

**REGULATING WOMEN LIKE THEY ARE SHOE STACK
HEIGHTS: WHY WORLD ATHLETICS’
HYPERANDROGENISM POLICY VIOLATES
INTERNATIONAL HUMAN RIGHTS LAW**

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INTRODUCTION

You have spent years—no—decades of your life preparing for this one moment, this one 800-meter race. You get on the line. The official raises the starting pistol. You hear the pop of the gun and take off sprinting before you even see the smoke. Your hard work and sacrifices pay off; you dominate, leaving your competitors in the dust to fight for silver and bronze. But the glow of victory is short-lived. Afterwards, competitors, athletic officials, and media outlets accuse you so severely of lying about your sex that you offer to get naked to confirm it. Then, the international governing body for athletics forces you to take an invasive sex test but refuses to release your results, which causes you to sit out from competition for a year.¹

Next, this international governing body releases a policy that restricts you from running. That is, unless you undergo forced surgery, hormone-reducing injections, or birth control medication. Naturally, this policy feels targeted towards you. However, you just want to do what you have trained your entire life for, so you put your head down and choose the birth control option. This medication causes you severe pain, anxiety, and fear. Eventually, you can no longer cope with the medication's side effects. As a result, you retire from your specialty events and try to race longer or shorter distances. As a previous Olympic medalist, you fail to run a qualifying standard in these other distances for the next Olympic cycle. This story may sound dystopian and cruel, but this is what Caster Semenya, and many other past and present athletes, have had to go through because of World Athletics' hyperandrogenism policy.²

1. World Athletics is an organization that provides standards for athletes and governs international sport competitions, specifically for running. Aside from its hyperandrogenism policy, World Athletics is best known for its regulations surrounding shoe stack heights (which are the thickness of running shoe soles). In 2021, World Athletics promulgated a regulation banning shoe stack heights over 20 millimeters (mm). The previous regulation, which limited road-racing shoes to a 40-mm stack height, sought to balance shoe innovation and fairness. World Athletics' old regulation was announced the day before Nike released information regarding its newest "super shoe" (which *just* happened to have a 40-mm stack height). Needless to say, both the shoe-stack-height regulation and hyperandrogenism policy are incredibly controversial and are widely seen as unfair by the running community. See Marley Dickinson, *World Athletics Approves New Rules and Regulations for Shoes in Competition*, CANADIAN RUNNING (Dec. 23, 2021), <https://runningmagazine.ca/the-scene/world-athletics-approves-new-rules-and-regulations-for-shoes-in-competition> (discussing the new stack height regulation); Madeleine Kelly, *The Latest Shoe Rules from World Athletics*, CANADIAN RUNNING (July 28, 2020), <https://runningmagazine.ca/sections/gear/the-latest-shoe-rules-from-world-athletics> (discussing the old regulation); see also Rachel Savage, *Olympic Champion Caster Semenya's 11-Year Battle to Compete*, REUTERS (Sept. 9, 2020), <https://www.reuters.com/article/us-south-africa-lgbt-athletics/olympic-champion-caster-semenyas-11-year-battle-to-compete-idUSKBN2602RM> (defining hyperandrogenism as where a person's body produces higher levels of natural testosterone than is considered normal).

2. The introduction, although a hypothetical, is based on Caster Semenya's fight against World Athletics' hyperandrogenism policy. See *infra* Part I.A.1, which lays out her story.

This Article discusses Semenya's arduous, decade-plus-long fight against World Athletics to race: ultimately culminating in Semenya bringing her case all the way to the European Court of Human Rights (ECHR).³ Part I of this Article tells stories on how World Athletics' sex verification policies have affected athletes, starting with Semenya's story; these athletes' stories provide the history of sex verification in track and field. Additionally, Part I examines the history and criticism of World Athletics' hyperandrogenism policy before and after the seminal ruling in *Chand v. Athletics Federation of India (AFI)*.⁴ Part II discusses Articles 3, 8, and 14 of the European Convention on Human Rights, respectively, and whether World Athletics' policy violates them. Part II concludes that the policy does violate the Articles; therefore, the ECHR should rule in favor of Semenya. Part III provides a two-prong solution: codifying LGBTQIA+ protections and modernizing current testing procedures.

This Article proposes a less discriminatory and violative way to ensure fair competition among women's athletics. Specifically, this Article proposes that World Athletics should narrow its policy to only ban athletes from competing in races who commit doping violations with artificial testosterone. A narrower policy would reduce outdated sex stereotypes and only punish athletes who have violated doping rules for an unfair advantage. Further, this Article argues that enjoining the policy would reduce indirect discrimination, especially on queer women of color from the Global South.⁵ Modifying the policy in this manner would bring women's athletics in line with the standard

3. *The European Court of Human Rights*, COUNCIL OF EUR., <https://www.coe.int/en/web/tbilisi/europeancourtsofhumanrights> (last visited May 12, 2024) (explaining that the ECHR was created in 1959 and its decisions are binding to the 46 Member States that are party to the European Convention on Human Rights); *What Is the European Convention on Human Rights*, EQUAL. & HUM. RTS. COMM'N (Apr. 19, 2019), <https://www.equalityhumanrights.com/human-rights/what-are-human-rights/what-european-convention-human-rights> (discussing that the ECHR applies the European Convention on Human Rights, which "guarantees specific rights and freedoms and prohibits unfair and harmful practices").

4. *Chand v. Athletics Fed'n of India (AFI)*, CAS 2014/A/3759, ¶ 548 (Ct. of Arb. for Sport 2015).

5. See Jamie Strashin, *What's the Real Problem with Caster Semenya*, CBC (May 18, 2018), <https://www.cbc.ca/sports/olympics/summer/trackandfield/caster-semenya-cultural-bias-1.4661929> (discussing further the targeted effect of World Athletics' policy as it is today, and the athletes it primarily affects); see generally ROYAL GEOGRAPHICAL SOC'Y, A 60 SECOND GUIDE TO . . . THE GLOBAL NORTH/SOUTH DIVIDE (2015), <https://cdn-rgs-media-prod.azureedge.net/vedfga10/secondguidetoglobalthsouthdivide.pdf> (discussing the Global South and Global North). The Global South and Global North as a description developed from the Brandt Line, which divided countries based on the country's gross domestic product (GDP) and political characteristics, at roughly latitude 30°North. *Id.* Countries with above average GDP are generally considered a part of the Global North, and countries with below average GDP are generally considered a part of the Global South. *Id.*

practices used in men's athletics, because there are no analogous policies restricting men's natural testosterone levels.

I. BACKGROUND

A. History of Sex Verification in Track and Field

This Article features some, but not all, of the athletes affected by forced sex tests and hyperandrogenism policies. Faulty testing, unfounded science, and lack of evidentiary support have all contributed to countless tragic stories of these policies cutting athletes' careers short. World Athletics' gender policing continues to affect many prominent athletes from around the world.⁶ This Article will highlight their stories.

1. Caster Semenya of South Africa

Mokgadi Caster Semenya was born in the small South African village of Ga-Masehlong in 1991, near Polokwane.⁷ Semenya lived with her grandmother in a nearby village, where she grew up playing soccer and training every day running from village to village.⁸ She went to Nthema Secondary School and studied at the University of North West, majoring in Sports Science.⁹ At 18, Semenya ran at the 2009 African Junior Championships winning the 800 meter (m) and 1,500m races. She demolished the previous Senior and Junior South African 800m records.¹⁰ During this same year, Semenya won gold at the 2009 World Championships in the 800m, running the fastest female time that year.¹¹ She also won the

6. *See About World Athletics*, WORLD ATHLETICS, <https://www.worldathletics.org/about-iaaf> (last visited May 12, 2024) (discussing that World Athletics was previously known as the International Amateur Athletic Federation (IAAF) from 1912 to 2001 and the International Association of Athletics Federations (IAAF) from 2001 to 2019). World Athletics changed its name to better describe the growth of sports. *Id.* *See Book of Rules*, WORLD ATHLETICS, <https://www.worldathletics.org/about-iaaf/documents/book-of-rules> (last visited May 12, 2024), for a list of World Athletics' rules regarding disciplinary appeal procedures. World Athletics' policies can be challenged in the Court of Arbitration for Sport (CAS), and ultimately to the Federal Supreme Court of Switzerland, with the European Court of Human Rights as the last appeal. WORLD ATHLETICS CONST. part XII, §§ 84.2, 84.6.

7. *Mokgadi Caster Semenya*, SAHO (Jan. 13, 2023), <https://www.sahistory.org.za/people/mokgadi-caster-semenya>.

8. *Id.*

9. *Id.*

10. *Id.* (describing that Semenya broke both the African Junior and Senior Championships records while racing at the Junior Championship).

11. *Id.*

popular vote and was crowned the best Track and Field women's 800m runner.¹²

After this meteoric international athletic rise, Semenya faced vocal opposition from competitors and highly-charged-media-fueled controversy over her sex. She became the figurehead for hyperandrogenism and arguments about what a “woman” is.¹³ Between 2009 and 2010, when she was 18 and 19, World Athletics banned Semenya from international competition because it forced her to take a sex test but refused to release her results.¹⁴ When her ban was eventually lifted, she won major races in Finland but later withdrew from the 2010 Commonwealth Games due to injury.¹⁵

World Athletics implemented a new policy in 2011 that banned women from competing at the international level unless their testosterone was within the “accepted range” for women. Women whose testosterone was naturally higher than World Athletics’ accepted range were then forced to do Hormone Replacement Therapy to compete.¹⁶ To comply with the policy, Semenya took daily contraceptive pills from 2010 to 2015.¹⁷ This medication caused her to have regular fevers and constant internal abdominal pain.¹⁸ Semenya later reported that the medication made her sick, gain weight, have panic

12. *Id.*

13. See Savage, *supra* note 1.

14. World Athletics calls this a gender verification test. This conflates gender, a social construct, with biological sex. For consistency I will use “sex test” because that is what it is testing. See Taylor Vann, Note, *Caster Semenya and the Policing of Competitive Athletic Advantage*, 53 CONN. L. REV. 1019, 1021 (2022) (mentioning that Semenya was banned from international competition for a year because of “ambiguity” in her sex test results (quotation omitted)); *id.* (“Pierre Weiss, the general secretary of . . . [World Athletics] . . . stated that the testing [of Semenya] was due to ‘ambiguity, *not because we believe she is cheating.*’” (emphasis added) (quoting Christopher Clarey, *Gender Test After a Global Medal Finish*, N.Y. TIMES (Aug. 9, 2009), <https://www.nytimes.com/2009/08/20/sports/20runner.html>)); see Molly Webster & Sarah Qari, *Gonads: Dutee*, RADIOLAB, at 25:27 (Aug. 5, 2021), <https://radiolab.org/episodes/dutee> (discussing how there is no clear-cut evidence supporting the contention that natural testosterone increases performance in the same manner that artificial testosterone does).

15. *Mokgadi Caster Semenya*, *supra* note 7.

16. See Gerald Imray, *Semenya Taking Case to European Court of Human Rights*, 59 NEWS (Feb. 25, 2021), <https://www.wvntv.com/sports/semeyna-taking-case-to-european-court-of-human-rights>; see also *Hormone Therapy: Is It Right for You?*, MAYO CLINIC (Dec. 6, 2022), <https://www.mayoclinic.org/diseases-conditions/menopause/in-depth/hormone-therapy/art-20046372> (“Hormone replacement therapy [HRT] is medication that contains female hormones. . . . [HRT] is most often used to treat common menopausal symptoms [HRT clinical trials showed an] increased . . . risk of certain serious conditions, including: [h]eart disease, [s]troke, [b]lood clots, [and] [b]reast [c]ancer.”).

17. Sean Ingle, *Caster Semenya Accuses IAAF of Using Her as a ‘Guinea Pig Experiment,’* GUARDIAN (June 18, 2019), <https://www.theguardian.com/sport/2019/jun/18/caster-semenya-iaaf-athletics-guinea-pig>.

18. *Id.*

attacks, and feel like a knife was stabbing her every day.¹⁹ During this time, she came up short and only won the silver medal for the 800m in the 2012 Olympics.²⁰

In 2015, the Court of Arbitration for Sport (CAS), in *Chand v. Athletics Federation of India (AFI)*, suspended this hyperandrogenism policy, and Semenya was no longer required to take birth control medication.²¹ Following the policy suspension, Semenya became the first athlete to win the 400, 800, and 1,500m races with world-leading times at the 2016 South African National Championship.²² She continued to run fast, setting a new national record three months after the South African National Championship.²³ Semenya continued to excel, winning the gold medal in the 800m at the 2016 Olympics.²⁴ During this time period, she continued to face hateful, discriminatory comments from media outlets, international governing bodies, athletic officials, and her own competitors.²⁵ As Semenya was celebrating her historic 2016 win at the Olympics, competitor Lynsey Sharp of Great Britain broke down crying, saying: “Everyone can see it’s two separate races so there’s nothing I can do.”²⁶ Joanna Józwiak of

19. *Olympic Champion Caster Semenya Says She Offered to Show Track Officials Her Body to Prove She Was Female*, ESPN (May 23, 2022), https://www.espn.com/olympics/trackandfield/story/_/id/33972416/olympic-champion-caster-semenya-says-offered-show-track-officials-body-prove-was-female.

20. *Mokgadi Caster Semenya*, *supra* note 7.

21. *Id.* (discussing that since the hyperandrogenism policy was suspended because of Dutee Chand’s legal victory, all athletes previously banned under the policy or those undergoing one of the “treatments” were allowed to run again in their specialty races while World Athletics tried to provide evidence for the policy).

22. *Id.*

23. *Id.*

24. *Id.*

25. See Anna North, “*I Am a Woman and I Am Fast*”: *What Caster Semenya’s Story Says About Gender and Race in Sports*, VOX (May 3, 2019), <https://www.vox.com/identities/2019/5/3/18526723/caster-semenya-800-gender-race-intersex-athletes> (noting Italian runner Elisa Cusma’s comments: “These kind of people should not run with us For me, she is not a woman. She is a man.” (quoting William Lee Adams, *Could This Women’s World Champ Be a Man?*, TIME (Aug. 21, 2009), <https://content.time.com/time/world/article/0,8599,1917767,00.html>)). Media outlets in Australia, such as the *Daily Telegraph*, incorrectly used the offensive word “hermaphrodite” to describe Semenya in articles. *Id.* (citation omitted).

26. See Sean Ingle, *In-form Lynsey Sharp Fears 800m Rio Gold Could Still Be Beyond Reach*, GUARDIAN (June 5, 2016), <https://www.theguardian.com/sport/2016/jun/05/lynsey-sharp-rio-olympics-caster-semenya-francine-niyonsaba>; Gene Cherry, *British Runner Sharp Received Death Threats for Semenya Comments*, REUTERS (May 3, 2019), <https://www.reuters.com/article/us-athletics-diamond-doha-sharp/british-runner-sharp-received-death-threats-for-semenya-comments-idUSKCN1S924F>; see also Ben Bloom, *Lynsey Sharp Interview: ‘I’ve Received Death Threats About Caster Semenya, but People Think I’ve Said Worse Than I Have,’* TELEGRAPH (May 2, 2020), <https://www.telegraph.co.uk/athletics/2020/05/02/lynsey-sharp-interview-didnt-do-anything-not-sure-apologising> (discussing how Lynsey reported facing death threats about her post-race comments, but doubled down

Poland, who placed fifth, argued in interviews that she was the “‘first European’ and ‘second white’” to finish.²⁷

Over the next several years, Semenya used her newfound-public-figure status to inspire children and athletes in her home country. She partnered with another South African entrepreneur to provide menstrual health education and affordable sanitary products to rural areas.²⁸ Semenya also married her wife, establishing herself as a queer icon to South Africans and the world at large.²⁹ However, her luck quickly soured in 2018 when World Athletics promulgated a new hyperandrogenism rule, which required athletes with natural testosterone levels above 5 nmol/L³⁰ and androgen sensitivity to do one of three things: (1) take birth control medication; (2) take hormone-blocking injections; or (3) undergo surgical removal of male genitalia for athletes born intersex.³¹ World Athletics set the limit at 5 nmol/L “because

on her sentiment, saying: “People still occasionally message me now and ask if I’m going to apologize to Caster. I didn’t do anything, I’m not sure what I would be apologizing for”).

