EUROPEAN COURT OF HUMAN RIGHTS
STRASBOURG, FRANCE

Application no: 10934/21
Case of Mokgadi Caster Semenya v. Switzerland

INTERVENTION

Pursuant to Article 36(2) of the European convention on Human Rights and Rule 44(3) of the Rules of Court

By the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Working Group on discrimination against women and girls, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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Ms. Tlaleng Mofokeng, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Ms. Melissa Upreti, Chair of the UN Working Group on discrimination against women and girls and Mr. Nils Melzer, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment are mandate-holders appointed by the United Nations Human Rights Council with mandates to make recommendations to address human rights issues from the perspective of their respective mandates.

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[1]. This written submission is made by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Working Group on discrimination against women and girls, and UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Article 36(2) of the European Convention on Human Rights ('**the Convention**') and Rule 44(3) of the Rules of the European Court of Human Rights ('**the Court**'), and the letter dated 12 July 2021 which requested leave to intervene in the case of *Semenya v Switzerland* (no. 10934/21). The Court granted leave to intervene on 31 August 2021.

[2]. The Court has recognised an 'obligation to take account of the relevant rules and principles of international law and to interpret the Convention so far as possible in harmony with other rules of international law of which it forms part'.[1] Its 'dynamic and evolutive'[2] approach to the interpretation of the Convention is informed by 'elements of international law other than the Convention'.[3] This submission aids the interpretive work of the Court with its analysis of international norms and standards in human rights law in the context of sports. In particular, it analyses State obligations arising in the context of regulations that establish requirements for women athletes, in particular those with variations in their sex characteristics, to be subjected to intrusive examinations and medically unnecessary interventions to modify their hormone levels in order to compete in sports, such as the World Athletics Eligibility Regulations for the Female Classification (Athlete with Differences of Sexual Development) ('**DSD Regulations**'), under existing international and European human rights norms, standards and jurisprudence on four specific rights: the right to private life (**part I**), the right not to be subjected to degrading treatment (**part II**), the right to equality and non-discrimination (**part III**) and the right to a fair trial and an effective remedy (**part IV**).

[3]. The submission argues that States have obligations under international human rights law to prevent women athletes, including those with variations in their sex characteristics, from being subjected to medical examinations and interventions that violate the principles of human dignity, equality, autonomy, and physical and psychological integrity of a person. *First*, such interventions are **impermissible *per se*** because they are intended to alter the targeted women's naturally occurring and healthy hormonal levels simply for the reason of altering their performance in sport, with serious consequences to their health. *Secondly*, such interventions are **not consensual**, because they present a perverse choice for women to either compromise their health and their sense of self, identity and integrity as women by accepting the interventions; or compromising their careers and indeed their livelihoods and socio-economic wellbeing by rejecting the interventions. *Thirdly*, such interventions are based on **gender and racial stereotypes** about who is a woman and who is a woman athlete in particular. These stereotypes are narrow and essentialist, and have to date disproportionately impacted Black women athletes and women athletes of Asian descent, predominantly from the Global South. *Lastly*, such interventions **cannot be justified** on grounds such as ensuring fairness in sport given their debilitating impact on the lives of women athletes targeted under such Regulations. *Finally*, any such Regulations must be **reviewed for compliance** with the prevailing human rights norms and standards at the domestic level. Thus, in relation to international human rights norms and standards, States have obligations to prohibit and ensure redress for the application of such Regulations on the basis that they –

- likely violate the right to **private life** under article 8(1) of the Convention which protects both: (i) the right to health, including the right to reject medical treatment; and (ii) the right to personal development, including the right to social identity and the right to profession or livelihood which cannot be made conditional upon receiving a medically unnecessary procedure; and constitute a breach of the State's positive obligations to prevent private entities, including sporting organisations, from subjecting women athletes to such coercive and non-consensual medical examination and intervention, and to punish and redress such violations.
- likely reach the threshold of severity for **degrading treatment** under article 3 of the Convention, and constitute a breach of a State's positive obligations to prevent private entities, including sports organisations, from subjecting women to degrading treatment, and to punish and redress such violations.
- likely violate the right to **equality and non-discrimination** and constitute a breach of the State's obligations to prohibit all forms of discrimination against women and promote gender equality under article 14 of the Convention, because they—
  - constitute sex or gender discrimination which requires very weighty reasons to be justified, which seem absent in contrast with the severe socio-economic impact on women athletes;
  - constitute discrimination based on sex characteristics since the Regulations are primarily based on differences or diversity in sex characteristics or development;
  - constitute intersectional discrimination based on a combination of sex characteristics, gender, race and national origin since the Regulations have led to the targeting of Black women athletes and women athletes of Asian descent, predominantly from the Global South.
- must be reviewed against international human rights norms and standards, including a **full and substantive consideration of Convention rights** at the domestic level. The absence of such consideration at domestic level would constitute a breach of the principle of subsidiarity and State obligations under articles 6(1) and 13 of the Convention.

I. Right to Private Life (Article 8)

Scope

[4]. The right to privacy in international law is a broad right.[4] The corresponding right under the Convention is likewise broad and not susceptible to an exhaustive definition.[5] Article 8(1) of the Convention, which guarantees the right to respect for private life, has been interpreted by the Court to include respect for **the right to health**[6] as well as the **right to personal development**.[7]

[5]. The right to health is guaranteed widely in international law.[8] It includes a range of freedoms such as 'the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation'.[9] To control one's health and body encompasses the **freedom to make decisions about one's body without coercion, discrimination or violence**.[10] In addition, the right to health also includes a range of underlying determinants, including in particular 'safe and healthy working conditions',[11] such as a prohibition on mandatory health testing as a condition of work because it violates women's rights to informed consent and dignity.[12]

[6]. **Free and informed consent** is the key for any medical intervention to be consistent with article 8, which means not only the absence of force or the mere acceptance of medical intervention, but the absence of any coercion in making a well-informed and voluntary decision in accessing a medical intervention or treatment.[13] In its report on health and safety, the UN Working Group on Discrimination against Women and Girls has deplored the negation of women's autonomy in decision-making related to their health, as well as stigmatization and pathologisation of women's health.[14]

[7]. The right to health is closely tied with the **right to personal development including self-determination,**[15] which touches upon all aspects of one's physical and social identity, including gender identity.[16] As held both by this Court and the UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the development of full personality and the recognition of one's physical and social identity cannot be made conditional upon an interference with the right to health.[17]

