than a process of sorting and separation of different powers. Moreover, in the CRC's absence of any real enforcement powers, the UK has strengthened the jurisdictional boundaries of the medical profession.

6. A POTENTIAL 'BOOMERANG' EFFECT?

While the State's use of scale frustrates international efforts to instigate change, what of the boomerang effect? The CRC has been widely ratified and a large number of states have incorporated aspects of the Convention into domestic law.[106] Incorporation however, does not necessarily lead to full or effective protection of children's rights. A large number of states have entered reservations or interpretative declarations of those rights protected under the convention,[107] and the constitutional recognition of children's rights or the incorporation of the CRC does not necessarily guarantee that those rights will be fully protected.[108] Commentators continue to optimistically hope that the UN's recognition of intersex will create public and/or political pressure on States that ultimately will leads to national reform. It may however, create greater domestic legal and political discourse around the

[104] Malta's s. 15 *Gender Identity Gender Expression and Sex Characteristics Act* (2015) and Portugal's Art 5 – 6 *Law No. 75/XIII/2* (2018) are not perfect. For example, Malta has been criticised for not going far enough as not only are sanctions relatively small, but it is possible for parents to take their children to the UK for such surgeries. See e.g. Garland and Travis, *Intersex Embodiment Beyond Frameworks of Identity and Disorder* (2022). Germany's *Law on the Protection of Children with Variants of Gender Development* (2021) has no penalties in place for the breach of this law.
[105] Garland and Travis, supra n 9.
[106] McCall-Smith, 'To incorporate the CRC or not – is this really the question?' (2019) 23 *The International Journal of Human Rights* 425 at 427.
[107] Lundy et al., *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (Belfast: Queen's University Belfast and UNICEF UK, 2012).
[108] Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 21 *South African Journal on Human Rights* 86.

protection of those rights – creating space for the discussion of those rights, even if their full realisation remains an aspiration.[109]

These complexities are all reflected in the UK's engagement with and understanding of its responsibilities. The UK has ratified but not incorporated the CRC, as is general practice for the UK with respect to UN human rights treaties. This limits the justiciability of rights protected under the Convention, although it does not entirely remove its influence from domestic law. In 2011, for example, commenting on the best interests of the child in deportation cases**,** Lady Hale has observed that the 'spirit if not the precise language' of the CRC has been translated into English law.[110] Similarly, McCall-Smith has documented increasing reference to the general comments of the Committee on the Rights of the Child in UK case law.[111] Within the UK's nations, Wales has indirectly incorporated the CRC by creating a duty to 'have due regard' to the Convention, to produce a children's scheme and to promote the CRC throughout society and institutions.[112] The Scottish Parliament has also unanimously passed *The UNCRC (Incorporation) (Scotland) Bill*, incorporating the CRC into law 'law to the maximum extent possible within the powers of the Scottish Parliament.'[113]

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[109] Further complicating this situation is the breadth of the rights protected under the CRC – the treaty spans, political, economic and social rights, leading to criticism that it is 'too unwieldy' for direct incorporation, and that the rights protected under the convention are 'more "aspirational" than enforceable'. This is particularly the case for the economic and social rights protected under the CRC. As McCall-Smith, supra n 100 notes, Article 4 of the CRC explicitly states that economic and social rights should be protected 'to the maximum extent' of a state party's available resources. Thus, '[t]he variable precision of the wording of CRC provisions has led some national jurisdictions to take a pick-and-mix approach to judicial recognition and remedy, thus blurring questions of enforceability.' at 429.

[110] *ZH Tanzania* v *SSHD* [2011] UKSC 4 (See also Fottrell, 'The UNCRC in the Supreme Court – the impact of SG v Secretary of State for Work and Pensions' (21 May 2015) *Family Law Week*, available at www.familylawweek.co.uk/site.aspx?i=ed144937 [last accessed 13 June 2022]; see also Williams, 'Multi-level Governance and CRC Implementation' in Invernizzi and Williams (eds), *The Human Rights of Children: From Visions to Implementation* (2011) at 239.

[111] McCall-Smith, 'Interpreting International Human Rights Standards Treaty Body General Comments as a Chisel or a Hammer' in Lagoutte, Gammeltoft-Hansen and Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (2017).

[112] McCall-Smith, ibid at 434. See also Funky Dragon, 'Our Rights, Our Story: Funky Dragon's Report to the United Nations Committee on the Rights of the Child ' in Invernizzi and Williams (eds), *The Human Rights of Children : From Visions to Implementation* (2011); Williams, supra n 104.