27. *Transmissions: The Lines Blur*, PRIDESOURCE (May 16, 2019),

<https://pridesource.com/article/transmissions-the-lines-blur>; *Rio 2016 Athletics 800M Women Results*, OLYMPICS, <https://olympics.com/en/olympic-games/rio-2016/results/athletics/800m-women> (last visited May 12, 2024) (listing results from the race, showing that Canadian middle-distance runner Melissa Bishop-Nriagu finished fourth (before Joanna Józwik) and Lynsey Sharp of Great Britain finished sixth).

28. *Mokgadi Caster Semenya*, *supra* note 7.

29. Jim Buzinski, *Olympic Gold Medalist Caster Semenya Marries Her Girlfriend*, OUTSPORTS (Jan. 9, 2017), <https://www.outsports.com/2017/1/9/14217014/olympic-gold-medalist-caster-semenya-violet-rasboya-wedding>; Roberto Igual, *Caster Semenya Among Queer Icons and Allies Honoured by Time Magazine*, MAMBAONLINE.COM (Apr. 18, 2019), <https://www.mambaonline.com/2019/04/18/caster-semenya-among-queer-icons-and-allies-honoured-by-time-magazine>.

30. *Revoke Discriminatory Athletics Gender Regulation*, HUM. RTS. WATCH (July 26, 2018), <https://www.hrw.org/news/2018/07/26/revoke-discriminatory-athletics-gender-regulations>;

see, e.g., Nanomoles Per Liter (nmol/L), N.Y.-PRESBYTERIAN,

<https://www.nyp.org/healthlibrary/definitions/nanomoles-per-liter-nmol> (last updated Oct. 24, 2023)

The abbreviation nmol/L stands for nanomoles per liter. *Id.* A mole is an amount of substance that is traditionally used to measure very small substances, such as a molecule or an atom. *Id.* 10 nmol/L would be 10 one billionths of a mole per liter of fluid volume. Therefore, 10 nmol/L in the context of the hyperandrogenism policy is where there are 10 nanomoles of testosterone present in a liter of blood.

31. INT’L AMATEUR ATHLETICS FED’N, ELIGIBILITY REGULATIONS FOR THE FEMALE CLASSIFICATION 1, 3–4 (2019), <https://worldathletics.org/download/download?filename=3d71ba69-d3db-4b61-800a-fcb333c89ad7.pdf&urlslug=ExplanatoryNotes%3AIAAFEligibilityRegulationsfortheFemaleClassification>

on (describing that this new rule was promulgated at the request of the CAS in *Chand v. AFI*, CAS 2014/A/3759 (Ct. of Arb. for Sport 2015); it required World Athletics to provide more evidentiary support for the policy to stand). The only differences between the new and old policy were the new evidentiary support and the 400m to 1,500m ban; the ban on middle-distance races resulted from claims World Athletics made that the new evidence showed higher testosterone impacted only middle-distance races. *Id.* at 3–4.

more than 99% of females have around 0.12–1.79 nmol/L of testosterone.”³² According to World Athletics, “differences of sexual development” (DSD) athletes have testosterone levels in the 7.7–29.4 nmol/L male range.³³ This rule prevented middle-distance athletes from competing in their specialty races, such as Semenya in the 800m.³⁴

After World Athletics promulgated the new regulation, Semenya appealed to the CAS.³⁵ Semenya lost at the CAS, appealed to the Swiss Supreme Court, and lost again.³⁶ In 2022, she appealed once more to the European Court of Human Rights (ECHR) who released a preliminary decision in favor of Semenya in July of 2023; the ECHR held that the Swiss Supreme Court failed to provide her an adequate procedural process—a decision which the Swiss state appealed to the ECHR’s Grand Chamber for a final judgment.³⁷ Semenya still argues that Switzerland violated her rights

32. Sean Ingle, *Caster Semenya’s Olympic Hopes Fade as Runner Loses Testosterone Rules Appeal*, *GUARDIAN* (Sept. 8, 2020), <https://www.theguardian.com/sport/2020/sep/08/caster-semenya-loses-appeal-against-world-athletics-testosterone-rules> [hereinafter Ingle, *Caster Semenya’s Olympic Hopes*]; see Ingle, *supra* note 17; see also Sean Ingle, *Francine Niyonsaba Becomes First Athlete with DSD to Break World Record*, *GUARDIAN* (Sept. 14, 2021), <https://www.theguardian.com/sport/2021/sep/14/francine-niyonsaba-becomes-first-athlete-with-dsd-to-break-world-record-2000m-athletics-zagreb> [hereinafter Ingle, *Francine Niyonsaba*].

33. Ingle, *supra* note 17; Ingle, *Caster Semenya’s Olympic Hopes*, *supra* note 32. I will use both intersex and DSD, but they are not interchangeable. DSD will be used when discussing medical terminology or World Athletics’ policy. Intersex will be used to describe individuals who were born intersex and were affected by the hyperandrogenism policy. *Differences in Sex Development*, NHS (Mar. 16, 2023), <https://www.nhs.uk/conditions/differences-in-sex-development> (discussing that DSD stands for “[d]ifferences in sex development,” and is a medical term used to describe when a person’s sexual development is different than what is considered normal). For example, people with XX chromosomes might have 46, XX DSD which involves a more developed clitoris and closed vagina. *Id.* DSD is a complicated term that is not always welcome in the intersex community. See *Glossary of Terms Related to Transgender Communities*, STAN. UNIV.: VADEN HEALTH SERVS., <https://vaden.stanford.edu/medical-services/lgbtqia-health/glossary-terms-related-transgender-communities> (last visited May 12, 2024).

34. Melissa Block, *Olympic Runner Caster Semenya Wants to Compete, Not Defend Her Womanhood*, *NPR* (July 28, 2021), <https://www.npr.org/sections/tokyo-olympics-live-updates/2021/07/28/1021503989/women-runners-testosterone-olympics>. The rule applied to middle-distance races, which are the 400m to 1,500m. *Id.*

35. *Id.*

36. *Semenya v. Int’l Ass’n of Athletics Fed’ns.*, CAS 2018/O/5794, ¶¶ 620, 626 (Ct. of Arb. for Sport 2018).

37. *‘A Long Time Coming’: Caster Semenya ‘Elated’ to Win Discrimination Case*, *GUARDIAN* (July 12, 2023), <https://www.theguardian.com/sport/2023/jul/12/caster-semenya-elated-court-ruling-human-rights-discrimination-case> (discussing the ECHR’s preliminary decision and noting that World Athletics is “encourage[ing] the Swiss state to refer the matter” to the ECHR’s Grand Chamber for a final ruling); *Olympic Champion Caster Semenya Says She Offered to Show Track Officials Her Body to Prove She Was Female*, *supra* note 19. The ECHR’s Grand Chamber heard the appeal on May 15 and the final binding decision is “not expected for several months.” *European Rights Court to Make Final Decision on Olympic Champion Semenya*, *FRANCE 24* (May 14, 2024), <https://www.france24.com/en/europe/20240514-european-rights-court-to-make-final-decision-on->

when it failed to protect her under the European Convention on Human Rights (Convention).³⁸

In the meantime, Semenya has refused to take any birth control medication. Instead, she tried switching to events outside of the 400m to 1,500m ban. In 2020, Semenya attempted to qualify for the Tokyo Olympics in the 200m but was roughly half a second short.³⁹ In 2021, Semenya competed in the 5,000m, running 22 seconds slower than the necessary qualifying time.⁴⁰ Semenya ultimately failed to qualify for the 2021 Tokyo Olympics and is still banned from racing her specialty event.⁴¹ Most recently, in March of 2023, World Athletics further restricted the range to 2.5 nmol/L for any female event.⁴² As a result, Semenya is now barred from running any female event, regardless of distance, unless she takes birth control medication, hormone-blocking injections, or undergoes invasive surgery.

2. María José Martínez-Patiño of Spain

María José Martínez-Patiño is a former Spanish hurdler and one of the most well-known cases of World Athletics' banning athletes from competition based on forced sex testing. Martínez-Patiño was 22-years old when she ran at the 1983 World Championships in Helsinki.⁴³ There, she

olympic-champion-semenya; Nick Said, *Semenya Case Referred to European Rights Court's Grand Chamber*, REUTERS (Nov. 6, 2023), <https://www.reuters.com/sports/athletics/semenya-case-referred-european-rights-courts-grand-chamber-2023-11-06>.

38. Suyin Haynes, *Olympic Champion Caster Semenya Is Taking Her Fight to Compete to the European Court of Human Rights*, TIME (Feb. 25, 2021), <https://time.com/5942286/caster-semenya-women-sports-european-court-human-rights> (discussing that Semenya is bringing the case against Switzerland because the CAS is an organization based in Switzerland). For a full list of the articles in the European Convention on Human Rights, see *What Is the European Convention on Human Rights?*, *supra* note 3 (discussing that the European Convention on Human Rights is a series of Articles that protect the human rights of the people living in the Member States party to the Convention).

39. Nick Said, *'Supernatural' Semenya Confident of 200m Success*, REUTERS (Mar. 14, 2020), <https://www.reuters.com/article/athletics-semenya/athletics-supernatural-semenya-confident-of-200m-success-idUSL8N2B70FI>.

40. Rory Jiwani, *Caster Semenya Misses Out on 5000m Olympic Qualifying Time in Durban*, OLYMPICS (May 28, 2021), <https://olympics.com/en/news/athletics-caster-semenya-misses-5000m-olympic-qualifying-time-durban>.

41. Block, *supra* note 34.

42. Press Release, World Athletics, *World Athletics Council Decides on Russia, Belarus and Female Eligibility* (Mar. 23, 2023), <https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility> [hereinafter 2023 Press Release].

43. See *María José Martínez*, WORLD ATHLETICS, <https://worldathletics.org/athletes/spain/maria-jose-martinez-patino-14559761> (last visited May 12, 2024) (showing that Martínez-Patiño was born in 1961, making her 22 years old at the Helsinki 1983 World Championships).

passed her first forced sex test, receiving a “Certificate of Femininity.”⁴⁴ Martínez-Patiño forgot her certificate two years later at the World University Games in Japan and was forced to take another sex test.⁴⁵ This time she failed and was banned from competition. Martínez-Patiño stated that at the time she wondered if she might have AIDS or leukemia, the latter of which had killed her brother.⁴⁶

Martínez-Patiño’s forced sex test results showed that she was a 46, XY woman⁴⁷ who had androgen insensitivity syndrome (AIS).⁴⁸ Martínez-Patiño’s team doctor told her to withdraw from competition, stop racing, or feign an injury to buy time to meet with specialists.⁴⁹ She complied at first, but later refused; she ran and won the 60m hurdles at the Spanish National Championships.⁵⁰ Subsequently, Martínez-Patiño’s sex test results were leaked. The Spanish team expelled her from the athletes’ residences, revoked her sports scholarship, and erased her racing records.⁵¹ In her own words, she stated: “But I knew that I was a woman, and that my genetic difference gave me no unfair physical advantage. I could hardly pretend to be a man; I have breasts and a vagina. I never cheated. I fought my disqualification.”⁵²

Arne Ljungqvist, medical chairman of the International Federation for Athletics (a predecessor organization to World Athletics), revoked Martínez-

44. Cyd Zeigler, *Moment #27: María José Martínez-Patiño Kicked Off Spanish Track Team, Titles Stripped*, OUTSPORTS (Sept. 7, 2011), <https://www.outsports.com/2011/9/7/4051788/moment-27-maria-jose-martinez-patino-kicked-off-spanish-track-team>; see generally *X-linked Inheritance*, KHAN ACAD., <https://www.khanacademy.org/science/ap-biology/heredity/non-mendelian-genetics/a/sex-linkage-sex-determination-and-x-inactivation> (last visited May 12, 2024) (passing a sex test means the sex test comes back with a XX karyotype, the karyotype traditionally associated with people assigned female at birth); Amalia Dutra, *Karyotype*, NIH, <https://www.genome.gov/genetics-glossary/Karyotype> (last updated May 9, 2024) (defining karyotype as “an individual’s complete set of chromosomes”).

45. María José Martínez-Patiño, *Personal Account: A Woman Tried and Tested*, 366 LANCET (SPECIAL ISSUE) S38, S38 (2005).

46. *Id.* (detailing that Martínez-Patiño’s team doctor told her to sit out from competition without explanation, which, since she had never doped, made her think she had a serious illness such as AIDS or leukemia).

47. *Swyer Syndrome*, MEDLINEPLUS, <https://medlineplus.gov/genetics/condition/swyer-syndrome> (last updated Feb. 25, 2022) (“[46, XY women] have a uterus and fallopian tubes, but their gonads (ovaries or testes) are not functional.”).

48. See Pedro Cifuentes, “¡La Peti es un tío!”: María José Patiño, vida y resurrección de la aqfhdcatleta que fue hombre durante cuatro años, EL CONFIDENCIAL (Feb. 25, 2021), https://www.elconfidencial.com/deportes/atletismo/2021-02-25/maria-jose-patino-atletismo-intersexual-genero-deporte_2965083; *Causes: Androgen Insensitivity Syndrome*, NHS, <https://www.nhs.uk/conditions/androgen-insensitivity-syndrome/causes> (last updated Mar. 18, 2021) (defining AIS as a “genetic alteration that means the body cannot respond to testosterone either completely or partially”).

49. Martínez-Patiño, *supra* note 45.

50. *Id.*

51. *Id.*

52. *Id.*

Patiño's ban in 1988—three years after she had last raced.⁵³ Martínez-Patiño attempted to qualify for the 1992 Barcelona Olympics; however, the involuntary time away from the sport had impacted her, and she failed to run an Olympic qualifying time by one-tenth of a second.⁵⁴

3. Ewa Janina Kłobukowska of Poland

Ewa Janina Kłobukowska is a former Polish sprinter with multiple Olympic and European Championship medals and world records.⁵⁵ Unlike Martínez-Patiño, whose story is well-known because of her academic work outside of running, Kłobukowska's is largely lost to history. However, when she was competing, Kłobukowska was widely known as the fastest woman in the world during the mid-1960s.⁵⁶ A forced sex test taken before the 1967 European Cup wrongly labeled Kłobukowska as not female, even though Kłobukowska had passed the nude sex test the year prior to competing.⁵⁷ As a result, World Athletics annulled her records and banned her from competition in 1967, and Kłobukowska faded from the public eye.⁵⁸

Later, at the 1968 Mexico Olympics, medical professionals found World Athletics' test procedures inaccurate.⁵⁹ The 1967 test inaccurately labeled Kłobukowska's sex, meaning she would have been eligible to compete if there were accurate testing procedures because she had a Barr body in all of her cells.⁶⁰ Kłobukowska likely had an XX/XXY genetic mosaic.⁶¹ Kłobukowska almost committed suicide because of the humiliation she faced around the complete erasure of all of her accomplishments.⁶² The

53. *Id.*

54. Zeigler, *supra* note 44.

55. *Ewa Klobukowska*, OLYMPICS, <https://olympics.com/en/athletes/ewa-klobukowska> (last visited May 12, 2024).