[8]. The Court has also held that '[r]estrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her **social identity**'.[18]

Interference

[9]. Article 8(1) of the Convention protects **the right to refuse medical treatment**. Even minor medical treatment without consent may be regarded as an interference with the right to respect for private life.[19]

[10]. There are **positive obligations** inherent in article 8(1) for the State to ensure the effective realisation of the right.[20] This is particularly so where there are 'fundamental values' and 'essential aspects' of private life at stake,[21] including in a private context.[22] Positive obligations extend to the professional context, including sport, where an individual's livelihood and sole source of income are impacted because of a measure.[23] Similarly, in the context of health, article 8(1) imposes positive obligations on States to create regulations compelling healthcare providers, including private entities, to adopt appropriate measures for the protection of their patients' physical integrity and to provide effective remedies when their physical integrity is violated.[24] This position is reaffirmed by the Committee on Economic, Social and Cultural Rights, which requires States to prevent third parties from interfering with the right to health, and especially to prevent third parties from subjecting women to harmful and coercive practices.[25]

[11]. Finally, it is useful to note that when a treatment does not attain the level of severity under article 3 (discussed below), it may still give rise to a violation under article 8.[26] It is accepted that **article 8 may be violated when a victim's wellbeing is affected** without seriously endangering their right to health.[27]

Justification

[12]. Article 8(2) of the Convention allows for an interference to be justified when **it has some basis in law and is necessary in a democratic society**. A four-part proportionality test is used in this assessment, according to which the Court examines whether the measure—(i) has a legitimate aim; (ii) is suitable in achieving that aim; (iii) is necessary to achieve that aim; and in the final analysis, (iv) is not excessive.

[13]. The legitimacy of an aim is measured in reference to the criteria listed in article 8(2). The Court has previously accepted that the criteria of *protection of morals* and the *protection of rights and freedoms of others* include the aim of ensuring fairness and meaningful competition in sports.[28] But the validity of a measure based on this aim is ultimately to be tested against its suitability in that the measure must be shown to have an appropriate link with the aim. This is closely tied with the necessity of a measure in that the measure must be shown to serve a 'pressing social need'.[29] In the context of

sports, this has been shown where there is 'broad consensus among medical, governmental and international authorities' on the mental and physical health of athletes, because of an impugned measure.[30] No such health considerations justify medical intervention in the case of healthy women who have a naturally high testosterone; rather according to the World Medical Association, '**medical treatment for the sole purpose of altering the performance in sport is not permissible**' and carries immense health risks for the targeted athletes.[31]

[14]. A measure must also strike 'a fair balance between the competing interests of the individuals concerned and of the community as a whole'.[32] The conditions of **full and informed consent** are key in proving this in the context of any medical intervention.[33] Consent obtained from an individual who is in a vulnerable position or in circumstances defined by an imbalance of power, has been deemed to be vitiated.[34] The Court has also recognised the 'impossible dilemma' presented by measures that make recognition of gender identity conditional upon medical treatment as 'disrupting the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned'.[35] Finally, States enjoy a narrow margin of appreciation in cases involving 'individuals' intimate identity' including aspects which touch on physical integrity and social identity[36] or where 'particularly important facet of an individual's existence or identity is at stake'.[37]

Analysis

[15]. The UN treaty bodies and special procedures have frequently highlighted the human rights concerns in relation to the right to health of persons with diverse sex characteristics and intersex variations.[38] They have decried the pathologisation of intersex bodies and the depiction of persons with intersex variations as in 'need' of medical intervention.[39] In fact there is broad consensus, as noted by the World Medical Association, that: '**the mere existence of an intersex condition, without the person indicating suffering and expressing the desire for an adequate treatment, does not constitute a medical indication**.'[40] Interventions which alter the natural composition of bodies, including hormone levels, with the purpose of bringing them within the binary stereotyped notions of what is deemed 'normal' range for women or men, has adverse side effects, notably: diuretic effects that cause excessive thirst, urination and electrolyte imbalances, disruption of carbohydrate metabolism (such as glucose intolerance or insulin resistance), headaches, fatigue, nausea, hot flashes and liver toxicity.[41] Moreover, given that the interventions are accompanied by intrusive medical examinations, the details of which have repeatedly entered the public domain and/or been leaked to the media, it also has a severe impact on the mental health of targeted athletes—inducing shame, self-doubt, withdrawal from sports and driving them to suicide.[42]

[16]. Furthermore, such treatment deprives a person of their **right to personal development in respect of their physical integrity and social identity**, including protecting aspects of their sex, sex characteristics and gender which are facets of private life protected under article 8(1). It thus constitutes an interference with the right to health (protected as part of the right to private life) due to both to its non-consensual nature and its negative impact on physical and psychological health. Such treatment constitutes a severe interference with the right of women to make voluntary decisions, free from coercion, concerning their bodies and sexual and reproductive health.[43] It also constitutes an interference with the right to personal development due to its severe impact on both the identity and integrity of persons with diverse sex characteristics, and the livelihood and income of athletes who rely solely on their ability to compete to earn a living.[44]

[17]. Such interventions should be distinguished from treatment individuals may choose for themselves in the exercise of their right to **self-determination and personal autonomy**. The absence of full, free and informed consent for such interventions violates these key principles underpinning the right to private life, because the DSD Regulations are essentially coercive and provide a perverse choice to targeted women athletes. The option involves (i) accepting the medical intervention to the detriment of their fundamental rights to health, dignity and physical and psychological integrity, or (ii) rejecting the medical intervention and being disqualified from competing as a woman in track events between 400 meters to 1 mile, and being forced to compete with men or in a non-existent intersex category.[45] These options are perverse because they involve competing in the women's category by **accepting the medical treatment which constitutes degrading medical treatment** or **competing in categories which mischaracterise one's sex, sex characteristics and gender** thus compromising the recognition of one's physical and social identity; or **not competing in elite international competitions** at all, and hence compromising one's employment and livelihood; in every case, leading to serious social, physical, mental and economic consequences that represent a substantive threat to the enjoyment and attainment of the highest standard of underlying determinants of health for the targeted athletes.

[18]. The DSD Regulations thus create circumstances of **coercion that vitiate any consent given** in relation to the required medical examinations and interventions, eventually violating the right to private life of women athletes profiled and targeted under the Regulations. Importantly, the absence of a real choice in this context deprives such a treatment from being considered either suitable or necessary, especially in the absence of it being medically necessary.

