

Talking T at the European Court of Human Rights: The Human Rights Case Against Testosterone Restrictions for Female Athletes and How the Sports Community Should Respond

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I. INTRODUCTION

When sprinter Caster Semenya won gold in the 800 meter at the 2016 Rio de Janeiro Olympics, she likely did not think that this Olympics could be her last.¹ In fact, the 30-year-old athlete² expressed intentions to continue competing at an elite level until she was 40.³ But she may now be done thanks to controversial rules promulgated by the International Association of Athletics Federations (IAAF).⁴ These regulations—purportedly created to make the sport fairer—disqualify female athletes from competing in certain track and field events if their testosterone levels are above a particular threshold.⁵ Among the events to which the regulations apply is Semenya's event, the 800 meter.⁶

Semenya, who is intersex, was disqualified from participating in that event in the 2020 Tokyo Olympics because her testosterone levels exceeded those allowed by the IAAF's rules.⁷ Her testosterone levels are a natural result of the variations in her sex characteristics that make her intersex.⁸ At first, Semenya took hormones to reduce her testosterone, per the instructions of the IAAF.⁹ However, she ultimately rejected the notion that she should change her natural hormones to compete as a woman and asked the Court of Arbitration for Sport (CAS) to void the IAAF's rules.¹⁰ The court denied her request¹¹ and she has since appealed this case to the European Court of Human Rights (ECtHR).¹²

¹ See *Caster Semenya*, OLYMPICS, <https://olympics.com/en/athletes/caster-semenya> (last visited Sept. 17, 2021).

² Gerald Imray, *Semenya Misses Tokyo, May be Forced Out of Olympics for Good*, AP NEWS, (July 3, 2021), <https://apnews.com/article/africa-olympic-games-2020-tokyo-olympics-sports-cl1b5fba248c03ea6ddd7e7089818eb0>.

³ Steve Brenner, *Caster Semenya: They're Killing Sport. People Want Extraordinary Performances*, THE GUARDIAN (Apr. 23, 2021, 7:00 AM), <https://www.theguardian.com/sport/2021/apr/23/caster-semenya-theyre-killing-sport-people-want-extraordinary-performances>.

⁴ INT'L ASS'N OF ATHLETICS FED'NS, ELIGIBILITY REGULATIONS FOR THE FEMALE CLASSIFICATION (ATHLETES WITH DIFFERENCES OF SEX DEVELOPMENT) (2019), <https://www.sportsintegrityinitiative.com/wp-content/uploads/2019/05/IAAF-Eligibility-Regulations-for-the-Female-Classi-2-compressed.pdf> [hereinafter *Eligibility Regulations*].

⁵ *Id.* at 1–3.

⁶ Imray, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Semenya v. Int'l Ass'n of Athletics Fed'ns*, CAS 2018/O/5794, 163 (Ct. of Arb. for Sport 2019), available at https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf [hereinafter *Semenya v. IAAF*]; *Eligibility Regulations*, *supra* note 4, at 3.

¹⁰ *Semenya v. IAAF*, *supra* note 9.

¹¹ *Id.* at 163.

¹² Press Release, European Court of Human Rights, Notification of *Semenya v. Switzerland* (May 17, 2021), <http://hudoc.echr.coe.int/eng-press?i=003-7021287-9471834> [hereinafter Notification of *Semenya v. Switzerland*].

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Semenya's case—alongside the disqualification of other female athletes—has generated controversy around these testosterone rules.¹³ Some take the position that the rules are specifically aimed at removing Semenya from the sport.¹⁴ Perhaps the most damning critique is that the focus of these rules has little to do with fairness, and everything to do with policing female bodies to enforce stereotypical femininity.¹⁵

In Part II, this note will describe the regulations and their history, as well as the science disputing the conclusions the IAAF relies upon to defend these regulations. Part III will explain Semenya's initial case before the CAS, examine the human rights law that will determine the outcome of Semenya's ECtHR case, and argue why she should prevail on the substantive questions of law. Finally, Part IV will present recommendations the International Olympic Committee (IOC) should take to prevent human rights violations and create a sports environment that does not discriminate and welcomes all kinds of diversity.

II. BACKGROUND

A. Definitions

The IAAF Regulations discuss biological sex, differences in sex development, and comment on gender identity.¹⁶ To understand the regulations, it is necessary to understand each of these concepts and how they differ.

1. Sex

According to the United States' National Institutes of Health, sex is a term that encompasses the physiological and biological characteristics that make a

¹³ See, e.g., Julian Savulescu, *Ten Ethical Flaws in the Caster Semenya Decision on Intersex in Sport*, THE CONVERSATION (May 9, 2019, 4:07 PM), <https://theconversation.com/ten-ethical-flaws-in-the-caster-semenya-decision-on-intersex-in-sport-116448>; Kim Elsesser, *What Makes an Athlete Female? Here's How the Olympics Decide*, FORBES (July 27, 2021, 1:48 PM), <https://www.forbes.com/sites/kimelsesser/2021/07/27/what-makes-an-athlete-female-heres-how-the-olympics-decide/?sh=130ddf574f9c>; Melissa Block, *Olympic Runner Caster Semenya Wants to Compete, Not Defend Her Womanhood*, NPR (July 28, 2021, 4:18 PM), <https://www.npr.org/sections/tokyo-olympics-live-updates/2021/07/28/1021503989/women-runners-testosterone-olympics>.

¹⁴ Hannah Mouncey, *Caster Semenya the Obvious Target in IAAF Changes that Only Create a Legal Minefield*, THE GUARDIAN, (Apr. 28, 2018, 6:38 PM), <https://www.theguardian.com/sport/2018/apr/29/caster-semenya-the-obvious-target-in-iaaf-changes-that-only-create-a-legal-minefield>.

¹⁵ Kyle Knight, *When Will Sports Stop Policing Femininity?*, HUM. RTS. WATCH, (July 1, 2020, 12:39 PM), <https://www.hrw.org/news/2020/07/01/when-will-sports-stop-policing-femininity#>; Sonja Erikainen, *Policing the Sex Binary: Gender Verification and the Boundaries of Female Embodiment in Elite Sport*, IOC OLYMPIC STUD. CTR. (2016).

¹⁶ *Eligibility Regulations*, *supra* note 4.

person biologically male, female, or intersex.¹⁷ These characteristics include reproductive organs, hormones, and chromosomes.¹⁸ The traditional western understanding of sex is dichotomous: one's sex is either male or female¹⁹ and the difference between males and females of almost any species is the size of the gametes they make.²⁰ "The classical biological definition of the 2 [sic] sexes is that females have ovaries and make larger female gametes (eggs), whereas males have testes and make smaller male gametes (sperm)."²¹ However, research has shown significant genetic variation within, and even across, the male and female categories, suggesting that sex might be better understood as existing on a spectrum.²²

2. Intersex/Differences in Sex Development

Intersex people, also known as people with differences in sex development or disorders in sex development (DSDs),²³ have characteristics that differ from the dichotomous male and female categories.²⁴ There are many ways that a person's biological or physiological characteristics may make them intersex. For example, a person who is chromosomally male might be completely insensitive to some sex hormones, in which case they will not have a uterus but will have a vulva, clitoris, testes, and possibly a partial or complete vagina.²⁵ Another example is Klinefelter Syndrome, in which a boy will have an additional X chromosome, small testicles, a low sperm count, and may develop breast tissue.²⁶ Some of the ways sex characteristics develop in intersex people can increase their levels of testosterone and affect their sensitivity to testosterone.²⁷

¹⁷ *Sex & Gender*, NAT'L INSTITUTES HEALTH: OFF. RSCH. ON WOMEN'S HEALTH, <https://orwh.od.nih.gov/sex-gender> (last visited Nov. 1, 2021); *Gender and Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/gender#tab=tab_1 (last visited Nov. 1, 2021).

¹⁸ *Sex & Gender*, *supra* note 18.

¹⁹ *Sex*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sex> (last visited Nov. 1, 2021); *Sex*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/sex> (last visited Nov. 1, 2021).

²⁰ Aditi Bhargava et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement*, 42 *ENDOCRINE REV.* 219, 221 (2021).

²¹ *Id.*

²² Claire Ainsworth, *Sex Redefined*, 518 *NATURE* 288 (2015).

²³ There is some debate regarding the appropriateness of the term "disorders of sex development," and "differences in sex development" falls within this as well. Intersex individuals have expressed unhappiness with this term because it pathologizes what, for most people, are completely harmless and often unnoticeable characteristics. Morgan Carpenter, *Intersex Variations, Human Rights, and the International Classification of Diseases*, 20 *HEALTH & HUM. RTS. J.* 205, 207 (2018). As such, unless quoting others, this note will hereinafter only use the term "intersex."