[113] Scottish Government, 'Strengthening children's rights' (20 Nov 2019) available at www.gov.scot/news/strengthening-childrens-rights/#:~:text=UNCRC%20to%20be%20incorporated%20into,powers%20of%20the%20Scottish%20Parliament.&text=To%20incorporate%20the%20UNCRC%20into,laid%20before%20Parliament%20next%20year [last accessed 13 July 2020]; Scottish Government, 'Children's Rights' (Scottish Government) available at www.gov.scot/policies/human-rights/childrens-rights/ [last accessed 19 May 2022]; Scottish Alliance for

However, subsequent questioning of the UK by other Treaty Bodies since the Committee on the Rights of the Child have not suggested a shift in this understanding of intersex embodiment or of children's rights. The hoped for 'boomerang effect' has not manifested. Rather the State has retreated further from discussions relating to these medical interventions instead stating that cases are decided on an 'individual case-by-case basis'; that the government is committed to tackling this 'emerging and complex issue'; and that more evidence is needed and it awaits the outcome of a Call for Evidence, a formal information gathering process, on intersex-specific issues.[114] The implication, then, is that the Government will continue to defer to this biomedical narrative of intersex framing unless the Call for Evidence produces evidence to the contrary.[115] As of yet, then the UN has failed to create the space, imagined by Garland and Slokenberga, for 'overcoming discrepancies between law and social reality, by providing authoritative support for governments and advocates to counter clinical resistance to national regulation.'[116]

It could be, however, that the failure to create such a space is simply a reflection of the fact that the intersex movement is still in a relatively early stage. In focusing on intersex activism, we must also account for parallel forms of activism that shape the context and norms within which intersex activists must operate. Most important for this article is the histories of women's rights and LGBT activism at the UN over the past 50 and 30 years respectively. As we have discussed, legal systems, scales and issues do not exist in isolation but instead interact and interpenetrate. This interpenetration or intertwinement is not limited to legal orders, but also encompasses connections and links between legal norms.[117]

Children's Rights, 'Incorporation of the UN Convention on the Rights of the Child', available at www.togetherscotland.org.uk/about-childrens-rights/monitoring-the-uncrc/incorporation-of-the-un-convention-on-the-rights-of-the-child/#:~:text=The%20UNCRC%20(Incorporation)%20(Scotland,the%20UNCRC%20into%20Scots%20law [last accessed 13 May 2022].

[114] Government Equalities Office, *Variations of Sex Characteristics Call for Evidence* (2019), available at Variations in sex characteristics (publishing.service.gov.uk) [last accessed 13 June 2022].

[115] We acknowledge here that a human rights framework does not necessarily challenge a biomedical framework and should not be seen as dichotomous. See for example, Rubin, supra n 15.

[116] Garland and Slokenberga, supra n 65 at 502.

[117] Burchardt, 'Intertwinement of Legal Spaces in the Transnational Legal Sphere' (2017) 30 *Leiden Journal of International Law* 305.

On the surface therefore, the relative success of LGBT and women's rights at the UN might be cause for future optimism. Two movements that might be seen as siblings to the intersex cause have enjoyed at least some institutionalisation in UN forums. This suggests that activists may be pushing at an open door at UN human rights bodies – an assumption that, as we have shown, does seem to be borne out in practice. Equally, the interpenetration of international scale may provide opportunities for activists to 'scale jump'[118]: activists who are struggling to gain traction at local or national scales may seek international recognition or support in order to foster change. Scale jumping from the national to the international can be a key part of 'boomerang' effect legal change.

Our concern here however is threefold. First, such scale jumping is not without risk or downsides, Valverde has written critically of scale jumping by feminist activists in the 1990s in response to a lack of domestic progress.[119] International law provided a point of entry at a time of domestic impasse and resulted in some successes, particularly in relation to the recognition of sexual violence as a human rights issue, but it also facilitated a degree of 'orientalization' of women's oppression,[120] or forms of transnational activism that focused on women's suffering outside of the US, perpetrated by racialized others on vulnerable and racialized female populations. Similarly, reflecting on her work in the 1990s in which she was involved in efforts demanding that 'mainstream' human rights organisations recognise violence against women and sexual violence against women as human rights issues, Miller emphasises the extent to which women's rights activists had to rely on crude gender stereotypes of women as victims in need of protection.[121] For Miller, this stereotype helped to advance an important cause, but also worked to amplify regressive ideas of women and sexuality. Entry into a particular scalar or jurisdictional realm required that she and her colleagues 'speak' in a language that could be perceived within that particular scale, and in so doing they reinforced stereotypical perceptions as women as vulnerable victims that existed at this register. Reflecting on the early work of intersex activists at the UN, O'Brien identifies a similar risk for intersex groups: that