[19]. The DSD Regulations effectively **legitimise widespread surveillance** of all women athletes by allowing national federations as well as doctors, doping officials, and other personnel to scrutinise women athletes' perceived femininity, including their appearance, gender expression, and sexuality, in violation of their right to private life. Moreover, given their legal and social identity as women including through participation in women's sports, exclusion from the women's category in elite competitions calls into question their very sense of self and dignity. The Regulations seem to ignore the real stigmatising and discriminatory impact of these processes, which can have serious repercussions on the well-being and safety of targeted athletes. For example, as documented by the Human Rights Watch, women athletes have had to leave their home country to avoid persecution for being targeted under such Regulations.[46]

[20]. In addition, the Regulations also disrupt the **fair balance** between the interests of women athletes and the rights and freedoms of others given that they have such **a profound impact** on the physical and psychological health of targeted athletes, while also depriving them of full recognition of their physical integrity and social identity as women and their employment and livelihood. In contrast, there is little evidence to show that there are any competing interests that are being served by targeting women athletes with diverse sex characteristics under these Regulations. Assertions that the lack of application of the DSD Regulations would damage the objective of achieving 'fair and meaningful' competition must be based on concrete and verifiable evidence rather than be speculative or imaginary, particularly when the Regulations cause or risk causing harm to the targeted women athletes. What constitutes 'fair and meaningful competition' must be capable of being independently and objectively measured, in line with human rights norms and standards. Such evidence must be unequivocal to pass the test of proportionality which demands a clear link between a measure and the interests it seeks to achieve. The general aim of ensuring fair and meaningful competition in sports appears too vague to be establishing this link in relation to another class of protected athletes who are being served by subjecting certain women to severe intrusions into their privacy life. Thus, the severity of impact on the targeted women athletes seems to far outweigh a 'fair balance' envisaged by the proportionality test.

[21]. In conclusion, in order to comply with its positive obligations, a State must take effective measures to protect persons from violations of the right to private life by private entities, including:

- Prohibiting, preventing and providing redress for interference with private life under article 8(1) as a result of Regulations that subject women athletes to non-consensual medical examination and interventions and/or exclusion in professional contexts, which strike at the core of their (i) right to health and (ii) the right to personal development which includes both the right to social identity and the right to livelihood;
- Such Regulations are not justifiable under article 8(2) because:
  - They may not be considered suitable and necessary in ensuring fairness and meaningful competitions in sport, given that they are intrusive and coerced, i.e. devoid of any medical necessity or respect for the full and informed consent of women athletes; and based on speculative and unscientific evidence;
  - They may be considered excessive in that in the final analysis, the Regulations do serious and irreparable harm to the physical integrity and personal development of the targeted women athletes, while having no concrete link with serving the competing interests of another protected class;
  - The State may only enjoy a narrow margin of appreciation in relation to cases that concern core aspects of an individual's existence and identity.

II. The Prohibition of Degrading Treatment (Article 3)

Scope

[22]. International law guarantees the right not to be subjected to torture or cruel, inhuman and degrading treatment or punishment.[47] Article 3 of the Convention provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Degrading treatment is prohibited in **absolute terms** alongside torture, inhuman treatment and punishment.[48]

[23]. The Court has held that the treatment complained of must 'attain a minimum level of severity if it is to fall within the scope of Article 3'.[49] Importantly, '"severity"' does not stem straightforwardly from the degree of harm or suffering inflicted, but relates rather to the character of the treatment at issue…assessment of 'minimum level of severity' therefore ultimately involves grappling with *the wrongs themselves*'.[50] Thus, the measure of the minimum level of severity is qualitative in the sense that it is not determined by the visibility or tangibility of suffering, but in reference to the **normative meaning of 'degrading' treatment** which is 'closely bound up with respect for human dignity'.[51]

[24]. Degrading treatment is that which '**humiliates or debases an individual** showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral

and physical resistance'.[52] Equally, a 'measure which does not involve physical ill-treatment but lowers a person in rank, position, reputation or character may…constitute degrading treatment.'[53]

Interference

[25]. According to the Court, the assessment of the 'minimum level of severity' is 'in the nature of things, relative; it depends on 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.'[54] This means that degrading treatment is assessed in both relational and contextual terms. For example, **discriminatory treatment** of women or racial or ethnic minorities can be degrading treatment when it meets the threshold of article 3.[55] This principle is mirrored in the jurisprudence of the Committee against Torture which has recognised that non-discrimination is 'included within the definition of torture itself in article 1, paragraph 1, of the Convention [Against Torture], which explicitly prohibits specified acts when carried out for "any reason based on discrimination of any kind"'.[56] This link between discrimination and ill-treatment is widely recognised by the Council of Europe in the context of intersex persons who are routinely subjected to degrading treatment *on the basis* of their sex characteristics.[57]

[26]. The Court has also been particularly sensitive to relationships of 'superiority and inferiority' and control exercised by a perpetrator over the victim.[58] Thus, a single slap inflicted by police or 'other similar authority' is considered degrading because it is characterised by this **imbalance of power**.[59]

[27]. A strong line of jurisprudence of the Court confirms that all medical intervention must be based on **free and informed consent**[60] and **protect the dignity and bodily and psychological integrity of a person**,[61] to be compatible with article 3. The International Covenant on Civil and Political Rights stipulates that "no one shall be subjected without his free consent to medical or scientific experimentation".[62] Medical treatment is considered to be based on free and informed consent when, for example, the choice of accessing such treatment is not coercive, i.e. the refusal of such treatment does not deprive a person of their right to physical and social identity and personal development.[63] Furthermore, according to the former Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: 'Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers.'[64]

[28]. Forced or coerced medical treatment is considered compatible with article 3 only when (i) medically necessary; and (ii) performed in a manner which does not reach the threshold of severity for article 3.[65] Importantly, medical necessity cannot be established in reference to public interest or rights of others,[66] and must instead be determined by the **health needs and circumstances of the individual concerned**.

