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COMMENT

THE OLYMPIC MEDDLE: THE INTERNATIONAL OLYMPIC COMMITTEE'S INTRUSION OF ATHLETES' PRIVACY THROUGH THE DISCRIMINATORY PRACTICE OF GENDER VERIFICATION TESTING

BY: RAHEEL SALEEM*

I. INTRODUCTION

Caster Semenya, a South African track and field athlete, recently reached the pinnacle of athletic success when she earned a gold medal at the World Championships for the women's 800 meters.¹ She not only won the competition, but also displayed her athletic dominance over her fellow competitors.² However, Semenya's success was quickly marred as

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1. Eben Harrell, *Is a Female Track Star a Man? No Simple Answer*, TIME (Aug. 25, 2009), <http://www.time.com/time/health/article/0,8599,1918668,00.html>.

2. See *12th IAAF World Championships in Athletics* (Aug. 19, 2009), http://berlin.iaaf.org/results/racedate=08-19-2009/sex=W/discCode=800/combCode=hash/roundCode=f/results.html#detW_800_hash_f (reporting Semenya's time at 1:55.45, more than 2 seconds ahead of her nearest competitors). See also Anna Kessel, *Caster Semenya Wins 800m Gold But Cannot Escape Gender Controversy*, GUARDIAN.CO.UK (Aug. 19, 2009), <http://www.guardian.co.uk/sport/2009/aug/19/caster-semenya-800m-world-athletics-championships->

speculation about her gender clouded her performance.³ A few weeks later, an unsuspecting Semenya learned, along with the entire world, that she was neither female nor male, but rather an intersexed individual.⁴ The once proud champion, Semenya is now a “traumatized” eighteen-year-old dealing with a personal issue that was unfairly and publicly caused by the International Association of Athletics Federations (IAAF) and the International Olympic Committee (IOC).⁵

The gender verification tests were forced on a powerless Semenya.⁶ The IAAF claims that its basis for ordering Semenya to undergo gender verification testing was to preserve the integrity of track and field.⁷ The IAAF argues that the tests were not used to investigate Semenya’s gender, but rather to investigate whether Semenya had an “unfair advantage” over her competitors.⁸ Under the IAAF’s reasoning, there is an inherent conflict between preservation of sporting integrity and preservation of bodily integrity, including athletes’ rights to privacy. The result here has been life changing. Since Semenya failed the gender verification test, she risks losing her gold medal at the World Championships, and, more importantly, her right to compete at a professional level.⁹ The results of the gender verification test not only stripped

gender (finding that Semenya faced gender controversy in her junior career, where she also holds the world record time).

3. Eben Harrell, *South Africa Slams Semenya’s Gender Test*, TIME (Sept. 11, 2009), <http://www.time.com/time/world/article/0,8599,1921847,00.html>.

4. See *What is Intersex?*, INTERSEX SOCIETY OF NORTH AMERICA, http://www.isna.org/faq/what_is_intersex (last visited Feb. 18, 2011) (explaining that intersex is a socially constructed “general term used for a variety of conditions in which a person is both with a reproductive or sexual anatomy that does [not] seem to fit the typical definitions of female or male”).

5. See Colean Jacobson, *Caster Semenya Receives Huge Welcome Home, Winnie Madikizel-Mandela: We Are Proud Of “Our Little Girl,”* THE HUFFINGTON POST (Aug. 25, 2009, 3:59 PM), http://www.huffingtonpost.com/2009/08/25/caster-semenya-receives-h_n_268010.html (explaining that the effects of the controversy has left Semenya traumatized).

6. See Oren Yaniv, *Caster Semenya, Forced to Take Gender Test, is a Woman . . . and a Man*, NY DAILY NEWS (Sept. 10, 2009, 1:50 PM), http://www.nydailynews.com/news/world/2009/09/10/2009-09-10_caster_semenya_.html (explaining that Semenya was ordered to take gender verifications tests after her 800m win by the IAAF, and those results revealed that she has internal testes and no womb or ovaries).

7. See INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, *IAAF Policy on Gender Verification 1* (2006), <http://www.iaaf.org/mm/document/imported/36983.pdf> (finding that gender verification is essential to ensure fair competition amongst female athletes).

8. *Id.* at 3. See also Katherine Franke, “*Gender Verification in Sports: We All Have a Stake in Caster Semenya’s Medal*,” RH REALITY CHECK (Sept. 14, 2009, 7:00 AM), <http://www.rhrealitycheck.org/blog/2009/09/14/gender-verification-sports-we-all-have-a-stake-caster-semenyas-medal> (alluding that the gender bias inherent in IAAF verification policy, where gender verification tests are “the female sex test” because the test only applies to women’s events).

9. Franke, *supra* note 8. Franke argues that gender verification tests are essentially a female test because it applies only to women’s events. *Id.* The tests are aimed to discover

Semenya of her privacy, but also her athletic achievements and promising competitive future.¹⁰

At this point, power of the IAAF and the IOC to administer gender verification tests is unfettered.¹¹ These tests intrude on the privacy of athletes and discriminate against them, violating international human rights. Specifically, gender verification tests violate the International Covenant on Civil and Political Rights (ICCPR),¹² the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),¹³ the Universal Declaration on the Human Genome and Human Rights (UDHGHR),¹⁴ and the International Declaration on Human Genetic Data (IDHGD).¹⁵ Thus, the IAAF and the IOC must either abolish gender verification testing or adopt a rule that protects information of gender verification results.

In order to fully evaluate the intricacies of this topical discussion, it is important to delve into the historical background of not only gender verification testing, but also its implementation by the IAAF and the IOC. Also, it is imperative to investigate the legal ramifications of gender verification testing within internationally accepted human rights. Section II will provide background of the science behind gender classifi-

whether an athlete is “enjoying the benefits of natural testosterone predominance normally seen in a male.” *Id.* Linda Lowen, *South African Runner Caster Semenya and the Dilemma of Gender Ambiguity*, ABOUT.COM: WOMEN’S ISSUES (Sept. 16, 2009), <http://womensissues.about.com/b/2009/09/16/south-african-runner-caster-semenya-and-the-dilemma-of-gender-ambiguity.htm>.

10. Lowen, *supra* note 9.

11. Throughout the evolution of gender verification testing, this presumption influenced the fates of athletes who subsequently failed the test. *Genetics: Mosaic in X & Y*, TIME (Sept. 29, 1967), available at <http://www.time.com/time/magazine/article/0,9171,899860,00.html>. In 1967, the first athlete to fail the new gender test was Ewa Klobukowska, who was discovered to have an XXY phenotype. *Id.* Prior to this test, Klobukowska won both gold and bronze medals in the 1964 Olympics, set a world record for 100 meters in 1965, and won two gold medals at the European Athletics Championships in 1966. *Id.* As a result of her failed test, her Olympic medals were taken, and she was subsequently banned from professional sports. *Id.*

12. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (Dec. 16 1966), available at <http://www2.ohchr.org/english/law/ccpr.htm>.

13. See Convention on the Elimination of All Forms of Discrimination Against Women, Division for the Advancement of Women, G.A. Res. 34/180, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, (Sept. 3, 1981), available at <http://www2.ohchr.org/english/law/cedaw.htm>.

14. United Declaration on the Human Genome and Human Rights, G.A. Res. 152, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/152 (Dec. 9, 1998), available at <http://www2.ohchr.org/english/law/genome.htm>.

15. United Nations Educational, Scientific and Cultural Organization Conference, *International Declaration on Human Genetic Data*, (Oct. 16, 2003), available at http://portal.unesco.org/en/ev.php-URL_ID=17720&URL_DO=DO_TOPIC&URL_SECTION=201.html.

cation, particularly sexual differentiation. Moreover, it will provide background on the evolution of gender verification testing, including the technological and scientific advancements that made gender verification testing a tool utilized by the IAAF and the IOC. This section will also provide the historical use of gender verification tests in relation to athletes, and examine the relevant rules that govern gender verification testing within the realm of the sporting arena. Section II will also explore prior gender verification tests that have been administered to athletes, and the ensuing impact these tests have had on those athletes. Finally, Section II will explain the IOC's structure and international human rights declarations that may govern or restrain the actions of the IOC.

Section III will propose the abolition of the IAAF and the IOC's gender verification rule. The initial purpose behind this rule, to prevent "men [from] impersonating or masquerading as women," is inconsistent with, and not furthered by, actual gender verification practices.¹⁶ The practice particularly undercuts the interests of female athletes.¹⁷ Additionally, this section will further propose that both the IAAF and the IOC should be restricted from violating its athletes' fundamental rights because of these organizations' boundless power. As it stands, the gender verification rule is in violation of international human rights. If the gender verification rule cannot be abolished, then it must be tailored to adhere to international laws. This can be accomplished by expanding the international courts' power to hold the IAAF and the IOC accountable for violations and protecting gender verification test results through improved confidentiality rules. Confidentiality rules need to explicitly restrict the IAAF and the IOC from the disclosure of unauthorized information relating to athlete investigations.¹⁸ Finally, Section IV will conclude.

16. See Hayden Opie, *International Sports Law Perspective: Australian Medico-Legal Issues in Sport: The View From the Grandstand*, 13 MARQ. SPORTS L. REV. 113, 138 (2002) (discussing the role of male hormone testosterone to separate male and female competitions, and further substantiating the original purpose of gender verification tests).