²⁴ David Andrew Griffiths, *Shifting Syndromes: Sex Chromosome Variations and Intersex Classifications*, 48 *SOC. STUD. SCIENCE* 125 (2018).

²⁵ *FAQ: What is Intersex*, INTERACT, (Jan. 26, 2021), <https://interactadvocates.org/faq/>.

²⁶ *Id.*

²⁷ *Id.*

3. Gender and Gender Identity

Gender is a social construction that can be related to, but is not necessarily determined by, one's sex and encompasses social norms, roles, and behaviors that can vary based on time and culture.²⁸ Rather than being something we are, which well defines sex, gender is now best understood by social scientists as something we do—something we accomplish, produce, or perform in our interactions in society.²⁹ An aspect of this is gender identity, which is “a person's deeply felt, internal and individual experience of gender.”³⁰

A. The IAAF Regulations Restrict Athletes with High Testosterone

The International Association of Athletics Federations (IAAF) published regulations after the Rio de Janeiro Olympic Games which place restrictions on athletes with testosterone levels above a certain threshold. These restrictions kept expected podium contenders out of their main events in the 2020 Tokyo Olympics.³¹ The IAAF is an international sports federation, which is the international administrator and governing body for a specific sport.³² To be eligible to compete in the Olympic Games, athletes must comply with the rules of their governing organization.³³ The IAAF, often referred to as World Athletics, governs the sport of track and field.³⁴

In April of 2018, the IAAF published new eligibility rules for female athletes in select competitions.³⁵ The new rules require intersex women who have sex characteristics that lead to testosterone levels of five nanomoles per liter (nmol/L) or more and who compete in restricted track and field events to reduce their testosterone levels to below five nmol/L.³⁶ Restricted events are all events between 400 meters and one mile, including combined events (events an athlete does not run alone).³⁷ One of the IAAF's suggestions for reducing testosterone levels is the use of hormones, particularly birth control hormones.³⁸

²⁸ *Sex & Gender*, *supra* note 18.

²⁹ Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 125–126 (1987).

³⁰ *Gender and Health*, *supra* note 18.

³¹ Laine Higgins, *There Will Be a New 800-Meter Champion in Tokyo. Thank the Testosterone Rules*, WALL ST. J. (Aug. 3, 2021, 5:29 AM), <https://www.wsj.com/articles/800-meters-tokyo-olympics-testosterone-rules-semenya-11627959617>.

³² *International Sports Federations*, INT'L OLYMPIC COMM., <https://olympics.com/ioc/international-federations> (last visited Nov. 1, 2021).

³³ *Competing and Being Part of the Games-FAQs*, INT'L OLYMPIC COMM., <https://olympics.com/ioc/faq/competing-and-being-part-of-the-games> (last visited Sept. 17, 2021).

³⁴ *About World Athletics*, WORLD ATHLETICS, <https://www.worldathletics.org/about-iaaf> (last visited Nov. 1, 2021).

³⁵ *Eligibility Regulations*, *supra* note 4.

³⁶ *Id.* at 1–3.

³⁷ *Id.* at 3.

³⁸ *Id.*

The IAAF states that it created these rules to ensure a level playing field for female athletes.³⁹ It claims sport is separated between men and women because, on average, men's higher testosterone levels give them a significant advantage over female competitors.⁴⁰ Since some female competitors have unusually high levels of testosterone that can give them the same or similar advantages as men, the IAAF requires these athletes to reduce their testosterone.⁴¹ If an athlete does not want to reduce her testosterone she has four options: she may compete in a non-restricted event, compete in a restricted event in a non-international competition, compete against only intersex athletes, or compete with men.⁴²

B. The Fraught History of Gender Verification in Sport

The IAAF's concern that athletes with more typically male traits can make the sport unfair is not new and stems from a long history of sex-testing in the Olympics. After World War II, the number of women competing in elite sports increased significantly, and the 1960s saw a major surge of women competing in the Olympic Games.⁴³ Concerns that men might lie about their sex to compete in the female category and that some female athletes might have unfair advantages spurred the International Olympic Committee (IOC) to institute a policy of sex verification for female athletes.⁴⁴

The initial version of this verification, which came to be known as "nude parades,"⁴⁵ required women to undress completely and submit themselves for inspection by a panel of female physicians.⁴⁶ This drew complaints from the athletes about the demeaning nature of the inspection.⁴⁷ As a result, in 1968 the IOC shifted to laboratory testing—a smear of the membrane inside an athlete's mouth would be tested to determine the X and Y chromatin.⁴⁸ This approach was criticized for being simultaneously over- and under-inclusive.⁴⁹ The IOC's primary concern was that intersex women may have traits that lend them above-average muscle mass.⁵⁰ However, the test for X and Y chromatin

³⁹ *Id.* at 1.

⁴⁰ *Id.*

⁴¹ Eligibility Regulations, *supra* note 4, at 1–3.

⁴² *Id.* at 4.

⁴³ Louis J. Elsas et al., *Gender Verification of Female Athletes*, 2 GENETICS MEDICINE 249 (2000).

⁴⁴ *Id.* at 250. These concerns were fueled by earlier scandals, such as the 1957 confession by Herman Ratjen that the Nazis had made him compete as a woman in the 1936 Olympics. *Id.*

⁴⁵ Samantha Shapiro, *Caught in the Middle*, ESPN MAGAZINE, (July 23, 2012), https://www.espn.com/olympics/story/_id/8192977/failed-gender-test-forces-olympian-redefine-athletic-career-espn-magazine.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Joe Leigh Simpson, *Gender Testing in the Olympics*, 256 J. AM. MED. ASS'N 1938 (1986).

⁴⁹ *Id.*

⁵⁰ *Id.*

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would not catch certain sex developments in intersex women that might increase muscle mass, and may catch developments that do not.⁵¹ In 1991, the IOC responded to this problem by adopting a different screening test, but this too was criticized for similar reasons.⁵² By contrast, in 1992 the IAAF decided to abandon its policy of screening every athlete and instead test athletes on a random basis or basis of individualized suspicion.⁵³ It took the IOC another eight years to follow the IAAF's lead and eliminate its sex verification policies.⁵⁴ In 2011, the IAAF introduced the first of a series of regulations targeting testosterone levels which restricted female athletes from competing if their testosterone was above a certain threshold.⁵⁵

Despite the improvement in the IOC's and IAAF's policies on gender verification, Semenya is not the first athlete to be impacted by the IAAF sex-verification rules since the 1992 relaxation of the rules or the 2011 change. In 2006 Indian athlete Santhi Soundarajan came in second in the 800 meter race in the Asian Games.⁵⁶ Soon after the games, for reasons not made public,⁵⁷ she was subjected to a sex test and failed when doctors discovered that she had a Y chromosome.⁵⁸ Despite her female genitalia and that she lived her whole life as a woman, the IAAF considered her to be male.⁵⁹ She was stripped of her silver medal and after the humiliation, the intense media scrutiny in India, and worldwide questioning of her gender, Soundarajan attempted suicide.⁶⁰

Annet Negesa was disqualified from the 2012 Olympic Games only weeks before they were set to start when blood samples taken during the 2011 World Championships revealed that her testosterone levels were too high.⁶¹ Negesa claims that the IAAF recommended that she see various doctors, but that she

⁵¹ *Id.*

⁵² Elsas et al., *supra* note 44, at 251.

⁵³ *Id.* at 253.

⁵⁴ *Id.*

⁵⁵ INT'L ASS'N ATHLETICS FED'NS, IAAF REGULATIONS GOVERNING ELIGIBILITY OF FEMALES WITH HYPERANDROGENISM TO COMPETE IN WOMEN'S COMPETITION (2011), [https://www.bmj.com/sites/default/files/response_attachments/2014/06/IAAF%20Regulations%20\(Final\)-AMG-30.04.2011.pdf](https://www.bmj.com/sites/default/files/response_attachments/2014/06/IAAF%20Regulations%20(Final)-AMG-30.04.2011.pdf).

⁵⁶ *Indian Athlete Fails Gender Test*, BBC NEWS (Dec. 18, 2006, 12:42 PM), http://news.bbc.co.uk/2/hi/south_asia/6188775.stm.

⁵⁷ Isheeta Sharma, *Santhi Soundarajan and the Misogyny of Sex Verification in Sports*, FEMINISM IN INDIA (Nov. 25, 2020), <https://feminisminindia.com/2020/11/25/santhi-soundarajan-gender-determination-test/>.

⁵⁸ Shapiro, *supra* note 46.