[29]. Lastly, States have a positive obligation to prevent, investigate, punish and remedy degrading treatment prohibited under article 3, including when carried out by private actors.[67] The UN High Commissioner for Human Rights has underscored States obligations to prohibit forced, involuntary or otherwise coercive or abusive treatments, including unnecessary medical interventions to modify variations of sex characteristics.[68] The existence of medically unnecessary and intrusive assessment and treatment for hormone suppression of women athletes with diverse sex characteristics would thus engage the **State's due diligence obligations to prevent, investigate, punish and remedy such degrading treatment**.[69]

Analysis

[30]. The DSD Regulations prescribe medically unnecessary and intrusive (i) medical assessments and (ii) hormone suppressing interventions for women athletes with specific differences in sex development, androgen sensitivity and whose natural blood testosterone level are above 5nmol/L.[70] Medical assessments may include examination of the most intimate details of a person's body, including genital exams, chromosomal testing, and imaging of sex organs. Assessments of this nature are not medically necessary and are deeply shameful, humiliating and abusive, with lasting negative psychological impact.[71] Such ill treatment has a long history of **victimisation, discrimination and violence** for persons with diverse sex characteristics who have been subjected to unnecessary observation, surveillance and exhibitionism.[72] Such ill treatment is also reflected in the long history of **racism and coloniality**, in the policing of Black and brown people deemed to be abnormal and subject to inspection and correction.[73]

[31]. The Regulations prescribe **pharmacological or surgical interventions for discriminatory reasons**, to suppress the targeted women's naturally occurring and healthy hormonal levels and to bring them within a range that the Regulations considers to be 'normal' for women. As recognised by United Nations experts including the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subjecting persons with intersex variations or diversity in sex characteristics to medically unnecessary procedures including hormonal treatment to forcibly modify their appearance or physical characteristics to be in line with gender norms and societal expectations about female and

male bodies violates fundamental human rights.[74] Such ill treatment may have detrimental physical, mental and sexual impact, including but not limited to loss of bone mass, nausea, depression, lack of sleep and focus, and loss of a sense of identity and personality.[75] Similarly, according to the Council of Europe Commissioner for Human Rights, medical interventions including hormonal alternation 'often disrupt [sic] physical and psychological well-being, producing negative impacts with lifelong consequences' including those connected to the 'removal of natural hormones, dependency on medication, and a deep feeling of violation of their person'.[76] The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed concern that non-consensual hormonal treatment causes 'severe and life-long physical and mental pain and suffering and can amount to torture and ill-treatment'.[77]

[32]. Moreover, while the Regulations claim that 'no athlete will be forced to undergo any assessment and/or treatment',[78] they leave **no real or viable choice** to the woman athlete, who has to 'choose' between (i) exclusion from competing in restricted events thereby damaging her livelihood and sporting career, or (ii) undergoing medically unnecessary and intrusive assessments and treatments with negative impacts on her health and well-being. Though the 'choice' is formally left to the woman athlete, the exercise of that choice involves significant detrimental impact on the physical and psychological integrity and dignity of women. The lack of autonomy of women athletes over their bodies and careers in turn signifies the very high degree of control exercised by sporting organisations on women athletes, a relationship characterised by **an acute imbalance of power**.

[33]. Lastly, such treatment should be considered wrong 'for reasons that stretch beyond the grave risks it poses for the bodily and psychological health of its victims' and because it 'singles out' women with diverse sex characteristics.[79] It is thus ultimately wrong in two senses: *first*, it violates women's autonomy to protect aspects of their identity related to their sex, sex characteristics and gender; and *secondly*, it denies dignity to women with diverse sex characteristics, by projecting their image as one that is abnormal and in need of correction.[80] This is what makes non-consensual, unscientific and unnecessary medical treatment for women athletes 'degrading' in the context of article 3. Furthermore, since article 3 is absolute in nature and permits no derogations, such treatment should be considered **impermissible *per se***.

[34]. In conclusion, a State has positive obligations to take effective measures to prevent, punish and redress degrading treatment resulting from the application of regulations such as the DSD Regulations, because:

- Such Regulations seem to attain the level of severity of degrading treatment prohibited under article 3, as they subject women athletes to non-consensual, unnecessary and unscientific medical assessment and interventions, with no medical necessity whatsoever;
- Such Regulations violate human dignity in their lack of respect for the bodies of women athletes and impair their physical and psychological integrity as a person;
- States have a positive obligation to prohibit such Regulations and to provide effective protection and redress against their enforcement, as part of its obligations to protect the right not to be subjected to degrading treatment.

III. Right to Equality and Non-Discrimination (Article 14)

Scope

[35]. Article 14 guarantees the enjoyment of rights and freedoms without discrimination. In other words, it prohibits discrimination only in relation to the Convention rights.[81] This means that article 14 applies when **a matter falls within the *ambit*** (not necessarily upon the *violation*) of other rights.[82]

[36]. Although not every case relating to article 14 raises an issue distinct from the issues related to other rights, the Court often analyses article 14 claims separately in cases which do raise distinct issues of inequality relating to socially disadvantaged groups[83] or persistent issues like racism.[84] As substantiated below, the DSD Regulations raise such **distinct issues of inequality concerning women with diverse sex characteristics, particularly Black women athletes and women athletes of Asian descent, predominantly from the Global South**, which merit the Court's consideration both in conjunction with articles 3 and 8, and separately under article 14.

Interference

[37]. The Court has recognised **positive obligations on States to prevent, stop and punish discrimination between private parties**.[85] This is recognised across international law, which, as the CEDAW Committee notes, requires States to 'protect women from discrimination by private actors.'[86] States may thus be held responsible under article 14 for failing to prohibit and remedy discriminatory provisions which regulate international sporting competitions managed by private bodies. This is reaffirmed by the UN High Commissioner for Human Rights who has specifically declared: 'States

should prohibit the enforcement of regulations that pressure athletes to undergo unnecessary medical interventions as a precondition for participating in sport and should review and investigate the alleged enforcement of such regulations.'[87]

[38]. Discrimination can either be **direct or indirect**. Direct discrimination occurs when a person is treated less favourably than others on the basis of a protected characteristic.[88] Indirect discrimination occurs when a neutral policy or practice has a disproportionate impact on a group in comparison with others.[89] In either case, discrimination is wrong because of its *effect* and not the *intention* of the discriminator.[90]

[39]. Discrimination can either be based on a **single or multiple grounds**. Discrimination based on multiple grounds is called **intersectional discrimination**, defined by the **shared and unique patterns of disadvantage created by a combination of grounds**.[91] As observed by the CEDAW Committee: 'The discrimination of women based on sex and gender is *inextricably linked* with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity…States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them'.[92]

[40]. Discrimination can either be based on any ground 'such as' those listed in article 14 or 'other status'. Article 14 has thus come to include unlisted grounds such as sexual orientation[93] and gender identity,[94] which are deemed to be **'analogous'** to listed grounds such as sex because they are **'inextricably bound up with the individual's personal circumstances and existence'**.[95] In this respect, the UN High Commissioner for Human Rights has recognised the State obligation to ensure that 'national anti-discrimination law is adequate to address discrimination on the basis of gender, as well as *compounded discrimination on the basis of gender and race or other prohibited grounds*, *including discrimination on the basis of particular intersex variations or on the basis of sex characteristics*.'[96]

Justification

[41]. Discrimination under article 14 can be justified if it has a legitimate aim and if there is a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[97] In applying the proportionality test, the Court has demanded **'very weighty reasons' or 'particularly serious and weighty reasons' for discrimination based on 'suspect grounds'** like sex,[98] sexual orientation[99] and ethnic origin[100] to be justified.

