European Court of Human Rights – *Semenya v. Switzerland* (GC) (Application no. 10934/21)
Third Party Intervention by the Human Rights Centre of Ghent University[1]

In this submission, we wish to develop two themes of particular salience to the case of *Semenya v. Switzerland*. *First,* we develop the theme of intersectional discrimination on the grounds of sex characteristics and race. We submit that, since women of colour are particularly affected by the type of regulations that are at stake in this case, intersectionality is of central relevance to the human rights analysis of this type of situations. *Second*, we dwell upon the importance of human rights accountability in sports, and the role for reserved for the ECtHR therein.

1. The State's obligations under Art. 14 j. 8 ECHR: intersectional discrimination on the grounds of sex characteristics and race

In its judgment in *Semenya v Switzerland*, the Chamber considered that *"it is not necessary either to answer the question of whether the applicant can also* [i.e. next to her sex characteristics] *rely on her race, ethnic origin and 'colour', even if the applicant alleges that the DSD Regulations overwhelmingly target athletes from the 'Global South'. It simply recalls that, according to the report relating to Resolution No. 2465 (2022) of the Parliamentary Assembly, LBTI athletes of colour, for instance of African origin, are particularly stigmatised".[2]* The Chamber therefore decided to only focus on the discrimination the applicant endured based on her sex characteristics, which can only be justified on the basis of very weighty reasons.[3]

While it is of paramount importance that the Grand Chamber again acknowledges the discrimination that intersex female athletes, such as the applicant, are confronted with based on their *sex characteristics* when they have to comply with hormonal eligibility criteria, we would like to respectfully draw the Court's attention to the *racial* aspect of the discrimination enacted upon them, which is of equal importance. Indeed, in practice, those criteria have overwhelmingly targeted intersex women of colour, who thus find themselves the victims of a very specific type of discrimination: intersectional discrimination on the basis of sex characteristics and race. In our view, this intersectional discrimination is an essential aspect of any case concerning the application of hormonal eligibility criteria in sport. Recognition of the intersectional nature of the discrimination faced by intersex female athletes when confronted with hormonal eligibility criteria is therefore crucial in order to provide an effective remedy for the discrimination at hand.

1.1. Intersectional discrimination in international human rights jurisprudence

We submit that the present case offers a perfect opportunity for the Court to engage with intersectionality, which is increasingly recognized as a necessary dimension for supranational human rights bodies to engage with.[4]

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[1] For the Human Rights Centre, the team consists of Eva Brems, Pieter Cannoot, Sarah Schoentjes and Cathérine Van de Graaf.

[2] ECtHR , *Semenya v Switzerland,* App. no. 10934/21, 11 July 2023, § 159 (own translation).

[3] ECtHR, *Semenya v Switzerland,* App. no. 10934/21, 11 July 2023, § 158-159, 169.

[4] For a recent discussion, see S. Schoentjes "'Doing intersectionality' through international human rights law: Substantive international human rights law as an effective avenue towards implementing intersectionality to counter structural oppression" (2022) *About Gender – International Journal of Gender Studies* 11.

Intersectional oppression refers to the situation in which multiple grounds of oppression interact to create a new situation that cannot be reduced to the simple sum of its parts.[5] The absence of an intersectional approach of inequalities and oppressions can lead to a lack of attention for the least privileged members of a marginalized community, and to inadequate redress for the human rights violations they suffer.[6] In order to avoid this, it is important to pay attention to patterns of sameness and difference between individuals and communities.[7]

The concept of intersectionality has been increasingly recognised by international human rights monitoring bodies in the last few years. The CEDAW Committee, for example, stressed the importance of intersectionality in gendered discrimination in its General Recommendation no. 28 on general State obligations, as well as in several decisions on individual communications.[8] The Inter-American Court of Human Rights explicitly insisted upon the role of intersectionality in the human rights violations suffered by a young girl living with HIV in a situation of poverty.[9]

The importance of intersectionality has also emerged in the ECtHR's case law, even though it has not (yet) been mentioned in explicit terms. In *B.S. v. Spain* (2012), the Court stressed that the vulnerability of a person or a group may result from the interaction of several characteristics such as gender, social and ethnic origins.[10] In *Pinto Carvalho de Sousa Morais v. Portugal* (2017), the Court clearly tackled an intersectional stereotype based on age and gender.[11] Most recently, in *G.M. and others v. the Republic of Moldova* (2023), the Court stressed the particular vulnerability and resulting systemic denial of autonomy affecting women with intellectual disabilities living in institutions, thus linking intersectional vulnerability with systemic oppression.[12] These developments offer a promising basis to develop a case law that does justice to the intersectional vulnerabilities of human beings to (systemic) discrimination and other human rights violations.