⁵⁹ *Id.*

⁶⁰ *Id.* Soundarajan survived and went on to open an athletics academy, although she was unable to afford to keep it going for long. *Id.*

⁶¹ Ivy Nyayieka, Christina Macfarlane & Jo Shelley, *Running as Equals: The Elite Athletes Fighting for Acceptance*, CNN, <https://edition.cnn.com/interactive/2021/07/sport/athletics-testosterone-rules-negesa-imali-running-as-equals-dsd-spt-intl-cmd/> (last visited Nov. 3, 2021).

was left confused through the whole process.⁶² She says she was eventually subjected to a surgery to remove her internal testes without her knowledge that this was the goal of the surgery.⁶³ As a result of the surgery her performance suffered, she lost her university scholarship, and was dropped by her manager.⁶⁴

Dutee Chand was similarly disqualified from competition in 2013.⁶⁵ Like the current IAAF regulations, the rules at the time required her to lower her testosterone levels in order to compete.⁶⁶ She challenged these rules in the CAS, but during the course of the proceedings the IAAF changed the regulations.⁶⁷ The IAAF offered no evidence to show that the new regulations addressed Chand's claims, but despite this the CAS terminated Chand's case in response to the rule change.⁶⁸

In November 2021, the IOC announced a new framework regarding sex verification, detailing how international federations should handle eligibility requirements.⁶⁹ This signaled a break from its previous policies supporting the IAAF's rules. However, this framework is not a requirement for international federations or national Olympic committees—it only provides guidance and states that international federations are in the best position to understand what is necessary to include in their eligibility requirements.⁷⁰

C. The Science on Gender and Performance Leads to Ambiguous Conclusions

The science behind performance and its relationship to gender continues to evolve, and there is not yet broad agreement in the scientific community about what that relationship is. According to the IAAF, “[t]here is broad medical and scientific consensus, supported by peer-reviewed data and evidence from the field, that the high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Juliet Macur, *Fighting for the Body She Was Born With*, N.Y. TIMES (Oct. 6, 2014), <https://www.nytimes.com/2014/10/07/sports/sprinter-dutee-chand-fights-ban-over-her-testosterone-level.html>.

⁶⁶ *Id.*

⁶⁷ Andy Brown, *IAAF's New Competition Regulations to Terminate Chand Case*, SPORTS INTEGRITY INITIATIVE (Mar. 8, 2018), <https://www.sportsintegrityinitiative.com/iaafs-new-competition-regulations-terminate-chand-case/>.

⁶⁸ *Id.*

⁶⁹ *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, INT'L OLYMPIC COMM. (2021), https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?_ga=2.186940843.2055494824.1637591902-700636348.1626889064.

⁷⁰ *Id.* at 1.

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sporting performance.”⁷¹ To characterize the scientific understanding of endogenous testosterone as a significant performance enhancer as “consensus” is misleading—there is still substantial debate as to the magnitude to which testosterone exists as a performance enhancer or even if it has that effect at all,⁷² in what events testosterone is beneficial and to what degree,⁷³ and whether high testosterone necessarily correlates with better performance in every individual.⁷⁴

The IAAF relies on findings from its own internal study of athletes in the 2011 and 2013 IAAF World Championships.⁷⁵ This study found that intersex women with testosterone levels above 10 nmol/L⁷⁶ had between a 1.8% and 4.5% advantage depending on the event.⁷⁷ Compare this to the estimated ten percent to twelve percent benefit enjoyed by male athletes over women.⁷⁸ Notably, the authors of this study issued a later correction emphasizing that there was only an *association* between testosterone and performance, and that they were not claiming the high testosterone levels *caused* better performance.⁷⁹

Moreover, it is unclear that the methods available for reducing testosterone are an appropriate remedy. Currently, birth control hormones appear to negatively affect performance, which some may interpret as evidence that testosterone had positively affected the performance of the athlete.⁸⁰ But

⁷¹ *Eligibility Regulations*, *supra* note 4.

⁷² Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis & Silvia Camporesi, *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12 AM. J. BIOETHICS 3, 8 (2012); M.L. Healy, J. Gibney, C. Pentecost, M.J. Wheeler & P.H. Sonksen, *Endocrine Profiles in 693 Elite Athletes in the Postcompetition Setting*, 81 CLINICAL ENDOCRINOLOGY 294, 303 (2014).

⁷³ The IAAF’s own study finds that testosterone does not offer an advantage in all events, and in some events correlated with worse performance. Stephane Bermon & Pierre-Yves Garnier, *Correction: Serum Androgen Levels and their Relation to Performance in Track and Field: Mass Spectrometry Results from 2127 Observations in Male and Female Elite Athletes*, 55 BRIT. J. SPORTS MED. e7 (2021); Rebecca M. Jordan-Young & Katrina Karkazis, *4 Myths About Testosterone: Don’t Let Sports be Shaped by Misguided “T Talk,”* SCI. AM. (June 18, 2019), <https://blogs.scientificamerican.com/observations/4-myths-about-testosterone/> (stating that in some events there is actually a negative correlation between testosterone and performance).

⁷⁴ Jordan-Young & Karkazis, *supra* note 74. (“[O]ne reason studies don’t always find consistent links between T level and physiological variables is that sometimes high T signals that a person isn’t very efficient at using T.”).

⁷⁵ *Eligibility Regulations*, *supra* note 4, n.3.

⁷⁶ The threshold in the old regulations was 10 nmol/L. That threshold has since been reduced to the stricter 5 nmol/L. *IAAF to Introduce Eligibility Rules for Females with Hyperandrogenism*, WORLD ATHLETICS (Apr. 12, 2011), <https://www.worldathletics.org/news/iaaf-news/iaaf-to-introduce-eligibility-rules-for-femal-1>.

⁷⁷ Stephane Bermon & Pierre-Yves Garnier, *Serum Androgen Levels and their Relation to Performance in Track and Field: Mass Spectrometry Results from 2127 Observations in Male and Female Elite Athletes*, 51 BRIT. J. SPORTS MED. 1309, 1314 (2017).

⁷⁸ Brown, *supra* note 68.

⁷⁹ Bermon & Garnier, *supra* note 74.

⁸⁰ Jordan-Young & Karkazis, *supra* note 74.

the poorer performance may not necessarily be a result of the reduction in testosterone. Rather, it may be because of other effects of these treatments, such as bloating, nausea, or weight gain.⁸¹

III. SEMENYA'S CASE

Semenya made an effort to comply with the old rules that were challenged by Dutee Chand in 2014, but when the most recent rule change came into effect, Semenya refused to comply, believing the rules to be a harmful and arbitrary invasion of her rights.⁸² Instead, she challenged the IAAF's rules, and her challenge is now before the European Court of Human Rights (ECtHR).⁸³ This section will provide the procedural history of how the case made it to the ECtHR, explain the law underpinning her claims, and argue why the law favors Semenya.

A. Procedural History

When Semenya was disqualified by the IAAF's rules, she challenged them in the Court of Arbitration for Sport (CAS).⁸⁴ She chose this venue because the International Olympic Committee (IOC) requires disputes that arise in connection to the Olympics to be brought to the CAS.⁸⁵ Semenya had many claims in her CAS complaint, including that the regulations were discriminatory. Semenya claims the regulations discriminate in multiple ways: they discriminate based on genetic traits over which athletes have no control; they discriminate based on sex by subjecting female, but not male, athletes to invasive screenings and medical procedures; they discriminate by classifying athletes as biologically male for the purpose of competing regardless of how they identify; and they discriminate based on appearance by targeting women who look too masculine.⁸⁶ She further alleged that the regulations are unnecessary because testosterone is only one of a variety of factors that contribute to performance, and natural variations in those other factors are not regulated.⁸⁷ Sport is inherently unfair because each athlete is different.⁸⁸

⁸¹ Melonie Burrows & Charlotte E. Peters, *The Influence of Oral Contraceptives on Athletic Performance in Female Athletes*, 37 *SPORTS MED.* 557, 558–61 (2007).

⁸² Mokgadi Caster Semenya v. Int'l Ass'n of Athletics Fed'ns, CAS 2018/O/5794, 163 (Ct. Arb. Sport 2019), available at https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf [hereinafter *Semenya v. IAAF*].

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Int'l Olympic Comm., *Olympic Charter*, art. 61 (Aug. 8, 2021), https://stillmed.olympics.com/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf?_ga=2.26886525.1127650544.1633901664-907834087.1631894549.

⁸⁶ *Semenya v. IAAF*, *supra* note 83, at 9.

⁸⁷ *Id.* at 10.