[42]. The Court has been particularly wary of cultural arguments and justifications rooted in general assumptions or stereotypes in assessing the proportionality of a discriminatory measure, especially those concerning women.[101] In the same vein, **the margin of appreciation in cases involving difference in treatment or disproportionate impact based on suspect grounds is narrow**, so that 'the notion of objective and reasonable justification must be interpreted as strictly as possible'.[102]

Analysis

[43]. Three forms of discrimination seem to arise under the DSD Regulations related to: (i) distinction based on **sex or gender** since the DSD Regulations are based on a stereotypical view of women and women athletes in particular; (ii) distinction based on **sex characteristics**, as the DSD Regulations distinguish between women on the basis of their sex characteristics or diversity in sex traits; and (iii) disproportionate impact based on **a combination of sex characteristics, race and national origin**, because the DSD Regulations have predominantly resulted, to date, in the targeting of **Black women athletes and women athletes of Asian descent, predominantly from the Global South**.

[44]. *First*, the DSD Regulations draw a distinction based on sex or gender as they seem to rely on **stereotypical notions of how a woman athlete should look or perform**. Women athletes are profiled and targeted for medical intervention if they are perceived as too masculine. Likewise, they are targeted if they perform better than what the Regulations considers to be the performance range for women. These rules subject all women athletes to public scrutiny, suspicion and speculation based on what is perceived as 'appropriate' with reference to harmful stereotypes about femininity and women's bodies. No such performance assessment or benchmark applies to men athletes. This constitutes gender discrimination in breach of the international standards which oblige States to actively combat gender stereotypes in both public and private spheres,[103] as well as the Court's own jurisprudence which obliges States to 'create conditions for substantive gender equality',[104] including through an anti-stereotyping approach to gender equality.[105] The Working Group on discrimination against women and girls has emphasised that unlawful gender discrimination is manifested in making women undergo humiliating treatment in the context of health services.[106] Gender stereotyping also increases the possibility of violence against women, particularly against women who are perceived not to conform to culturally constructed notions of womanhood.

[45]. *Secondly*, the DSD Regulations draw a distinction between women on the basis of their sex characteristics. As stated by the United Nations High Commissioner for Human Rights: '**sex characteristics refer to each person's physical characteristics relating to sex**, including genitalia and other reproductive anatomy, chromosomes, hormones and secondary physical characteristics emerging from puberty.'[107] Although sex characteristics is not a ground listed in article 14 explicitly, it can be considered both: (i) an integral component of the ground of sex which is explicitly listed; as well as, (ii) an analogous ground similar to the other analogous grounds which have been previously recognised by the Court such as sexual orientation and gender identity, because it relates to an intimate and innate aspect of a person's existence and identity. The UN CEDAW and CESCR Committees have called on States to prohibit discrimination on the basis of sex characteristics / against intersex persons.[108] The Parliamentary Assembly of the Council of Europe (PACE) has called on Member States to take steps to protect the human rights of persons with intersex variations by 'inserting sex characteristics as a specific prohibited ground in all anti-discrimination legislation'.[109] Similarly, the Commissioner for Human Rights of the Council of Europe has also urged that either '[s]ex characteristics should be included as a specific ground [of discrimination]' or that 'the ground of sex/gender should be authoritatively interpreted to include sex characteristics'.[110] Since then, at least Malta,[111] Portugal,[112] Iceland,[113] the Netherlands[114] and Montenegro[115] have recognised sex characteristics as an independent ground of discrimination in their anti-discrimination legislations.

[46]. The DSD Regulations seem to constitute direct discrimination based on sex characteristics because they rely on stereotypes about women with differences in sex development as not being 'fully' women, and in 'need' of having their bodies modified in line with these stereotypes through medically unnecessary intervention without free and informed consent, for non-health related and disputed purposes in sport. **Such stereotypes are harmful for both recognition and redistributive effects**, [116] i.e. because, (i) they have the effect of misrecognising women's sex or gender in sports and more broadly impair their recognition as women in their public and private identities and lives, and (ii) deprive them from competing in the women's category at the highest level of competition and in the choice of track events they train and excel in. Such stereotypes debase, degrade and marginalise women with diverse sex characteristics in social, economic and cultural terms.[117] Stereotypes also have a serious impact on women's ability to perform and function because they 'constrain behaviour and make people underachieve' and 'causes anxiety, which in turn causes underperformance.' [118] The Court is urged to recognise and address the harmful stereotypes based on sex characteristics either on its own terms by recognising sex characteristics as an analogous ground of discrimination under article 14; and/or by recognising sex characteristics as an aspect of sex or gender discrimination.

[47]. *Thirdly*, DSD Regulations seem to have been enforced, to date, disproportionately against **Black women athletes and women athletes of Asian descent, predominantly from the Global South** and may constitute **indirect intersectional discrimination on the basis of a combination of sex characteristics, race and national origin**. The Court has previously recognised direct intersectional discrimination in the case of *BS v Spain* where the Court recognised the 'particular vulnerability' of African American women in comparison with women of the 'European phenotype'.[119] Similarly, the Court has made an observation regarding direct intersectional discrimination against Roma women in the context of article 3, stating that the 'practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups'.[120]

[48]. This case now presents a significant opportunity for the Court to recognise indirect intersectional discrimination which is a more recalcitrant form of discrimination because it is multi-causal and represents the complexity of disadvantage suffered simultaneously on the basis of multiple grounds.[121] The complex causality in how indirect intersectional discrimination comes about manifests sharply in the context of DSD Regulations which have predominantly resulted, to date, in the targeting of **Black women athletes and women athletes of Asian descent, predominantly from the Global South**. Human Rights Watch has collected extensive data in this regard that show that neither white women nor women from developed countries or the Global North are targeted by such regulations.[122] Women affected by these Regulations have been from sub-Saharan Africa and South Asia, including Santhi Soundarajan and Dutee Chand (India), Caster Semenya (South Africa), Annet Negesa (Uganda), Margaret Wambui (Kenya) Francine Niyonsaba (Burundi), Christine Mboma and Beatrice Masilingi (Namibia).[123] The undeniable **disproportionate impact on Black women athletes and women athletes of Asian descent, predominantly from the Global South** seems to be rooted in stereotypes about white femininity as the standard in elite sport; and conversely, the racialised view of Black and Asian women athletes as masculine,[124] especially those who come from the margins of society in the Global South who do not 'fit' the image of an elite woman athlete.[125] The DSD Regulations thus rely on compounded stereotypes that are co-constituted by the forces of patriarchy, racism and socio-economic disadvantage.