[118] Moore, supra n 38; Valverde (2015), supra n 33.
[119] Valverde (2014), supra n 33; Valverde (2015), supra n 33.
[120] Valverde (2014), supra n 33 at 350.
[121] Miller, 'Sexuality, Violence Against Women and Human Rights: Women Make Demands and Ladies Get Protection' (2004) 7 *Health and Human Rights* 16.

the price of recognition and protection is the positioning as the 'vulnerable other' of international law, or the body in need of protection.[122] Rubin raises similar questions in regard to how intersex activists often frame their narratives through simplistic conceptualisations of 'harm' rather than the focussing on the broader and more complex questions of sex and gender that might lead to wider and more substantive change but have the capacity to be misconstrued or misappropriated.[123]

Second is a general feminist and queer critique of rights' potential to lead to liberation. Or as Reecia Orzek and Laam Hae note, '[i]f it is social justice that we are after, we cannot afford to prematurely celebrate actions that seem to subvert one oppressive structure even as they reproduce or are predicated upon another.[124] Feminist critiques of the progress of women's rights at the UN are multiple: described as caught been resistance and compliance[125], and often siloed into 'women's issues' unless and until women's rights can be capitalised upon to secure other causes –not always aligned with feminist concerns – the assumed 'progress' of women's rights in securing women's liberation is patchy.[126] Equally, LGBT rights, while now a globally recognised cause, are also at risk of co-option into larger, homonationalist agendas, at odds with wider goals of queer liberation. In transnational LGBT rights campaigning, activists have long recognised the 'double edged sword'[127] of international support. International alliances may bring resources and allies, but may also expose activists to the regulatory and governmental effects of LGBT human rights in transnational spaces,[128] the entanglement of LGBT rights trends with teleologies of progress,[129] and 'pinkwashing': the

[122] O'Brien, 'Can International Human Rights Law Accommodate Bodily Diversity?' (2015) 15 *Human Rights Law Review* 1.
[123] Rubin, supra n 15.
[124] Orzeck and Hae, 'Restructuring Legal Geography' (2020) 44 *Progress in Human Geography* 832; Riles, supra n 48.
[125] Kouvo and Pearson, *Feminist Perspetives on International Law: Between Resistance and Complicance?*` (2014) at 5.
[126] Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl* (2018).
[127] Jjuuko, 'International Solidarity and its Role in the Fight Against Uganda's Anti-Homosexuality Bill' in Lalor et al. (eds), *Gender, Sexuality and Social Justice: What's law got to do with it?* (2016).
[128] Puar, 'Rethinking Homonationalism' (2013) 45 *International Journal of Middle East Studies* 45; Rao, 'The locations of homophobia' (2014) 2 *London Review of International Law* 169; Kapur, 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject, and Non-liberal Search for Freedom and Happiness' (2014) 25 *Law and Critique* 25.
[129] Weber, 'Queer Intellectual Curiosity as International Relations Method: Developing Queer International Relations Theoretical and Methodological Frameworks' (2016) 60 *International Studies Quarterly* 11.

deployment of a state's LGBT rights record in order to draw attention away from more problematic policies.[130]

Third, we push back against the temporal assumption that similarities in focus and tactics, amidst an interactive international legal terrain means that intersex rights can or should follow a similar trajectory to LGBT or women's rights. Queer and feminist scholarship have highlighted the dangers of assuming that rights protections can or will follow a single 'progressive' trajectory towards liberation or protection.[131] Shades of the human rights-based promise of liberation can be found in some discussions of the potential of intersex rights at the UN:

> While [international human rights mechanisms] create soft law that cannot necessarily be directly enforced in national practice, global movements have shown that this strategy can create a 'boomerang effect' that in turn impacts national law and practice. International Human Rights (IHR) laws and recommendations can lead to hard laws in individual nations. The appeal to [international human rights mechanisms] may have a dual impact of raising public awareness about rights claims, while pushing for actual legislative protection at the same time.[132]

We agree that transnational advocacy networks may succeed in influencing domestic law and practice through international advocacy. However, we are more cautious about the possibility that this will play out as it has for LGBT or women's rights groups, who are often used as exemplars for this kind of transnational advocacy. This is because although intersex may be a sibling of women's or LGBT rights, the concerns, legal mechanisms and arguments at play are not identical. Indeed, the amalgamation of intersex rights into LGBTI rights in international legal spheres has been problematised by both intersex activists[133] and by the UN Independent Expert on SOGI,[134] for failing to recognise the unique needs of the intersex community, separate from the concerns of sexual