⁸⁸ *Id.*

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Semenya also claimed that the rules were arbitrary. There is no reason for singling out intersex conditions that increase testosterone as the lone genetic and physiological trait that improves performance to be subject to regulation.⁸⁹ Additionally, it makes no sense to limit an athlete's testosterone level in the selected events when the IAAF-funded study that the regulations rely on also found a correlation between high testosterone and better performance in other events that were not restricted.⁹⁰ This is especially true when considering that some of the events that were not restricted showed a greater correlation with performance than some of the restricted events.⁹¹ Nor is the chosen threshold of 5 nmol/l any more rational.⁹² Athletes with 6 nmol/l were not performing measurably better than athletes with 4 nmol/l.⁹³ Importantly, athletes with polycystic ovary syndrome (PCOS) were not subject to the regulations,⁹⁴ even though this condition is shown to have a relationship with performance.⁹⁵ This raises the question of how connected the regulations are with regulating the participation of athletes who are perceived as too masculine.

Most importantly, Semenya claimed that the regulations were not rationally related to ensuring fair competition and that the harm caused was disproportionate to the supposed benefit of the rules.⁹⁶ For these reasons, among others, Semenya asked the CAS to invalidate the eligibility rules.⁹⁷

Close to a year after Semenya began the arbitration process, the CAS dismissed her case in 2019.⁹⁸ It recognized that the rules were discriminatory but found that they were necessary to make female competitions fair, they were reasonable restrictions, and the harms were proportionate to the benefit of the IAAF's goals.⁹⁹ It made this finding despite the extensive evidence put forth by Semenya's experts showing the flaws in the scientific basis for the regulations.¹⁰⁰

Semenya chose to appeal the CAS's ruling. The CAS is located in Lausanne, Switzerland,¹⁰¹ and thus, Semenya's appeal of this dismissal was to the Swiss

⁸⁹ Semenya v. IAAF, *supra* note 83, at 10.

⁹⁰ *Id.* at 12.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*; see also *Eligibility Regulations*, *supra* note 4.

⁹⁵ Angelica Linden Hirschberg, *Female Hyperandrogenism and Elite Sport*, 9 *ENDOCRINE CONNECTIONS* R81, R88 (2020).

⁹⁶ Semenya v. IAAF, *supra* note 83, at 13.

⁹⁷ *Id.* at 53.

⁹⁸ *Id.* at 163.

⁹⁹ *Id.* at 160.

¹⁰⁰ *Id.* at 24–45.

¹⁰¹ *Code: ICAS Statutes*, CT. OF ARB. FOR SPORT (last visited Nov. 5, 2021), <https://www.tas-cas.org/en/icas/code-icas-statutes.html>.

Federal Supreme Court.¹⁰² Her appeal alleged a violation of the prohibition on discrimination and a violation of her human dignity.¹⁰³ The Court would only overturn the CAS decision if it found that the IAAF's rules were against substantive public policy.¹⁰⁴ It ruled against her because it found that the CAS decision did not violate "fundamental and widely recognized principles of public order."¹⁰⁵ The Court had to rely on findings of the CAS that are factually inaccurate and in doing so determined that the legitimate interest in fairness in sport was sufficient to allow the IAAF to considerably interfere with the physical integrity of athletes, even in a discriminatory manner.¹⁰⁶

Semenya then appealed to the European Court of Human Rights (ECtHR).¹⁰⁷ She claimed that the Swiss Federal Supreme Court's decision was a violation of her right to be free from inhuman and degrading treatment, her right to respect for private and family life, her right to be free from discrimination, her right to a fair hearing, and her right to an effective remedy.¹⁰⁸ While her last two allegations are undoubtedly important, they are focused on the fairness of the procedure available to her—this note is focused on the substance of the IAAF regulations and thus will only address the first three allegations.

D. The Law

1. Jurisdiction

The ECtHR does not have jurisdiction over private organizations like the IAAF or the CAS—rather, it only has jurisdiction over the state parties to the European Convention on Human Rights (ECHR).¹⁰⁹ But where a state party, like Switzerland, validates actions of a private organization which may be violations of human rights under the Convention, then the Court will have jurisdiction to hear the case.¹¹⁰

¹⁰² Bundesgericht (BGER) [Federal Supreme Court] Aug. 25, 2020, 147 III 49 (Switz.). [hereinafter *Rechtsprechung*].

¹⁰³ Press Release, Bundesgericht, *DSD Regulations: Caster Semenya's Appeal Against the Decision of the Court of Arbitration for Sport Dismissed* (Sept. 8, 2020), (https://www.bger.ch/files/live/sites/bger/files/pdf/en/4A_248_2019_yyyy_mm_dd_T_e_18_18_10.pdf) [hereinafter *Semenya's Appeal Dismissed*].

¹⁰⁴ *Rechtsprechung*, *supra* note 103.

¹⁰⁵ *Semenya's Appeal Dismissed*, *supra* note 104.

¹⁰⁶ *Id.*

¹⁰⁷ Notification of *Semenya v. Switzerland*, *supra* note 12.

¹⁰⁸ *Id.*; see European Convention on Human Rights, arts. 3, 8, 14, 6, & 13, Nov. 4, 1950, E.T.S. No. 005.

¹⁰⁹ See Case of Mutu and Pechstein v. Switzerland, Apps. Nos. 405758/10 and 67474/10, 324 Eur. Ct. H.R., 25 (Oct. 2, 2018), <http://hudoc.echr.coe.int/eng?i=001-186828>.

¹¹⁰ *Id.* at 64.

2. State Parties Have Obligations to Protect Individuals from Human Rights Abuses

The ECHR imposes both negative and positive obligations on states. A negative obligation requires that a state *not do* something. For example, under Article 4 of the ECHR a state may not enslave a person.¹¹¹ A positive obligation, however, requires that a state *do* something. Typically, under the case law of the ECtHR, this means that a state must create an effective legal framework for the protection or realization of these rights.¹¹² For example, under Article 8, states must create an effective way for a person to change their legal gender.¹¹³ In Semenya's case, the Swiss Federal Supreme Court did not impose these testosterone rules. Therefore, it is likely that the Court will instead examine whether the legal system in place adequately safeguards Semenya's rights—in short, whether Switzerland has met its positive obligations.

3. The Right to Be Free from Inhuman and Degrading Treatment

Article 3 of the Convention provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹¹⁴ To fall under the Article 3 prohibition on inhuman and degrading treatment, the treatment must meet a certain threshold of severity.¹¹⁵ Severity can be determined by looking to “all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”¹¹⁶ The European Commission on Human Rights has defined inhuman treatment separately from degrading treatment,¹¹⁷ which is considered less severe than inhuman treatment.¹¹⁸ The Greek Case established that inhuman treatment “causes severe suffering, mental or physical, which in the particular situation is unjustifiable.”¹¹⁹ The Greek Case concerned the torture of arrested political opponents committed by the Greek junta that had taken power.¹²⁰ Alongside its findings of torture, the Commission also found that overcrowded prison conditions, failure to provide

¹¹¹ Eur. Conv. on H.R., art. 4, Nov. 4, 1950, E.T.S. No. 005.

¹¹² JEAN-FRANCOIS AKANDJI-KOMBE, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 16 (2007).

¹¹³ Goodwin v. United Kingdom, App. No. 28957/95, Eur. Ct. H.R., ¶ 93 (July 11, 2002), <http://hudoc.echr.coe.int/eng?i=001-60596>.

¹¹⁴ Eur. Conv. on H.R., art. 3, Nov. 4, 1950, E.T.S. No. 005.

¹¹⁵ Ireland v. United Kingdom, App. No. 5310/71, Eur. Ct. H.R., ¶ 162 (Jan. 18, 1978), <http://hudoc.echr.coe.int/eng?i=001-57506>.

¹¹⁶ *Id.*

¹¹⁷ The Greek Case, 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n of H.R.) ¶ 186.

¹¹⁸ Debra Long, *Guide to Jurisprudence on Torture and Ill-Treatment: Article 3 of the European Convention on Human Rights*, ASS'N FOR THE PREVENTION OF TORTURE, 13–17 (June 2002), https://www.files.ethz.ch/isn/16023/Guide%20to%20Jurisprudence%20on%20Torture_E.pdf.

¹¹⁹ The Greek Case, *supra* note 118.