17. 'Semenya Case Still Pending', SPORT 24 (Oct. 4, 2009, 1:04 PM), <http://www.sport24.co.za/OtherSport/Semenya-case-still-pending-20091004>. This article explains that the medical commissioner, Arne Ljungqvist, revealed that many cases like Semenya surfaced throughout the 1996 Olympics Games, which later substantiated the initial abolishment of the gender verification tests. *Id.* Moreover, Ljungqvist does not list names of any athletes that were affected by this test at the 1996 Olympic Games because of "confidentiality," but can freely discuss Semenya's case. *Id.*

18. See e.g., LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 152, 153 (2d ed. 2008). MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2006) (stating that "a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph b"). Moreover, Comment 4 provides that:

II. BACKGROUND

A. GENDER CLASSIFICATION

Genetics is the scientific study of genetic transmission from parent to child.¹⁹ This genetic transmission is possible through chromosomal development.²⁰ Chromosomes contain long aggregates of genes that carry the basic physical and functional units of heredity information.²¹ In determining gender, the chromosomal development is particularly essential for sexual differentiation.²² Sexual differentiation includes four steps: (1) Fertilization and determination of genetic sex; (2) Formation of organs common to both sexes; (3) Gonadal differentiation; and (4) Differentiation of the internal ducts and external genitalia.²³

Fertilization occurs when a mother's egg, which contains twenty-three chromosomes, is combined with a father's sperm, which also contains twenty-three chromosomes.²⁴ The mother's egg includes an X chromosome, whereas a father's sperm includes either an X or Y chromosome.²⁵ The fertilized egg has either forty-six chromosomes including a XX (genetic female) or XY (genetic male) karyotype.²⁶ The fertilization process determines genetic sex.²⁷

During formation of organs common to both sexes, the fertilized egg

Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibitions also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Id. at 153.

19. *Definition of Genetics*, MEDICINE.NET.COM, <http://www.medterms.com/script/main/art.asp?articlekey=15390> (last visited Feb. 18, 2011).

20. Regina Bailey, *Chromosomes and Sex*, ABOUT.COM: BIOLOGY, <http://biology.about.com/od/basicgenetics/p/chromosgender.htm> (last visited Feb. 18, 2011).

21. *What is a Gene?*, GENETICS HOME REFERENCE (Nov. 7, 2010), <http://ghr.nlm.nih.gov/handbook/basics/gene>.

22. See Berdache Jordan, *Syndromes of Abnormal Sex Differentiation*, HEALTHY PLACE (Aug. 09, 2007), <http://www.healthyplace.com/gender/inside-intersexuality/syndromes-of-abnormal-sex-differentiation/menu-id-1427/> (explaining that sexual differentiation is a process that "results in a newborn baby who is either male or female.").

23. *Id.*

24. P.C. Sizonenko, *Human Sexual Differentiation*, GENEVA FOUNDATION FOR MEDICAL EDUCATION AND RESEARCH (Sept. 4, 2008), http://www.gfmer.ch/Books/Reproductive_health/Human_sexual_differentiation.html.

25. Jordan, *supra* note 22.

26. M.J. FARABEE, *Human Genetics*, in ON-LINE BIOLOGY BOOK (2001), <http://www.emc.maricopa.edu/faculty/farabee/biobk/BioBookhumgen.html> (last modified May 18, 2010).

27. *Id.*

multiplies to form a large number of similar cells.²⁸ These cells differentiate during the growth of an embryo to form various organs of the body, including sex organs.²⁹ At that stage, both male and female fetuses have similar sex organ formation that includes gonadal ridges, internal ducts, and external genitalia.³⁰ The formation of gonadal ridges is essential for development of differentiated gonads.³¹

Step three of sexual differentiation is gonadal differentiation, where the gonadal ridge becomes a testis or an ovary.³² In males, the gonadal ridge develops into testes from a product defined as “testis determining factor” or “sex determining region of the Y chromosome” (SRY) from a gene located on the Y chromosome.³³ In females, the absence of SRY, or absence of a Y chromosome, allows the expression of other genes that will transition the gonadal to ovaries.³⁴ The final step, differentiation of the internal ducts and external genitalia, involves the secretion of Mullerian Inhibiting Substance (MIS) and of androgens.³⁵ Two products are

28. See Jordan, *supra* note 22 (explaining that cell formation from fertilized eggs is a common formation common to both sexes).

29. *Id.*

30. *Id.* (explaining the formation of organs common to both sexes).

Gonadal ridges are the primary formation of reproductive organs. *Id.* Internal ducts are tubes or channels that carry reproductive secretions. *Id.* External genitalia are the reproductive organ. *Id.* By the fourth to fifth weeks of gestation, or carrying of an embryo or fetus, gonadal ridges are recognized and include undifferentiated germ cells that later develop into either eggs or sperm. *Id.* Furthermore, this formation requires the effects of several genes that, if non-functional, will result in an absent gonadal ridge, and therefore no development of either testes or ovaries. *Id.* During the fetal life’s sixth and seventh weeks, the fetuses of both sexes have two sets of internal ducts, the Mullerian female ducts and the Wolffian male ducts. Jordan, *supra* note 18. Mullerian ducts are essential in females to form the fallopian tubes, uterus, and the upper portion of the vagina. *Id.* The Wolffian ducts are essential for storing embryonic cells to form male reproductive organs. *Id.* The external genitalia appear female with genital tubercle, the genital folds, urethral folds, and a urogenital opening. *Id.* These parts are essential to foster the female reproductive system. *Id.*

31. Jordan, *supra* note 22.

32. *Syndromes of Abnormal Sex Differentiation*, THE JOHN HOPKINS CHILDREN’S CENTER, <http://www.hopkinschildrens.org/intersex/> (last visited May 21, 2001).

33. Jordan, *supra* note 22.

34. *Id.*; *Syndromes of Abnormal Sex Differentiation*, THE JOHN HOPKINS CHILDREN’S CENTER, *supra* note 32.

35. See also Jordan, *supra* note 22 (stating the anatomical processes for differentiation of external female and male genitalia). *Id.* Normal testes development, where Sertoli cells produce MIS, inhibits the growth of the female Mullerian ducts, uterus and fallopian tubes, which are present in all fetuses in early development. *Id.* Moreover, Leydig cells of the testes start secreting androgens, hormones that enable growth of the male Wolffian ducts, epididymis, vas deferens, seminal vesicles, which are also present in all fetuses. *Id.* Unlike testes, the ovaries do not produce androgens and, as a result, Wolffian ducts fail to grow and disappear in fetuses with ovarian development. *Id.* Additionally, ovaries do not

needed for normal male development.³⁶ In contrast, a female fetus with no developing testes will produce neither MIS nor androgens, and therefore female ducts will develop and male ducts will disappear.”³⁷

During sexual differentiation, errors may arise that cause abnormalities of the sex organs.³⁸ These abnormalities cause newborns to develop

produce MIS at the appropriate time, and as a consequence, the Mullerian (female) ducts can develop. *Id.*

36. Jordan, *supra* note 22.

37. *See id.* (explaining the affects of MIS and androgens in development of external genitalia). In the female, absence of androgens permits the external genitalia to remain feminine, where the genital tubercle becomes the clitoris, the genital swellings become the labia majora and the genital folds become the labia minora. *Id.* In the male, fetal androgens from the testes influence growth of the external genitalia. *Id.* The genital tubercle grows to become the penis and the genital swellings fuse to form the scrotum. *Id.*

38. *Id.*; see Joel Hutcheson & Howard M. Snyder III, *Ambiguous Genitalia and Intersexuality*, EMEDICINE, <http://emedicine.medscape.com/article/1015520-overview> (last updated July 16, 2009) (explaining processes that lead to different abnormalities for intersexed individuals).

AIS occurs in an individual with a mutated receptor gene, which makes that individual incapable of responding to androgens. *Id.* There are two forms of AIS, Complete Androgen Insensitivity Syndrome (CAIS) and Partial Androgen Insensitivity Syndrome (PAIS). *Id.* CAIS affects individuals with 46 chromosomes and XY (genetic male) karyotype. *Id.* Such individuals have normal appearing female external genitalia because of their complete inability to respond to androgens. *Id.* This inability occurs because the genital tubercle, swellings, and folds cannot masculinize, despite the presence of functional testes within the abdomen. *Id.* Moreover, Wolffian ducts do not develop due to the fact that these structures cannot respond to androgens by those with CAIS. *Id.* Mullerian duct development is further inhibited because of the testes inability to produce MIS. *Id.* Unlike individuals with CAIS, PAIS individuals are born with ambiguous genitalia because of their partial inability to respond to androgens. *Id.* Here, the genital tubercle is larger than a clitoris, but smaller than a penis. *Id.* Moreover, there may be a presence of a partially fused labia/scrotum, undescended testes, and a perineal hypospadias. *Id.* “Wolffian duct development is minimal or nonexistent and the Mullerian duct system does not develop properly.” *Id.*

Individuals with Gonadal Dygenesis respond to androgens, but develop abnormal testes that are unable to produce androgens. *Id.* There are two forms of Gonadal Dygenesis, Complete Gonadal Dygenesis and Partial Gonadal Dygenesis. *Id.* Complete Gonadal Dygenesis is where abnormal gonads form, Wolffian Ducts regress, no MIS produce, Mullerian Ducts develop, and external genitalia form. *Id.* Because the gonads cannot produce androgens or MIS, the genital tubercle, swellings, and fold fail to masculinize, the Wolffian duct regresses, and the Mullerian duct develops. *Id.* Partial Gonadal Dygenesis also affects genetic males, but differs in that partial testes with ambiguous external genitalia produce androgens and MIS. *Id.* The production of some androgens and MIS is possible through the partial development of both Wolffian and Mullerian ducts, along with the ambiguous external genitalia. *Id.*

Reductase Deficiency occurs during fetal development in genetic males, where the genital tubercle, swellings, and folds masculinize from androgen exposure. *Id.* Although, gonads transition into testes, secrete normal levels of testosterone, and response to androgens, genetic males with reductase deficiency are unable to convert testosterone into dihydrotestosterone (DHT). *Id.* Therefore, these individuals have functioning testes and

both male and female characteristics, and intersexual traits.³⁹ Ambiguous external genitalia occur when the external genital structures are exposed to higher or lower amounts of male hormones.⁴⁰ Here, external

normal Wolffian ducts, but lack Muellarian ducts, penis resembling a clitoris, and scrotum resembling labia majora. *Id.*

Normal testosterone distribution for genetic males occurs through biological conversions. *Id.* However, Testosterone Biosynthetic Defects, where enzyme deficiency may inhibit biochemical conversion necessary for testosterone production, may occur. *Id.* Despite having testes, genetic males are unable to make normal amounts of testosterone. *Id.* Therefore, newborns either have external female genitalia or ambiguous genitalia. *Id.*

As a result of cortisol biosynthetic defect, excess adrenal androgens are produced. *Id.* This abnormality, CAH affects genetic females and can lead to ambiguous development of the external genitalia, where enlarged clitoris and fused labia that resembles a scrotum exist. *Id.*

See also Goro Sasaki et al., *Micropenis and the 5 α -Reductase-2 (SRD5A2) Gene: Mutation and V89L Polymorphism Analysis in 81 Japanese Patients*, 88 J. CLIN. ENDOCRINOL. METAB. 3431 (2003) available at <http://jcem.endojournals.org/cgi/reprint/88/7/3431> (explaining that in genetic males, fetal development for penis formation depends on androgens in early fetal life, where genital tubercle, swellings, and folds transform into a penis and scrotum, and later in fetal life to enlarge the penis. A condition where individuals have a developed penis, but is extremely small, is called micropenis).