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[130] Franke, 'Dating the State: The Moral Hazards of Winning Gay Rights' (2012) 44 *Columbia Human Rights Law Review*; Rubin, supra n 15.
[131] Weber, supra n 123; Kapur, supra 120
[132] Bauer, Truffer and Crocetti, supra n 1. Importantly this quote reference work by Kollman and Waites on the global politics of LGBT rights, who themselves reference Keck and Sikkink's analysis of Transnational Advocacy Networks, which includes, among other case studies, analysis of transnational advocacy networks and violence against women.
[133] Garland and Travis, 'Queering the Queer/Non-Queer Binary: Problematising the "I" in LGBTI+' in Raj and Dunne (eds), *The Queer Outside in UK Law: Recognising LGBTQI People in the United Kingdom* (2021).
[134] General Assembly, 'Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, 19 July 2017, Doc A/72/172.

orientation and gender identity. These unique needs will require unique patterns of advocacy and action.

We would also suggest that careful attention must be paid to the temporal and spatial parameters of where and when the legal regulation of intersex in comparison to women's or LGBT rights. To give just one example, the UK and much of Europe had already adopted relatively 'progressive' positions on LGBT rights before sexual orientation and gender identity came into focus in a sustained way at the UN. The UK's decriminalisation of homosexuality began in 1967, with full decriminalisation following the *Dudgeon v UK* European Court of Human Rights decision in 1982. The *Dudgeon* decision preceded the UN's decriminalisation decision in *Toonen v Australia* by 12 years. The UN's focus on LGBT rights offered relatively limited challenges to the UK, who could paint itself as 'progressive' compared to many other member states. Intersex occupies a very different legal framework within the UK where it is subject primarily to medical jurisdiction at the regional level. Compared to international terrains, the UK is significantly out of step with the UN's approach, tending to adopt an approach that protects and sustains this medical jurisdiction rather than heeding UN warnings about intersex rights violations. In this respect, unlike women's rights or LGBT rights demands, the UK's engagement becomes not a legal norm through which the UK can either demonstrate its progressive credentials or safely neutralise challenges into particular institutional fora, but an urgent and necessary demand for change – a demand that the UK government seems unwilling to acknowledge.

What becomes clear therefore, is that just as activists may scale jump, so too may powerful states use scale as a strategic tool. Eslava suggests that,

> …the common idea that the 'underdeveloped' parts of the world are the furthest from the international. In my view, the (poor) South (and, for that matter, the poor parts of the North) is, thanks to the uneven topography of the global order, actually much closer to the international, because the nation-state there is less resilient as a sovereign unit and

> has often been formed (or reformed) with extensive involvement on the part of the 'international community' and its ideals.[135]

For Eslava, certain nation states are less resilient, more likely to be indebted to, and less able to resist impositions by international institutions. The organising technology of international law is not neutral; it has an uneven topography that is revealed in the differential capacity of states to respond to the demands of international organisations such as the UN. In this case, we show how this response does not need to be confrontational, but instead the technical legal organisational work of jurisdiction and scale allows the UK's responsibilities to be neutralised as they pass from the international to the domestic.

In a legal terrain in which norms, legal regimes and forms of action interact and influence each other, we do not intend to ignore or set aside wider narratives of gender, sexuality and sexual orientation in international human rights law. Instead, we want to set the discursive interpenetration of human rights narratives alongside the technical operation of international human rights law. The weaknesses of international human rights law for securing change are well rehearsed and highlight the importance of translating soft international pressure into hard legislative change. Yet activists continue to approach the UN and to engage with UN bodies, seeking to use the international scale to leverage change at other locations. By focusing on the technicalities of the operation of the Committee on the Rights of the Child, we seek to draw out the way in which activists are not the only actors making scalar and jurisdictional moves to bring about – or inhibit – certain ends. As we have explored, the state as a central actor of international law is also implicated in how (international) law and jurisdiction are operationalised to frame narratives of intersex rights protections or interventions.

7. CONCLUSIONS

Where does this leave the potential of scale jumping intersex activists? We would reiterate that we are not suggesting that the UN be abandoned as a forum for action. Instead, returning to the formulation

[135] Eslava, supra n 2.

of scale as a category of practice, we return to the fundamental problem that despite the well rehearsed weaknesses and limitations of international human rights law[136] the UN remains a forum through which intersex activists seek redress and recognition. To be clear we are not arguing against this strategy, but we do suggest that there is important further investigation required as to why the UN continues as a target for intersex activists.