56. *Id.*

57. *See id.*

58. *Id.*

59. *See id.*; Katie Thomas, *Gender Tests for Olympians: A Relic That Persists*, N.Y. TIMES (July 30, 2008), <https://www.nytimes.com/2008/07/30/sports/30iht-GENDER.1.14880817.html>.

60. *Ewa Klobukowska*, *supra* note 55; *Barr Body*, BIOLOGY DICTIONARY (Apr. 28, 2017), <https://biologydictionary.net/barr-body> (defining Barr body as “the inactive X chromosome in female . . . cells”).

61. Robert Ritchie et al., *Intersex and the Olympic Games*, 101 J. ROYAL SOC'Y MED. 395, 397 (2008); *see* Natalie Downs, *How Rare Is DNA Mosaicism of the Sex Chromosomes*, THE TECH INTERACTIVE (Apr. 6, 2016), <https://www.thetech.org/ask-a-geneticist/articles/2016/mosaicism-x-and-y/> (describing 46, XX/47, XXY as an incredibly rare DSD where individuals may have both ovarian and testicular tissues). A mosaicism is where some cells contain, in Kłobukowska's case, XX and others XXY. *See id.*

62. *Ewa Klobukowska – sskrzywdzona mistrzyni*, DZIEJE.PL (July 14, 2016), <https://dzieje.pl/aktualnosci/ewa-klobukowska-skrzywdzona-mistrzyni>.

International Olympic Committee (IOC)⁶³ changed its sex verification policies after seeing the humiliation Kłobukowska faced.⁶⁴

4. Santhi Soundarajan of India

Santhi Soundarajan is a former Tamil track athlete from India who specialized in the 800m and 1,500m.⁶⁵ Prior to being banned, she won 12 medals on the world stage.⁶⁶ She was the first Tamil woman to win a medal at the 2006 Asian Games, which was later stripped after she failed a forced sex test that same year.⁶⁷ Soundarajan attempted suicide, and stated that “Indian authorities had not fought [for her] after she was stripped” of her Asian Games medal.⁶⁸ Soundarajan was pivotal in setting the stage for an eventual legal challenge to the policy.

63. *International Olympic Committee*, INT’L OLYMPIC COMM., <https://olympics.com/ioc/overview> (last visited May 12, 2024) (noting that the IOC is located in Lausanne, Switzerland); *International Sports Federations*, INT’L OLYMPIC COMM., <https://olympics.com/ioc/international-federations> (last visited May 12, 2024) (discussing that World Athletics sets the rules that the IOC must follow). World Athletics’ rules apply to every international athletic competition involving running, while the IOC is a non-governmental organization based in Switzerland in charge of organizing the Olympics. *Id.*; Frankie de la Cretaz, *The IOC Has a New Trans-Inclusion Framework, but Is the Damage Already Done?*, SI (Mar. 23, 2022), <https://www.si.com/olympics/2022/03/23/transgender-athletes-testosterone-policies-ioc-framework>. The IOC released a new non-binding framework in 2022 regarding trans-athletes, which encourages transitioning away from the current testosterone restrictions adopted from World Athletics’ hyperandrogenism policy but does not set specific time frames for implementation. *Id.* In doing so, the framework rejects the presumption that XY sex chromosomes automatically confers an advantage. *Id.* However, the framework gives wide discretion for sport-specific organizations to promulgate their own regulations regarding trans and DSD athletes. This discretion allows sport-specific organizations to adopt any regulations, such as alternative competitions like open events. If allowed, this would further alienate women athletes, such as Semenya. It would label them as something “other” by forcing them to compete in an open event because they are deemed as not “woman” enough. 2023 Press Release, *supra* note 42. World Athletics has used this framework to “exclude male-to-female transgender athletes who have been through male puberty from female” events. *Id.*

64. *Ewa Kłobukowska*, *supra* note 55.

65. *Santhi ‘Medal Should Be Returned,’* BBC: NEWS, http://news.bbc.co.uk/2/hi/south_asia/8253880.stm (last updated Sept. 14, 2009); *Soundarajan Santhi*, WORLD ATHLETICS, <https://worldathletics.org/athletes/india/soundarajan-shanti-14283061> (last visited May 12, 2024).

66. *Santhi ‘Medal Should Be Returned,’* *supra* note 65.

67. Susan Ninan, *Poll Ticket, Crowd-Funded Academy on Santhi’s Agenda*, TIMES INDIA (Mar. 20, 2016), <https://timesofindia.indiatimes.com/sports/more-sports/athletics/Poll-ticket-crowd-funded-academy-on-Santhis-agenda/articleshow/51295052.cms>.

68. *Santhi ‘Medal Should Be Returned,’* *supra* note 65.

5. Dutee Chand of India

Dutee Chand is a sprinter who was the first Indian to win a gold medal in an international 100m competition, the third-ever Indian woman to qualify for the Olympics' in the 100m, and India's first-ever openly queer athlete.⁶⁹ Chand was forced to sit out from competition in 2014 after the Athletic Federation of India (AFI) stated that hyperandrogenism made her ineligible.⁷⁰ Chand "refused to subject herself" to World Athletics' prescribed "corrective" surgery.⁷¹ She appealed her ban to the CAS, which held that there was no evidence supporting Chand's suspension.⁷² This suspension effectively removed the ban on Chand while World Athletics redesigned the policy.⁷³ During Chand's court challenge, Soundarajan showed support for her, emphasizing that World Athletics should not have banned Chand.⁷⁴

6. Francine Niyonsaba of Burundi

Francine Niyonsaba is a Burundian runner, formerly specializing in the 800m.⁷⁵ She was born with a 46, XY karyotype.⁷⁶ Niyonsaba was second at the 2016 Rio Olympic Games, earning the silver medal and winning the first Olympic medal in twenty years for Burundi.⁷⁷ Following this success, World Athletics banned Niyonsaba under the new 2019 hyperandrogenism

69. *Dutee Chand*, OLYMPICS, <https://olympics.com/en/athletes/dutee-chand> (last visited May 12, 2024); *Dutee Chand Becomes First Openly Gay Indian Athlete*, BBC (May 19, 2019), <https://www.bbc.com/news/world-asia-india-48327918>.

70. See Matt Slater, *Sport & Gender: A History of Bad Science & 'Biological Racism'*, BBC: SPORT (July 28, 2015), <https://www.bbc.com/sport/athletics/29446276>.

71. *Id.*

72. *Chand v. Athletics Fed'n of India (AFI)*, CAS 2014/A/3759, ¶ 548 (Ct. of Arb. for Sport 2015).

73. John Branch, *Dutee Chand, Female Sprinter with High Testosterone Level, Wins Right to Compete*, N.Y. TIMES (July 27, 2015), https://www.nytimes.com/2015/07/28/sports/international/dutee-chand-female-sprinter-with-high-male-hormone-level-wins-right-to-compete.html?_r=0.

74. Krithika Gopalkrishnan, *Santhi Urges Establishment to Help Sidelined Dutee*, NEW INDIAN EXPRESS (July 19, 2014), <https://www.newindianexpress.com/sport/2014/jul/19/Santhi-Urges-Establishment-to-Help-Sidelined-Dutee-637658.html>.

75. *5,000-Meter Runner Francine Niyonsaba Withdraws from World Championships Citing Foot Injury That Hampered Training*, ESPN (July 11, 2022), https://www.espn.com/olympics/trackandfield/story/_/id/34227049/5000-meter-runner-francine-niyonsaba-withdraws-world-championships-citing-foot-injury-hampered-training.

76. *Id.*; see, e.g., Dutra, *supra* note 44 (discussing how karyotype is a person's entire set of chromosomes, which is often used to examine for abnormalities in chromosomal structure).

77. Diane Uwimana, *Francine Niyonsaba: "My Dream Is to Win 2020 Gold Medal"*, IWACU ENG. NEWS (Sept. 20, 2016), <https://www.iwacu-burundi.org/englishnews/francine-niyonsaba-my-dream-is-to-win-2020-gold-medal>; see *5,000-Meter Runner Francine Niyonsaba Withdraws from World Championships Citing Foot Injury That Hampered Training*, *supra* note 75.

regulations.⁷⁸ As a result of her ban, Niyonsaba moved up in distance away from the 800m to avoid hormone-reducing medication, birth control, or surgery.⁷⁹

B. History of World Athletics' Policy

1. Hyperandrogenism Policies and Sex Testing Pre-*Chand v. AFI*

In 1946, World Athletics required all female athletes, prior to competing, to submit a note from their doctor verifying their sex.⁸⁰ During the Cold War, athletic officials became worried that fraudulent documentation would be used to cheat the system.⁸¹ As a result, World Athletics started comprehensive sex tests in 1968.⁸² At the start, tests were done by making women strip off all of their underwear.⁸³ This “nude parade,” as it was called, involved women stripping naked in front of male doctors and athletic officials.⁸⁴

World Athletics eventually moved to less-explicit and invasive sex tests, such as buccal swabs, to determine questioned athletes' karyotypes.⁸⁵ Despite feedback from endocrinologists and geneticists emphasizing that chromosomes were not a single identifier of sex, but because of World Athletics' regulatory authority, the IOC accepted buccal swabs as the standard test.⁸⁶ World Athletics eventually halted mandated buccal swabs in 1992 but kept “the right to check any ‘suspicious’ competitors.”⁸⁷ The IOC switched to polymerase chain reaction testing, “which used DNA to

78. Ben Morse, *Burundi's Francine Niyonsaba, Who Has an Intersex Condition, Breaks World Record*, CNN (Sept. 15, 2021), <https://www.cnn.com/2021/09/15/sport/francine-niyonsaba-intersex-world-record-spt-intl/index.html>.

79. See Ingle, *Francine Niyonsaba*, *supra* note 32.

80. Lindsay Pieper, *Hyperandrogenism Regulations in Sport*, SPORT IN AMER. HIST. (Sept. 17, 2015), <https://ussporthistory.com/2015/09/17/hyperandrogenism-regulations-in-sport>.

81. *Id.* (discussing that this fear of fraudulent documentation and subjective need for sex testing comes from the “increased cultural capital” of winning in international sport and the entrenchment of the Western idea of femininity).

82. Slater, *supra* note 70. Prior to 1968, the sex test scheme was not extensive and was primarily at the discretion of World Athletics. See *id.* After 1968, however, sex tests were comprehensive until Martínez-Patiño's sex test results were found to be wrong. *Id.* After which, testing returned to focusing on suspicious athletes. *Id.*

83. Pieper, *supra* note 80.

84. *Id.*; Webster & Qari, *supra* note 14, at 9:41.

85. Pieper, *supra* note 80; see, e.g., *Buccal Smear*, UCSF HEALTH (Apr. 24, 2023), <https://www.ucsfhealth.org/medical-tests/buccal-smear> (discussing that buccal swabs, or buccal smears, are one method to collect DNA where cells are collected from the inside of a person's cheek).

86. Pieper, *supra* note 80.

87. *Id.*

[classify] sex”; however, this test was highly inaccurate in determining sex and led to a large number of false positives.⁸⁸ As a result, the IOC stopped all sex testing in 1999.⁸⁹

In the early 2010s, IOC officials implemented World Athletics’ hyperandrogenism policy and required all National Olympic Committees to investigate any departures from traditional sex stereotypes.⁹⁰ Originally, World Athletics “drew [the] line” at 10 nmol/L.⁹¹ If a female athlete had testosterone higher than 10 nmol/L they were not able to compete at any distance unless the athlete could (1) prove androgen resistance or (2) subject themselves to “medical intervention to suppress” their natural hormone levels.⁹² Under this version of World Athletics’ hyperandrogenism policy, any “female athlete who decline[d], fail[ed], or refuse[d] to comply with the eligibility determination process” was banned from competition.⁹³ Before the 2012 London Olympics, the IOC banned four Olympic athletes from competition under this policy and ordered the athletes to France for what was called “treatment.”⁹⁴ The doctors conducted various “corrective measure[s]” when treating the athletes, such as “feminizing vaginoplasty,” which was an “aesthetic (re)construction of the vagina.”⁹⁵

In 2014, Chand challenged her suspension in the CAS, leading to the *Chand v. Athletics Federation of India (AFI)* decision.⁹⁶ During the CAS proceeding, Chand referenced endocrinologist Richard Holt who stated that scientific studies could not conclusively prove that testosterone was a singular factor for athletic success.⁹⁷ Holt argued that other factors, such as

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Androgen resistance and AIS for purposes of this article are interchangeable. See *Causes Androgen Insensitivity Syndrome*, *supra* note 48, for a further description.

93. *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>.

94. Pieper, *supra* note 80 (“The medical practitioners responsible [for sending the athletes to treatment] noted that the women were muscular, slim, and tall, and all hailed from ‘rural or mountainous regions of developing countries.’” (citation omitted)); Geneva Abdul, *This Intersex Runner Had Surgery to Compete. It Has Not Gone Well.*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2019/12/16/sports/intersex-runner-surgery-track-and-field.html>.

Annet Negesa, a Ugandan 800m runner, was one of the athletes sent to France for examinations. *Id.* Negesa reports that a World Athletics’ doctor recommended her undergo a gonadectomy (an irreversible invasive surgery) as the first treatment option, rather than potentially temporary hormonal medication. *Id.* World Athletics sent her from France to Uganda to have the unnecessary surgery to remove her internal testes. *Id.*

95. Pieper, *supra* note 80.

96. *Id.*

97. *Id.*

wealth, height, and training affected success.⁹⁸ Biomedical ethicist Katrina Karkazis argued that the 10 nmol/L point was arbitrary and inaccurate.⁹⁹ Endogenous testosterone levels overlap between gender, just as heights overlap.¹⁰⁰ Effectively, in *Chand*, the CAS ordered World Athletics to suspend its hyperandrogenism policy because there was not sufficient evidence to support the policy's claimed justification of ensuring fair competition.¹⁰¹ Previously banned athletes who refused to undergo unwanted medical treatment could now compete in their preferred events because the CAS ruling in *Chand* suspended the policy.

2. Hyperandrogenism Policies and Sex Testing Post-*Chand v. AFI*

In 2015, in *Chand*, the CAS suspended World Athletics' hyperandrogenism policy.¹⁰² The CAS ruling reported that World Athletics lacked evidence showing that testosterone increased female athletic performance.¹⁰³ The CAS gave World Athletics two years to provide the necessary evidence to support the policy, or else the policy would become void.¹⁰⁴

Within the two-year time limit, World Athletics announced its new regulation.¹⁰⁵ The new regulation again required athletes, this time with natural testosterone levels above 5 nmol/L and androgen sensitivity, to: (1) take birth control medication; (2) receive hormone-blocking injections;

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* (“[T]here is presently insufficient evidence about the *degree* of the advantage that androgen-sensitive hyperandrogenic females enjoy over non-hyperandrogenic females [It is] not self-evident that a female athlete with a level of testosterone above 10 nmol/L would enjoy the competitive advantage of a male athlete.” (first alteration in original) (citation omitted)).