¹²⁰ *Id.*

adequate sleeping conditions, and refusal to allow prisoners contact with the outside world all fell into its definition of inhuman treatment.¹²¹

Degrading treatment, on the other hand, “arouse[s] in [] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.”¹²² Degrading treatment may also “driv[e] the victim to act against his will or conscience.”¹²³ Treatment that is debasing or humiliating such that it fails to show respect for human dignity can be characterized as degrading.¹²⁴ It may also be both physical and psychological.¹²⁵ The degradation need not occur in public either—acts that occur in private that humiliate the victim may also be considered degrading treatment.¹²⁶ A possible reading of the language establishing that principle could be that treatment may be considered degrading even if it is only subjectively, rather than objectively, humiliating. The Court wrote, regarding humiliating treatment that occurred non-publicly, that “it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.”¹²⁷

Importantly, Article 3’s prohibition against inhuman and degrading treatment does not contain any exceptions.¹²⁸ The Convention does not outline any reasons for which a state may violate the prohibition on inhuman or degrading treatment. For comparison, Article 5 secures a person’s right to liberty but contains articulated exceptions for scenarios such as lawful arrests or quarantines.¹²⁹ Other provisions allow limitations “necessary in a democratic society” so long as they are in certain specified state interests.¹³⁰ Therefore, a state has a narrow margin of appreciation, meaning that the state has little room to exercise its own discretion when acting in regard to the provisions of the ECHR.¹³¹ Essentially, it cannot be argued that there was any intention by the drafters of the ECHR to allow for exceptions to Article 3 because other articles do include exceptions. If the drafters of the Convention

¹²¹ *Id.*

¹²² *Ireland v. United Kingdom*, *supra* note 116.

¹²³ *The Greek Case*, *supra* note 118.

¹²⁴ *Burlya and Others v. Ukraine*, App. No. 3289/10, ¶ 120 (June 11, 2018), <http://hudoc.echr.coe.int/eng?i=001-187508>.

¹²⁵ *Id.* ¶ 121.

¹²⁶ *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. 1978 Y.B. Eur. Conv. on H.R., ¶ 32 (Eur. Ct. H.R.).

¹²⁷ *Id.*

¹²⁸ *European Convention on Human Rights*, art. 3, Nov. 4, 1950, E.T.S. No. 005 [hereinafter ECHR].

¹²⁹ *See ECHR*, *supra* note 125 art. 5.

¹³⁰ *See Id.*, arts. 8–11. These interests are national security, public safety, the country’s economic well-being, preventing disorder or crime, protecting health or morals, and protecting the rights and freedoms of others.

¹³¹ OPEN SOC’Y JUST. INITIATIVE, MARGIN OF APPRECIATION: AN OVERVIEW OF THE STRASBOURG COURT’S MARGIN OF APPRECIATION DOCTRINE (2012), <https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf>.

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intended for there to be an exception to Article 3, it would have been explicitly included the way exceptions were included in the other articles.

Article 3's protection safeguards individuals against forced medical treatment, but the ECtHR case law in this area is focused on persons who have been confined by the state.¹³² In *Jalloh v. Germany*, the Court explained that the Court will look for therapeutic necessity when determining whether the treatment violated an article of the Convention.¹³³ For example, in *Bogumil v. Portugal*, the Court did not find a violation of Article 3 when a detainee was forced to have surgery to remove a bag of drugs he had swallowed, because the drugs were posing a risk to his life and needed to be removed to maintain his health and safety.¹³⁴ An exception is allowed where the state has an interest in collecting evidence of a crime, but there are still limits on how far a state may go to do so.¹³⁵ In *Jalloh*, the Court found that the mildly violent and humiliating way in which the treatment was administered went too far.¹³⁶ Thus, outside of the circumscribed exception for criminal investigations, individuals may not be required to undergo therapeutically unnecessary medical treatments. However, there is no case law to address medical treatments that are simply coerced rather than forced in the Article 3 context.

4. The Right to Respect for Private and Family Life

Article 8 of the Convention guarantees individuals “the right to respect for [their] private and family life, [their] home and [their] correspondence.”¹³⁷ However, interference with this right is allowed “as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”¹³⁸ Any interference with a person's private life that is not in accordance with the law, in pursuit of one of the legitimate aims outlined in Article 8 itself, and necessary in a democratic society is a per se breach of Article 8.¹³⁹

The most on-point case law describing the balancing of Article 8 rights with the interests of the state comes from *FNASS v. France*.¹⁴⁰ France had enacted

¹³² See EUR. CT. H.R., THEMATIC REPORT: HEALTH-RELATED ISSUES IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS 19–20 (2015).

¹³³ *Jalloh v. Germany*, App. No. 54810/00, 9 Eur. Ct. H.R., ¶ 69 (2006).

¹³⁴ *Affaire Bogumil c. Portugal*, App. No. 35228/03, Eur. Ct. H.R., ¶ 82 (2008).

¹³⁵ *Id.* ¶ 70.

¹³⁶ *Id.* ¶¶ 79–86.

¹³⁷ ECHR, art. 8, Nov. 4, 1950, E.T.S. No. 005.

¹³⁸ *Id.*

¹³⁹ *X v. Finland*, App. No. 34806/04, Eur. Ct. H.R. ¶ 213 (2012), <https://hudoc.echr.coe.int/eng?i=001-111938>.

¹⁴⁰ *FNASS v. France*, Apps. Nos. 48151/11 and 77769/13, Eur. Ct. H.R. (Jan. 18, 2018), <https://hudoc.echr.coe.int/eng?i=001-180442>.

highly restrictive, intrusive, and inconvenient regulations to allow for the testing of athletes for controlled substances.¹⁴¹ In particular, athletes had to communicate to the anti-doping agency a one-hour time frame and location for each day during which they would be available for testing.¹⁴² The athletes argued that this was a violation of private and family life, but the government argued that it had an interest in protecting the health of both professional athletes and in protecting public morals by ensuring fair sport.¹⁴³ The Court agreed that the law was a violation of the athletes' Article 8 rights but found that their interests were outweighed by the interests proffered by the government.¹⁴⁴

The Court is willing to define "private life" as it applies to the Convention extremely broadly.¹⁴⁵ Part of this right is the right to personal development, the right to personal autonomy, and the right to live free of "unwanted attention."¹⁴⁶ An individual's private life "can therefore embrace multiple aspects of the person's physical and social identity."¹⁴⁷ Restrictions that arise in one's professional life can also fall under the protection of Article 8 if "they have repercussions on the manner in which he or she constructs his or her social identity."¹⁴⁸ Additionally, restrictions that impact a person's ability to access or participate in a profession may be scrutinized under Article 8.¹⁴⁹ This can occur if a person's ability to engage in their profession is restricted because of something they did in their private life (reason-based) or if their inability to participate in their profession sufficiently impacts their private life (consequence-based).¹⁵⁰ The Court is willing to take either approach.¹⁵¹ Importantly, the Court has expressed that a particularly important factor in its determination that an employment-related action violates Article 8 is the difficulty the person will have in getting another job.¹⁵²

The Court makes clear that even if a private organization has a legitimate interest in taking actions that can negatively affect a person's employment or

¹⁴¹ *Id.*

¹⁴² *Id.* ¶¶ 69.

¹⁴³ *Id.* ¶ 132.

¹⁴⁴ *Id.* ¶ 191.

¹⁴⁵ *Barbulescu v. Romania*, App. No. 6149/08, Eur. Ct. H.R., ¶ 70 (Sept. 5, 2017), <http://hudoc.echr.coe.int/eng?i=001-177082>.

¹⁴⁶ *Id.*

¹⁴⁷ *Case of Denisov v. Ukraine*, App. No. 76639/11, Eur. Ct. H.R. ¶ 95 (Sept. 25, 2018), <http://hudoc.echr.coe.int/eng?i=001-186216>.

¹⁴⁸ *Barbulescu v. Rom.*, *supra* note 146, ¶ 71.

¹⁴⁹ *Case of Sidabras & Dziautas v. Lith.*, Apps. Nos. 55480/00 and 59330/00, Eur. Ct. H.R., ¶ 50 (July 27, 2007), <http://hudoc.echr.coe.int/eng?i=001-61942>.

¹⁵⁰ *Denisov v. Ukr.*, *supra* note 148, ¶ 115.

¹⁵¹ *Id.*

¹⁵² *Case of Schuth v. Ger.*, App. No. 1620/03, Eur. Ct. H.R., ¶ 73 (Sept. 23, 2010), <https://hudoc.echr.coe.int/eng?i=001-100469>.

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career, those interests must still be compatible with fundamental legal principles, which include the ECHR's guarantees.¹⁵³ In *Schuth v. Germany*, the Court found that the Catholic Church's interest in discharging employees who violated their duty of loyalty to the Church could be incompatible with the principles of law set forth in the Convention.¹⁵⁴ In that case, Schuth was employed as an organist by the Catholic Church.¹⁵⁵ He was fired when the Church discovered that he and his wife had separated and he had subsequently fathered a child with another woman, violating Catholic dogma which does not recognize divorce and would consider his new relationship to be adultery and bigamy.¹⁵⁶ The Court noted that simply being a part of a private organization or even being employed by such an organization does not require one's life to become subsumed by that organization's principles, particularly when they affect deeply intimate aspects of private life.¹⁵⁷ Thus, a private organization's practices must still be accordance with general principles set forth by the Convention when they affect a protected aspect of private life.