[49]. It follows that there are strong reasons for recognising indirect intersectional discrimination here. The Court has itself recognised that its proof depends on **'less strict evidential rules'** than those which apply for direct discrimination,[126]

and that importantly, statistical proof is not essential.[127] This is especially so where indirect discrimination concerns institutional practices which target members of certain disadvantaged groups rather than the universal application of neutral criterion or policy to everyone. For example, in *Orsus v Croatia*,[128] it was the practice of the school of placing Roma children in Roma-only classes that gave rise to a presumption of discrimination. Thus, the existing repertoire of evidentiary rules and principles under the Court jurisprudence should enable a finding of indirect intersectional discrimination.

[50]. Finally, it is important to note that discrimination on grounds like race, sex or gender demands: (i) **'very weighty reasons'** to be justified and (ii) affords a **narrow margin of appreciation** to the State. The key justification of the DSD Regulations seems to be the assumption that blood testosterone level is determinative of the performance of athletes. This assumption has been contested by scientific evidence which attributes performance to a whole range of biological, social, economic and cultural variables including endogenous factors such as body composition, muscle mass, aerobic capacity, bone density, height etc, and exogenous factors such as nutrition, training, psychology, etc.[129] There is also no evidence to show that the competition has hitherto – in the absence of such Regulations – been unfair or not meaningful when women compete based on their natural abilities, including a diversity of hormonal levels. It is thus unlikely that the DSD Regulations will satisfy the high standard of scrutiny applicable here.

[51]. In summary, States have positive obligations to prohibit and redress discrimination against women in sports, including by private sporting organisations, and such Regulations raise unique issues under article 14 which are related to but also distinct from issues raised in articles 3 and 8 and deserve to be considered on their own, including in relation to:

- Obligations to prohibit, prevent and redress multiple forms of direct and indirect discrimination, viz. direct discrimination based on sex and gender, as well as sex characteristics as an aspect of sex and also an analogous ground of discrimination; and indirect intersectional discrimination on the basis of a combination of sex characteristics, race and national origin.
- Such discrimination is rooted in harmful stereotypes about women with differences in sex development, especially Black and Asian women athletes from the Global South and lacks very weighty reasons to be justified given their impact on the most intimate aspects of a person's existence, dignity and identity.

IV. Right to an Effective Remedy (Articles 6 and 13)

Scope

[52]. Article 6 of the Convention guarantees the right to a fair trial and the right to a fair hearing in the determination of civil rights and obligations.[130] It is read alongside article 13, which guarantees the right to an effective remedy 'before a national authority'. As the Court held in *A v UK*: '[i[t is fundamental to the machinery of protection established by the Convention that **the national systems themselves provide redress for breaches of its provisions**, with the Court exercising a supervisory role subject to **the principle of subsidiarity**'.[131]

[53]. Article 13 applies in relation to 'the substance of the rights and freedoms set out in the Convention'.[132] Thus, the assessment of an alleged violation of article 13 takes place in relation to a competent national authority's ability to deal with the substance of an arguable complaint under the Convention.[133] The Court has interpreted this to include 'an obligation on *the domestic courts* to ensure…**the full effect of the Convention standards**, as interpreted by the Court' such that 'where an applicant's pleas relate to the "rights and freedoms" guaranteed by the Convention *the courts* are required to **examine them with particular rigour and care and that this is a corollary of the principle of subsidiarity**.'[134] Thus, the principle of subsidiarity implies not only the 'duty to act' but also 'the duty to secure Convention rights' on *the domestic courts* of a State.[135]

Analysis

[54]. The UN High Commissioner's report on the intersection of race and gender discrimination in sport has raised significant issues with the way sports arbitration **falls short of giving a full and consistent application of human rights norms and standards in sporting disputes**.[136] While the Court has deemed institutions like the Court of Arbitration for Sport (CAS) to have 'full jurisdiction to entertain, on the basis of legal rules and after proceedings conducted in a prescribed manner, any question of fact or law submitted to it in the context of the disputes before it';[137] the UN High Commissioner for Human Rights has found that private dispute resolution mechanisms such as the CAS are not designed to fully address human rights complaints given that they do not include 'human rights norms and standards as binding sources of law for adjudication.'[138]

[55]. CAS applies World Athletics rules and regulations as the principal source of law in arbitration proceedings. World Athletics has stated that it is not bound by international human rights norms and standards.[139] Consequently, the CAS jurisdiction is characterised by 'limited and inconsistent application of international human rights norms and standards

… [by] most Court arbitrators [who] lack human rights expertise, pos[ing] **a serious challenge to access to effective remedies for athletes** whose human rights are alleged to have been violated.'[140]

[56]. For example, the CAS has been regarded as treating the matter in cases like *Dutee Chand* (2015) and *Caster Semenya* (2019) 'as a scientific dispute, as opposed to a human rights and justice dispute'.[141] The result being that the CAS awards show scant engagement with the human rights norms and standards which require attaching **appropriate weight to the interests at stake both in normative and substantive terms**—i.e. taking into account the underlying values and principles protected in specific rights guaranteed under the Convention; and the Court's jurisprudence informing the interpretation of Convention rights.