102. *Chand v. Athletics Fed’n of India (AFI)*, CAS 2014/A/3759, ¶ 548 (Ct. of Arb. for Sport 2015).

103. *Id.*

104. *Id.*

105. Strashin, *supra* note 5. Strashin writes:

But the science has never fully backed up the [World Athletics’] claim that so-called DSD athletes have a massive advantage in women’s races The track body’s latest research says athletes like Semenya enjoy a “competitive advantage” but still fails to demonstrate that even a 10 per cent edge exists.

Id.; Rory Carroll & Amy Tennery, *World Athletics Proposes Tighter Rules for Transgender Women Athletes*, REUTERS (Jan. 21, 2023), <https://www.reuters.com/lifestyle/sports/world-athletics-proposes-tighter-rules-transgender-women-athletes-2023-01-21>. As of writing this article in May 2023, World Athletics announced its new stringent 2.5 nmol/L testosterone limits for DSD athletes and a complete bar on all transgender athletes who underwent male puberty. 2023 Press Release, *supra* note 42. These stricter guidelines only strengthen the severity of the punishment and provide for an even stronger argument for an Article 3 violation. *See infra* Part II.A.

or (3) undergo surgical removal of male genitalia for athletes born intersex.¹⁰⁶ World Athletics changed the previous 10 nmol/L limit because “most females” have around 0.12–1.79 nmol/L of testosterone.¹⁰⁷ Male athletes, World Athletics states, have testosterone levels in the 7.7–29.4 nmol/L male range.¹⁰⁸

This regulation received considerable criticism and public outcry, citing racism as the motive behind the policy.¹⁰⁹ Critics noted that the policy required suspicious-looking athletes to undergo a forced sex test.¹¹⁰ Notably, previous white female athletes with similar “masculine” characteristics were not required to undergo a sex test.¹¹¹ In response to objections related to the birth control medication requirement to compete in the 400m to 1,500m, World Athletics stated that:

There are some effects of the medication that might be considered as or confused with “side effects” but are in fact the desired effects of treatment to reduce testosterone levels. . . . For many 46 XY individuals with one of these DSDs and a female gender identity, such treatment is the recognised standard of care, and the medication helps to change their body to better reflect their chosen gender. . . . We have also pointed out that in 46 XY DSD

106. INT’L AMATEUR ATHLETICS FED’N, *supra* note 31, at 3–4.

107. *Id.* at 2.

108. *Id.*

109. See Press Release, World Med. Ass’n, WMA Urges Physicians Not to Implement IAAF Rules on Classifying Women Athletes (Apr. 25, 2019), <https://www.wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes> (discussing that the World Medical Association, an international organization that represents physicians, is one of many organizations that criticized the policy). They came forward, stating that the restrictions were based on “weak evidence,” were unethical, and urged nonenforcement because there is no apparent medical need. *Id.* (“The WMA calls on physicians to oppose and refuse to perform any test or administer any treatment or medicine which is not in accordance with medical ethics, and which might be harmful to the athlete using it, especially to artificially modifying blood constituents, biochemistry or endogenous testosterone.”).

110. *Id.*; *Mokgadi Caster Semenya*, *supra* note 7.

111. See, e.g., Jeré Longman, *Track’s Most Resilient (and Suspect) Record Is in Danger*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/sports/olympics/jarmila-kratochvilova-800-meters-record.html> (discussing the controversy around former Czech runner Jarmila Kratochvílová, who still holds the 800m record); Jonathan Gault, *The Olympic Track & Field MVPs, Part II: 1964–2016*, LETSRUN.COM (July 30, 2020), <https://www.letsrn.com/news/2020/07/the-olympic-track-field-mvps-part-ii-1964-2016> (discussing the controversy surrounding Soviet runner Nadezhda Olizarenko, who held the record prior to Kratochvílová, with the author writing that there was “a better chance [he] end[ed] up marrying Emma Watson than . . . [Olizarenko’s] performance [being] clean”). Both Kratochvílová and Olizarenko are examples of white-female athletes that had similar “masculine” characteristics yet were not required to undergo a sex test. See Longman, *supra*; Gault, *supra*; see also *Mokgadi Caster Semenya*, *supra* note 7.

individuals, reducing serum testosterone to female levels by using a contraceptive pill (or other means) is the recognised standard of care for 46 XY DSD individuals with female gender identity (whether those individuals are athletes, or not). These medications are gender-affirming.¹¹²

World Athletics further addressed discrimination allegations by saying that unequal treatment could still be lawful, as long as the rule or policy is a “necessary and proportionate means of achieving a legitimate objective.”¹¹³ World Athletics has since promulgated a more invasive and stringent policy, lowering the allowed testosterone levels to 2.5 nmol/L, and barring from any female event all female athletes who fail to meet that barometer.¹¹⁴

112. Press Release, World Athletics, IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations (May 7, 2019), <https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>.

113. *Id.*

114. 2023 Press Release, *supra* note 42.

II. WORLD ATHLETICS' CURRENT POLICY VIOLATES ARTICLES 3, 8, AND 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. This Hyperandrogenism Policy Violates Article 3's Prohibition on Inhuman or Degrading Treatment from the European Convention on Human Rights

1. Forced Medical Treatments Rise to the Level of Torture, a Higher Standard than Inhuman or Degrading Treatment, as Established by Article 3 Precedent

Article 3 prohibits two categories of treatment: torture and inhuman or degrading actions.¹¹⁵ Torture, as defined in the United Nations Convention against Torture, is “the intentional infliction of severe pain or suffering” with the purpose of “obtaining information or a confession, inflicting punishment or intimidation.”¹¹⁶ This Article provides absolute protection for Member States’ citizens from torture and inhuman or degrading treatment. There are no exceptions. Derogation from Article 3 is never allowed. This protection remains intact despite public emergencies that threaten the nation.¹¹⁷ Historically, Article 3 has been interpreted as imposing a negative obligation, where Member States must refrain from harming individuals in their territory.¹¹⁸ However, more recently, the European Court of Human Rights (ECHR) has interpreted the Article as imposing a positive obligation to provide protection, take measures to protect individuals, and investigate claims of violation.¹¹⁹

115. EUR. CT. HUM. RTS., GUIDE ON ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: PROHIBITION OF TORTURE 12 (2022), https://www.echr.coe.int/Documents/Guide_Art_3_ENG.pdf [hereinafter GUIDE ON ARTICLE 3].

116. *Id.* at 7 (first citing *Selmouni v. France*, 1999-V Eur. Ct. H.R. 149, 153; then citing *Salman v. Turkey*, 2000-VII Eur. Ct. H.R. 365, 369; and then citing *Petrosyan v. Azerbaijan*, App. No. 32427/16, ¶ 68 (Feb. 28, 2022), <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-212965%22>);).

117. *See Mocanu v. Romania*, 2014-V Eur. Ct. H.R. 437, 442–43; *El-Masri v. Yugoslav Republic of Maced.*, 2012-VI Eur. Ct. H.R. 263, 266–67; *Z.A. v. Russia*, App. Nos. 61411/15, 61420/15, 61427/15, and 3028/16, ¶¶ 187–88 (Nov. 21, 2019), <https://hudoc.echr.coe.int/eng-press#%22itemid%22:%22003-6568858-8695882%22> (holding that the prohibition is absolute, public emergency doesn't waive it).

118. GUIDE ON ARTICLE 3, *supra* note 115, at 6.

119. *Id.*; *Some Definitions*, COUNCIL OF EUR., <https://www.coe.int/en/web/echr-toolkit/definitions> (last visited May 12, 2024) (defining “positive obligations” as a Member State’s duty to “take active steps in order to safeguard Convention rights,” while “negative obligations” simply require a Member State to “refrain from acting in a way that unjustifiably interferes with Convention rights”).

The severity of treatment must reach a certain level to violate the Article, limiting its scope so that not every mistreatment is deemed a violation.¹²⁰ Severity is context specific for both torture and inhuman or degrading treatment. Many factors, such as treatment duration, physical or mental effects, sex, age, and health of the victim are considered.¹²¹ Other factors that are considered include: the purpose of the mistreatment in combination with the intent or motivation behind it; the context within which the mistreatment was administered (for example, if the mistreatment was in a high-tension environment); and the relative vulnerability of the victim.¹²² Additionally, Member States can violate Article 3 when they deprive someone's liberty. For example, law enforcement violates Article 3 when confronting an individual in a way that "diminishes human dignity."¹²³ Further, forced or coerced medical treatment violates Article 3.¹²⁴ However, a narrow exception is "medically necessary" treatment that is "performed in a manner" that does not meet the Article 3 "severity" requirement.¹²⁵ Whether treatment is medically necessary is based on the affected individual's "health needs and circumstances."¹²⁶

The European Convention on Human Rights (Convention) was created to adapt to current conditions to function as a living instrument.¹²⁷ As a result, alleged acts of "torture" or "inhuman or degrading treatment" are interpreted using modern-day knowledge and present social conditions.¹²⁸ Examples of acts found to constitute torture include: "Palestinian hanging;"¹²⁹ rape, physical and psychological mistreatment; sleep deprivation; "falaka"¹³⁰ and

120. Savran v. Denmark, App. No. 57467/15, ¶ 122 (Dec. 7, 2021), <https://hudoc.echr.coe.int/fre/#%7B%22tabview%22:%5B%22document%22,%22itemid%22:%5B%22001-214330%22%7D>.

121. GUIDE ON ARTICLE 3, *supra* note 115, at 6; Muršić v. Croatia, App. No. 7334/13, ¶ 97 (Oct. 20, 2016), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-167483%22%7D%7D>.

122. GUIDE ON ARTICLE 3, *supra* note 115, at 6–7; Khlaifia v. Italy, App. No. 16483/12, ¶ 160 (Dec. 15, 2016), <https://hudoc.echr.coe.int/?i=001-170054>.

123. Bouyid v. Belgium, App. No. 23380/09, ¶¶ 88, 90 (Sept. 28, 2015), <https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2223380/09%22%7D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%7D,%22itemid%22:%5B%22001-157670%22%7D%7D>.

124. GUIDE ON ARTICLE 3, *supra* note 115, at 21.

125. Submission of UN Special Rapporteur et al. as Amici Curiae Supporting Applicant ¶ 28, Semenya v. Switzerland, App. No. 10934/21 (July 11, 2023) [hereinafter Submission of UN Special Rapporteur].

126. *Id.*

127. *Id.* ¶ 2.

128. GUIDE ON ARTICLE 3, *supra* note 115, at 7.

129. *Id.* at 7–8 (discussing that Palestinian hanging, which is a torture technique that involves suspending someone by their wrists with hands cuffed behind their backs, violated Article 3).

130. *Falaka*, ENCYC. IRANICA (Dec. 15, 1999), <https://iranicaonline.org/articles/falaka> (describing falaka as a form of whipping, traditionally beating a person's bare feet).

repeated beatings; force-feeding despite no medical necessity; handcuffing, hooding, and forced undressing; and beatings resulting in the death of a relative.¹³¹ Examples of where the ECHR has found inhuman treatment include: threats of torture and harsh detention conditions; deprivation of livelihoods and involuntary relocation; excessive physical exercise; and poor confinement conditions.¹³²

Specific to Semenya's case, ECHR precedent establishes that unnecessary medical treatment violates Article 3.¹³³ In fact, there are notable similarities between *Neymerzhitsky v. Ukraine* and Semenya's circumstances. In *Neymerzhitsky*, Ukrainian police officers arrested and detained the applicant on fraud charges.¹³⁴ While the applicant was detained, he went on a hunger strike, which the police officers ended by force-feeding him.¹³⁵ This force-feeding was without medical necessity.¹³⁶ This is directly comparable to the effects of World Athletics' hyperandrogenism policy. World Athletics' policy intentionally subjects athletes to unnecessary medical treatment in the form of forced birth control or surgery. This treatment is often to the detriment of the athlete and certainly not based on the medical needs of the athlete concerned, which ECHR precedent requires.

Semenya has publicly stated that the unnecessary medical treatment was to her detriment.¹³⁷ She experienced intense pain, fear, and panic attacks from

131. GUIDE ON ARTICLE 3, *supra* note 115, at 8 (discussing that rape, physical violence, and psychological mistreatment violated Article 3); *see, e.g.*, *Bati v. Turkey*, 2004-IV Eur. Ct. H.R. 249, 251–52 (holding that Palestinian hanging, falaka, sleep deprivation, and repeated beatings violated Article 3); *Neymerzhitsky v. Ukraine*, 2005-II Eur. Ct. H.R. 307, 309 (holding that force feeding applicant without medical necessity violated Article 3); *El-Masri v. Yugoslav Republic of Maced.*, 2012-VI Eur. Ct. H.R. 263, 266–67 (holding that handcuffing, hooding, and forced undressing constituted a violation of Article 3); *Satybalova v. Russia*, App. No. 79947/12, ¶ 76 (Sept. 30, 2020), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-203313%22%7D> (holding that police beating applicant to death violated Article 3); *Lutsenko v. Ukraine*, App. Nos. 12482/14 and 39800/14, ¶¶ 79–80, 121 (Apr. 21, 2021), <https://hudoc.echr.coe.int/fre#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%22001-207417%22%7D> (holding that Article 3 was violated when “non-State agents” beat applicant to death).

132. *See, e.g.*, *Gäfgen v. Germany*, 2010-IV Eur. Ct. H.R. 247, 251; GUIDE ON ARTICLE 3, *supra* note 115, at 9 (discussing that intentional destruction of applicants' livelihoods and forced relocation constituted inhuman treatment); *Chember v. Russia*, 2008-IV Eur. Ct. H.R. 1, 4 (holding that forced subjection to excessive physical exercise constituted inhuman treatment); *Simeonovi v. Bulgaria*, App. No. 21980/04, ¶¶ 79,90 (May 12, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-172963%22%7D> (holding that poor confinement conditions constituted inhuman treatment).

133. *Neymerzhitsky*, 2005-II Eur. Ct. H.R. at 309.

134. *Id.* at 313.

135. *Id.* at 309.

136. *Id.*

137. Bianna Golodryga et al., *Caster Semenya Says She Went Through ‘Hell’ Due to Testosterone Limits Imposed on Female Athletes*, CNN, <https://www.cnn.com/2023/11/06/sport/caster-semenya-testosterone-limits-world-athletics-spt-intl/index.html> (last updated Nov. 6, 2023).

the birth control she was required to take. Akin to *Neymerzhitsky*, where the applicant was force-fed without medical necessity, Semenya was forced to take hormonal medication without any medical necessity. Not only that, Semenya was also forced to undergo: (1) a forced public undressing of sorts when her sex test results were released and (2) intangible and internal repeated “beatings” from the medical treatment. The required unnecessary hormonal medication caused continuous stabbing pain, panic, and fear—a variation of beating, except instead of being physically beaten by another person, Semenya faced continuous internal beating by the forced medical treatment. Therefore, this violates Article 3.¹³⁸

Further, regarding unnecessary medical treatment, “the mandate-holders appointed by the United Nations Human Rights Council” have stated:

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. 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. 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.¹³⁹

The public release of Semenya’s forced sex test results is an intangible, forced public undressing because Semenya’s genetic makeup and intersex status were released without her consent. Effectively, Semenya’s most closely and personally held private information was released to the entire world, publicly undressing her in the eyes of the world. Everyone who followed international sports or had a social media account heard about her sex test results. Now, everyone who had ever heard of Semenya knew that she was born intersex and assigned female at birth. Publicly, everyone knew

138. See Submission of UN Special Rapporteur, *supra* note 125, ¶28; *UN Charter-Based Institutions Including Special Procedures*, UNITED NATIONS SUSTAINABLE DEV. GRP., <https://unsdg.un.org/2030-agenda/strengthening-international-human-rights/un-special-procedures> (last visited May 12, 2024) (describing mandate holders as individuals that “examine, advise and publicly report on human rights issues and situations” who consult, advocate, and provide advice to governments, organizations, and other entities).