See also Jordan, *supra* note 22 (explaining other abnormalities that lead to intersexed conditions). Proper timing is also important for normal development of male genitalia. *Id.* If all four of the steps are properly timed, but are delayed, then the external genitalia will be ambiguous. *Id.* Any sort of delay in timing can result in abnormalities of sexual differentiation. *Id.*

Mosaicism affects individuals with forty-five chromosomes and XO karyotype or individuals with forty-six chromosomes and XY karyotype. *Id.* Individuals born with Mosaicism can have male, female, or ambiguous genitalia at birth. *Id.* Males have normal male sex differentiation processes, while female with Mosaicism have consistent sexual differentiation to those with Turner Syndrome. *Id.* Individuals with ambiguous genitalia will have two or more sets of chromosomes that influence sexual differentiation. *Id.* Because the Y chromosome is affected by Mosaicism, the individual will have abnormal sexual differentiation that will result in inconsistencies in formation of genitalia. *Id.*

See also Harold Chen, *Klinefelter Syndrome*, EMEDICINE, <http://emedicine.medscape.com/article/945649-overview> (last updated Mar. 22, 2010) (explaining that Klinefelter Syndrome occurs in individuals with forty-seven chromosomes and a XXY karyotype). Usually Klinefelter Syndrome affects men, who at puberty can have female breast growth, low androgen production, small testes, and decrease sperm production. *Id.* Although individuals with Klinefelter have normal external genitalia differentiation, they will have a substantially smaller penis than the average male. *Id.*

See also *Turner Syndrome*, MAYOCLINIC (Aug. 22, 2009), <http://www.mayoclinic.com/health/turner-syndrome/DS01017> (explaining that individuals with forty-five chromosomes and XO karyotype have Turner Syndrome). Webbing of the neck, broad chest, horseshoe kidneys, cardiovascular irregularities, and short stature, are common characteristics of individuals with Turner Syndrome. *Id.* Individuals with Turner Syndrome do not have either ovaries or testes, but have a combination of both; moreover, these individuals have normal appearing external female genitalia, but do not have breast development or menstruation cycles at puberty due to non-functioning ovaries. *Id.*

39. Hutcheson & Snyder, *supra* note 38.

40. Jordan, *supra* note 22.

genitalia develop in a manner that is not female or male.⁴¹

Thus, sexual differentiation produces three categories of people: women, men, and intersexed individuals. The category of intersexed individuals complicates the gender verification rule because it does not account for the broad range of intersexed genetic abnormalities. Instead, gender verification tests seek to clearly divide women and men, and in doing so, exclude intersexed athletes from competitions.

B. ORIGIN AND EVOLUTION OF GENDER VERIFICATION IN TRACK AND FIELD

Gender verification is a procedure used in sports that qualifies athletes to participate in gender-restricted events.⁴² The initial purpose of gender verification testing was to prevent men from impersonating women in sporting events.⁴³ This prevention was based on the assumption that male athletes would have an unfair advantage over women.⁴⁴ Gender verification arose in response to concerns that the Soviet Union was entering male athletes as women.⁴⁵ Although gender verification tests seemed like a necessary and simple solution, the evolution of this approach suggests the innate complexity in generalizing gender based on such tests.⁴⁶

41. *Id.*

42. S.E. Smith, *What is Gender Verification?*, WISEGEEK, <http://www.wisegeek.com/what-is-gender-verification.htm> (last visited Feb. 18, 2010).

43. Opie, *supra* note 16, at 138.

44. *Id.*

45. Arne Ljungqvist, *Gender Verification*, in *WOMEN IN SPORT* 183-193 (Barbara L. Drinkwater ed., 2000); See J.C. Reeser, *Gender Identity and Sport: Is the Playing Field Level?*, 39 BR. J. SPORTS MED. 695, 695-699 (2005), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1725041/pdf/v039p00695.pdf> (finding that “initial accounts of men masquerading as women in order to compete for the laurels . . . when athletic achievement became a source of both personal and national pride, prestige, and reward . . . sex fraud may have been systematically perpetuated for political gain dating back to the 1936 Berlin Olympics”).

46. See M.A. Ferguson-Smith & Elizabeth A. Ferris, *Gender Verification in Sport: The Need for Change?*, 25 BR. J. SPORTS MED. 17 (1991), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1478807/pdf/brjmsmed00025-0021.pdf> (explaining that sex fraud continued through the Rome Olympics in 1960, which prompted the IAAF and IOC to establish rules of eligibility for women athletes to ensure that athletes compete on an equal basis, including physical status); see also Rachel Liberman, *When the Private Becomes so Very Public: The Case of Caster Semenya*, SOCIOLOGY COMPASS (Aug. 26, 2009, 4:24 AM), <http://sociologycompass.wordpress.com/2009/08/26/when-the-private-becomes-so-very-public-the-case-of-caster-semenya/> (arguing that a long history of suspicion exists where female athletes achieve success). Dave Zirin & Sherry Wolf, *Caster Semenya: The Idiocy of Sex Testing*, *The Nation*, Aug. 31, 2009, available at <http://www.thenation.com/article/caster-semenya-idiocy-sex-testing> (arguing that gender verification tests must be eliminated due to gender bias within sporting agencies, which is substantiated through IAAF and fellow competitors comments on Semenya’s physical attributes).

In 1966, the first gender verification test required athletes to strip before a panel of physicians and undergo direct gynecological examinations.⁴⁷ This approach faced scrutiny from women athletes because of the invasive “crude and perhaps humiliating” nature, and was subsequently replaced by the introduction of chromosomal, or buccal smear, examinations.⁴⁸ This test determined gender by searching for the “Y” chromosome to differentiate males from females.⁴⁹

The chromosomal test was discredited by the mid-1970s because of its limited ability to assess those who possessed various chromosomal disorders, such as intersexed individuals.⁵⁰ In 1992, a variant test was introduced to supplement chromosomal examinations.⁵¹ This supplementation includes a panel of an endocrinologist, a gynecologist, a psychologist, and an internal medicine specialist who examine athletes that failed the chromosomal test to determine eligibility.⁵² This addition was scrutinized because of its limitations to other forms of chromosomal irregularities and abnormalities, which eventually led to its abandonment by the IAAF in 1991 and the IOC in 2000.⁵³

Although gender verification tests may have deterred athletes from impersonation in its formative years, opponents further argue that this

47. Ljungqvist, *supra* note 45. See also Ferguson-Smith & Ferris, *supra* note 46, at 17-20 (explaining that manual examinations of the external genitalia were performed by gynecologists).

48. IAAF Policy on Gender Verification, *supra* note 7; see also Opie, *supra* note 12, at 139 (explaining that the scientific discovery of buccal smear paved the way for modern use of buccal smear; moreover, reporting that this tests is limited in respects to ambiguous findings). See also Ferguson-Smith & Ferris, *supra* note 46, at 18 (stating the process of chromosomal, or buccal smear, was used as an acceptable means of establishing eligibility and preventing masquerading). This test is “a microscopic examination of epithelial cells scraped from the inside of the cheek. *Id.* The cells are strained to reveal the presence or absence of the Barr body, which is caused by inactivation of one of the two X chromosomes in female cells and which appears in 20-30% of nuclei. *Id.* Male cells do not show this Barr body as they have only one active X chromosome. *Id.* The test therefore indicates the number of X chromosomes in the cell nucleus and this reflects the sex chromosome constitution of the individual, normally XX in females and XY in males.” *Id.*

49. S.E. Smith, *What is Gender Verification?*, <http://www.wisegEEK.com/what-is-gender-verification.htm> (last visited Feb. 18, 2011).

50. Opie, *supra* note 12, at 139.

51. *Id.* See also Ferguson-Smith & Ferris, *supra* note 46, at 17 (explaining that genetic disorders interfere with sex differentiation and thus to “paradoxical findings between anatomical sex and chromosomal sex.” The Polymerase chain reaction (PCR) test was used to overcome these difficulties because “PCR amplifies . . . genetic material . . . making the process much faster, cheaper, and more reliable.” PCR replicates DNA strand and easily allows for a reading of the SRY gene, which determines gender).

52. Christopher Clarey & Gina Kolata, *Gold Awarded Amid Dispute Over Runner's Sex*, N.Y. TIMES, Aug. 20, 2009, at B9, available at <http://www.nytimes.com/2009/08/21/sports/21runner.html>.