[57]. Given the lack of engagement of private dispute mechanisms such as CAS with the full and substantive content of human rights norms and standards, the onus of giving effect to the rights under articles 6 and 13 fall with the domestic courts. This position is reflected in wider international law, as noted by the UN High Commissioner for Human Rights, that it is ultimately States who must ensure that 'non-State actors, including sport governing bodies, respect human rights in their own regulatory regimes and are accountable for breaches' and also ensure 'access to adequate and effective remedies that can provide full redress for discrimination in sport'.[142] Therefore, a domestic court reviewing an arbitral award bears the utlimate duty for a full and substantive review of Convention rights especially when the arbitral entity below has undertaken limited review of the human rights dispute, such as in the case of sports arbitration. **Articles 6 and 13 may be breached if neither the sports arbitration panel nor the domestic court give full and substantive consideration to the rights guaranteed under the Convention, leaving no effective remedy to a victim before a competent national authority**.

[58]. Articles 6 and 13 of the Convention require **full and substantive consideration of the full range of Convention rights at stake, including under Articles 3, 8 and 14, as in this case**, both in light of domestic law, as well as the Convention rights and other applicable international law.[143] This is recognised by the Court which has held that although it is 'not in theory required to settle disputes of a purely private nature…in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act [is] blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention'.[144] It follows that limitations to the capacity of domestic courts to review a challenge to sports arbitration awards on the basis of alleged breaches of Convention rights, including limiting permissible grounds of review to notions such as 'public policy' or 'public order' that do not incorporate the full breadth of substantive human rights protected by the Convention[145], would amount to a breach of articles 6 and 13 of the Convention.

[59]. In summary, States have positive obligations to ensure rigorous, full and substantive consideration of Convention rights by domestic courts under articles 6 and 13 of the Convention, including:

- In the context of the system of sports arbitration, which is itself limited in its competence in and consideration of human rights disputes to discharge the State obligations under articles 6 and 13 of the Convention;
- Ensuring that no limitations are placed on the review of sports arbitral awards on grounds of public policy or public order that do not effectively encompass international human rights norms and standards including Convention rights; and/or limitations on domestic courts to review awards which do not include a full and substantive review of human rights claims.

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1 *Jones v UK*, nos. 34356/06 and 40528/06, ECtHR 2014 [195]; *Al-Saadoon and Mufdhi v UK*, no. 61498/08, ECtHR 2010 [126]; *Catan and Others v the Republic of Moldova and Russia*, nos 43370/04, 8252/05, and 18454/06, ECtHR 2012 [136].

2 *Sergey Zolotukhin v Russia*, no. 14939/03, ECtHR 2009 [80]; *Vilho Eskelinen v Finland*, no. 63235/00, ECtHR 2007 [56].

3 *Bayatyan v Armenia*, no. 23459/03, ECtHR 2011 [102]; *Demir and Baykara v Turkey*, no. 34503/97, ECtHR 2008 [85].

4 Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948), art 12; International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art 17. See the first mandate report of the Special Rapporteur on the right to privacy, A/HRC/31/64 (24 November 2016) [19] – [27].

5 *FNASS v France*, nos. 48151/11 and 77769/13, ECtHR 2018 [152]; *Hadri-Vionnet v Switzerland*, no. 55525/00, ECtHR 2008 [51].

6 *Nada v Switzerland*, no. 10593/08, ECtHR 2012 [151].

7 *Denisov v Ukraine*, no. 76639/11, ECtHR 2018 [95]; *S and Marper v UK*, nos. 30562/04 and 30566/04, ECtHR 2008 [66]; *Von Hannover v Germany (no. 2)*, nos. 40660/08 and 60641/08, ECtHR 2012 [95].

8 UDHR, art 25.1; International Covenant on Economic, Social and Cultural Rights, (1976) 993 UNTS 3, art 12; International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS

195, art 5(e)(iv); Convention on the Elimination of All Forms of Discrimination against Women (1981) 1249 UNTS 13, arts 11.1 (f) and 12; Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163, art 11.

[9] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, (11 August 2000) [8].

[10] Committee on Economic, Social and Cultural Rights, General comment No. 22: The Right to Sexual and Reproductive Health, (Art. 12), E/C.12/GC/22 (2 May 2016) [5].

[11] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (11 August 2000) [4].

[12] CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (Women and Health), A/54/38/Rev.1, chap. I (1999) [22].

[13] See esp the dedicated report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272 (10 August 2009).

[14] Report of the Working Group on the issue of discrimination against women in law and in practice on the issue of discrimination against women with regard to health and safety, A/HRC/32/44 (8 April 2016) [63] [67]–[75].

[15] *Pretty v UK* (2002) 35 EHRR 1 [61].

[16] *AP, Garçon, Nicot v France*, nos 79885/12, 5247/13 and 52596/13, ECtHR 2017 [95]; *Mikulić v Croatia*, no. 53176/99, ECtHR 2002 [53].

[17] ibid [130]. See also *Van Kück v Germany*, no. 35968/97, ECtHR 2003 [75]; *YY v Turkey*, no. 14793/08, ECtHR 2015 [66]. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Report, A/HRC/22/53 (1 February 2013) [78].

[18] *Bărbulescu v Romania*, no. 31675/04, ECtHR 2009 [71]; *Fernández Martínez v Spain*, no. 56030/07, ECtHR 2014 [110]; *Antović and Mirković v Montenegro*, no. 70838/13, ECtHR 2017 [42].

[19] *X v Austria* [1979] ECHR 6 [3]; *Acmanne v Belgium*, no. 10435/83, ECtHR 1984, p 255; *Boffa v San Marino*, no. 26536/95, ECtHR 1998, p 34.

[20] *Bărbulescu v Romania*, no. 61496/08, ECtHR 2017 [108]–[111]; *Lozovyye v Russia* [2018] ECtHR 361 [36].

[21] *Hämäläinen v Finland*, no. 37359/09, ECtHR 2014 [66].

[22] *Noveski v The former Yugoslav Republic of Macedonia*, no. 39630/09, ECtHR 2012 [61]; *Bărbulescu v Romania*, no. 61496/08, ECtHR 2008 [108]–[111]; *Evans v UK*, no. 6339/05, ECtHR 2007 [75].

[23] *Platini v Switzerland*, no. 526/18, ECtHR 2020 [57].

[24] *Jurica v Croatia*, no. 30376/13, ECtHR 2013 [84]; *Vasileva v Bulgaria*, no. 23796/10, ECtHR 2010 [63]; *Mehmet Ulusoy v Turkey*, no. 13423/09 ECtHR 2009 [81].

[25] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, (11 August 2000) [33] [35].

[26] *Wainwright v UK* [2006] ECHR 807 [43]; *Raninen v Finland* (1998) 26 EHRR 563 [63].

[27] *López Ostra v Spain*, no. 16798/90, ECtHR 1994 [58]–[60].