139. Submission of UN Special Rapporteur, *supra* note 125, ¶30 (footnotes omitted).

about the most intimate, deeply personal details about her life—an effective undressing. The ECHR has already held that forced undressing constitutes torture, and it should do so here as well.

The “beatings” from the continuous pain from the forced medical treatment, in conjunction with the public undressing, constitutes torture and violates Article 3 per ECHR precedent.

2. Forced Sex Verification Tests, Even Absent a Finding of Torture, Constitute Human or Degrading Treatment

World Athletics tortured Semenya—precedent establishes that. However, even if the ECHR fails to hold World Athletics responsible, it subjected Semenya to inhuman or degrading treatment. Necessarily, World Athletics’ actions still violate Article 3.

Inhuman or degrading treatment has a lower intensity of suffering when compared to torture.¹⁴⁰ However, similarly to torture, inhuman or degrading treatment is context specific, and it is inconsequential whether or not the treatment effectively deters and controls crimes.¹⁴¹ The ECHR has held that inhuman treatment is often “premeditated [and] applied for hours” and causes either bodily harm or “physical and mental suffering.”¹⁴² The ECHR emphasized that “‘degrading’ treatment [and] respect for ‘dignity’” are “strong[ly] link[ed]” when determining an Article 3 violation.¹⁴³ In fact, any

140. GUIDE ON ARTICLE 3, *supra* note 115, at 8.

141. *Id.* at 9 (explaining that whether the level of humiliation meets a certain level “depends on . . . the nature and context of the punishment,” and that punishments for deterrence are “never permissible”).

142. *Id.* at 8–9 (first citing *Labita v. Italy*, 2000-IV Eur. Ct. H.R. 98, 131; and then citing *Kudła v. Poland*, 2000-XI Eur. Ct. H.R. 195, 200).

143. *Bouyid v. Belgium*, App. No. 23380/09, ¶ 90 (Sept. 28, 2015), <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2223380%2F09%22%2C%22documentcollectionid%22%3A%2222GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%222001-157670%22%7D> (holding that there was a strong “link between . . . ‘degrading treatment’ and respect for ‘dignity’”); *see also* *Yankov v. Bulgaria*, 2003-XII Eur. Ct. H.R. 119, 121 (holding that there was a violation when hair was forcibly shaved by prison administration without legal basis); Press Release, Registrar of the Eur. Ct. of Hum. Rts., Judgment in the Case of *Iwańczuk v. Poland* (Nov. 15, 2001), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%222003-448669-449428%22%7D> (discussing the European Court of Human Rights’ holding in *Iwańczuk v. Poland*, App. No. 2156/94, that there was a violation of Article 3 from an inappropriate strip search with humiliating remarks); *Valašinas v. Lithuania*, 2001-VIII Eur. Ct. H.R. 385, 388 (holding that there was a violation when plaintiff was stripped naked and forced to have sexual organs examined without gloves); *R.R. v. Poland*, 2011-III Eur. Ct. H.R. 209, 211–12 (holding that there was a violation when health professionals procrastinated in providing genetic test access until it was “too late for her to make an informed decision” on an abortion or pregnancy).

action that intrudes on human dignity goes against the purpose of the Convention.¹⁴⁴

The level of severity required can be satisfied if the treatment induces fear, suffering, or feelings of inferiority that could morally or physically break a person.¹⁴⁵ To establish degrading treatment, the mistreatment must humiliate or debase, show a lack of respect, and diminish human dignity.¹⁴⁶ However, treatment does not require objective humiliation; subjective humiliation suffices.¹⁴⁷ Even if the treatment was not undertaken to cause humiliation, that does not “conclusively rule out” an Article 3 violation.¹⁴⁸

Historically, World Athletics’ policy has certainly aroused fear and anguish in the affected athletes and continues to do so. In fact, there are considerable parallels between the “nude parades” and what happened in *Valašinas v. Lithuania*. In *Valašinas*, a female prison guard conducted a body search on the male applicant, who was serving his prison sentence.¹⁴⁹ This guard forced the applicant to strip naked while male guards touched, without gloves, the applicant’s testicles.¹⁵⁰ Nude parades, where female athletes were required to strip naked and have their reproductive organs visually searched by athletic officials, constitutes a nude strip search akin to that in *Valašinas*.¹⁵¹ Even the current system of genetic nude parades, where athletes are stripped naked and their karyotypes visually searched by officials, constitutes a genetic strip search. Nude and genetic strip searches are entirely what the ECHR found as violating Article 3’s prohibition on inhuman or degrading treatment.¹⁵²

The primary difference between *Valašinas* and Semenya’s situation is in the former the applicant was serving a nine-year prison sentence, and in the latter current athletes are trying to take part in a competition they have

144. GUIDE ON ARTICLE 3, *supra* note 115, at 13.

145. *Id.* at 9.

146. *Id.*

147. *Id.*

148. *Id.* at 9, 13 (citations omitted); *see also* Gäfgen v. Germany, 2010-IV Eur. Ct. H.R. 247, 251 (holding that threats of torture while the applicant was in police custody constituted inhuman treatment); Ilașcu v. Moldova, 2004-VII Eur. Ct. H.R. 179, 184–85; M.S.S. v. Belgium, 2011-I Eur. Ct. H.R. 255, 258 (emphasizing that the purpose of the treatment should be considered, and an absence of purpose does not mean that there cannot be an Article 3 violation).

149. *See* *Valašinas v. Lithuania*, 2001-VIII Eur. Ct. H.R. 385, 387.

150. *Id.* at 396.

151. Compare Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAG. (June 28, 2016), <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html> (discussing nude parades, where athletes had their genitals and genital regions searched), with *Valašinas v. Lithuania*, 2001-VIII Eur. Ct. H.R. at 396 (discussing where guard searched prisoner’s genitals).

152. *Valašinas*, 2001-VIII Eur. Ct. H.R. at 388 (holding that there was an Article 3 violation when a male inmate was forced to strip naked by a female guard).

dedicated their entire lives to.¹⁵³ In both situations, officials had considerable legal power over the affected person, and in both situations, the affected person had to strip down naked to have their genitals examined at the demand of the officials. World Athletics officials examined Semenya's genitals through forced medical testing, while prison guards examined the applicant's genitals in *Valašinas* (which constituted torture). If prisoners have the right to not have to strip naked and have their genitals examined, free athletes certainly do as well.

Even though athletic officials no longer require athletes to take part in a "nude parade," World Athletics' sex verification test still arouses fear and anguish and gives rise to an Article 3 violation. In multiple interviews, Semenya has spoken about the fear and anguish she experienced from the fevers, pain, and panic attacks caused by the forced medical "solutions" that the World Athletics policy requires.¹⁵⁴ The hyperandrogenism policy further targets women's healthy hormone levels for the sole reason of changing their sport performance with significant health consequences. The policy violates Article 3 because Semenya and other similarly situated athletes are forced to take nonconsensual, unnecessary medication, with unknown side effects.¹⁵⁵ This *tangible*, physical pain arises to an even higher level of severity than the visual strip search past athletes were required to do.¹⁵⁶

However, even before Semenya underwent the required medical "treatments," World Athletics withheld her sex verification test for a year without explanation, during which Semenya could not compete.¹⁵⁷ The ECHR has stated before that although the publicity of the punishment is a relevant factor, the absence of publicity does not preclude an Article 3 violation.¹⁵⁸ Therefore, World Athletics' year of silence is not excluded from constituting a violation of Article 3. In fact, humiliation from the victim's point of view can violate Article 3, and violations have arisen from inhuman treatments that assaulted an individual's dignity and physical integrity.¹⁵⁹ In Semenya's case, not only was she forced to undergo medical treatments that were humiliating and impacted her physical integrity (through fevers, physical pain, and panic attacks), she also was, and still is, publicly punished

153. *Id.* at 392.

154. Golodryga et al., *supra* note 137; GUIDE ON ARTICLE 3, *supra* note 115, at 8–9.

155. Submission of UN Special Rapporteur, *supra* note 125, ¶ 6.

156. See *Ireland v. United Kingdom*, App. No. 5310/71, ¶ 167 (Sept. 10, 2018), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-181585%22%7D>.

157. E.g., *Olympic Champion Caster Semenya Says She Offered to Show Track Officials Her Body to Prove She Was Female*, *supra* note 19.

158. See GUIDE ON ARTICLE 3, *supra* note 115, at 9.

159. *Id.* at 8–9.

by athletic governing bodies through her competition ban.¹⁶⁰ Athletic governing bodies and Member States all publicly punished athletes, such as Niyonsaba, Chand, Kłobukowska, Martínez-Patiño, and Soundarajan, after World Athletics released their private medical data.¹⁶¹ In some cases, this public humiliation and punishment led to suicidal ideation.¹⁶²

Semenya has also been subject to inhuman treatment through deprivation of her livelihood. In *Selçuk v. Turkey*, the ECHR held that Article 3 was violated when state security forces violently destroyed the applicants' gardens and fields, thus, depriving the applicants of their livelihood.¹⁶³ Similarly, athletes were deprived of their livelihood of competitive running. Runners, who are effectively independent contractors, primarily make their salary from a base-sponsorship salary, with predetermined bonuses for breaking records, winning, and global titles.¹⁶⁴ If a runner is banned from racing, not only do they lose the chance to earn the predetermined bonuses set forth in their contract, they also will likely lose their base-sponsorship salary.¹⁶⁵ Their contracts typically include penalizations for getting injured or not racing enough races.¹⁶⁶ Therefore, if a runner is barred from racing, their livelihood is taken away because they cannot earn performance bonuses, meet race quotas, or even afford benefits like health insurance. Admittedly, there is a difference between earning a livelihood from farming and gardening and having the ability to run on the international level. Regardless, the policy still deprives individuals of their livelihoods, effectively violating Article 3.

Although the type of violence differs between *Selçuk* and Semenya, it is not totally inapposite. The violence simply manifests in a different manner. In *Selçuk*, villagers saw their housing, gardens, and fields

160. *Olympic Champion Caster Semenya Says She Offered to Show Track Officials Her Body to Prove She Was Female*, *supra* note 19; Imray, *supra* note 16; Ingle, *supra* note 17.

161. For their stories, see *supra* Parts I.A.1–6.

162. See *Ewa Kłobukowska – skrzywdzona mistrzyni*, *supra* note 62; *Santhi 'Medal Should Be Returned'*, *supra* note 65.

163. *Selçuk v. Turkey*, 1998-II Eur. Ct. H.R. 1, 18–19, 26.

164. Sarah Lorge Butler, *How Much Do Pro Runners Make? For Some Veterans, It's Less This Year*, *RUNNER'S WORLD* (May 13, 2021), <https://www.runnersworld.com/news/a36385189/how-much-do-pro-runners-make-sponsorships-contracts>.

165. *Id.*; Kelly McLaughlin & Meredith Cash, *Olympian Allyson Felix Says Nike Was 'Beyond Disrespectful' When Asking Her to Be in Female-Empowerment Ads While Privately Disputing Maternity Protections*, *BUS. INSIDER* (July 8, 2021), <https://www.insider.com/olympian-allyson-felix-criticizes-nike-maternity-protections-dispute-2021-7> (discussing how Nike cut Allyson Felix's pay by 70% because she could not meet the race quota due to pregnancy, in addition to failing to provide Felix with maternity protections).

166. Butler, *supra* note 164.

deliberately destroyed.¹⁶⁷ Analogously, Semenya saw her titles, records, and accomplishments stripped from her. She was unable to race, therefore unable to make a living, and was forced to take an unnecessary and potentially harmful medication if she wanted to race and make a livelihood again. As a result, Semenya was subjected to a multi-faceted violation of Article 3. The policy (1) both privately and publicly humiliated Semenya in a manner that aroused fear and anguish; (2) violated and assaulted Semenya's dignity and physical integrity through the forced medication that caused fear, pain, and panic attacks; and (3) deprived Semenya of her livelihood. Therefore, the policy clearly violates the prohibition on inhuman or degrading treatment, and necessarily violates Semenya's rights as established under ECHR precedent for Article 3.

167. GUIDE ON ARTICLE 3, *supra* note 115, at 9.

B. World Athletics' Hyperandrogenism Policy Violates Article 8's Right to Privacy and Private Life from the European Convention on Human Rights

1. Forced Sex Verification Violates Semenya's Right to Personal Autonomy, Constitutes an Ethical Issue, and Low Deference Should Be Given to Member States

Article 8 states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹⁶⁸ To bring a challenge under Article 8 the alleged act must fall into one of the interests listed in the Article: “private life, family life, home[,] and correspondence.”¹⁶⁹ Unlike Article 3’s absolute prohibition, there are certain conditions in which it is deemed appropriate for the Member State to interfere with Article 8 rights, such as “in the interests of national security, public safety, . . . economic wellbeing,” and crime prevention.¹⁷⁰ Article 8 has both a “positive and negative obligation[.]”¹⁷¹ Member States have the “positive obligation to ensure” that Article 8 is protected “between private parties,” and the negative obligation to protect individuals from “arbitrary interferences with [their] private and family life, home, and correspondence”¹⁷²

In determining whether Member States have a positive obligation, the ECHR examines whether the interests are important enough to trigger a positive obligation, and if so, whether ““essential aspects”” of an individual’s private life are impacted.¹⁷³ For negative obligations, the ECHR provides Member States a certain level of deference depending on the context of the allegation.¹⁷⁴ Sensitive moral or ethical issues allow a wider margin, while if a person’s existence or identity is in question, the margin is narrow.¹⁷⁵ To meet the necessity requirement, interferences must correspond to a “social

168. EUR. CT. HUM. RTS., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE 7 (2022), https://www.echr.coe.int/documents/guide_art_8_eng.pdf [hereinafter GUIDE ON ARTICLE 8] (quoting Human Rights Act of 1988, ch. 42, sch. 1, art. 8 (U.K.)).

169. *Id.*

170. *Id.*

171. *Id.* at 8 (describing the obligation under Article 8 as being classically negative); *Bărbulescu v. Romania*, App. No. 61496/08, ¶ 52 (Sept. 5, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-159906%22%5D%7D> (explaining that Member States have “positive obligations” under Article 8, even for private parties).