Because a person's reputation is related to their identity and psychological integrity, Article 8 also provides a right to respect for reputation—although it cannot protect someone from the reputational harms that are the consequences of their own actions.¹⁵⁸ In *Denisov v. Ukraine*, the applicant Denisov was fired from his position as the president of a court.¹⁵⁹ But because this was based on his failure to adequately perform the necessary managerial duties, he still maintained his position as a judge on the court.¹⁶⁰ His dismissal from the position of president did not call into question his capacity as a judge or his character.¹⁶¹ Nor was his lifelong professional role affected, so his right to professional life and reputation were not interfered with.¹⁶² *Denisov* provides perhaps the clearest example of employment-based effects on reputation and the way the Court will analyze such claims. Most other case law on reputation revolve around defamation, which is less on point to Semenya's claims.

For an applicant's interest to fall under the protection of Article 8 of the ECHR, a threshold of severity must be met.¹⁶³ Whether an intrusion on private life meets that threshold will depend on the interest at stake.¹⁶⁴

¹⁵³ *Id.* ¶ 60.

¹⁵⁴ *Id.* ¶ 75.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* ¶ 13.

¹⁵⁷ *Id.* ¶ 71.

¹⁵⁸ *Denisov v. Ukraine*, *supra* note 148, ¶¶ 97–98.

¹⁵⁹ *Id.* ¶ 20.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* ¶ 126.

¹⁶² *Id.* ¶¶ 126–33.

¹⁶³ *Id.* ¶ 114.

¹⁶⁴ *Denisov v. Ukraine*, *supra* note 148, ¶¶ 111–14.

The margin of appreciation given to a state also depends on the interest at issue—“[w]here a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted.”¹⁶⁵ The margin of appreciation afforded to states when a professional interest is at stake is quite broad.¹⁶⁶ In *Platini v. Switzerland*, the vice president of FIFA (International Federation of Football Associations) challenged a suspension from football-related activity. The Court found that, under the wide margin of appreciation Switzerland enjoys in fashioning remedies for potential violations of Article 8 that affect a person’s career, the ability to take a complaint to the CAS, appeal it to the Swiss Federal Supreme Court, and have both institutions provide duly reasoned decisions was a sufficient safeguard for the applicant’s Article 8 rights.¹⁶⁷

But where an essential aspect of a person’s identity¹⁶⁸ or an intimate aspect of their private life are implicated that margin of appreciation will narrow.¹⁶⁹ For example, in *Dudgeon v. United Kingdom*, the U.K., defending laws against certain homosexual acts, argued that it had a wide margin of appreciation when regulating matters related to morality.¹⁷⁰ But the Court considered the private sexual activity of Mr. Dudgeon to be an intimate aspect of his life, thus warranting narrower deference to the State.¹⁷¹

Additionally, in Article 8 cases, the Court will weigh the severity of the intrusion against the public interest.¹⁷² For example, the Court upheld France’s fairly intrusive anti-doping regulations for athletes because of the need for unannounced testing, the state’s desire to protect the health of athletes, and the need for fair sport.¹⁷³

States must also protect individuals’ physical, moral,¹⁷⁴ and psychological integrity.¹⁷⁵ Like Article 3, Article 8 also safeguards against forced medical treatment.¹⁷⁶ When doctors in the United Kingdom provided medical

¹⁶⁵ *Evans v. United Kingdom*, App. No. 6339/05, Eur. Ct. H.R., ¶ 77 (Apr. 10, 2007), <http://hudoc.echr.coe.int/eng?i=001-80046>.

¹⁶⁶ *Platini c. Suisse*, App. No. 526/18, Eur. Ct. H.R., ¶ 70 (Feb. 11, 2020), <http://hudoc.echr.coe.int/eng?i=001-201734>.

¹⁶⁷ *Id.*

¹⁶⁸ *Evans v. The United Kingdom*, *supra* note 166, ¶ 77.

¹⁶⁹ *Case of Dudgeon v. The United Kingdom*, App. No. 7525/76, Eur. Ct. H.R., ¶ 52 (Oct. 22, 1981), <http://hudoc.echr.coe.int/eng?i=001-57473>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Case of Nat’l Fed’n of Sportspersons’ Ass’ns & Unions (FNASS) v. France*, Apps. Nos. 48151/11 and 77769/13, Eur. Ct. H.R., ¶191 (Jan. 18, 2018), <http://hudoc.echr.coe.int/eng?i=001-180442>.

¹⁷³ *Id.* ¶¶ 164–166, 191.

¹⁷⁴ *Case of Khadija Ismayilova v. Azerbaijan*, Apps. Nos. 65268/13 and 57270/14, Eur. Ct. H.R., ¶106 (Jan. 10, 2019), <http://hudoc.echr.coe.int/eng?i=001-188993>.

¹⁷⁵ *Denisov v. Ukraine*, *supra* note 148.

¹⁷⁶ ECHR, art. 8, Nov. 4, 1950, E.T.S. No. 005.

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treatment to a child against his mother's objections, the Court found that this violated the child's physical integrity, despite the medical necessity of the treatment.¹⁷⁷

When deciding when Article 8 will apply, the Court must determine if the applicant's interest is sufficient to warrant imposing on the defendant state the obligation to protect that interest.¹⁷⁸ “[F]undamental values’ or ‘essential aspects’ of private life” are important in assessing to what degree a state has a positive obligation to protect the applicant's purported interest.¹⁷⁹

5. The Prohibition on Discrimination

Article 14 states that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”¹⁸⁰ A notable feature of the ECHR is that it does not outright ban all discrimination. Rather, it states that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination.”¹⁸¹ Thus, for a claim of discrimination to be admissible there must be some nexus between the discrimination and one of the rights enumerated in the Convention.¹⁸² This does not necessarily mean that there has to be a violation of one of the Articles of the Convention.¹⁸³ The discrimination must simply “fall ‘within the ambit’” of any Convention article.¹⁸⁴ However, once it is shown that the claim is related to that substantive provision the scope of Article 14's application is quite wide.¹⁸⁵

The Court defines discrimination as “treating differently, without an objective and reasonable justification, persons in relevantly similar situations,”

¹⁷⁷ Case of Glass v. The United Kingdom, App. No. 61827/00, Eur. Ct. H.R., ¶ 70 (Mar. 9, 2004), <https://hudoc.echr.coe.int/eng?i=001-61663>.

¹⁷⁸ Case of Hamalainen v. Finland, App. No. 37359/09, Eur. Ct. H.R., ¶ 66 (July 16, 2014), <http://hudoc.echr.coe.int/eng?i=001-145768>.

¹⁷⁹ *Id.*

¹⁸⁰ ECHR, art. 14, Nov. 4, 1950, E.T.S. No. 005.

¹⁸¹ *Id.*

¹⁸² Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, Apps. Nos. 1464/72, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/64, Eur. Ct. H.R., ¶ 9 of “Interpretation Adopted by the Court” (July 23, 1968), <http://hudoc.echr.coe.int/eng?i=001-57525>.

¹⁸³ Case of Carson and Others v. The United Kingdom, App. No. 42184/05, Eur. Ct. H.R., ¶ 63 (Mar. 16, 2010), <http://hudoc.echr.coe.int/eng?i=001-97704>.

¹⁸⁴ *Id.*

¹⁸⁵ See *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, EUR. CT. H.R., 7 (Dec. 31, 2021), https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf,

but an actor may discriminate “to correct ‘factual inequalities.’”¹⁸⁶ However, the Court must find the means employed were not unreasonably disproportionate to the actor’s aims.¹⁸⁷ The Court will also consider policies or laws with discriminatory effects to be discriminatory.¹⁸⁸

E. Semenya Should Prevail Because the State’s Justifications Do Not Outweigh Semenya’s Rights

In Semenya’s case, the threshold of severity has likely been met to constitute degrading treatment. The length of time Semenya would need to be subject to the humiliation of these rules could be extensive, especially if she can continue to compete for the next ten years, as she intends. To participate in any competition, she would need to keep her testosterone levels below 5 nmol/L for at least six months beforehand, which in practice would mean having to constantly take hormones and regularly have her hormone levels tested. Forcing her to submit so regularly to these tests when other athletes may never be tested brings shame and humiliation and signals to others that her sex and gender is in question. She has already been disqualified for two years for not complying, and if the Court did not void these regulations, she, and other athletes who are in a similar position, would have to spend years enduring this degrading treatment. Thus, the duration of the treatment should weigh in favor of the severity threshold being met.