53. IAAF Policy on Gender Verification, *supra* note 7.

approach is archaic since current athletic clothing and required drug testing makes “impersonation virtually impossible.”⁵⁴ Moreover, the use of “‘gender verification’ [tests] as a blanket measure” are inherently discriminatory in that only women undergo them, even in cases of athletes who have borne children.⁵⁵ Despite such arguments, and the IAAF and the IOC’s abandonment, gender verification tests are still in use where “occasional anomalies that do surface as a chance observation during the ubiquitous anti-doping controls . . . or through a ‘challenge’ by a competitor.”⁵⁶ However, the historical evolution of this method provides that there is no single and adequate laboratory method or physical examination for gender screening.⁵⁷

C. EFFECTS OF GENDER VERIFICATION

The history of gender verification tests demonstrates the profound difficulty faced by athletes who are intersexed, or equivocally one of the other sex.⁵⁸ Although the gender verification rule’s original purpose was to bar impersonators, it is now used to bar intersexed athletes.⁵⁹ Proponents support this broadening scope of gender verification tests by arguing that the testosterone levels of intersexed athletes are more similar to men, and therefore such athletes should be ineligible to compete in women’s events.⁶⁰ Proponents argue that higher testosterone levels of intersexed athletes grant an unfair advantage against competitors.⁶¹ Thus, proponents’ justification for the gender verification rule is based upon the presumption that the performance enhancing characteristics of testosterone garners unfair athletic advantages.⁶²

Throughout the evolution of gender verification testing, this presumption influenced the fates of athletes who subsequently failed the test. In 1967, the first athlete to fail the new gender test was Ewa

54. Opie, *supra* note 16, at 140 (questioning the current validity and necessity for gender verification tests, since the initial primary purpose of the test was to bar male impersonators).

55. *Id.*

56. *IAAF Policy on Gender Verification*, *supra* note 7.

57. *Id.*

58. Opie, *supra* note 16, at 140.

59. *Id.* (explaining the inconsistencies of the prior motivation behind the enactment of gender verification tests, especially where intersexed, and not male, athletes, seemed to be mostly effected by such tests).

60. Ljungqvist, *supra* note 45.

61. *Id.*

62. Opie, *supra* note 16, at 140 (discussing that the eligibility requirement that women’s events are only for women allows for proponents of gender verification tests to argue testosterone levels should be the determinative factor because men have more testosterone than women).

Klobukowska, who was discovered to have an XXY phenotype.⁶³ Prior to this test, Klobukowska won both gold and bronze medals in the 1964 Olympics, set a world record for 100 meters in 1965, and won two gold medals at the European Athletics Championships in 1966.⁶⁴ As a result of her failed test, her Olympic medals were taken, and she was subsequently banned from professional sports.⁶⁵ The justification for these actions were based solely on the test, which found Klobukowska “not a woman because she has ‘one chromosome too many.’”⁶⁶

In 2006, Santhi Soundarajan was stripped of her 2006 Asian Games silver medal after failing a gender verification test.⁶⁷ This test was administered after someone placed an anonymous complaint with the Indian Olympic Association (IOA).⁶⁸ The IOA announced that the 25-year-old failed the test and further implied that she deceived the sporting community by competing as a woman when she was actually a man.⁶⁹ Thus, the effects of gender verification testing unduly burden athletes with genetic anomalies. In failing the gender verification test, athletes are excluded from competitions and stripped of all athletic achievements.

D. ORGANIZATION OF THE INTERNATIONAL OLYMPIC COMMITTEE

There are three main constituents that encompass the Olympic Movement: the International Olympic Committee, the IAAF, and the Na-

63. *Genetics: Mosaic in X & Y*, *supra* note 11.

64. *Ewa Klobukowska*, A GENDER VARIANCE WHO'S WHO (Aug. 25, 2009), <http://zagria.blogspot.com/2009/08/ewa-kobukowska-1946-athlete.html>.

65. *Id.*

66. *Genetics: Mosaic in X & Y*, *supra* note 11.

67. *See Santhi Soundarajan*, A GENDER VARIANCE WHO'S WHO, (Aug. 23, 2009), <http://zagria.blogspot.com/2009/08/santhi-soundarajan-1981-athlete.html>.

68. *See id.* The author states that Soundarajan was born into an impoverished area in India, eventually became a middle distance track athlete. She holds the national record for women's 3000 meters. *Id.* In 2005, she won the 880m, 1,500m, 3,000M in a Bangalore event. Also, she won the 800m silver medal at the Asian Championships. *Id.* *See also The Sad Story of Santhi Soundarajan*, THE TIMES OF INDIA, Jan. 9, 2007, available at <http://timesofindia.indiatimes.com/The-sad-story-of-Santhi-Soundarajan/articleshow/1109135.cms> (alluding that a fellow Indian athlete may have tipped a doping control official, who later made the complaint based on the rumors circulating about Soundarajan's physical appearances).

69. *The Sad Story of Santhi Soundarajan*, *supra* note 68 (explaining that it was the Indian Olympic Association [IOA] that prompted the investigation that later banned Soundarajan from IAAF and IOC competitions). *See also* Ramachandra Maniappa, *Indian Runner Knows About Gender-Test Backlash*, ASSOCIATED PRESS (Sep. 19, 2009), available at <http://intersexnews.blogspot.com/2009/09/indian-runner-knows-about-gender-test.html>. Soundarajan was publicly humiliated not only by the IOC, but also the Indian media. *Id.* She was stripped of her Asian Games medal, as well as, forced to drop out of competitive athletics. *Id.* The stigma attached to her failed gender test brought unemployment and shame. *Id.*

tional Olympic Committees (NOCs).⁷⁰ The IOC is a private, non-profit organization located in Switzerland, and was created by the Congress of Paris on June 23, 1894.⁷¹ The IOC delegates certain Olympic functions to various groups⁷² and has granted the IAAF, which is headquartered in Monaco, authority to establish Olympic rules and regulations for track and field events.⁷³ The IAAF is responsible for sanctioning international track and field competitions. Although the IAAF may make recommendations regarding track and field, the IOC retains sole authority over the rules and regulations of the sport.⁷⁴

Each country that participates in the Olympic Games has a NOC, which determines which of their athletes will compete in the Olympics.⁷⁵ The IOC recognizes the NOCs as a constituent part of the Olympic Movement.⁷⁶ Any person or organization belonging to any of these three organizations are bound by the Olympic Charter (OC) and must abide by the decisions of the IOC.⁷⁷ Any complaints regarding the IOC's decisions or sporting events are made to the Court of Arbitration for Sport (CAS), which is established and operated by the IOC.⁷⁸

E. INTERNATIONAL LEGAL INSTRUMENTS

The universal system of international law embodies customary human rights that are intended to be universally, rather than regionally, applicable.⁷⁹ The International Bill of Rights encompasses this structure through its composition of the U.N. Charter's human rights provisions, Universal Declaration of Human Rights, and the International Covenants and Commissions.⁸⁰ In response to World War II, the United Nation General Assembly adopted the Universal Declaration of Human Rights.⁸¹ The Universal Declaration, although non-binding, is revered

70. *The Olympic Charter*, International Olympic Committee, 9 (Feb. 11, 2010), available at http://www.olympic.org/Documents/olympic_charter_en.pdf.

71. *Id.* at 10, 29.

72. *Id.* at 45.

73. *Headquarters*, INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, <http://www.iaaf.org/aboutiaaf/headquarter/index.html> (last visited Feb. 21, 2011).

74. *The Olympic Charter*, *supra* note 70 at 30, 41.

75. *Id.* at 69, 80-81.

76. *Id.* at 13.

77. *Id.* at 9.

78. *Id.* at 29.

79. PETER MALANCZUK & MICHAEL B. AKEHURST, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 2-3 (1997).

80. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, *supra* note 12.

81. *See* Universal Declaration of Human Rights, *supra* note 80 (incorporating in the Preamble that "the advent of a world in which human beings shall enjoy freedom of speech

as an authoritative interpretation of the U.N. Charter's provisions and is accepted through State practice as customary international law of human rights.⁸² The Universal Declaration constructs the foundation for the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Universal Declaration on the Human Genome and Human Rights (UDHGHR), and the International Declaration on Human Genetic Data (IDHGD).⁸³ These declarations articulate internationally binding fundamental rights of privacy and rights against sex and genetic discrimination.⁸⁴

Regional systems foster differing conceptions and attitudes of human rights than that of the universal system, including the Americas, Europe, and Africa human rights systems. In 1950, members of the Council of Europe enacted the European Convention on Human Rights to protect civil and political rights.⁸⁵ The European Court of Human Rights (ECHR) oversees claims against other parties and applications from "any person, non-governmental organization or group of individuals claiming to be the victim of a violation" of one of the Convention's rights or protocols.⁸⁶ The Court has jurisdiction over complaints by state parties and individuals.⁸⁷

1. *International Covenant on Civil and Political Rights*

The ICCPR, adopted on December 19, 1966, by the U.N. General Assembly, encompasses most of the rights expressed in the Universal Declaration.⁸⁸ Under ICCPR, States are obligated to implement these rights immediately.⁸⁹ The ICCPR establishes the Human Rights Committee, which consists of eighteen members, elected on the basis of their human rights expertise, who serve in their personal capacities rather than as

and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people").

82. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 711-713 (1987).

83. International Covenant on Civil and Political Rights, *supra* note 12; Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 13; United Declaration on the Human Genome and Human Rights, *supra* note 14; *International Declaration on Human Genetic Data*, *supra* note 15.

84. *Id.*

85. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 22 (Sept. 3, 1953), *as amended by* Protocols No. 11 and 14, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

86. *Id.*

87. *Id.*

88. *See generally*, International Covenant on Civil and Political Rights, *supra* note 12.