172. GUIDE ON ARTICLE 8, *supra* note 168, at 8; *Bărbulescu*, App. No. 61496/08, ¶ 52.

173. GUIDE ON ARTICLE 8, *supra* note 168, at 8.

174. *Id.*

175. *Id.*; see *Fretté v. France*, 2002-I Eur. Ct. H.R. 345, 347–48; *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 3–4 (pointing out that there is no consensus between Member States as to what interests are important or how to best protect, especially for moral or ethical issues).

need” that is “pressing,” while still being proportionate to the legitimate purpose pursued.¹⁷⁶ The ECHR, in determining if an interference is necessary, will consider the required deference to the Member State and the duty of the Member State to prove the existence of the “pressing social need.”¹⁷⁷

Semenya is a woman, identifies as a woman, and has always legally been a woman.¹⁷⁸ Therefore, using established ECHR precedent, a low margin of deference is given to a Member State on issues where they challenge an individual’s existence or identity. If the issue was instead moral or ethical, such as it was in *X v. United Kingdom* (where the ECHR held that Article 8 was not violated, because the ECHR could not imply that a State has an obligation to recognize a transsexual man as the “father of a child” that is not biologically his), precedent establishes a wider margin for Member States.¹⁷⁹

Low deference does not always mean the applicant will prevail on any claim for alleged challenges to their existence or identity. However, that does not mean that applicants could never prevail on their claim. In fact, ECHR precedent establishes that even though Member States have no obligation to take steps to minimize the violative questions asked by transgender individuals when being issued government documents, the Convention is a living document aimed at protecting human rights.¹⁸⁰ Additionally, the ECHR stated that “[i]t is of crucial importance” that the ECHR interpret the Convention in an evolutionary manner, using modern-day conditions and knowledge.¹⁸¹

Personal identity and existence are directly implicated in Semenya’s case, and ECHR precedent provides protections. The ECHR has held that Article 8 protects the personal autonomy of the individual—which includes

176. GUIDE ON ARTICLE 8, *supra* note 168, at 13.

177. *Piechowicz v. Poland*, App. No. 20071/07, ¶ 212 (July 17, 2012), <http://hudoc.echr.coe.int/eng?i=001-110499>; *see also* *M.A. v. Denmark*, App. No. 6697/18, ¶¶ 140–63 (July 9, 2021), <http://hudoc.echr.coe.int/eng?i=001-211178> (discussing the relevant factors to determine margin or deference given to a State).

178. For the purposes of this discussion, to legally be a woman means that Semenya was assigned female at birth. So, under the eyes of the South African government, Semenya is legally a woman. *See Track Officials Called Caster Semenya ‘Biologically Male,’ Newly Released Documents Show*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/sports/track-officials-called-caster-semenya-biologically-male-newly-released-documents-show.html> (discussing that “Semenya was legally [assigned] female at birth,” additionally quoting her as saying, “I will not allow [World Athletics] to use me and my body again”).

179. GUIDE ON ARTICLE 8, *supra* note 168, at 8; *X v. United Kingdom*, 1997-II Eur. Ct. H.R. 1, 6, 14.

180. *See Goodwin*, 2002-VI Eur. Ct. H.R. at 4.

181. *Id.* at 26.

the right to dictate their identity as humans.¹⁸² Semenya's identity as an athlete, specifically a female athlete, is quintessentially a right protected by Article 8. It is a fundamental part of her right to personal autonomy, and she has a right to change her legal identity if she desires.¹⁸³ However, Semenya has not chosen to change her legal identity. In fact, it is World Athletics who argues that Semenya's identity is not what Semenya, and the law, say her identity is. The policy violates Semenya's right to private life because it not only violates her right to refuse treatment, but also Semenya's right to her own individual identity.¹⁸⁴ World Athletics is trying to impose an identity (a gender) upon Semenya that she has never claimed and indeed fought against. Through requiring her to satisfy arbitrary testosterone levels, World Athletics strips Semenya of her right to dictate her identity. In doing so, World Athletics violates Article 8.

Semenya is a woman, both legally and in personal identity. However, even if she was assigned male at birth and later transitioned into a female identity, the argument and result is unchanged because the ECHR has held that "the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the . . . identity chosen by them at great personal cost."¹⁸⁵ Therefore, Member States no longer have a wide margin of deference when they choose to violate the privacy of an individual in relation to their gender identity.¹⁸⁶ When applying ECHR precedent to Semenya's case, there is certainly a violation of Article 8's right to a private life because World Athletics, without consent, publicly released her forced sex test results and invaded Semenya's right to personal autonomy. World Athletics does not have a wide margin of deference, given the topic of the claim, and its actions clearly constitute a violation.

182. *Id.* at 31; Mikulić v. Croatia, 2002-I Eur. Ct. H.R. 141, 154.

183. *See Goodwin*, 2002-VI Eur. Ct. H.R. at 31; Mikulić v. Croatia, 2002-I Eur. Ct. H.R. at 154.

184. Submission of UN Special Rapporteur, *supra* note 125, ¶ 3; *see also* Submission for World Medical Association & Global Health Justice Partnership as Amici Curiae Supporting Applicant ¶¶ 11–12, *Semenya v. Switzerland*, App. No. 10934/21 (July 11, 2023), <https://hudoc.echr.coe.int/?i=001-226011>. The Amici Curiae explained:

Further, the [World Medical Association's] Declaration of Geneva—the modern Hippocratic oath—dictates that physicians will not, in any circumstances, use their medical knowledge to violate human rights and civil liberties. . . . The Regulations . . . ask physicians . . . to *intervene* upon athletes using non-beneficial practices aimed at compliance with sports regulations

Id. (footnote omitted) (citations omitted).

185. *Goodwin*, 2002-VI Eur. Ct. H.R. at 32.

186. *Id.* at 4.

natural consequence, considering she has never used artificial testosterone and has only ever sought to race in her specialty events. If she had taken artificial testosterone, then Article 8 would not provide protections.¹⁹⁵ Semenya would have brought the suffering on herself because being banned for doping is a foreseeable consequence.

World Athletics has also violated Semenya's right to physical, psychological, or moral integrity. The ECHR has held that forced medical treatment and compulsory medical procedures can constitute a violation of Article 8.¹⁹⁶ However, medical intervention may be justified if global authorities (specifically medical, governmental, and international) come to a consensus on the dangers.¹⁹⁷ Precedent supports Semenya. Specifically, Article 8 was violated when Member States failed to provide information to divers about associated health risks of decompression tables.¹⁹⁸ Moreover, ECHR precedent establishes that Article 8 protects personal information, such as gender identification in Semenya's case.¹⁹⁹

There is no consensus on World Athletics' hyperandrogenism policy because forced medical intervention on otherwise healthy women is almost never considered justified. In fact, medical, governmental, and international authorities reached consensus against World Athletics' hyperandrogenism policy. Specifically, authorities have explicitly stated that there is no consensus in support of the policy, because there are no health considerations that can require healthy women with naturally high testosterone to undergo medical intervention.²⁰⁰ Therefore, there is an Article 8 violation because "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."²⁰¹

However, even if there is consensus, informed consent is still required. In *Vilnes v. Norway*, the ECHR held that lack of informed consent violated

195. See *Denisov v. Ukraine*, App. No. 76639/11, ¶ 98 (Sept. 25, 2018), [https://hudoc.echr.coe.int/eng/#{%22itemid%22:\[%22001-186216%22\]}](https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-186216%22]}) (discussing the Gillberg exclusionary principle, which would bar Semenya from bringing a claim under Article 8 if she had taken artificial testosterone because she would be suffering because of her own actions, rather than a state action).

196. *Glass v. United Kingdom*, 2004-II Eur. Ct. H.R. 25, 27–28.

197. Submission of UN Special Rapporteur, *supra* note 125, ¶ 13.

198. *Vilnes v. Norway*, App. Nos. 52806/09 and 22703/10, ¶ 244 (Mar. 24, 2014), [https://hudoc.echr.coe.int/eng/#{%22itemid%22:\[%22001-138597%22\]}](https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-138597%22]}).

199. *Goucha v. Portugal*, App. No. 70434/12, ¶ 27 (June 22, 2016), <http://hudoc.echr.coe.int/eng?i=001-161527> (holding that sexual orientation and gender identity are "distinctive and intimate characteristics," and confusion between the two would constitute an attack).

200. See Submission of UN Special Rapporteur, *supra* note 125, ¶ 13.

201. *Id.* (quoting *Physician Leaders Reaffirm Opposition to IAAF Rules*, WORLD MED. ASS'N (May 15, 2019), <https://www.wma.net/news-post/physician-leaders-reaffirm-opposition-to-iaaf-rules>).

Article 8.²⁰² The applicants in *Vilnes* were professional divers (akin to being a professional athlete, as Semenya is) who sued Norway.²⁰³ The divers brought the case to the ECHR to challenge Norway's failure to provide relevant information on risks that involved their work.²⁰⁴ The ECHR held that Article 8 was violated because the divers were unable to consent when Norway failed to provide them with the necessary information about health risks related to decompression tables.²⁰⁵ This is directly analogous and applicable to the case at hand because the policy requires Semenya to take forced medication or undergo surgery if she wants to continue competing in her specialty events. This medication is given without any instruction about side effects, consequences, or health risks. In effect, this forced birth control medication is to Semenya as the lack of decompression tables are to the divers in *Vilnes*. Both cases result from a lack of information that puts an individual's health at risk; the only difference is that the ECHR already gave a decision for one, and the other is pending. The ECHR held that the lack of information and informed consent violated Article 8 in *Vilnes*, and the analogous facts clearly suggest that it should do the same in Semenya's case.

Furthermore, even if the ECHR chooses to ignore precedent and dismiss the earlier two arguments, the ECHR has explicitly held that involuntary medical treatment and compulsory medical procedures violate Article 8.²⁰⁶ Semenya was not only forced to undergo medical treatments against her will, but she was also required to undergo said medical treatments (birth control medication), which led to a series of unwanted side effects.²⁰⁷ World Athletics forced her to take the medication, yet provided no information

202. *Vilnes*, App. Nos. 52806/09 and 22703/10, ¶ 244.

203. *Id.* ¶ 121.

204. *Id.* ¶ 171.

205. *Id.* ¶ 244.

206. *Glass v. United Kingdom*, 2004-II Eur. Ct. H.R. 25, 27–28.

207. See Gerald Imray, *IAAF Claims Olympic Champion Semenya Is 'Biologically Male,'* AP (June 18, 2019), <https://apnews.com/general-news-81de352b13d4409d8e3e05d44b417078>; see also Gerald Imray, *Documents Reveal New Details in Bitter Semenya-IAAF Battle*, AP (June 22, 2019), <https://apnews.com/article/f844add98d02453ea926706f687c2fc7>. Others might argue that World Athletics did not actually force Semenya to take the medicine, and therefore that it is South Africa's duty to inform Semenya of the side effects of the medicine. They would be right in so far as a South-African gynecologist is who gave Semenya a prescription for the medicine. The gynecologist that treated Semenya stated that World Athletics "'made it clear' at the outset that its 'preferred treatment' was surgery. . . . [The gynecologist] resisted and said if Semenya should undergo any treatment it should be hormone suppression." *Id.* The gynecologist was simply following World Athletics' orders to suppress Semenya's hormones by any means. *Id.* Additionally, World Athletics' responsibility is easily shown by a "but for" test. *But for* World Athletics' hyperandrogenism policy forcing athletes to undergo unnecessary medical treatment, Semenya would have never taken the medicine. In fewer words, but for World Athletics, Semenya would not have taken the medicine. Therefore, World Athletics must inform Semenya of the side effects of the medicine it is forcing Semenya to take.

about how that medication might affect her other than telling her that her testosterone levels would reach levels that World Athletics deemed normal. The fact that Semenya must choose between her primary source of income and forced medical procedures effectively acts as a ban from her profession—or livelihood. In fact, intersex athletes might face even more adverse side effects from hormonal medication than non-intersex athletes because the medication is not medically necessary. For example, because of hormonal medications, intersex athletes could experience “diuretic effects,” “electrolyte imbalances,” “glucose intolerance,” “insulin resistance,” “nausea,” “liver toxicity,” and increased risk of “suicide.”²⁰⁸ The ECHR has held before that an effective banning from the profession violates Article 8; accordingly, the ECHR should apply that precedent here.²⁰⁹

208. Submission of UN Special Rapporteur, *supra* note 125, ¶ 15; see *Toxic Hepatitis*, MAYO CLINIC (June 4, 2022), <https://www.mayoclinic.org/diseases-conditions/toxic-hepatitis/symptoms-causes/syc-20352202> (describing liver toxicity as liver inflammation that can lead to permanent scarring or failure, with symptoms such as yellow skin and eyes, abdominal pain, fatigue, vomiting, weight loss, and dark urine).

209. Submission of Human Rights Centre of Ghent University as *Amici Curiae* Supporting Applicant at 8–9, *Semenya v. Switzerland*, App. No. 10934/21 (July 11, 2023).

C. World Athletics' Hyperandrogenism Policy Violates Article 14's Prohibition of Discrimination from the European Convention on Human Rights, in Conjunction with Article 8

1. World Athletics' Policy Indirectly Discriminates Against Athletes of Color from the Global South

Article 14 exists solely to complement the other Convention provisions.²¹⁰ In other words, this Article does not prohibit discrimination. Article 14 only prohibits discrimination in relation to the enjoyment of the rights put forth in the Convention.²¹¹ The Article cannot exist independently.²¹² The ECHR must examine Article 14 in relation to a substantive Convention Article.²¹³ Article 14 provides a horizontal effect, where the right to nondiscrimination can apply in purely private situations.²¹⁴ In fact, the ECHR held that it cannot be passive when an “interpretation of a legal act” (such as “an administrative practice,” “private contract,” or “public document”) is “unreasonable, arbitrary[,] or blatantly inconsistent” with any Convention principles, *especially “the prohibition of discrimination.”*²¹⁵

Under Article 14, indirect discrimination is present when the effect of a general policy is prejudicial in nature.²¹⁶ The policy may be neutral in terms, but nevertheless, has a discriminatory effect on a specific group.²¹⁷ The policy need not be directed at a specific group for it to indirectly discriminate

210. See *Carson v. United Kingdom*, 2010-II Eur. Ct. H.R. 407, 409–11 (describing the test that an applicant must show that they were treated differently from another person in a similar situation); Press Release, Registrar of the Eur. Ct. of Hum. Rts., Grand Chamber Judgment *E.B. v. France* (Jan. 22, 2008), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22003-2245258-2392886%22%5D%7D> [hereinafter 2008 Press Release] (discussing the ECHR’s holding in *E.B. v. France*, App. No. 43546/02, that a refusal to allow a woman with a female partner to adopt violated Article 14 because the decision was based off the “applicant’s lifestyle”); see also GUIDE ON ARTICLE 8, *supra* note 168, at 20 (discussing that Article 14 complements the substantive Convention provisions).

211. EUR. CT. HUM. RTS., GUIDE ON ARTICLE 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ON ARTICLE 1 OF PROTOCOL NO. 12 TO THE CONVENTION: PROHIBITION OF DISCRIMINATION 6 (2022), https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf [hereinafter GUIDE ON ARTICLE 14].

212. *Id.*

213. *Id.*

214. *Id.* at 8.

215. *Id.* at 8–9.

216. *Id.* at 12.