Intersectionality is also an essential element of the human rights violations at play in the case of hormonal eligibility criteria for competing in women's sport competitions. We submit that the situation of intersex women of colour who are excluded from sport competitions by hormonal eligibility criteria exemplifies the relevance of intersectionality analysis. Their sex characteristics and race interact in a way that places them in a unique position and subjects them to specific scrutiny and exclusion in their chosen profession. Legal analyses that artificially limit their cases to the sole aspect of sex characteristics consequently ignore the ways in which hormonal eligibility criteria impact

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[5] K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *University of Chicago Legal Forum* 1.8.

[6] J. Bouchard and P. Meyer-Bisch, "Intersectionality and Interdependence of Human Rights: Same or Different?" (2016) *Equal Rights Review* 16, p. 186.

[7] S. Atrey, "Beyond Universality: An Intersectional Justification of Human Rights", in S. Atrey and P. Dunne (ed.), Intersectionality and Human Rights Law, Oxford: Hart Publishing, 2020, p. 17-38.

[8] CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. CEDAW, *Alyne da Silva Pimentel Texeira v. Brazil*, 25 July 2011, no 17/2008, § 7.7; *Cécilia Kell v. Canada*, 28 February 2012, no 19/2008, § 10.2; *R. P. B. v. The Philippines*, 21 February 2014, no 34/2011, § 8.3.

[9] IACtHR, *Case Of Gonzales Lluy Et Al. V. Ecuador*, Judgment of 1 September 2015, § 290.

[10] "The decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute" (§ 62).

[11] ECtHR, *Pinto Carvalho de Sousa Morais v. Portugal*, App. no. 17484/15, 25 July 2017, § 52-56.

[12] ECtHR, *G.M. and Others v. the Republic of Moldova,* App. No. 44394/15, 22 November 2022, § 89.

intersex women of colour not only based on their sex characteristics, but on the specific intersection of those sex characteristics with their race.[13]

1.2. Intersectionality and the racialised construction of womanhood

As soon as women were allowed to enter the world of sports, women athletes' bodies and gender were policed and met with suspicion.[14] Eligibility criteria for women's sport competitions reflect (and participate in) the social regulation of who 'is', and 'is not', a woman. While this policing of womanhood applies to *all* women, it is a form of discrimination that is particularly familiar for Black women, who have throughout history been stereotyped as 'overly masculine' and have been denied being recognized as 'feminine' or even as 'women'.[15] Their marginalization occurs on the basis of both race and gender, so that they are confronted with specific forms of oppression that white women or Black men do not face. Black women are subjected to specific stereotypes – such as their perceived toughness, aggression and anger, tying into the 'Angry Black Woman' stereotype – which ensure that their femininity is constantly scrutinized.[16] Indeed, gender is constructed through a racialised lens: the social category of 'woman' is influenced by the ideal of the white woman.[17] This factor played an important role in the exclusion of intersex female athletes of colour, such as the applicant, from sporting competitions; their *womanhood* was first suspect by virtue of their *Blackness*.

In this sense, it is no coincidence that the 2020 Summer Olympics in Tokyo saw two more Black women being disqualified from the running competitions, after three Black women (including Semenya herself) had already suffered the same fate in 2016.[18] It is telling that hormonal eligibility criteria set in DSD regulations have, to date, overwhelmingly been enforced against Black women; the definition of a woman in sports is built around, and for, white women.[19] When applied to Black women, eligibility regulations that force women with variations in sex characteristics (VSC) to lower their level of testosterone perpetuate a societal tendency to deny them their womanhood as they are not considered 'woman enough' to participate in women's sport competitions.[20] The racial aspect of the intersectional discrimination suffered by those athletes thus becomes abundantly clear, as we will see below.