89. *See id.* at art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . .").

government representatives.⁹⁰ These members question States on their fundamental rights implementation listed in the ICCPR and, in turn, make recommendations for States to implement absent fundamental rights in States' legislation.⁹¹

Under Article 41 of ICCPR, a party to the Covenant can make a claim against another party of the Human Rights Committee for failure to fulfill its obligations under the Covenant.⁹² Another option for claimants is the First Optional Protocol to the ICCPR, which is an optional agreement that allows individuals to file claims against States in violation of the Covenant's rights.⁹³ If the Committee decides that the complaint is admissible, it informs the involved State, which then has six months to respond.⁹⁴ If the Committee decides that the State has violated the rights of the petitioner, it forwards its findings to the State, including remedial recommendations.⁹⁵

In regards to privacy, the ICCPR specifically guarantees privacy as a right in Article 17, which states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.
2. Everyone has the right to protection of the law against such interferences or attacks.⁹⁶

Paragraph 1 of Article 17 guarantees a right of privacy to individuals, and paragraph 2 imposes a duty upon States to provide means to protect such guarantees.⁹⁷ The Human Rights Committee's General Comment 16 provides that the right to privacy must be guaranteed against all arbitrary or unlawful interferences and attacks from State authorities or from legal persons.⁹⁸ General Comment 16 also obliges States parties to adopt legislative and other measures to prohibit privacy intrusions and

90. See generally, International Covenant on Civil and Political Rights, *supra* note 12 (167 parties and 72 signatories).

91. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Pages/WelcomePage.aspx> (last visited Feb. 18, 2011); *Human Rights Committee*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/> (last visited Feb. 18, 2011).

92. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *supra* note 91.

93. International Covenant on Civil and Political Rights, *supra* note 12, at art. 41.

94. *Id.*

95. *Id.*

96. David Banisar & Simon Davis, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, GLOBAL INTERNET LIBERTY, <http://gilc.org/privacy/survey/intro.html> (last visited Feb. 18, 2011).

97. ALEX CONTE & RICHARD MURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS: THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 201 (2009).

98. *Id.*

to protect privacy rights.⁹⁹ Also, General Comment 16 requires States to implement laws that regulate the collecting and holding of personal information by public authorities and private individuals and organizations in computers, data banks, or other means.¹⁰⁰ Effective protection of personal information includes security of such information from unauthorized persons, and such information cannot be utilized in violation of the ICCPR.¹⁰¹ The IOC is a recognized legal person within Switzerland; therefore, Swiss law determines the permissibility of gender verification testing.¹⁰² Switzerland's Federal Act of Data Protection of 1992 requires that personal information held by private bodies must be legally and fairly collected with limits on its use and disclosure to third parties.¹⁰³ Moreover, Swiss law provides a specialized rule that guarantees professional confidentiality in medical and legal information.¹⁰⁴ Thus, the Federal Act of Data Protection of 1992 adheres to Article 17 of the ICCPR by implementing both a prohibitive duty not to interfere with privacy and a positive duty to protect privacy.¹⁰⁵

2. *Committee on the Elimination of all forms of Discrimination Against Women*

The Committee on the Elimination of all forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the U.N. General Assembly to prohibit discrimination against women and protect women's rights.¹⁰⁶ CEDAW is comprised of twenty-three members who oversee the state reporting procedures, ensuring that legal standards and practical steps are enacted by the States to ensure improvement of women status.¹⁰⁷ Like the ICCPR, CEDAW has an individual communication procedure where claimants can file complaints against States.¹⁰⁸ CEDAW defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a

99. *Id.* at 202.

100. *Id.*

101. *Id.*

102. *The Olympic Charter*, *supra* note 70.

103. *Swiss Confederation*, PRIVACY & HUMAN RIGHTS 2003: AN INTERNATIONAL SURVEY OF PRIVACY LAWS AND DEVELOPMENTS, <http://www.privacyinternational.org/survey/phr2003/countries/switzerland.htm> (last visited Feb. 18, 2011).

104. *Id.*

105. CONTE & MURCHILL, *supra* note 97, at 202.

106. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 13.

107. MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 86-87 (2003).

108. *Id.* at 87.

basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field.¹⁰⁹

States accepting this Convention must “ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.”¹¹⁰ Article 5 of CEDAW further obliges member States to take measures in order to instill equality between men and women and remove perpetuated practices based on stereotypes of women and men.¹¹¹

3. *Universal Declaration on the Human Genome and Human Rights*

With the rise of technological developments, interests within international law and policy emerged to protect genetic tests.¹¹² In 1997, the General Conference of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) implemented the UDHGHR, which was later endorsed by the U.N.¹¹³ UDHGHR’s Article 1 provides that “the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.”¹¹⁴ Furthermore, the Preamble of UDHGHR states that:

the recognition of the genetic diversity of humanity must not give rise to any interpretation of a social or political nature which could call into question the ‘inherent dignity and . . . the equal and inalienable rights of all members of the human family’, in accordance with the preamble to the Universal Declaration of Human Rights.¹¹⁵

The Preamble prohibits “all forms of discrimination based on genetic characteristics,” which is further substantiated through Articles 2, 6, and 7.¹¹⁶ Article 2 states that individuals have the right of respect for their dignity and rights regardless of genetic characteristics, and moreover that “dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.”¹¹⁷ Article 6 prohibits genetic characteristics discrimination that infringes on human rights, fundamental freedoms, and human dignity; furthermore, this provision bars the use of genetic information for medical or

109. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 13.

110. *Id.*

111. NOWAK, *supra* note 107, at 86.

112. IULLIA V. MOTOC, *NEW TECHNOLOGIES AND HUMAN RIGHTS* 226 (Therese Murphy eds., 2009).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

non-medical health purposes to discriminate against individuals.¹¹⁸ Finally, Article 7 protects information of genetic testing to remain confidential unless otherwise consented.¹¹⁹

4. *International Declaration on Human Genetic Data*

In October 2003, UNESCO adopted IDHGD to establish principles that govern the collecting, processing, using, and storing of human genetics data.¹²⁰ IDHGD has three established goals.¹²¹ First, “to guarantee the respect of human dignity and protection of human rights and fundamental freedoms in the collection, processing, use, and storage of human genetic data, human proteomic data, and biological samples, in keeping with the requirements of equality, justice, and solidarity.”¹²² Second, provide guidance for the States in forming legislation and policies to adhere to these issues listed above.¹²³ Third, to set forth guidelines of accepted practice for institutions and individuals handling genetic data.¹²⁴

Article 3 of IDHGD provides that each “individual has a characteristic genetic make-up. Nevertheless, a person’s identity should not be reduced to genetic characteristics, since it involves complex education, environmental, and personal factors and emotional, social, spiritual and cultural bonds with others and implies a dimension of freedom.”¹²⁵

Article 7 addresses both discrimination and stigmatization, which provides:

(a) Every effort should be made to ensure that human genetic data and human proteomic data are not used for purposes that discriminate in a way that is intended to infringe, or has the effect of infringing human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to the stigmatization of an individual, a family, a group of communities.

(b) In this regard, appropriate attention should be paid to the findings of population-based genetic studies and behavioral [sic] genetic studies and their interpretations.¹²⁶

Therefore, IDHGD “prohibit[s] discrimination that impacts on human rights fundamental freedoms, and human dignity.”¹²⁷ Also, the IDHGD

118. MOROC, *supra* note 112, at 226.

119. *Id.*

120. *Id.* at 228.

121. *Id.*

122. *Id.*

123. *Id.*

124. MOROC, *supra* note 112, at 228-29.

125. *Id.* at 229.

126. *Id.*

127. *Id.* at 228.

focuses on the protection of genetic privacy and confidentiality. Article 8 emphasizes the importance of consent stating that:

prior, free, informed, and express consent, without inducement by financial or other personal gain, should be obtained for the collection of human genetic data, human proteomic data or biological samples, whether through invasive or non-invasive procedures, and for their subsequent use and storage, whether carried out by public or private institutions.¹²⁸

Article 14 addresses both privacy and confidentiality.¹²⁹ Article 14(a) articulates that States should provides safeguards to protect individuals' privacy and human genetic confidentiality linked to an identifiable person pursuant to domestic law consistent with international law of human rights.¹³⁰ Article 14(b) states that:

Human genetic data, human proteomic data and biological samples linked to an identifiable person should not be disclosed or made accessible to third parties . . . except for an important public interest reason in cases restrictively provided for by domestic law consistent with the international law of human rights or where the prior, free, informed and express consent is in accordance with domestic law and the international law of human rights. The privacy of an individual participating in a study using human genetic data, human proteomic data or biological samples should be protected and the data should be treated as confidential.¹³¹

Thus, the international human rights declarations provide protections from privacy intrusion and discrimination for all citizens of the States. The declarations are binding against both public and private actors, including the IOC. Although binding, the committees of these declarations can make binding recommendations towards improved actions. These committees do not have the power to prosecute wrongful actions like the ECHR.

5. *European Convention of Human Rights*

Like ICCPR, CEDAW, UDHR, and IDHGD, the European Convention protects the fundamental rights of privacy and protects against discrimination.¹³² For example, Article 8 of the European Convention states, “[e]veryone has the right to respect for his private and family life . . . there shall be no interference by a public authority . . . as is necessary in a democratic society in the interests . . . for the protection of

128. *Id.* at 232-33.

129. *Id.* at 233.

130. Morocco, *supra* note 112, at 233.

131. *Id.*

132. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 22 (Sept. 3, 1953), *as amended*, by Protocols No. 11 and 14, *available at* <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

the rights and freedoms of others.”¹³³ The European Court of Human Rights enforces such privacy rights, construing protections expansively and restrictions narrowly.¹³⁴ The court expanded Article 8’s protections beyond government actions to apply to private persons in situations where prohibition was necessary.¹³⁵ Article 14 states that “the enjoyment of the rights and freedoms set forth . . . shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.”¹³⁶

III. ANALYSIS

The IAAF and the IOC’s verification test should be abolished for various reasons. First, verification testing intrudes on athletes’ privacy rights. Second, verification testing discriminates based on genetic characteristics and gender. Third and finally, if verification testing is necessary, then the IAAF and the IOC should implement confidentiality rules to protect athletes’ medical information.