217. *Biao v. Denmark*, App. No. 38590/10, ¶ 103 (May 24, 2016), <http://hudoc.echr.coe.int/eng?i=001-163115> (describing direct discrimination as treating people in analogous or relevantly similar situations differently based on an identifiable characteristic and indirect discrimination as a general policy or measure that, despite having neutral terms, has a discriminatory effect on a particular group); see also *D.H. v. Czech Republic*, 2007-IV Eur. Ct. H.R. 241, 244–46.

against the group.²¹⁸ There is no requirement of a discriminatory intent, since indirect discrimination can result from a neutral rule, “a *de facto* situation,” or policy.²¹⁹ Further, precedent established in *BS v. Spain* “recognised the ‘particular vulnerability’ of [Black] women in comparison with women of the ‘European phenotype’” of facing discrimination.²²⁰

The argument could be made that World Athletics’ policy is neutral on its face because athletes from the Global South²²¹ are not explicitly named, and if you overlook the “differences of sexual development” (DSD) language, neither are intersex athletes.²²² However, even assuming that the policy is neutral on its face for the purposes of argument, it still has a discriminatory effect on a specific group of people. World Athletics’ policy almost exclusively affects athletes from the Global South such as Semenya, Niyonsaba, Chand, and Soundarajan. While some Global North²²³ athletes were affected, such as Martínez-Patiño from Spain and Kłobukowska from Poland, the policy is still grossly swayed towards targeting athletes from the Global South. Martínez-Patiño and Kłobukowska were profiled for having “masculine” characteristics, rather than originating from the Global South. However, four out of the six most well-known athletes affected by the hyperandrogenism policy are from the Global South. Notably, these athletes, who are women of color, face what the ECHR has noted is a “particular vulnerability” of discrimination.²²⁴ Therefore, even if World Athletics policymakers had no intent to discriminate, the ECHR has held that lack of intent is not dispositive, and objectively, the policy predominately affects athletes of color from the Global South.²²⁵

218. GUIDE ON ARTICLE 14, *supra* note 211, at 12 (emphasizing that the policy need not be specifically aimed at a particular group for it to still discriminate indirectly against that group).

219. Biao, App. No. 38590/10, ¶ 103 (holding that indirect discrimination “does not require a discriminatory intent” and that a neutral rule can still result in indirect discrimination); Adami v. Malta, 2006-VIII Eur. Ct. H.R. 305, 308 (holding that indirect discrimination can come from a *de facto* situation); Tapayeva v. Russia, App. No. 24757/18, ¶ 112 (Feb. 23, 2021), <https://hudoc.echr.coe.int/eng?i=001-213371> (holding that indirect discrimination can result from a policy).

220. Submission of UN Special Rapporteur, *supra* note 125, ¶ 47 (quoting *B.S. v. Spain*, App. No. 47159/08, ¶ 61 (Oct. 24, 2012), <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-112459%22>)) (mentioning *B.S. v. Spain*, a 2012 decision that recognized that Black women are particularly vulnerable to discrimination when compared to white women because of institutional racism).

221. ROYAL GEOGRAPHICAL SOC’Y, *supra* note 5 (describing what constitutes the Global South).

222. INT’L AMATEUR ATHLETICS FED’N, *supra* note 31, at 1–2.

223. ROYAL GEOGRAPHICAL SOC’Y, *supra* note 5 (describing what constitutes the Global North).

224. Most of the women affected by the policy are from Africa or South Asia. Other athletes not already mentioned above are Annet Negesa of Uganda and Christine Mboma and Beatrice Masilingi of Namibia. See Submission of UN Special Rapporteur, *supra* note 125, ¶ 47–48.

225. Biao v. Denmark, App. No. 38590/10, ¶ 103 (May 24, 2016), <http://hudoc.echr.coe.int/eng?i=001-163115>; D.H. v. Czech Republic, 2007-IV Eur. Ct. H.R. 241, 244–46.

The test established by the ECHR to determine if there was discrimination is as follows: (1) were people in similar situations treated differently, or were people in different situations treated the same; and (2) if yes, is the difference, or absence of one, justified objectively.²²⁶ Furthermore, does the “difference—or absence of difference— . . . pursue a legitimate aim?”; or rather, “[a]re the means . . . reasonably proportionate to the aim pursued?”²²⁷

Now, if by chance the policy was found to not be neutral, it would still meet all the elements of the test. For purposes of testing, let us compare Semenya with her American equivalent, Athing Mu. Mu has smashed records, owns Olympic gold medals, and holds a 1:55.04 800 meter (m) personal record.²²⁸ Semenya holds an 800m personal record of 1:54.25.²²⁹ The two athletes are separated by less than one second. Yet Mu has never been forced to take a sex verification test. Mu is from New Jersey—her parents immigrated from South Sudan—and races for the United States, a country in the Global North; Semenya was born in and races for South Africa, a country in the Global South.²³⁰ Mu dominates the field just as much as Semenya did, both are athletes of color with origins in Africa, and they share similar personal records. In other words, they are in an analogous or relevantly similar situation. Yet Semenya is treated far worse than Mu by World Athletics despite all their shared similarities. The only objective difference between the two athletes is that Mu fits the Western standard of “femininity,” and Semenya does not. This is a blatant “difference in treatment of persons in analogous or relevantly similar situations.” Both athletes are at the top of their fields in the 800m, yet Semenya was treated differently without any objective justification.

Effectively, the policy targets athletes on two levels. The first level looks to whether the athlete is from the Global South. The second level looks to whether the athlete fits the Western standard of femininity. If the athlete is from the Global South, then they are more likely to be flagged as suspicious

226. GUIDE ON ARTICLE 14, *supra* note 211, at 16.

227. *Id.*

228. See Alex Azzi, *Athing Mu Becomes First American Woman to Win 800m, Keeps Win Streak Alive (Video)*, NBC SPORTS (July 24, 2022), <https://www.nbcsports.com/on-her-turf/news/athing-mu-wins-womens-800>; *Athing Mu*, TEAM USA, <https://www.teamusa.org/usa-track-and-field/athletes/Athing-Mu> (last visited May 12, 2024).

229. *Caster Semenya Runs 1:54.25 with No Rabbits to Become 4th Fastest Ever and Destroy World's Best in Paris*, LETSRUN.COM (June 30, 2018), <https://www.letsrun.com/news/2018/06/caster-semenya-runs-154-25-no-rabbits-become-4th-fastest-ever-destroy-wolds-best-paris>.

230. *Athing Mu*, *supra* note 228; *Who Is South African Olympic Gold Medalist Caster Semenya*, BBC (May 1, 2019), <https://www.bbc.com/news/world-africa-48097440>.

and tested. Then, if the athlete also does not fit the Western standard of femininity, then the athlete will almost certainly be tested.

Using Mu and Semenya again, Semenya is from South Africa (Global South), while Mu is from New Jersey (Global North). Mu so far is safe, but Semenya already has a notch against her. As for the second level, Mu has narrow shoulders, while Semenya's are broad. Semenya has a powerful build, while Mu is slender. Semenya is quite muscular, while Mu has the stereotypical lankiness of a distance runner. Semenya has a strong jawline and broad face, while Mu has a delicate facial structure. In other words, Mu fits the stereotype of what a female distance runner "should" look like. She is lanky, slender, and looks "feminine." Semenya was never safe because, in conjunction with her being from the Global South, her strong and powerful build does not meet the Western feminine stereotype. Mu is "safe" because she is from the Global North *and* fits the "female" stereotype. Semenya on the other hand is not safe, because she is both from the Global South *and* does not fit this Western stereotype.

Even if this difference was objectively justified, the difference does not pursue a legitimate aim. In other words, the "means" of the policy (barring athletes and forcing them to take medication or undergo surgery) is not reasonably proportionate to the desired achievement (ensuring fair competition for female athletics). There are certainly less violative ways in which to achieve the goal of ensuring fair competition. For example, World Athletics could simply test for artificial testosterone while allowing athletes with naturally high levels of testosterone to continue to race (because they have not committed doping violations).²³¹

The ECHR has held that a country's "traditions, general assumptions [and] societal attitudes . . . are insufficient justification for a difference in treatment on the grounds of sex . . . or sexual orientation."²³² Additionally, stereotyping specific groups ultimately prohibits their needs from being evaluated individually, ignoring the differences among group members.²³³ Most relevant to Semenya's case, however, is that ECHR precedent

231. See *Caster Semenya Given London 2012 Gold Medal After Rival Is Stripped of Title*, GUARDIAN (Feb. 10, 2017), <https://www.theguardian.com/sport/2017/feb/10/caster-semenya-given-london-2012-gold-after-rival-is-stripped-title-mariya-savinova-farnosova>. Russian athlete Mariya Savinova-Farnosova, who beat Semenya for gold in the 2012 London Olympics, had her medal stripped after she was convicted of doping. *Id.* Semenya, a completely clean athlete, was forced to reduce her natural testosterone through unnecessary medical interventions. Meanwhile, Savinova-Farnosova competed for over five years while doping. In other words, an athlete taking artificial testosterone beat an athlete with naturally higher levels of testosterone.

232. GUIDE ON ARTICLE 8, *supra* note 168, at 20 (citations omitted); *Tapayeva v. Russia*, App. No. 24757/18, ¶¶ 111, 118 (Feb. 23, 2022), <https://hudoc.echr.coe.int/eng?i=001-213371>.

233. *Tapayeva*, App. No. 24757/18, ¶¶ 113–17.

establishes that general assumptions are insufficient justifications for discrimination on the basis of sex.²³⁴

The World Athletics policy is founded upon outdated gender stereotypes by testing athletes that look suspicious. In simpler terms, athletes who do not meet the Western gender stereotype of femininity are tested, which constitutes insufficient justification under ECHR precedent. Justifying the policy with language such as ensuring fair competition for female sports, and only forcibly sex testing “suspicious” athletes, is insufficient. The justification for the policy is based entirely on the fact that the athlete does not look feminine enough. The athlete looks “suspicious” because female athletes are being policed on outdated gender stereotypes.²³⁵

The World Athletics hyperandrogenism policy violates Articles 3, 8, and 14 of the Convention. The policy (1) subjects female athletes to degrading medical treatments that lack respect for athletes’ human dignity; (2) violates Member States’ positive obligation (requirement to act) under Article 8 and goes beyond the narrow margin given to Member States; and (3) indirectly discriminates against women in analogous situations without being reasonably proportionate to the aim pursued. In other words, the policy inflicts inhuman treatment to athletes through sex tests and forced medical treatment; violates athletes’ privacy because it discloses personal medical results without consent; and is indirectly discriminatory because it hurts predominately queer women of color from the Global South. Accordingly, the ECHR should hold that the policy violates Articles 3, 8, and 14 of the Convention.

234. GUIDE ON ARTICLE 8, *supra* note 168, at 20; Tapayeva, App. No. 24757/18, ¶ 111.

235. See 2008 Press Release, *supra* note 210; see also Pieper, *supra* note 80.

III. HOW TO ACTUALLY MAKE WOMEN'S ATHLETICS FAIR: THE
YOGYAKARTA PRINCIPLES AND CARBON-ISOTOPE-RATIO TESTING ARE
VIABLE SOLUTIONS

*A. Adopting the Yogyakarta Principles Would Provide Much-Needed
Clarification and Codify Protections for LGBTQIA+ Individuals*

Experts created the Yogyakarta Principles (Principles) to intersect international human rights law with sexual orientation and gender identity.²³⁶ In effect, these Principles provide a more comprehensive system of legal principles that international human rights law currently lacks.²³⁷ The European Court of Human Rights (ECHR) has not cited the Principles in a decision. This is despite widespread public support and over 30 signatories to the act—including everyone from professors in the United Kingdom and United States to United Nations' chairpersons in Poland and Turkey.²³⁸ The Principles' drafters created them in response to the discrimination, and sometimes violence, that individuals face because of their sexual orientation, gender, and gender expression.²³⁹

These Principles are nonbinding, but they are still restatements of international law at the time of drafting.²⁴⁰ In other words, they simply restate the responsibilities that governments already have.²⁴¹ Because there is no organizational affiliation, the Principles do not serve an advocacy or political purpose.²⁴² As a result, many governments have already implicitly adopted

236. Andrew Park, *Yogyakarta Plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. INT'L L. 223, 238–39 (2019). The Yogyakarta Principles originated from a joint project by International Services for Human Rights and the International Commission of Jurists. *Id.* However, the final project had no affiliation with any organization, and no organization had editorial control. *Id.*

237. *Id.* at 225.

238. *Id.* at 238 (explaining that signatories are significant because it shows affirmative approval of the Principles).

239. PAULA L. ETTTELBRICK & ALIA TRABUCCO ZERÁN, *THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT* 4 (2010), https://yogyakartaprinciples.org/wp-content/uploads/2016/10/Yogyakarta_Principles_Impact_Tracking_Report.pdf.

240. Park, *supra* note 236, at 240.

241. *Id.*

242. *Id.*

them.²⁴³ The Principles require Member States to examine existing structures and reform the structures that were built on heteronormative assumptions.²⁴⁴

Principle 32 of the Yogyakarta plus 10 update declares that every person “has the right to bodily and mental integrity, autonomy and self-determination irrespective of sexual orientation, gender identity, gender expression or sex characteristics.”²⁴⁵ Furthermore, Principle 32 states that no one can be forced into “invasive or irreversible medical procedures”; specifically, no one can be subjected to medical procedures with “sex characteristics [unless they give their] informed consent.”²⁴⁶ The updated edition also provides protections for intersex children from involuntary modification of their sex characteristics.²⁴⁷ In addition, the document contains 111 obligations calling for Member States to protect intersex children.²⁴⁸

Because the Principles are nonbinding, technically Member States can violate them. However, the Principles are restated binding international law applied in the context of LGBTQIA+-related discrimination.²⁴⁹ This means the Principles simply restate Member States’ current responsibilities and apply the protections that cisgender heterosexual individuals receive to

243. *Id.* at 241. Park highlights various examples:

[N]ational legislatures in Argentina, Brazil, Canada, Uruguay, the Netherlands, Germany, and Mexico introduced or passed bills citing the first Principles. . . . The Dutch Senate referred to the Yogyakarta Principles when reforming their gender identity laws. The Australian Government issued Guidelines on the Recognition of Sex and Gender, which relied on the first Principles. They have been repeatedly referred to as reflecting binding international legal standards by national courts, international intergovernmental organizations, governments, and academics.

Id. (footnotes omitted) (first citing ETELBRICK & ZERÁN, *supra* note 239, at 3–4; then citing *The Netherlands: Victory for Transgender Rights*, HUM. RTS. WATCH (Dec. 19, 2013), <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights#>; and then citing ETELBRICK & ZERÁN, *supra* note 239, at 11).

244. *Id.* at 254.

245. MAURO CABRAL GRINSPAN ET AL., *THE YOGYAKARTA PRINCIPLES PLUS 10*, at 10 (2017), https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf.

246. *Id.*

247. *Id.*

248. *Global Principles Protecting LGBTI Rights Updated: ‘Yogyakarta Principles Plus 10’ Call for Action Against Discrimination*, HUM. RTS. WATCH (Nov. 28, 2017), <https://www.hrw.org/news/2017/11/28/global-principles-protecting-lgbti-rights-updated>.

249. Park, *supra* note 236; *LGBTQIA+ Basic Terms and Definitions*, S.D. STATE UNIV. (June 9, 2023), <https://www.sdstate.edu/office-multicultural-affairs-accessibility/lgbtqia-basic-terms-and-definitions> [<https://web.archive.org/web/20230609053542/https://www.sdstate.edu/office-multicultural-affairs-accessibility/lgbtqia-basic-terms-and-definitions>] (defining “LGBTQIA+” as “[a]n acronym used to signify Gay, Lesbian, Bisexual, Transgender, Queer, Intersex, and Asexual people collectively”).