1.3. Intersectional discrimination on the grounds of sex characteristics and race under art. 14 j. 8 ECHR

As the Court has convincingly argued in the Chamber judgment on the present case, the respondent State provided insufficient institutional and procedural safeguards to allow an effective examination of the credible claim of discrimination based on sex characteristics stemming from the World Athletics

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[13] P. Chow, "Has Intersectionality Reached its Limits? Intersectionality in the UN Human Rights Treaty Body Practice and the Issue of Ambivalence", H*uman Rights Law Review*, 2016, n°16, p. 453.

[14] We discussed the relevance of this historical background in our submission at Chamber level (section 2.1).

[15] K.J. Kauer and L. Rauscher L (2019) Negotiating gender among LGBTIQ athletes. In Krane V (ed) Sex, Gender, and Sexuality in Sport: Queer Inquiries. New York, Routledge.

[16] T. Jones and K.J. Norwood (2017) Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman. Iowa Law Review 102.

[17] N. Yuval-Davis (2006) Intersectionality and Feminist Politics. European Journal of Women's Studies 13(3):193–209; Olofsson A, Zinn, J, Griffin G, Girtli Nygren K, Cebulla A, Hannah-Moffat, K (2014) The mutual constitution of risk and inequalities: intersectional risk theory. Health, Risk & Society 16(5).

[18] N. Zaccardi (2021) "Top 400m sprinters ruled ineligible due to testosterone rule, officials say" OlympicTalk | NBC Sports.

[19] L. Holzer (2020), What Does it Mean to be A Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport. Human Rights Law Review 20(3).

[20] Holzer (2020).

regulations concerning hormonal eligibility criteria.[21] In what follows, we will respectfully argue that, as evidenced by their application, those regulations are also – and simultaneously – discriminatory on the grounds of race.

As the Court has found in the Chamber judgment, the World Athletics DSD regulations are based on flawed research that insufficiently proves the alleged advantages of female athletes with higher testosterone levels over their fellow athletes.[22] Consequently, those alleged advantages cannot serve as sufficient justification for the difference in treatment between intersex female athletes and their endosex counterparts.[23] The eligibility criteria are also applied inconsistently: while the – flawed – study they are based on found a correlation between higher testosterone levels and an advantage in a number of very specific athletics disciplines, the criteria were not applied across all of those disciplines, but instead only in those disciplines in which one targeted athlete – Semenya – competed.[24] In addition to this factor, the hormonal eligibility criteria have been lowered several times throughout the years – from 10 nmol/L in 2011, to 5 nmol/L in 2018, to 2.5 nmol/L in 2019 – without any real justification being given for this progressive change.[25]

However, while there has been speculation that the DSD regulations have been aimed at Caster Semenya in particular, she is not the only athlete to have suffered the consequences of those regulations. As mentioned above, five other athletes have been excluded from athletic events in the 2016 and 2020 Olympics. These athletes were all Black women from African countries.[26] In addition to being discriminatory against intersex female athletes by their very nature and intent, these regulations consequently also have a clear disproportionate impact on, specifically, Black female athletes. While they might not have been intended to exclude Black athletes in the same way as intersex athletes from women's sports, this overwhelmingly disproportionate impact does show that, (indirect) racial discrimination is clearly an important aspect of the nature of the exclusion resulting from the application of the DSD regulations. Importantly, this fact has also been picked up on by other international bodies for the protection of human rights: as the Court mentioned in the Chamber judgment, Resolution 2465 of the Parliamentary Assembly of the Council of Europe stresses the particular stigmatization of LBTI female athletes of colour,[27] and the United Nations High

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[21] ECtHR, *Semenya v Switzerland,* App. no. 10934/21, 11 July 2023, § 202.

[22] ECtHR, *Semenya v Switzerland,* App. no. 10934/21, 11 July 2023, § 179-184; see also R. Pielke, R. Tucker & E. Boye, *Scientific Integrity and the IAAF Testosterone Regulations*, 19 Int Sports Law J 18 (2019). In our submission in the procedure at Chamber level, we discussed the questionable nature of the evidence used by World Athletics to support the pertinence of hormonal eligibility criteria. Importantly, the authors of a 2017 study that was cited by World Athletics as "peer-reviewed data and evidence from the field", published a statement correcting their earlier conclusions. According to the authors, "there is no confirmatory evidence for causality in the observed relationships [between levels of testosterone and performance advantage] reported. We acknowledge that our 2017 study was exploratory, and our intent was not to prove a causal inference" (S. Bermon, P-Y Garnier, "Correction: Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes", Br. J. Sports Med. 2021, Vol. 55, No. 17). See our submission, section 2.3.