A. GENDER VERIFICATION TESTING INTRUDES ON ATHLETES’ PRIVACY RIGHTS

Gender verification testing violates the privacy rights provisions of the ICCPR and the IDHGD. In the ICCPR, “the term . . . ‘unlawful’ [interference] applies to circumstances in which the State party or an individual acts contrary to [domestic] law.”¹³⁷ Since the IOC is a recognized legal person within Switzerland, Swiss law determines the permissibility of gender verification testing.¹³⁸ Switzerland’s Federal Act of Data Protection of 1992 requires that personal information held by private bodies must be legally and fairly collected with limits on its use and disclosure to third parties.¹³⁹ Moreover, Swiss law provides a specialized rule that

133. *Id.*

134. David Banisar & Simon Davis, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, GLOBAL INTERNET LIBERTY, <http://gilc.org/privacy/survey/intro.html> (last visited Feb. 18, 2011).

135. *See* *Leander v. Sweden*, 9 Eur. Ct. H.R. 433 (1987) (holding that Article 8(1) was interfered when the defendant stored and released information relating to the applicant’s private life, coupled with a refusal to allow him to refute such information). *See also* *Gasikin v. United Kingdom*, 12 Eur. Ct. H.R. 36 (1989) (holding that confidentiality of public records breached the applicant’s Article 8 because of applicant’s inability to obtain his own protected information).

136. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 132.

137. SCOTT N. CARLSON & GREGORY GISVOLD, *PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 108 (2003).

138. *The Olympic Charter*, *supra* note 70.

139. *Swiss Confederation*, *supra* note 103.

guarantees professional confidentiality in medical and legal information.¹⁴⁰

None of these Swiss requirements are now met. The practice of gender verification testing is unlawful because it is not collected fairly and makes medical information accessible to third parties, namely the media.¹⁴¹ In the cases of Klubowska, Soundarajan, and Semenya, the sporting governments insisted on gender verification testing based on mere suspicions.¹⁴² In all three cases, these women were required to take gender verification testing in order to confirm their sex.¹⁴³ Without such confirmation, the athletes would be barred from professional sporting competitions.¹⁴⁴ Failure to consent to gender verification tests implies that athletes are evading the results. Thus, athletes' "consent" is forced because if they wish to compete (or clarify their sex to the sporting government and public), they have no other viable choice but to consent to the test.

Moreover, the IOC does not secure sensitive medical information as described by Swiss law. Gender verification is a medical test and should have "professional confidentiality" as ensured by Swiss law.¹⁴⁵ Here, it is clear that the results were not handled with confidentiality since the media revealed reports of the test.¹⁴⁶ Thus, the IOC violated the Federal Act of Data Protection of 1992 based on the fact that the tests were collected through forced consent and the results were leaked to the media.

The ICCPR is designed to guarantee a right of privacy to individuals.¹⁴⁷ Gender verification testing tarnishes the reputation of athletes who fail the test, while abrasively intruding upon their privacy.¹⁴⁸ Klubowska and Soundarajan, for example, were stripped of their achievements and labeled as cheaters after they failed the gender verification test.¹⁴⁹ In both cases, the media revealed the test results, and

140. *Id.*

141. Ariel Levy, *Either/Or*, THE NEW YORKER, Nov. 30, 2009, available at http://www.newyorker.com/reporting/2009/11/30/091130fa_fact_levy.

142. Donald McRae, *Caster Semenya: 'People Want to Stare at me, to touch me. I Don't Think I Like Being Famous so Much.'* THE GUARDIAN, Nov. 14, 2009, available at <http://www.guardian.co.uk/sport/2009/nov/14/caster-semenya-donald-mcrae-training-camp>.

143. Levy, *supra* note 141.

144. McRae, *supra* note 142.

145. *Swiss Confederation*, *supra* note 103.

146. Ljungqvist, *supra* note 45.

147. International Covenant on Civil and Political Rights, *supra* note 12; CONTE & MURCHILL, *supra* note 97, at 201.

148. IAAF Policy on Gender Verification, *supra* note 7. *Genetics: Mosaic in X & Y*, *supra* note 11. See also Santhi Soundarajan, A Gender Variance Who's Who, *supra* note 67; *The Sad Story of Santhi Soundarajan*, *supra* note 68; *12th IAAF World Championships in Athletics*, *supra* note 2 (reporting Semenya's time at 1:55.45, more than 2 seconds ahead of her nearest competitors); Kessel, *supra* note 2.

149. *Genetics: Mosaic in X & Y*, *supra* note 11. See also Maniappa, *supra* note 69.

subsequently the two were excluded from the sporting community and scrutinized by the public. Such negative public ramifications of gender verification testing underscores the severe privacy intrusions, in violation of the ICCPR.

Proponents of the testing argue that the need for testing is to somehow “preserve the integrity” of competitions; moreover, they argue that intersexed athletes are innately advantaged over female competitors.¹⁵⁰ However, there is currently no research or studies that substantiate claims that intersexed athletes garner any advantage over their female counterparts.¹⁵¹ Proponents’ arguments rely on unsupported information. There is already an alternative means to gender verification testing without privacy intrusions. Anti-doping tests are a reasonable alternative that will preclude males from participating in women’s competitions.¹⁵² Many anti-doping tests are administered in front of doping officials, who are present when athletes urinate into testing samples.¹⁵³ During this test, doping officials have to personally observe an athlete while urinating, and therefore could plainly see the external genitalia of the athlete. Thus, doping officials could readily bar imposters from female competitions through anti-doping tests since they will have clear view of the athletes’ genitalia.

Since there is a lack of evidence pertaining to increased testosterone levels aiding in a competitors’ success, anti-doping screenings can serve as the best remedy for screening males from female competitions. Proponents cannot argue that gender verification testing is the only necessary tool to bar any male entrants in female competitions. Anti-doping tests provide a less intrusive means against male participation of female competitions. Therefore, gender verification testing on female athletes is an unnecessary means because supervision of anti-doping tests would be a reasonable alternative that would not violate the ICCPR.

Additionally, gender verification testing must be abolished because the justifications for the tests are inconsistent with the ICCPR. The jus-

150. Ljungqvist, *supra* note 45.

151. Levy, *supra* note 141.

152. *Gender Testing - Gender Verification at Elite Sports Competitions: The Foundation Position*, WOMEN’S SPORTS FOUNDATION, <http://www.womenssportsfoundation.org/Content/Articles/Issues/Equity-Issues/G/Gender-Testing—Gender-Verification-at-Elite-Sports-Competitions-The-Foundation-Position.aspx> (last visited Feb. 18, 2011) (explaining that gender verification tests should be abolished, but even so, the testing could be administered during anti-doping tests in order to gain anonymity in testing).

153. *Testosterone Doping Test “Not Fit for Purpose,”* SWISSINFO.CH (Mar. 12, 2009), http://www.swissinfo.ch/eng/sport/Testosterone_doping_test_not_fit_for_purpose.html?siteSect=181&sid=10440720&cKey=1236948533000&ty=st&rs=yes (explaining the procedures of anti-doping tests as well as arguing that anti-doping officials need to invalidate some of the tests because the tests disregard the effects of testosterone, which may trigger a failed steroid use test).

tification for gender verification testing does not amount or warrant the encroachment of athletes' privacy. Gender verification testing is a tool that is abused by the IOC to investigate the sensitive information of genetic make-up due to mere curiosity. In most cases, the foundation that prompts investigation into athletes' sex is based solely on gender-based classifications. Therefore, the use of gender verification testing, along with the underlying discriminatory purpose, violates Swiss law and ICCPR because the IOC cannot abrasively intrude on individuals' privacy on the basis of merit-less accusations.¹⁵⁴ Thus, the continued use of gender verification testing grants the IOC boundless power to administer such tests without any supported justification or cause, which is inconsistent with human rights prescribed by the ICCPR.

Furthermore, gender verification testing violates both Article 8 and Article 14 of the IDHGD. The IOC violates the consent provision of Article 8 because the gender verification tests are forcibly administered. Athletes must surrender their privacy rights to remain eligible to compete. Thus, they have little choice but to submit to testing. Moreover, gender verification testing violates Article 14 of the IDHGD because the IOC does not maintain safeguards to protect athletes' privacy and human genetic confidentiality linked to an identifiable person, as illustrated with the cases of Klubowska, Soundarajan, and Semenya. The media reported the genetic anomalies of their tests to the public. The women had no security in their genetic results because their tests were publicized. Thus, the practice of gender verification violates both the ICCPR and the IDHGD, and should be abolished due to the lack of sufficient safeguards to protect this sensitive information from third parties, namely the media, and the illegal intrusions into athletes' genetic information.

B. GENDER VERIFICATION TESTING DISCRIMINATES AGAINST WOMEN AND INTERSEXED ATHLETES

In addition, gender verification testing by the IOC and the IAAF violates CEDAW, specifically Article 1, "Discrimination," and Article 5, "Sex Role Stereotyping and Prejudice." Article 1 provides that:

discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁵⁵

Gender verification tests are inherently geared towards subjecting only

154. McRae, *supra* note 142.

155. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 13.

women to such testing.¹⁵⁶ The IAAF argues that such testing is implemented in order to foster fair competition between competitors.¹⁵⁷ This notion of fair competition is rooted in the belief that women who have ambiguous genitalia will have higher levels of testosterone that garners an unfair competition in sports.¹⁵⁸

However, this argument is flawed for several reasons. First, there are no studies or information to substantiate or verify the claim that higher levels of testosterone will bestow an advantage on female or intersexed athletes.¹⁵⁹ Without such empirical data, the IOC cannot substantiate an actual purpose for gender verification tests. Thus, the use of the tests appears to be without any justification.