In particular, this suggests that some reflection is needed on what role the UN can be for intersex activists. It has universal reach and an authoritative voice, but the price of universal reach is often a lack of particularity and specificity and, in the case of the UN rights bodies, an ongoing need to treat the state as the ideal subject of international law, even if the kinds of scale jumping discussed in this article reveal the much more tangled complexity of the transnational arena. Significantly however, the state remains a key actor within the 'moveable feast'[137] of international law, and, as we demonstrate above, state actors have considerable scope – supported by international legal structures – to themselves engage in scalar and jurisdictional practices that create or maintain particular narratives of action and law. Thus, our insistence on the technicalities of law is part of a recognition that while the UN may be a staging point for engagements with different combinations of international, transnational, domestic and local scales and jurisdictions in ways that might challenge the nexuses of knowledge/power that current render medical approaches to non-therapeutic intervention so dominant, the terrain of these entanglements is still striated by international legal practices that are perhaps not as contingent or open to change as is sometimes assumed.

For scholars of legal scale and legal geographers, there are also important questions to be asked. In particular we draw on Orzek and Hae in questioning the 'contingency mindset' in legal geography.[138] They cite Susan Marks' important warning against false contingency: 'while current arrangements can indeed be changed, change unfolds within a context that includes systematic

[136] Kapur, supra n 120; Hitchcock, 'The Rise and Fall of Human Rights?: Searching for a Narrative from the Cold War to the 9/11 Era' (2015) 37 *Human Rights Quarterl*y 80.
[137] Johns, supra n 31.
[138] Orzeck and Hae, supra n 118.

constraints and pressures.'[139] We are not denying here the agency of intersex or other actors but developing a critique that understands the limits imposed on these actors by legal and other structures. It is for this reason that we insist with Riles on the importance of legal technicalities and on tracing carefully the limiting work of jurisdictional blackboxing. Such blackboxing works as a form of knowledge production, of epistemological and practical confinement of thought and action, even under conditions of interlegality or interscalarity.

The point here requires some clarification. Of interest here is how the unevenness, interaction and interpenetration of interlegality can be part of the structure of international law and practice and thus can be anticipated by state actors as the subjects of international law. The UK is able to integrate and deflect intersex rights claims through jurisdictional practices. We can lay out clearly the UK's responsibilities under the Convention on the Rights of the Child, but we can also trace how these responsibilities are rendered meaningless – or even how the UK might view itself as meeting those responsibilities – through a careful analysis of jurisdiction and scale. The State must act as an interlocutor between international and medico-local scales to facilitate communication, dialogue and change. States and international legal frameworks are not necessarily unchanging stable blocks or striations that do not move within an otherwise fluid international, plural system. Instead, they are part of that system, able to deploy particular legal rules and tools to absorb or react to events, encounters or contingencies.[140]

Thus, we question the extent to which engagement with the international aims at immediate legal or regulatory change and the extent to which it is an effort to shift the terms of debate in a way that de-privileges medical power/knowledge frames and amplifies one that is grounded in the language of human rights. At issue is how intersex activists might use interscalarity in the most strategic way. Contained in this question is a need to confront the practicalities of what can be achieved at different scales, how different scales might interpenetrate and interact in order to

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[139] Ibid. See also Painter, 'Congingency in International Legal History: Why Now?' in Venzke and Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (2021) at 45; see also Johns, 'On Dead Circuits and Non-Events' in Venzke and Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (2021).
[140] Johns, ibid.

challenge particular paradigms of knowledge and governance, how this aligns with particular goals and what the consequences of acting at different scales might be. More simply, Taylor-Goldhill tells us that the NHS is responsible, how then, might the human rights of intersex individuals be made a more central concern of NHS practitioners and decisionmakers?

Indeed, in her response to the CRC, Taylor-Goldhill herself acknowledged the need for a culture shift in the NHS.[141] This is clearly the approach envisaged by the Committee – in its General Comments on Healthcare, there is a clear steer towards improving legislation, training and education.[142] Such a shift will require the state, rather than the medical profession or individual healthcare practitioners, to take responsibility for the current failings around intersex wellbeing. This guidance or legislation would not represent a punishment or admonishment of the medical profession but rather an acceptance of state responsibility and thus a shift in governance.[143] Instead, this scalar shift would allow unproductive discussions around responsibility and consent to be displaced away from the individual healthcare professional and refocused towards the state.