[23] *Semenya v Switzerland,* § 200-202.

[24] K. Karkazis & M. Carpenter, *Impossible "Choices": The Inherent Harms of Regulating Women's Testosterone in Sport*, 15 Bioethical Inquiry 579 (2018).

[25] *Ibid.*

[26] N. Zaccardi (2021) "Top 400m sprinters ruled ineligible due to testosterone rule, officials say" OlympicTalk | NBC Sports; Holzer (2020).

[27] Parliamentary Assembly of the Council of Europe, Resolution n° 2465, *The fight for a level playing field – Ending discrimination against women in the world of sport*, 2022.

Commissioner for Human Rights devoted an entire report to the importance of the intersection of race and gender discrimination in sport.[28] We consequently respectfully argue that the racial and intersectional aspect of this case should be examined in further detail, in order to provide effective human rights protection for intersex female athletes (of colour).

By way of illustration, we would like to draw the Court's attention to the 'suspicion-based' model of enforcement of the hormonal eligibility criteria in sport.[29] The 2011 World Athletics DSD regulations mentioned that women with higher testosterone levels "*often display masculine traits and have an uncommon athletic capacity in relation to their fellow female competitors*"; the International Olympic Committee stressed the need "*to actively investigate any perceived deviation in sex characteristics*"; and the 2018 World Athletics DSD regulations include the "material androgenising effect" of androgen insensitivity as a relevant criterium for an investigation.[30] These formulations amount to a recommendation to investigate athletes' testosterone levels based on a *prima facie* evaluation of their femininity.[31] Women who are not perceived to be sufficiently feminine will, consequently, be the ones to face suspicion and a subsequent assessment. As explained above, this perception of femininity is heavily influenced by racialised constructions of womanhood: since Black women are generally perceived as less feminine than their white counterparts, they will be the first to face suspicion. As we have seen, this is in fact confirmed by the way those regulations are applied in practice.[32]

Consequently, hormonal eligibility criteria in sport, such as the World Athletics DSD Regulations, have a disproportionate impact on Black female athletes. They thus indirectly discriminate against Black women at the same time as they directly discriminate against intersex female athletes. Sidelining either the racial aspect or the sex-based aspect of the discrimination suffered by intersex female athletes of colour, such as the applicant, would therefore amount to artificially denying an important part of the protection offered by Article 14 ECHR.

2. Human Rights Accountability in Sports under the ECHR

It is submitted that a central theme in the *Semenya* case is the establishment of human rights accountability over transnational private sports governance and adjudication.

The world of sports is very dense in rules, and a large portion of those rules are not issued by public authorities, but rather by private sports governing bodies (SGB). This private regulation is enforced by private adjudicating bodies. Private sports regulation as well as private sports adjudication exist at the national as well as the transnational level, with the Court of Arbitration for Sport (CAS) embodying

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[28] A/HRC/44/26 , Report of the United Nations High Commissioner for Human Rights on the Intersection of race and gender discrimination in sport, 2022.

[29] The current (March 2023) version of the DSD Regulations mentions that each Member Federation has the obligation to promptly advise the Medical Manager (a medically qualified person who is authorised by World Athletics to act on its behalf in matters arising under the DSD Regulations) of "any relevant information derived from a reliable source" that indicates that an athlete under its jurisdiction might fall within the scope of the regulations. The Medical Manager might also decide to open an investigation *proprio motu* provided they act in good faith and on "reasonable grounds based on information derived from reliable sources" (Art. 4.4 and 4.5).

[30] Karzakis and Carpenter (2018).