Second, there is no such argument for male athletes because, presumptively, no one can make an argument that higher levels of estrogen will cause an unfair advantage.¹⁶⁰ In the history of the use of gender verification testing in athletic sports, all of the cases involved testing the gender of women.¹⁶¹ These cases show a history of discrimination against female athletes. Women are only subject to such testing based on the sole fact that they are women.¹⁶² When the results of the gender verification tests have established that a woman is intersexed, the IOC and IAAF historically have taken away any winnings made by the athlete or banned further participation in the sport.¹⁶³ Therefore, the tests' results negatively impact individuals with a female chromosome or genetic anomaly.

Third, there is history that shows a discriminatory pattern against not only intersexed individuals, but also women. As aforementioned, women were not allowed entry into sports, and even today are not able to participate in as many sports as men. Moreover, the purpose of gender verification testing is inconsistent with its implementation. The original purpose of the test was to preclude men from participating in female competitions. However, in practice, there has not been a single instance where a male failed a gender verification test, but only situations where

156. *IAAF Policy on Gender Verification*, *supra* note 7. *See also* Franke, *supra* note 8.

157. *IAAF Policy on Gender Verification*, *supra* note 7.

158. Opie, *supra* note 16.

159. *Id.*

160. Opie, *supra* note 16 (explaining the inconsistencies of the prior motivation behind the enactment of gender verification tests, especially where intersexed and non-male athletes seemed to be mostly affected by such tests). *See also* Franke, *supra* note 8.

161. *Genetics: Mosaic in X & Y*, *supra* note 11. *See also* Santhi Soundarajan, A Gender Variance Who's Who, *supra* note 67; *The Sad Story of Santhi Soundarajan*, *supra* note 68; *12th IAAF World Championships in Athletics*, *supra* note 2; Kessel, *supra* note 2.

162. *See* Franke, *supra* note 8.

163. *Genetics: Mosaic in X & Y*, *supra* note 11. *See also* Santhi Soundarajan, A Gender Variance Who's Who, *supra* note 67; *The Sad Story of Santhi Soundarajan*, *supra* note 68; *12th IAAF World Championships in Athletics*, *supra* note 2; Kessel, *supra* note 2.

intersexed females failed.¹⁶⁴ The intent supporting the justification for gender testing is skewed, since it clearly affects a miniscule class of people: intersexed individuals. The initial intent of preserving the integrity of female competitions and banning male imposters is a fallacy since gender verification testing does nothing more than bar participation of intersexed females.¹⁶⁵ Thus, the IOC and IAAF's implementation of gender verification testing is based solely on discrimination.

Gender verification testing should be abolished because of its discriminatory impact and discriminatory purpose. The discriminatory impact of gender verification testing is clear. First, those who undergo gender verification tests are those suspected of having genetic anomalies due to their masculine features. Such accusations alone are quite stigmatizing because they are merely based on the assumption that these female athletes are too masculine, and, in turn, question these individuals' femininity. Those who fail gender verification testing are subject to further stigmatization and public humiliation. This conclusion perpetuates the problem with gender verification testing. In attempts to categorize athletes strictly by gender, those with chromosomal irregularities are automatically placed in the male category.¹⁶⁶ These athletes are subject to scrutiny by sporting officials that too readily determine those with chromosomal ambiguities are intentionally impersonating a female.¹⁶⁷

Article 5 of CEDAW provides that "States Parties shall take all appropriate measures to modify the social . . . patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on . . . stereotyped roles for men and women."¹⁶⁸ Gender verification testing incorporates stereotypes of both women and intersexed individuals.¹⁶⁹ The IOC and IAAF rely on the

164. See generally Ferguson-Smith & Ferris, *supra* note 46; See also Liberman, *supra* note 46; Zirin & Wolf, *supra* note 76.

165. Farida Iqbal, *The Persecution of Caster Semenya – Sport and Intersex People's Rights*, GREEN LEFT WKLY., (Sep. 20 2009), <http://links.org.au/node/1266>. Iqbal argues that there should be an abolishment to sex testing in sport because it is a discriminatory practice used to bar intersex people from competing, and it "is meaningless when there is no natural, clear cut dividing line between male and female. *Id.* Moreover, she argues that "maleness" is not the ultimate advantage in sport that other factors like athlete's nutritional level, training, muscle strength, and length of their legs have more impact on sporting prowess than does intersexuality. *Id.*

166. *Id.*

167. Opie, *supra* note 16.

168. Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 13.

169. Bronwen Dachs, *Gender Tests on Runner Could Dispel Stereotypes, Church Official Says*, CATHOLIC NEWS SERVICE (Aug. 26, 2009), <http://www.catholicnews.com/data/stories/cns/0903842.htm> (explaining that stereotypes that are relied upon for speculation of sex, as in Semenya's case, can be used to reformulate gender stereotypes).

stereotype that normal females are weaker than males.¹⁷⁰ The fear that an intersexed female may have more testosterone than normal female athletes inherently perpetuates the stereotype that women are weaker than men.¹⁷¹ The ban placed on athletes who fail the gender verification tests further supports this claim because these athletes are no longer allowed to compete based on the simple fact that their genetic ambiguities are viewed as an unfair advantage over “normal” female athletes.¹⁷² This classification not only strips individuals of their own gender association, but also perpetuates stereotypes between males and females, and between intersexed individuals and males. Gender verification tests, therefore, facilitate the stereotype that individuals who have male genetic characteristics are stronger and more capable of excelling in competitions than women who have normal genetic characteristics.¹⁷³

Article 5 of CEDAW further supports the claim that the gender verification rule should be abolished because of its dependence upon sex stereotyping. Female athletes are subjected to gender verification testing when speculation of an athlete’s gender occurs. Speculation arises when an athlete’s characteristics appear inconsistent with societal norms of female characteristics. In the cases of Klobukowska, Soundarajan, and Semenya, speculation only arose because their physical and behavioral characteristics did not match socially constructed norms of female characteristics.¹⁷⁴ The tests were issued based on claims that their appearances and behaviors were too masculine. In essence, the existence of gender verification tests relies on gender stereotypes to justify inquiries about an athlete’s gender. Therefore, mechanisms like the gender verification tests perpetuate societal structures of male and female stereotypes.

The IOC, IAAF, and other sporting agencies, rely on mere speculation and should be barred from practice not only because it perpetuates discrimination within sporting arenas, but it also leaves female athletes susceptible to intrusive and unwarranted gender verification tests. Therefore, under CEDAW the IOC’s implementation of gender verification testing should be banned because its actions are blatantly discriminatory in that it seeks to exclude women and intersexed individuals from athletic competitions, in violation of Article 1 and relies on sex stereotyping to prompt investigations, in violation of Article 5.¹⁷⁵

170. See SANDRA ALTERS & WENDY SCHIFF, *ESSENTIAL CONCEPTS FOR HEALTHY LIVING* 143 (2011).

171. Iqbal, *supra* note 167.

172. *Id.*

173. *Id.*

174. Yaniv, *supra* note 6.

175. NOWAK, *supra* note 107, at 86.

Also, gender verification testing violates the UDHDHR, which prohibits “all forms of discrimination based on genetic characteristics,” as well as Article 7 of IDHGD, which provides that “human genetic data are not used for purposes that discriminate in a way that is intended to infringe . . . human rights, fundamental freedoms or human dignity of an individual or for purposes that lead to stigmatization of an individual.”¹⁷⁶ Historically, the subjects of gender verification testing have been women seeking to compete in women’s events. The resulting bans against participation violated UDHDHR because it only excludes individuals based on their genetic characteristics. Proponents may argue that gender verification testing accurately divides sex-specific sporting events because a genetic male has an XX chromosome and a genetic female has an XY chromosome. However, this argument fails because the gender verification rule does not account for genetic anomalies like intersexed chromosomes. Without any scientific basis that supports the claim that XXY individuals are considered male, the IAAF and the IOC cannot discriminate intersexed individuals from participating in female competitions.

Intersexed individuals who are excluded from competing in female competitions are further stigmatized by the IOC’s actions in violation of Article 7 of the IDHGD.¹⁷⁷ The repercussions of these baseless accusations by insensitive officials cause serious emotional trauma and public humiliation.¹⁷⁸ In Soundarajan’s case, public humiliation—coupled with the fact that her professional aspirations were essentially stripped from her—led to attempted suicide.¹⁷⁹ Although she recovered, Soundarajan still faces the effects of the trauma. Since her story was reported, Semenya has sought counseling to deal with the IOC’s actions, but still faces a lifetime of recovery.¹⁸⁰ The IOC ostracizes and stigmatizes individuals on the most personal, sexual level, based only on genetic characteristics. This has a deeply traumatizing effect on those affected by its discrimination because it not only excludes such athletes from the sporting community, violating Article 7 of the IDHGD, but also calls into public question their whole gender and sexual identity.¹⁸¹ Therefore, the gender verification rule should be abolished based on its discriminatory nature against both women and intersexed individuals, which infringes upon their fundamental human rights.

176. MOROC, *supra* note 112, at 229.

177. *Id.*

178. *The Sad Story of Santhi Soundarajan*, *supra* note 68.

179. *Id.*; see also Maniappa, *supra* note 69.

180. *The Sad Story of Santhi Soundarajan*, *supra* note 68.

181. *Id.*; see also Maniappa, Maniappa, *supra* note 69.

C. ALTERNATIVELY, IF VERIFICATION PRACTICES REMAIN, THERE SHOULD BE EXPLICIT CONFIDENTIALITY RULES AND EXPANSION OF COURT SUPERVISION

If gender verification tests are found to be necessary, then there needs to be stringent rules of confidentiality. Currently, there is limitless discretion of those who operate the tests, as well as unfettered power for the IOC and IAAF to abuse the test results. In the case of Semenya, ambiguous chromosomal results were publicly announced.¹⁸² This is an illegal intrusion into privacy that needs to be limited to protect the athletes and the reputations of the IOC and the IAAF.