[28] *FNASS v France*, nos. 48151/11 and 77769/13, ECtHR 2018 [166]

[29] ibid [167].

[30] ibid [171]–[177].

[31] World Medical Association, 'Physician Leaders Reaffirm Opposition to IAAF Rules', 15 May 2019.

[32] *AP, Garçon, Nicot v France*, nos. 79885/12, 5247/13 and 52596/13, ECtHR 2017 [101].

[33] *VC v Slovakia* (2014) 59 EHRR 29 [105]–[107].

[34] ibid; *IG v Slovakia* [2012] ECHR 1910 [117]–[118].

[35] ibid [132].

[36] *AP, Garçon, Nicot v France*, nos. 79885/12, 5247/13 and 52596/13, ECtHR 2017 [123]; *X and Y v the Netherlands* [1985] ECHR 4 [24] [27]; *Christine Goodwin v UK* [2002] ECHR 588 [90]; *Pretty v UK* (2002) 35 EHRR 1 [71].

[37] *AP, Garçon, Nicot v France*, nos. 79885/12, 5247/13 and 52596/13, ECtHR 2017 [123]; *ES v Sweden*, no. 5786/08, ECtHR 2012 [58]; *Mosley v UK*, no. 48009/08, ECtHR 2011 [109].

[38] United Nations and regional human rights experts, 'End Violence and Harmful Medical Practices on Intersex Children and Adults' (24 October 2016); Committee Against Torture, Concluding Observations on Denmark, CAT/C/DNK/CO/6-7 [42]–[43]; Committee Against Torture, Concluding Observations on Austria, CAT/C/AUT/CO/6 [44]; Committee Against Torture, Concluding Observations on Hong Kong, CAT/C/CHN-HKG/CO/5 [28]–[29]; Committee Against Torture, Concluding Observations on Switzerland, CAT/C/CHE/CO/7 [20]; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53 (1 February 2013), [88]; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/31/57 (1 January 2016) [48] [50]. See also OHCHR, 'Background Note on Human Rights Violations against Intersex People' (2019) [2.1].

[39] ibid.

[40] World Medical Association, 'Physician Leaders Reaffirm Opposition to IAAF Rules', 15 May 2019.

[41] Rebecca Jordan-Young et al, 'Sex Health and Athletes' (2014) British Medical Journal 348; Arne Ljungqvist et al, 'The History and Current Policies on Gender Testing in Elite Athletes' (2006) 7 International Sport Medical Journal 225; Ruth Padawer, 'The Humiliating Practice of Sex-Testing Female Athletes' New York Times, 28 June 2016.

[42] Human Rights Watch Report, '"They're Chasing Us Away from Sport": Human Rights Violations in Sex Testing of Elite Women Athletes' (4 December 2020), pp. 10, 24, 74, 98.

[43] CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (Women and Health), A/54/38/Rev.1, chap. I (1999) [31e]; Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, (11 August 2000) [8]; Report of the Working Group on the issue of discrimination against women in law and in practice on the issue of discrimination against women with regard to health and safety, A/HRC/32/44 (8 April 2016) [86].

[44] *Denisov v Ukraine*, no. 76639/11, ECtHR 2018 [115]–[117]; *Platini v Switzerland*, no. 526/18, ECtHR 2020 [45]–[58].

[45] Katrina Karkazis and Morgan Carpenter, 'Impossible "Choices": The Inherent Harms of Regulating Women's Testosterone in Sport' (2018) 15 Bioethical Inquiry 579.

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[49] *Ireland v UK* (1979–80) 2 EHRR 25 [162].

[50] Natsa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (Hart 2021) 92 (emphasis in original).

[51] *Bouyid v Belgium* (2016) 62 EHRR 32 [81].

[52] *Pretty v UK* (2002) 35 EHRR 1 [52]. See also *Campbell and Cosans v UK* (1982) 4 EHRR 293 [28]; *Costello-Roberts v UK* (1995) 19 EHRR 112 [30]–[32]; *Keenan v UK* (2001) 33 EHRR 38 [110].

[53] *Raninen v Finland* (1998) 26 EHRR 563 [50].

[54] *Ireland v UK* (1979–80) 2 EHRR 25 [162]. See also *Labita v Italy* (2008) 46 EHRR 50 [102].

[55] *Valašinas v Lithuania*, no. 44558/98, ECtHR 2001 [117]; *Wiktorko v Poland* (2013) 56 EHRR 30 [54].

[56] Committee Against Torture, General Comment No. 2, 'Implementation of article 2 by States parties', CAT/C/GC/2 (24 January 2008) [20].

[57] Council of the European Union, 'Guidelines to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBT) Persons' Foreign Affairs Council Meeting, Luxembourg, 24 June 2013; European Parliament, 'Report on the EU Roadmap against Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity' e2013/2183(INI), Plenary sitting, No. A7-0009/2014, 7 January 2014; Council of Europe, Children's right to physical integrity, Resolution 1952, Parliamentary Assembly, 2013. See also Council of Europe (2014), Commissioner for Human Rights Comments, A boy or a girl or a person – intersex people lack recognition in Europe, 9 May 2014; UN, High Commissioner for Human Rights (2011), Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 17 November 2011.

[58] *Bouyid v Belgium* (2016) 62 EHRR 32 [106].

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[63] *AP, Garçon, Nicot v France*, nos. 79885/12, 5247/13 and 52596/13, ECtHR 2017 [130] [131]; *X and Y v Romania*, nos. 2145/16 and 20607/16, ECtHR 2021.

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[65] *Nevmerzhitsky v Ukraine* (2006) 43 EHRR 32 [94]; *Naumenko v Ukraine*, no. 42023/98, ECtHR 2004 [112]; *Herczegfalvy v Austria* (1993) 15 EHRR 437 [82]; *Ciorap v Moldova*, no. 12066/02, ECtHR 2007 [77].

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[145] The Swiss Federal Tribunal has stated, in its review of arbitral awards CAS 2018/0/5794 and CAS 2018/0/5798, that, "an appeal in international arbitration can only be brought for one of the grounds exhaustively listed in art. 190 para. 2 LDIP", that "the substantive review of an international arbitration award by the Federal Tribunal is limited to the question of the compatibility of the award with public order" and that a "violation of the provisions of the ECHR or of the Constitution does not count among the complaints exhaustively listed by art. 190 para. 2 LDIP. It is therefore not possible to directly invoke such a violation."