[31] *Ibid.*

[32] In this sense, it is also relevant to Semenya's case that she is a lesbian. The femininity and womanhood of same-gender-attracted women is, indeed, also often the target of suspicion (see K J Kauer and Rauscher L (2019) Negotiating gender among LGBTIQ athletes. In Krane V (ed) Sex, Gender, and Sexuality in Sport: Queer Inquiries. New York, Routledge).

transnational private sports adjudication. The term *lex sportiva*[33] – in analogy with *lex mercatoria* – was coined to suggest the existence of a transnational system beyond State control. The latter feature is quite accurately captured in the statement of the International Olympic Committee (IOC) president in 1909: "*The goodwill of all the members of any autonomous sport grouping begins to disintegrate as soon as the huge, blurred face of that dangerous creature known as the state makes an appearance*".[34] Indeed, *lex sportiva* is viewed "*as a positive self-regulating law rather than an 'ensemble of social norms which can be transformed into law only by the juridical decisions of nation-states'*".[35] FIFA has also been cited as an example of a supranational SGB that has been successful at blocking government interference, whether it be judicial action against (the officials of) Football Associations or legislation adopted by national parliaments.[36] Several commentators have expressed concern over the tendency of private sports regulation and adjudication to ward off human rights protection, and become 'human rights – free zones'.[37] The growing awareness of this tendency and the risks it entails has moreover inspired the joint letter to the president of World Athletics by three UN human rights mandate holders.[38]

It is submitted that it would be highly problematic for the rules and rulings of '*lex sportiva*' to be free from human rights scrutiny, and that, like other supranational human rights bodies, the ECtHR is in a position, and has a responsibility, to prevent and remedy such a scenario. This argument will be built in four steps: 1. Sport is a profession, 2. The 'private character' and the term 'arbitration' do not make out an escape route, 3. Transnationalism is not an escape route, as the ECtHR is the relevant human rights body for sports entities established in Europe and 4. Ruling on substantive '*lex sportiva'* is logical in light of the case law on procedural '*lex sportiva'.*

2.1. International human rights law applies (amongst others) because sport is a profession.

The sports world is not the only professional world that establishes its own internal rules as well as adjudication mechanisms. Other professionals who are familiar with this phenomenon include medical professionals and attorneys. The term 'disciplinary rules' is often used in this regard. What those rules and adjudication mechanisms have in common, is that they have an important impact on the lives of the relevant professionals, as they determine many of the conditions in which the profession in question can be exercised, and as they typically are able to deny important professional opportunities to some professionals. In the past, when the Court found that certain rules governing access to the profession were a violation of rights protected under the Convention, it intervened. Since its early years, it has applied the ECHR amongst others to procedures and sanctions of the adjudicating

[33] A. Duvan, "The FIFA Regulations on the Status and Transfer of Players: trans-national law making in the shadow of Bosman", Asser Institute, Asser research paper 2016-06, 2016, p. 24.

[34] P. De Coubertin. 1909. Une campagne de vingt-et-un ans (1887-1908). Paris: education physique, p. 152.

[35] T. Serby, "Sports corruption: Sporting autonomy, *lex sportiva* and the rule of law." ESLJ 15 (2017) p. 2

[36] H. E. Meier, and B. Garcia. "Protecting private transnational authority against public intervention: FIFA's power over national governments." Public Administration 93.4 (2015) p. 895

[37] E.g. Schwab, who uses the term 'autonomous human rights-less bubble': B. Schwab, "Embedding the human rights of players in world sport", *Int Sports Law J* 2018, Vol. 17, p. 214. See also D. West, "Revitalising a phantom regime: the adjudication of human rights complaints in sport.", *The International Sports Law Journal* 2019, Vol. 19(1), p. 3; and J. G. Ruggie, "For the Game. For the World. FIFA and Human Rights" 2016, p. 26.

[38] Letter by the Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on the issue of discrimination against women in law and in practice, OL OTH 62/2018, p. 2.

bodies of the Belgian Medical Association,[39] and the Dutch Bar Association.[40] In these cases, the Court did not see the fact that these issues arose in a separate legal 'disciplinary order' as any obstacle to applying the Convention. Rather, it found that rules governing access to the profession for groups such as lawyers[41] and accountants[42] were in violation of the Convention rights. Similarly, professional women athletes with VSC who choose to preserve their bodily integrity and reproductive status are **effectively banned from their profession**, which in many cases is their main or only source of income. Given the monopoly position of most international sports federations, these athletes have no other possibility but to agree to the required treatment or to engage in other professional activities.