LGBTQIA+ individuals.²⁵⁰ Despite their non-binding nature, the Principles have already been cited as persuasive authority in United Nations' declarations, academic papers, and the 2011 Brazilian Supreme Court decision legalizing same-sex civil unions.²⁵¹

The 2011 Brazilian Supreme Court decision cited Principle 24, which recognizes diversity in family structure.²⁵² This Principle states that families are entitled to equal treatment and have the right to form a family.²⁵³ Necessarily, families also have the right to adopt, access reproduction assistance, and not face discrimination from Member States on the basis of their sexual orientation or gender identity.²⁵⁴ This decision extended the legal rights associated with marriage given to heterosexual couples to LGBTQIA+ couples.²⁵⁵

The Principles should be adopted in the same manner as restatements are in the United States. Judicial decisions have already widely cited them, and they merely restate current international precedent and apply it in the context of LGBTQIA+ individuals.²⁵⁶ Or, even easier, the Principles should be incorporated into the existing European Convention on Human Rights (Convention) precedent. Incorporating the Principles into the Convention would not substantively change any of the Articles. The Principles would merely clarify and codify protections for LGBTQIA+ individuals and ensure

250. Park, *supra* note 236; *What Do Transgender and Cisgender Mean?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-do-transgender-and-cisgender-mean> (last visited May 12, 2024) (defining “cisgender” as someone who identifies with the sex they were assigned “at birth”). For example, if a person is assigned female at birth and identifies as a woman, they are cisgender. *Id.*

251. Helena Campos Refosco & Martha Maria Guida Fernandes, *Same-Sex Parents and Their Children: Brazilian Case Law and Insights from Psychoanalysis*, 23 WM. & MARY J. WOMEN AND THE L. 175, 181 (2017).

252. *Id.*

253. *Id.*

254. *Id.*

255. Sueann Caulfield, *The Recent Supreme Court Ruling on Same-Sex Unions in Brazil: A Historical Perspective*, INT'L INST. J. U. MICH., Fall 2011, at 7. As the 2011 case was making its way through the legal system, a family court judge in Brazil who had previously denied cases involving LGBTQIA+ families, said: “I was wrong about [denying the previous cases], I see that now and I feel really badly. . . . But I see things differently now; you can see in the cases . . . and in doctrine . . . these are families like any other family and they deserve equal rights.” *Id.* at 10.

256. *Restatements of the Law and Uniform Laws: The Restatements; Introduction and Explanation*, OKLA. CITY UNIV. SCH. OF L.: CHICKASAW NATION L. LIBR, <https://libguides.okcu.edu/c.php?g=225285> (last updated Sept. 12, 2022) (discussing that Restatements are secondary sources that synthesize the existing case law for specific areas of law, which help courts understand and interpret current law). They do not replace precedent but exist to allow courts to either adopt or cite to when deciding cases. *See id.* When cited to or adopted in court decisions Restatements become mandatory authority. *See id.*

that the Convention is applied in the same manner as it currently is for cisgender heterosexual individuals.²⁵⁷

B. *Catching the Real Cheaters: Carbon-Isotope-Ratio Testing*

In addition to codifying protections for LGBTQIA+ individuals, there is a less discriminatory and violative way to ensure fair competition in women's athletics. The hyperandrogenism policy should be narrowed to only bar athletes from competing who commit doping violations with artificial testosterone. Not only would a narrow policy reduce outdated gender stereotypes associated with regulating women's natural testosterone, but it would also only punish athletes who have committed doping violations.²⁵⁸ This would have an injunctive effect on the policy, reducing the indirect discrimination that queer women of color from the Global South have faced. Further, modifying the policy in this manner would bring women's athletics in line with the standard practice used in men's athletics since there are no analogous policies restricting men's natural testosterone levels.

Tests that differentiate between natural and artificial testosterone are readily available, and there is plenty of evidence to support transitioning to them.²⁵⁹ The Carbon-Isotope-Ratio (CIR) test is an incredibly accurate test

257. Submission of UN Special Rapporteur, *supra* note 125, ¶ 45. The submission notes: [Multiple UN bodies] have called on States to prohibit discrimination on the basis of sex characteristics / against intersex persons. 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.”

Id. (footnote omitted) (first citing Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Eighth Periodic Rep. of New Zealand, U.N. Doc. No. CEDAW/C/NZL/CO/8, ¶¶ 9, 23 (2018); and then quoting COUNCIL OF EUR., PROMOTING THE HUMAN RIGHTS OF AND ELIMINATING DISCRIMINATION AGAINST INTERSEX PEOPLE ¶ 7.4 (2017), <https://pace.coe.int/pdf/08de8813d993b8b15cba4b65234f8a91499ca0f4e2a077ae1533425bb86123b5/doc.%2014404.pdf>).

258. See *supra* note 231 and accompanying text, for further discussion on how doping athletes have affected Semenya's races. See generally Erin Beresini, *The Top 10 Running Doping Scandals of All Time*, PODIUM RUNNER (May 25, 2011), <https://www.podiumrunner.com/events/the-top-10-running-doping-scandals-of-all-time> (listing several famous doping scandals in track and field and their respective punishments), *reposted at* JACKDOGWELCH.COM, <https://www.jackdogwelch.com/?p=46552> (last visited May 12, 2024).

259. See Arnaud Maître et al., *Urinary Analysis of Four Testosterone Metabolites and Pregnandiol by Gas Chromatography-Combustion-Isotope Ratio Mass Spectrometry After Oral Administrations of Testosterone*, 28 J. ANALYTICAL TOXICOLOGY 426, 426 (2004) (explaining how carbon-12 and carbon-13 ratios can be tested to determine the difference between artificial and natural testosterone); *The Test That Caught Tom Danielson*, OUTSIDE: VELO, <https://www.velonews.com/news/the-test-that-caught-tom-danielson> (last visited May 12, 2024); Thomas Piper et al., *Carbon Isotope Ratios of Endogenous Steroids Found in Human Serum—*

that differentiates between natural and artificial testosterone.²⁶⁰ This test looks at the actual weight of the testosterone as opposed to the athlete's bodily reaction to it.²⁶¹ Traditionally, testosterone tests look at the testosterone/epitestosterone (T/E)²⁶² ratio.²⁶³ Ratios over 4:1 are considered positive for purposes of World Anti-Doping Agency (WADA) drug testing.²⁶⁴ However, this testing goes back to normal ratios quickly if doping is done strategically and in the proper doses.²⁶⁵ Carbon-isotope tests also use a ratio. However, the ratio looks at the differences of carbon-12 and carbon-13 isotopes.²⁶⁶ Carbon-13 occurs less in artificial testosterone than natural testosterone.²⁶⁷ The carbon-12 and carbon-13 ratio stays consistent in a person, so the test compares the ratio of carbon-12 and carbon-13 in testosterone with another compound, such as cholesterol.²⁶⁸ A positive test occurs when the ratios fail to match.²⁶⁹

Implementing this test could take many forms. The easiest way to incorporate CIR testing is just to replace all current testing with CIR tests. WADA could, and should, continue testing athletes through whereabouts, in-competition training, and podium finishes in the same manner it currently

Method Development, Validation, and Reference Population-Derived Thresholds, 413 ANALYTICAL & BIOANALYTICAL CHEMISTRY 5655, 5655–56 (2021).

260. *The Test That Caught Tom Danielson*, *supra* note 259; see also Thomas Piper & Mario Thevis, *Investigations in Carbon Isotope Ratios of Seized Testosterone and Boldenone Preparations*, 14 DRUG TESTING & ANALYSIS 514, 517 (2021).

261. *The Test That Caught Tom Danielson*, *supra* note 259.

262. See *Testosterone, Epitestosterone and the Doping Tests*, CYCLINGNEWS (July 30, 2006), <https://www.cyclingnews.com/features/testosterone-epitestosterone-and-the-doping-tests> (discussing how since epitestosterone is naturally produced in a human body, and testosterone cannot convert to epitestosterone, an elevated T/E ratio can indicate doping).

263. *The Test That Caught Tom Danielson*, *supra* note 259; *Who We Are*, WADA, <https://www.wada-ama.org/en/who-we-are> (last visited May 12, 2024) (describing that WADA tests athletes for doping violations). Additionally, if an athlete tests positive on a WADA test, then they are banned from all competition for a specified period of time, generally two or four years, depending on the nature of the violation. See Alison Wade, *How Drug Testing in Running Works*, RUNNER'SWORLD (Nov. 14, 2014), <https://www.runnersworld.com/races-places/a20835249/how-drug-testing-in-running-works>.

264. *The Test That Caught Tom Danielson*, *supra* note 259.

265. *Id.*

266. See *DOE Explains . . . Isotopes*, ENERGY.GOV, <https://www.energy.gov/science/doe-explainsisotopes> (last visited May 12, 2024) (describing how carbon-12 and carbon-13 isotopes differ because of their number of neutrons, and therefore, their weight; carbon-12 has 6 neutrons (6 protons and 6 neutrons, hence the 12) and carbon-13 has 7 neutrons (7 neutrons and 6 protons, hence the 13)); *The Test That Caught Tom Danielson*, *supra* note 259.

267. *The Test That Caught Tom Danielson*, *supra* note 259.

268. *Id.*

269. *Id.*

does.²⁷⁰ The only change WADA would have to implement is using CIR testing instead of blood, urine, or Athlete Biological Passport testing.²⁷¹ Through testing athletes with CIR testing, doping officials could find out whether carbon-12 and carbon-13 ratios did not match. If the ratios did not match, then doping officials can be certain that the athlete genuinely doped, rather than discriminate based on an athlete's natural testosterone levels.

Not only is the CIR test more accurate, if World Athletics adopted it as the gold-standard test, it would allow for the hyperandrogenism policy to be repealed without adverse effects on the fairness of competition. Widespread use of CIR tests would allow for clean athletes with higher levels of natural testosterone to compete without having to undergo forced medical treatment and still catch dirty athletes who are doping. Overall, the CIR test would lessen the discriminatory impact on athletes like Semenya and Niyonsaba and do more for fair competition than World Athletics' hyperandrogenism policy ever has. Punishing athletes who do not dope, while letting dirty athletes off scot-free from inadequate testing²⁷² is not only unfair, but it also blatantly ignores well-known medical advances in sports science that could be implemented to avoid violating the Convention, all at a low cost to World Athletics.

270. *Whereabouts*, USADA, <https://www.usada.org/athletes/testing/whereabouts> (last visited May 12, 2024) (defining whereabouts as an "out-of-competition testing program" that tests athletes without any prior warning or notice).

271. *Athlete Biological Passport*, WADA, <https://www.wada-ama.org/en/athlete-biological-passport> (last visited May 12, 2024) (discussing how athlete biological passport testing essentially monitors athletes' "longitudinal profiles" of steroid levels in urine, blood, or other biological variables); see E. Strahm et al., *Detection of Testosterone Administration Based on the Carbon Isotope Ratio Profiling of Endogenous Steroids: International Reference Populations of Professional Soccer Players*, 43 BRIT. J. SPORTS MED. 1041, 1042 (2009) (discussing that the CIR test could use urine to test for mismatched carbon-12 and carbon-13 ratios, but urine might not be accurate for low-level artificial testosterone use); Piper et al., *supra* note 259, at 5661 (discussing that the CIR test could use blood to test for mismatched carbon-12 and carbon-13 ratios).

272. While athletes that test positive for doping do not technically get off scot-free, they typically serve minimal bans that extend for only one Olympic cycle, such as a four-year ban. Clean athletes affected by the hyperandrogenism policy effectively receive lifetime bans unless they undergo unnecessary medical procedures. Comparatively, a four-year ban for using banned performance-enhancing substances is getting off "scot-free" when compared to a lifetime ban for athletes who have the biological gift of naturally producing more testosterone than considered "normal." See *supra* note 231 and accompanying text, for a discussion about an athlete that avoided testing positive despite doping.

CONCLUSION

I know the [World Athletics'] regulations have always targeted me specifically. . . . For a decade [World Athletics] has tried to slow me down, but this has actually made me stronger. . . . The decision of the [Court of Arbitration for Sport] will not hold me back. I will once again rise above and continue to inspire young women and athletes in South Africa and around the world.²⁷³

Semenya has publicly fought the hyperandrogenism policy, calling it targeted, discriminatory, and unsupported by evidence. If the world keeps punishing Semenya for being born with a natural advantage, then it should punish other athletes with a natural advantage. Extending the logic behind World Athletics' policy—that it is keeping international sports fair by regulating the natural advantages of women such as Semenya, Chand, Niyonsaba, Kłobukowska, and Martínez-Patiño to all athletics—then Eero Mäntyranta should be stripped of all seven of his medals because of his natural advantage. Mäntyranta has a rare condition where he produced 65% more red blood cells than the normal man, giving him a natural advantage for cross-country skiing.²⁷⁴ Donald Thomas should have his medals stripped because of his natural advantage, a rare genetic condition that caused his Achilles tendon to be far longer than normal, providing a substantial advantage for the high jump.²⁷⁵ Shaquille O'Neal should be stripped of his records and awards because he would have been banned from basketball due to his biological advantage of abnormal height. Eero Mäntyranta, Donald Thomas, and Shaquille O'Neal possess natural advantages that make it unfair for their competitors, yet they were never questioned as to how their natural advantage made their respective competitions unfair for the other athletes.

Punishing Semenya, Chand, and Niyonsaba simply does not make for fairer competition. It does not level the playing field. If World Athletics wanted to make competition start with a level playing field, then it and the International Olympic Committee would not have allowed Russian athletes to compete in the Olympics despite institutionalized state-run doping

273. North, *supra* note 25.

274. David Epstein, *Magic Blood and Carbon-Fiber Legs at the Brave New Olympics*, SCI AM (Aug. 5, 2016), <https://www.scientificamerican.com/article/magic-blood-and-carbon-fiber-legs-at-the-brave-new-olympics>.

275. Michael Skinner, *What's More Important for Athletes: Training or Genetics?*, UNIV. OF NOTRE DAME: BIOMECHANICS IN THE WILD (Mar. 6, 2019), <https://sites.nd.edu/biomechanics-in-the-wild/2019/03/06/why-are-athletes-so-good>.

schemes. Instead of punishing convicted doping violators, they continued to let said athletes compete without their flag, gain national recognition, win medals, and earn a livelihood. Instead of punishing actual dopers, they chose to punish and ban women who were clean athletes simply born with a natural advantage. They chose to punish clean athletes and let dirty ones compete freely. If World Athletics wanted to make competition fair, it would regulate the elevation that athletes could train at; the recovery techniques that athletes employ; and the height, weight, arm, and leg span that athletes have.²⁷⁶ However, it does not, because that would be nonsensical and would punish natural advantages that society has chosen as acceptable for sports competition.

World Athletics' hyperandrogenism policy infantilizes women by hurting the competition within the events barred. It implies that athletes without a natural advantage cannot even compete with those who have a natural advantage. Further, the policy does nothing more than perpetuate outdated concepts of gender. Instead of ensuring fairness in women's athletics by banning doping athletes, World Athletics chose to police gender norms and punish athletes for failing to conform to outdated Western gender stereotypes. World Athletics should modify its policy to only restrict athletes who dope, using Carbon-Isotope-Ratio testing. This would continue to help make athletics fair and would stop World Athletics from violating the European Convention on Human Rights.

276. Strashin, *supra* note 5. Strashin quotes Bruce Kidd:

If the world of sport is going to look at factors that are strongly correlated with outstanding performance and medals, they should first look to personal and national income before anything else. . . . Look at any medal table. It's lined up in favour of the richest countries and the richest families from those countries.

Id.