The physical and mental effects of the treatment should also weigh in favor of the severity threshold being met. Physically, athletes are being asked to change their natural bodies for no medically necessary reason. But more significantly, the mental effects of consistently being told that she is not enough of a woman are extremely damaging. Semenya herself has testified that the treatment she has received from the IAAF was extremely distressing and drained her love of athletics.¹⁸⁹ Additionally, the fact that there is so little known about how hormone medications work to reduce testosterone made Semenya feel like she was nothing more than a lab rat—little has changed regarding the lack of science in this area and thus any woman who must comply may also feel the same reduction of their worth.¹⁹⁰ Taking hormone medication can also affect training in ways that harm athletes’ mental health. One of Semenya’s doctors testified that her “inability to train optimally . . . caus[ed] her to be clearly and visibly depressed.”¹⁹¹ Further, intersex women can experience anxiety, depression, and social withdrawal as a consequence of

¹⁸⁶ D.H. v. Czech Republic, 4 Eur. Ct. H.R. ¶ 175 (Nov. 13, 2007), <http://hudoc.echr.coe.int/eng?i=001-83256>.

¹⁸⁷ Biao v. Denmark, App. No. 38590/10, ¶ 90 (May 24, 2016), <http://hudoc.echr.coe.int/eng?i=001-163115>.

¹⁸⁸ *Id.* ¶ 91.

¹⁸⁹ Semenya v. IAAF, *supra* note 83, at 16.

¹⁹⁰ *Id.*, at 18.

¹⁹¹ *Id.* at 22.

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“being placed under mandatory scrutiny without being treated as an equal partner.”¹⁹²

Not only do these facts show that the threshold of severity has been met, but they clearly meet the definition for degrading treatment as the regulations cause “feelings of fear, anguish and inferiority capable of humiliating and debasing them.”¹⁹³ They cause people to act against their will or conscience by coercing women into undergoing medically unnecessary, and possibly mentally damaging, medical interventions. Furthermore, the lack of medical necessity supports a finding that this is a degrading forced medical treatment, as the case law treats therapeutic necessity as the sole justification for forcing a medical treatment absent the need to obtain evidence of a crime.¹⁹⁴ The rules also fail to respect the athletes’ human dignity by forcing them to conform to a narrow and arbitrary conception of womanhood.

How a person identifies and understands themselves is a crucial aspect to personal and social identity, and thus, these restrictions which call an athlete’s sex into question challenge an important aspect of private life. For that reason, the margin of appreciation should be narrow when evaluating Semenya’s Article 8 claim. Even though restrictions that impact professional life or originate in professional life are generally afforded a wide margin of appreciation, the impact of these regulations has on such an important facet of identity, personal conception, and physical integrity is quite severe. Thus, the narrowing of the margin that occurs when those interests are implicated should occur here as well. The fact that the CAS and Swiss Federal Supreme Court can hear the cases and provide duly reasoned decisions should not be sufficient, as it was in *Platini*,¹⁹⁵ because the interests at stake are so significant.

Further, with such an important interest at stake, the severity of this intrusion significantly outweighs the public interest. While there is a public interest in fair sport,¹⁹⁶ fair sport alone is not enough to coerce athletes into medically unnecessary interventions. *FNASS v. Switzerland*, the case in which fair sport was used to outweigh the Article 8 interests at stake, differs from this case in two important ways. First, it is unquestionable that doping provides an unfair advantage to athletes—that’s the entire point of doing it in the first place—and thus there is no debate that anti-doping measures are necessary to ensure fairness. But in this case, there is still significant scientific disagreement as to the advantage high natural testosterone levels give the athletes singled-out in the regulations.¹⁹⁷ If there is an advantage, it is unclear what the magnitude of that advantage is, and whether it is even unfair for

¹⁹² *Id.* at 43.

¹⁹³ *Ireland v. United Kingdom*, *supra* note 116, ¶ 167.

¹⁹⁴ *Jalloh v. Germany*, *supra* note 134, ¶ 69.

¹⁹⁵ *Platini c. Suisse*, *supra* note 167.

¹⁹⁶ *FNASS v. France*, *supra* note 141.

¹⁹⁷ *See infra* § II.C.

these athletes to have that advantage. It is debated whether a high testosterone level differs in any meaningful way from genetic differences that give some athletes greater height, more hemoglobin in the blood, increased muscle mass, or more flexibility, none of which are considered unfair advantages instead of just natural genetic diversity.

Second, in the FNASS case, the Court did not accept the government's interest in fair sport alone when it upheld the restrictions. The government also cited an interest in protecting athletes from negative health effects that arise from taking drugs that are not medically necessary simply for the sake of affecting performance.¹⁹⁸ In Semenya's case, this interest weighs against the validation of the IAAF regulations because the IAAF is coercing athletes into taking medications that are not medically necessary. The government's interest in fair sport alone cannot outweigh the significant interest athletes have in respect for their personal identities and physical integrity.

Finally, these rules are discriminatory, and the CAS has already acknowledged that fact. There is a nexus between the discrimination and other articles of the Convention. Both the degrading treatment and the intrusion into private and family life apply in a discriminatory manner by applying only to intersex women, even though conditions like PCOS also increase testosterone levels and are shown to have similar associations with performance. They also discriminate against women specifically because there are no comparable restrictions for men, even though outlier testosterone levels in men could have the same impact as it does for women under the IAAF's assumption about the impact of testosterone.

The rules also have a racially discriminatory impact. These rules have a disproportionate impact on black and brown athletes, who have almost exclusively been targeted by them.¹⁹⁹ Because athletes can come under suspicion when their appearance seems too masculine, black and brown athletes will always be more likely to be scrutinized since whiteness is so inherent to the Western understanding of ideal feminine beauty.²⁰⁰

The only question then is whether the means employed are reasonably proportionate to the actor's aims. The fact that there is no scientific consensus regarding the scientific underpinnings of the rule, and the fact that some of the main aspects of the regulation appear to be arbitrary suggests that even if creating a fair sport environment is regarded as a legitimate aim, the means employed are not reasonable. This is especially true when the magnitude of the degrading treatment and the intrusion into private life are taken into account.

¹⁹⁸ FNASS v. France, *supra* note 141.

¹⁹⁹ Katrina Karkazis & Rebecca M. Jordan-Young, *The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes*, 30 FEMINIST FORMATIONS 1 (2018).

²⁰⁰ See Kathryn Harper & Becky L. Choma, *Internalised White Ideal, Skin Tone Surveillance, and Hair Surveillance Predict Skin and Hair Dissatisfaction and Skin Bleaching Among African American and Indian Women*, 80 SEX ROLES 735 (2019).

IV. RECOMMENDATIONS

A. The IOC Should Adopt Better Eligibility Rules by Which International Federations Must Abide

1. An Identity-Based Rule

Eligibility rules that are based on uncontrollable sex characteristics have a number of pitfalls, the most significant of which is the severe intrusions on human rights. An alternative rule that avoids human rights violations is to allow athletes who were assigned a certain gender at birth, who have lived their entire lives identifying as that gender, and who wish to compete with athletes of that gender to do so. This rule respects the gender identity of the athletes and their experiences living and competing their whole lives with that identity. It understands the genetic diversity of intersex athletes as comparable to other genetic mutations that give athletes advantages.

Adopting this rule would be a significant improvement on the current IAAF rule and would also be an improvement on any iterations of the rule that might emerge if the ECtHR were to rule in Semenya's favor. For that reason alone, it should be considered by the IOC, the IAAF, and other international sports federations. But the downside to this rule is that it would still require transgender athletes to follow different eligibility requirements than their cisgender peers. Transgender women who compete in track and field events would still have to comply with the same arbitrary testosterone threshold that currently exists for intersex women.²⁰¹ Of course, there is no reason that the IAAF could not simply change its transgender eligibility requirements to be fairer, or at the least more scientifically grounded. But separating the eligibility requirements for transgender women from those that would apply to cisgender women creates artificial distinctions that only serve to unnecessarily complicate things and create another system ripe for discrimination. While this rule improves on the status quo, there is a better option.

2. Embracing Categories Beyond the Binary

The idea of abandoning the male-female binary in sports has been floated around amid the controversy surrounding the IAAF's rules.²⁰² It is time that the IOC, rather than allow International Federations to double down on restrictive gender eligibility rules, start taking seriously the possibility of desegregated sports. The most workable version of this would be similar to how the Paralympics and boxing categorize athletes: based not on sex, but on what

²⁰¹ *Decisions Made at IAAF Council Meetings in Doha*, WORLD ATHLETICS, (Oct. 14, 2019), <https://www.worldathletics.org/news/press-release/iaaf-council-219-decisions>.