The IOC and the IAAF should implement confidentiality rules that protect information related to gender verification, i.e. the reasons for the gender verification test and the test results of it. The confidentiality must extend to all those individuals who issue, provide services, and receive results of gender verification tests. Such confidentiality would enhance anonymity for testing, as well as create boundaries for the IOC and the IAAF regarding privileged medical information.

Moreover, the IOC and the IAAF should implement different testing procedures in order to foster greater anonymity for athletes being subjected to gender verification tests. This will protect competitors from intrusive gender verification investigations based on nothing but malicious speculation. First, the gender verification process should be administered to all athletes along with anti-doping tests. This will also prevent officials who oversee urine and blood samples from obtaining knowledge that a specific athlete is being gender tested. Second, the IOC and the IAAF should view the gender verification results only when an athlete's sex has been scientifically triggered. These safeguards will increase athletes' privacy, while improving the IOC and the IAAF's integrity.

Also, confidentiality rules should protect genetic data from reaching third parties, namely the media. Genetic information is increasingly becoming an issue of great interest among international committees that recognize the sensitivity of genetic data. Genetic data is identifiable to a single individual; therefore, anonymity of genetic material is essential. Here, athletes' gender verification results seem to readily appear in the media. This revealing public announcement can be damaging to athletes, as exemplified by both Soundarajan and Semenya. Thus, the IOC must set strict confidentiality rules to protect genetic data and results because of the media's influence in furthering privacy intrusions upon athletes.

Another problem with the gender verification rule is that in the absence of court supervision, the IOC has unfettered power to abuse its

182. McRae, *supra* note 142.

discretion in rendering decisions. Currently, the Court of Arbitration for Sport (CAS) controls all appeals of the IOC and the IAAF decisions; however, this governing agency is controlled by the IOC and may further abuse its discretion in arbitrarily enforcing the rule and its consequences.¹⁸³ Athletes have little options outside of arbitration, therefore a continued use of the gender verification rule warrants court expansion and supervision to oversee the IOC's actions.¹⁸⁴ Although the declarations listed above are binding, they do not have encompassing power and procedural foundation like the European Court of Human Rights (ECHR).¹⁸⁵ Thus, the United Nations must consider creating a court system that enables claims to be heard in a court or the United Nations must consider broadening its scope, like the United Nations, to consider claims against private individuals.

Like the ICCPR, the CEDAW, the UDHR, and the IDHGD, the European Convention protects fundamental rights of privacy and protects against discrimination. However, the scope of the European Convention, and moreover the ECHR, does not provide protection against private individuals or organizations.¹⁸⁶ Although the aforementioned declarations are legally binding, the Human Rights Committee only has discretion in making recommendations to remedy violations.¹⁸⁷ Thus, the United Nations or the European Convention must implement a judicial system that encompasses protection against private individuals and organizations, and applies strict judicial enforcement. Without doing so, the IAAF and the IOC's implementation of the gender verification rule will continue to violate fundamental human rights prescribed by international declarations.

Moreover, the lack of judicial decisions concerning the gender verification rule warrants court expansion. There is a lack of case law governing the use of the gender verification rule. A reason for the lack of case law lies within the fact that the IAAF and the IOC are not subject to international judgments, and are seemingly self-operating entities, even at the judicial level. Currently, the IOC is shielded from athletes' claims due to the IOC's structure and the CAS. Anti-doping tests exemplify athletes' difficulties in ascertaining constitutionally granted rights at the national level.

In the United States, the Supreme Court has found that the United States Olympic Committee (USOC), a constituent part of the IOC, did

183. *The Olympic Charter*, *supra* note 70.

184. *Id.*

185. *See* Leander v. Sweden, 9 Eur. Ct. H.R. 433 (1987). *See also* Gaskin v. United Kingdom, 12 Eur. Ct. H.R. 36 (1989).

186. *Id.*

187. *Id.*

not violate the rights of athletes.¹⁸⁸ The Court found that the USOC is a private institution; therefore, the Court did not have jurisdictional power over the USOC.¹⁸⁹ Thus, the IOC's tiered structure makes it invariably difficult for athletes to file claims against the national Olympic committees, international sporting committees, and the IOC because national courts protect their citizens' rights against state, and not private, actors.¹⁹⁰

Appeals of IOC decisions are heard in front of the CAS, which more often than not favors the IOC's decisions.¹⁹¹ Also, the CAS does not account for claims against the IOC's rules and procedures, but only investigates their decisions.¹⁹² Thus, athletes are increasingly susceptible to the abuse of power by the IOC because an athlete cannot challenge the validity of the gender verification rule through their national courts, international courts, or the CAS.¹⁹³

This is at odds with the IOC's Olympic Charter, which contains provisions that promote human dignity and protection against discrimination. The Olympic Charter states "the goal of Olympism is to place sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity."¹⁹⁴ It states that "any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender, or otherwise is incompatible with belonging to the Olympic Movement."¹⁹⁵

188. See Dionne L. Koller, *How the United States Government Sacrifices Athletes' Constitutional Rights in the Pursuit of National Prestige*, 2008 BYU L. REV. 1465, 1482-1487 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1161270.

189. *Id.*

190. *Id.* Koller explains that the United States' practice of sportive nationalism is furthered through private organizations like the USOC and United States Anti-Doping Agency. *Id.* Furthermore, Koller argues that "the private sector status of sport regulation in the United States has created a significant accountability vacuum so that manifestations of sportive nationalism that threaten athletes' eligibility, like the war on doping, largely go unchecked." *Id.* Koller finds that such practices threaten athletes' constitutional liberty and property interests because athletes are not afforded substantive due process protections to protect their eligibility. *Id.* See also Dionne L. Koller, *Does the Constitution Apply to the Actions of the United States Anti-Doping Agency?*, 50 ST. LOUIS U. L.J. 91, 93 (2005) (discussing the USADA's relationship to the federal government to determine if its actions could be constrained by the Constitution, and finds that the Constitution does not restrain the USADA because it is neither a government entity and not engaged in state action).

191. PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 1070-1071 (1998).

192. *Id.*

193. *Id.*

194. *The Olympic Charter*, *supra* note 70.

195. *Id.* The Charter, as a basic instrument of a constitutional nature, sets forth and recalls the Fundamental Principles and essential values of Olympism. *Id.* This serves as statutes for the International Committee, and defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movements, International Olympic Committee, the International Federations and the National Olympic Committees, as well

On the other hand, the Charter claims unrestrained power over athletes. The Olympic Charter states that the “Olympic Movement is the concerted, organized [sic], universal and permanent action, carried out under the supreme authority of the IOC . . . [that] covers the five continents.”¹⁹⁶ Thus, the IOC’s internationally influential power should be restrained through an international court that promotes the protection of athletes’ fundamental rights.

Also, international courts should expand their jurisdiction to include the IOC because of public policy concerns. The underlying public policy issue is the IOC’s influence towards international communities. The practice of gender verification testing promotes discrimination and misunderstanding of different genetic characteristics, which is inconsistent with Olympic goals. This inconsistency instills negative messages within the international community because of the Olympic Movement’s expansive influential power. Thus, it is important for the international law system to appropriately develop a court that not only restricts the IOC from intruding on athletes’ privacy rights and performing discriminatory practices, but also regulates the IOC’s influential messages towards the international community.

Thus, if gender verification testing continues to be prevalent in determining athletes’ eligibility, it must be refined to enhance the confidentiality of athletes and to protect the inherent intrusions of privacy from the IOC and third parties. It is important for both national and international courts to expand their courts’ power to include private organizations, like the IOC and the IAAF, for individual claims. Without such a system, the IOC and the IAAF will continue to administer arbitrary decisions because of the absence of judicial restraints.

IV. CONCLUSION

The IOC and the IAAF act as governing bodies for athletes and, therefore, are innately responsible for their actions. However, the gender verification rule exemplifies that irresponsible actions by these governing agencies adversely effects its athletes. The gender verification rule empowers both the IOC and the IAAF to make life-changing decisions without any restriction, leaving athletes susceptible to the unfettered power and abuse of the rule. The legal foundation established by the international human rights declarations support the argument that gender verification testing must be abolished because of its embedded discrimination and intrusive nature. An application of the ICCPR provides that the practice of gender verification testing is discriminatory

as the Organising Committees of the Olympic Games. *Id.* These constituents are required to comply with the Olympic Charter. *Id.*

196. *Id.*

against both women and intersexed individuals; moreover, such practice is an abrasive intrusion of privacy. The IOC and the IAAF also violate the UDHR and the IDHGD because gender verification tests discriminate based on genetic characteristics, which later stigmatize intersexed athletes. Therefore, the gender verification rule must be abolished.

If such tests are necessary, then procedures must be severely modified to resemble the confidentiality rules within international declarations. The IOC and the IAAF should adopt provisions in the Olympic Charter to reinforce its Olympic principles because the practice of gender verification testing is the antithesis of the ideologies behind the Olympic spirit. Moreover, the Olympic Charter should implement ideologies found within the UDHR and the IDHGD, particularly notions of discrimination based solely on sex, sex stereotyping, and genetic characteristics.

Finally, the gender verification rule should implement safeguards that protect the anonymity and autonomy of professional athletes. Safeguards that resemble confidentiality rules of international human rights declarations will not only protect athletes from public humiliation, but also regain trust within the sporting government. Also, there must be an expansion of international courts in order to oversee the IOC's actions. Particularly, it is important for international courts to provide judicially enforced judgments against the IOC to not only protect athletes from IOC practices, but also to force the IOC to question and tailor intrusive actions. These suggestions are vital for the IOC and the IAAF, as well as athletes because, without such a structure, cases like Ewa Klobukowska, Santhi Soundarajan, and Caster Semenya will continue to perpetuate the cycle of public humiliation and discrimination for decades to come.