Professional activities occupy a central place in many people's lives. The Court has earlier shown awareness of the fact that professional environments are generally characterized by **power relations** in *Hovhannisyan v. Armenia (2018)*.[43] In such contexts, human rights violations can and do occur. As a result, states should provide protection against the occurrence of human rights violations in work spheres. And states should provide human rights justice when violations have occurred in work spheres. That competitive sport is characterized by a similar **hierarchical structure** was already adequately captured by the Chamber in the case at hand.[44] Just as most employees are 'subordinates' to their 'superiors' in a work environment, athletes are confronted with often very powerful sports organizations.[45] The Chamber convincingly concluded that it "*does not see why judicial protection should be less for sports professionals than for persons exercising more conventional professions*" (§ 178).

2.2. The 'private character' and the term 'arbitration' do not make out an escape route

It should be acknowledged that – outside the sports world – professional associations may have acquired a public status by intervention of domestic regulation. This is not the case for transnational sports regulation, which is private in nature.

Private sport rules have an immense impact on the lives and careers of athletes. Yet these are not the result of a democratic process or subjected to democratic control as is the case for State-issued rules. What happens is that a collection of non-State actors establishes rules and standards that are accepted as legitimate by actors who have no say in the definition of these rules.[46] In this autonomous legal sporting order, the sports governing bodies combine the roles of both legislative and executive powers.[47] It is, for instance, included in the Olympic Charter that sports organisations have the right

[39] ECtHR, *Le Compte, Van Leuven & De Meyere v Belgium*, App. no. 6878/75; 7238/75, 23 June 1981; ECtHR, *Albert & Le Compte v Belgium*, App. no. 7299/75; 7496/76, 10 February 1983.

[40] ECtHR, *Steur v the Netherlands*, App. No. 39657/98, 28 October 2003.

[41] ECtHR, *Alexandridis v. Greece*, App. no. 19516/06, 21 February 2008.

[42] ECtHR, *Thlimmenos v. Greece* (GC), App. no. 34369/97, 6 April 2000.

[43] ECtHR, *Hovhannisyan v. Armenia*, App. No. 18419/13, 19 July 2018, § 58.

[44] The Chamber correctly differentiates the relationship between professional athletes and powerful sports organisations from the one between companies who are "generally on an equal footing".

[45] Wording in ECtHR, *Hovhannisyan v. Armenia*, App. No. 18419/13, 19 July 2018, § 58.

[46] H.E. Meier and B. Garcia, "Protecting private transnational authority against public intervention: FIFA's power over national governments.", Public Administration 2015, Vol. 93.4, p. 891.

[47] A. Duval, "What *Lex Sportiva* Tells You About Transnational Law." The many lives of transnational law. Critical engagements with Jessup's bold proposal, 2019, p. 9.

to freely establish and control the rules of sports as well as to determine their own structure and governance.[48]

In the environment of private transnational sports regulation, the SGBs' own dispute resolution mechanisms in combination with the CAS act as the judicial power. This is labelled as arbitration. A common trait of arbitration is that tribunals can adjudicate claims arising between parties that have signed an arbitration agreement. With such an agreement, they consent to assigning disputes that would arise between them to said body. Yet commentators have noted that in the context of sports, such consent is not always given freely. It is crucial to know that oftentimes, athletes are forced to sign agreements with 'forced' arbitration clauses as a prerequisite to participate in their respective sport.[49] Indeed, in the Chamber judgment of the case at hand, the Court already confirmed that – unlike other contexts in which arbitration is used – professional athletes and a sports governing bodies are not on an equal footing when agreeing on arbitration ((§ 177). Already in the case of *Mutu and Pechstein v. Switzerland*, the Court found that: "*the only choice in the second applicant's case was between accepting the arbitration clause and thus earning her living by practising her sport professionally, or not accepting it and being obliged to refrain completely from earning a living from her sport at that level*" (§ 113).

It is clear that the private nature of transnational sports regulation and adjudication cannot be any excuse for these regimes being 'sheltered' from human rights accountability. Indeed, the protection offered by international human rights law would be illusory if it were allowed to be circumvented simply by private actors generating their private system of rules and their private adjudication mechanism. It is one of the central principles of international human rights law that states have positive obligations to further human rights compliance by private actors.

2.3. The ECtHR is the relevant human rights body for sports entities established in Europe

It should be acknowledged that, while many professions develop their internal rules and adjudication mechanisms in a domestic context, the *Semenya* case deals with transnational regulation and adjudication in the world of sports.