²⁰² Irena Martinková, *Unisex Sports: Challenging the Binary*, 47 J. PHIL. SPORT 248 (2020); Roslyn Kerr, *Why it Might be Time to Eradicate Sex Segregation in Sports*, THE CONVERSATION (Jan. 14, 2018, 2:03 PM), <https://theconversation.com/why-it-might-be-time-to-eradicate-sex-segregation-in-sports-89305>; Louise Radnofsky, *The Race to Replace the Binary of Men's and Women's Sports*, THE WALL ST. J. (Mar. 9, 2020, 12:00 PM), <https://www.wsj.com/articles/the-race-to-replace-the-binary-of-mens-and-womens-sports-11583769636>.

each person's body is capable of achieving.²⁰³ The IOC can determine which traits are important to success in a sport and create categories for athletes based on those traits. There must, of course, be a clear scientific reason behind which traits are used to distinguish the athletes and the categories must be based on physiological aspects that do not require invasive or humiliating examination. Thus, rather than exclude athletes at an extreme end of the spectrum, there will already be a category for those athletes to compete in that places no judgment or suspicion on crucial aspects of identity like gender.

Roslyn Kerr, a researcher studying the sociology of sport, provides an excellent example of how this would look.²⁰⁴ For the high jump, muscle mass and height are important determinants of success.²⁰⁵ So, one category of competitors will be those with greater muscle mass and height, while those with less muscle mass and height will compete in the other category.²⁰⁶ Athletes who might find themselves with greater muscle mass but who are shorter may be categorized based on which trait is most important, or, if both traits are significant, be permitted to choose in which category to compete. This is a system that also accommodates trans and non-binary athletes, whereas with the identity-based system there may have to be separate rules determining against whom trans and non-binary athletes may compete.

F. The IOC Should Create Within it a New Institution for the Protection of Athlete's Human Rights

The case of Caster Semenya and the case of Dutee Chand before her show the inadequacy of the current system of recourse available to athletes when their human rights are violated. Both athletes experienced invasive and humiliating discrimination that excluded them from competing for years in a career where age is a major factor—as athletes grow older, they can become less competitive and even one year can be the difference between making the Olympics and falling just short. Even if Semenya prevails in her case before the European Court of Human Rights (ECtHR), she will have been kept out of competition for at least three years. She may even have been kept out of her last opportunity to compete in the Olympics. She has, after all, been competing in the Olympics for over a decade now, and at age 31,²⁰⁷ has passed the peak age for women in her sport.²⁰⁸

²⁰³ *IPC Classification*, INT'L PARALYMPIC COMM., <https://www.paralympic.org/classification> (last visited Apr. 4, 2023).

²⁰⁴ Roslyn Kerr, *Why it Might be Time to Eradicate Sex Segregation in Sports*, THE CONVERSATION (Jan. 14, 2018, 2:03 PM), <https://theconversation.com/why-it-might-be-time-to-eradicate-sex-segregation-in-sports-89305>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Imray, *supra* note 2.

²⁰⁸ Aldo F. Longo, Carlos R. Siffredi, Marcelo L. Cardey, Gustavo D. Aquilino, Nestor A. Lentini, *Age of Peak Performance in Olympic Sports: A Comparative Research Among Disciplines*, 11 J. OF HUM. SPORT & EXERCISE 31, 38 (2016).

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There must instead be an alternative available for athletes to bring complaints and a system in place to prevent human rights abuses from occurring in the first place. The best option would be the creation of an independent human rights commission with power stemming from the Olympic Charter. To be truly effective this commission must have the power to do four things: 1) review the regulation of the IOC and recognized national and international governing bodies on its own motion, 2) hear and adjudicate complaints by athletes, 3) make recommendations and set requirements for the IOC and governing bodies, and 4) have the power to revoke recognition of governing bodies by the IOC.

The most important of these powers is that the commission be able to review regulations of the IOC and the governing bodies on its own motion, and issue recommendations and requirements based on these reviews. A commission dedicated to human rights can recognize when rules may be violative of an athlete's human rights and stop them from ever coming into force in the first place. By not having to rely on an athlete's complaints to evaluate whether a governing body's rules comply with human rights guidelines, this system improves on the current one because it can prevent human rights abuses before they occur rather than just remedy them after-the-fact.

However, it is also important that this body be able to adjudicate complaints of human rights violations brought to it by athletes. The CAS, in its dismissals of both the Chand and Semenya cases, has demonstrated that it is willing to tolerate human rights violations as long as there is some scientific reasoning put forth in support of the violations, regardless of the reliability of that science. This forces athletes to go through lengthy appeals processes to be able to compete unrestricted. By having the opportunity to start with an adjudicative body dedicated to human rights, rather than have that be the court of last resort, athletes may be able to have their complaints resolved more quickly and be free to compete sooner.

Lastly, this body should have the power to revoke recognition of international federations and national Olympic committees (NOC) if they fail to comply with any requirements set forth by the commission. For example, if in the Semenya case the commission found that the IAAF's rules violated human rights laws and guidelines, it could require the IAAF to amend or repeal the rules. If the IAAF failed to do so, it could revoke its recognition, which would take away its power to determine athlete eligibility to compete in the Olympic Games. Instead, the commission could decide that in a certain sport, each country's national Olympic committee would be the highest recognized governing body in the sport and each committee would be solely responsible for determining eligibility in their country. If a similar situation arose for an NOC, the IOC itself could set up a council to determine eligibility for that country.

For this to be most effective, the commission must have the power of the IOC, and therefore should be part of the IOC, but only in a technical sense. The IOC has supported the IAAF's rules from their inception up until November of

2021, and has shown the same callousness toward the rights of athletes as the IAAF. The organization therefore cannot be relied upon to effectively evaluate and adjudicate human rights in the way envisioned for this committee. Instead, various human rights groups and player's unions should be involved in selecting the members of the committee. These two selection groups are essential because it ensures that the committee will be made up of members who are experts on and advocates for human rights, as well as representatives of the athletes who are subject to the rules of the governing bodies and the IOC. Furthermore, the human rights committee should make evaluations based on the whole of human rights law in existence. Simply relying on the ECtHR would offer only an incremental improvement from the current protections athletes enjoy. Relying solely on any one Convention and its case law forecloses multiple avenues for applying human rights laws and norms to the situations faced by athletes.

To accomplish an effective human rights commission, the Olympic Charter would need to be amended to create the commission and establish the necessary bylaws for its functional operation, including provisions ensuring that its funding, while stemming from the IOC budget, is in no way controlled by the IOC. The Charter must also be amended to allow human rights complaints that arise in connection to the Olympics to be brought not only to the CAS, but also to this committee. This may be the most difficult to achieve, but if the ECtHR rules in favor of Semenya, that could demonstrate to the IOC the need for greater human rights oversight and galvanize this kind of action. Even if the ECtHR finds for the IAAF, the human rights problems in the IAAF's rules don't simply disappear, nor does that indicate that all is well with the policies of the IOC and the international federations it recognizes. The history of the IOC and the IAAF support a need for greater oversight regardless of the ECtHR's decision.

V. CONCLUSION

The long history of sex verification in the Olympics demonstrates the extreme difficulty organizations have with administering it in fair and reasonable ways. Even as the IOC and IAAF have made efforts to make the tests less humiliating and more rooted in science, they have failed to divorce the practice from the desire to enforce western standards of femininity and to protect the human rights of athletes. Now that Semenya has challenged these practices before the European Court of Human Rights, the IOC has finally realized the danger of what it and the IAAF have endorsed. But the IAAF has yet to abandon its regulations, and the IOC's change of course does not go far enough to ensure athletes are protected from the same kind of human rights violation athletes like Caster Semenya and Dutee Chand have experienced.

The IOC, as a global leader in the world of sports, must completely rethink how eligibility for competition will work. The best options will be those proposed in this Note, or rules similar to them, because they respect the identity, lived experiences, and physical integrity of athletes without subjecting them to unnecessary medical examinations or treatments. These

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ideas celebrate, rather than eliminate, the genetic diversity that makes sports what it is. Additionally, the IOC needs to ensure greater oversight over the regulations international federations and national Olympic committees put in place so it may prevent human rights abuses. When the IOC fails to intervene when organizations violate human rights, it impliedly condones the actions and lets that organization set a global standard for how athletes may be treated. Standing by while athletes have their rights violated is antithetical to the Olympic movement and will chip away at the already strained legitimacy of the IOC. Putting a committee in place to investigate and adjudicate cases of human rights violations by international governing bodies in sports is a reform that could make elite sports a safer and fairer environment for all athletes.