It is clear that the transnational nature of private sports regulation and adjudication cannot be an excuse for them being 'sheltered' from human rights accountability. Commentators have argued that the rights of athletes should be considered in every phase of the regulation of sports,[50] just like human rights of all individuals have to be considered in every instance of norm making. Having access to "*coherent and credible mechanism for the adjudication of human rights disputes arising within sport"* is considered an essential pillar of such consideration of human rights in sports.[51] Human rights

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[48] Rule 5, Fundamental Principles of Olympism, Olympic Charter (in force as from 17 July 2020).

[49] Examples are: International Olympic Committee (2017) Olympic Charter, Rule 61(2); FIFA (2018) FIFA Statutes, Article 57(1).; UEFA (2018) UEFA Statutes, Article 60; 18 IAAF (2017) 2017 Constitution, Article 20(1); H. Lenskyj, "Sport exceptionalism and the Court of Arbitration for Sport." Journal of Criminological Research, Policy and Practice 4.1 (2018): 5-17; L. Freeburn, "The De Facto Jurisdiction of the Court of Arbitration for Sport." Regulating International Sport. Brill Nijhoff, 2018.

[50] S. Patel, "Gaps in the protection of athletes gender rights in sport—a regulatory riddle." The International Sports Law Journal (2021) p. 8.

[51] D. West, "Revitalising a phantom regime: the adjudication of human rights complaints in sport." The International Sports Law Journal 19.1 (2019) p. 3.

accountability is due before the European Court of Human Rights when the relevant private transnational adjudication body is situated in a State Party to the ECHR.

The right to an effective remedy entails that when a victim can make an arguable complaint of a human rights violation, it is necessary that this complaint is investigated and responded to effectively. If such a victim is – because of an arbitration clause – forced to bring their case before an arbitration body situated within the Council of Europe, their complaint does not become less deserving of the protection of the Court. The CAS has been applying standards resembling human rights, such as a prohibition of discrimination, but a general lack of expertise on human rights among CAS arbiters has been cited as one of the main obstacles to settling human rights claims through the tribunal.[52] It is submitted that the present case offers a welcome opportunity for the Court to indirectly offer human rights guidance to the CAS. It is furthermore submitted that bringing areas that attempt to circumvent human rights protection within the reach of the Convention, merits to be a priority concern of the ECtHR.

2.4. Ruling on substantive '*lex sportiva*' is logical in light of the case law on procedural '*lex sportiva*'

The ECtHR has been praised – in line with a few national courts – for its track record in adjudicating cases that would "*otherwise fall exclusively within the sports domain*".[53] The Court has earlier taken a critical stance toward *lex sportiva*, when it confirmed in *Mutu and Pechstein v Switzerland* (§ 114-115) that the acceptance of a CAS arbitration clause could not be considered to be freely consented to, given the restrictive implication of non-acceptance on the applicant athlete's professional life. In the same case, the Court applied article 6 ECHR to the CAS. In *Ali Riza and others v Turkey* (§ 180), the Court has confirmed that the specificities of sports arbitration do not justify depriving athletes of fair trial guarantees. Beyond fair trial guarantees, the Court has moreover found violations of article 10 ECHR on account of sanctions imposed by the Turkish Football Federation (*Sedat Doğanv. Turkey, Naki and Amed Sportif Faaliyetler Kulübü Derneğiv. Turkey* and *Ibrahim Tokmakv. Turkey*).

The Court is respectfully invited to now apply similar critical ECHR scrutiny to substantive sports rules, as applied by the CAS. While the involvement of the Swiss civil courts is the formal anchor point for jurisdiction, substantively the case is about rules that are part of the private *lex sportiva*. It is submitted that it would be of great value for human rights protection in sports in Europe and beyond, if the Court in its ruling in the present case could give strong incentives to SGBs and sports adjudicating bodies toward robust human rights protection. While the Court will be ruling on the facts of the case, the impact of the ruling will be much broader. For private sports bodies, as well as for state courts monitoring them, the judgment in this case is likely to become a central reference point concerning the role of human rights standards in sports. As such it has the potential to strengthen - or alternatively to disable – dynamics calling for increased human rights protection for athletes.

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[52] J. G. Ruggie, "For the Game. For the World. FIFA and Human Rights" 2016, p. 26.

[53] D. West, "Revitalising a phantom regime: the adjudication of human rights complaints in sport." The International Sports Law Journal 19.1 (2019) p. 6.