

NOTES / AANTEKENINGE

THE IAAF RULES ON TESTOSTERONE LEVELS AND THE RIGHT TO HEALTH

1 Introduction

The International Association of Athletics Federation (IAAF) regulates the participation of athletes, both male and female, at an international level (see IAAF website <https://www.iaaf.org/home>). Therefore, it has the mandate to develop criteria for the administration of athletic competitions. In pursuance of this role, in 2018, the IAAF rolled out the Eligibility Regulations for Female Classifications – Athletes with Differences in Sex Development (2018). The IAAF states that the Rules are intended to ensure that females are given the same opportunities in terms of competing in races (International Association of Athletics Federations, 2018 Eligibility Regulations for Female Classification – Athletes with Differences in Sexual Development for events from 400 metres to the mile, including 400 metres, hurdles races, 800 metres, 1500 metres, one mile races and combined events over the same distances, 26 April 2018 - the 2018 Regulations). According to these Regulations, for Relevant Athletes to be eligible to compete internationally in the 400 metres, 800 metres, and 1500 metres races, their testosterone levels have to be under 5 nanomoles (nml) per litre. Importantly, “Relevant Athletes” who are females and belong to a specific list of DSD conditions all happen to be XY. These athletes are to reduce their testosterone levels to 5 nml/L for at least six months and thereafter to maintain it at that level for as long as they wish to participate in these races (the 2018 Regulations). They are therefore being asked to lower their testosterone levels to help ensure a level playing ground based on the debatable assumption that testosterone levels impact on athletic performance. These rules were rolled out against the backdrop of existing standards on human rights demanding, among other things, that the rights of all people are respected. That would include athletes. One such right is the right to health.

The right to health falls within the ambit of socio-economic rights. States ought to protect this right which arises from both international human rights law and national law. In 2015, South Africa ratified the International Covenant on Economic, Social and Cultural Rights, for example. By virtue of ratifying this treaty, South Africa is under obligation to implement the rights guaranteed under this treaty, which include the right to health, in good faith (Vienna Convention on the Law of Treaties, article 26). The International Covenant on Economic, Social and Cultural Rights places an obligation on State Parties to this covenant by providing that “states must recognise the right to enjoy the highest attainable standard of physical and mental health” (International Covenant on Economic, Social and Cultural Rights 1966,

Article 2). This implies that the right to health is an international human rights obligation. It is important to note that this right is also embodied in various national constitutions. For instance, section 27 of the Constitution of the Republic of South Africa (1996) provides that “everyone has the right to health”. This implies that at a national level, states have a duty to ensure that the right to health is protected. Indeed, it is unquestionable that the IAAF has the mandate to enact rules for the administration of athletic competitions. The issue that remains unresolved, though, is whether the recently enacted 2018 IAAF Rules would be in accord with the right to health as understood under international human rights law and national human rights law. This issue is resolved in this note and in resolving it, the scholarly contribution that this research makes is first discussed. Subsequently, the 2018 IAAF Rules are discussed in detail. These rules are then measured against the international human rights framework on the right to health and South African national laws on the right to health.

2 Getting to grips with the scholarly gap in the literature

Much has been written about the right to health. Scholarly writings also exist on the IAAF Rules generally. It is essential to briefly engage with such literature with a view to mapping out the contribution that this research makes to the existing body of knowledge on this subject. Kinney’s research, for example, paid much attention to access to health care services of any kind for all persons (Kinney “The International Human Right to Health: What Does This Mean for our Nation and World” 2001 *Indiana Law Review* 1475). The writer examines the right to health and what it means for states that are parties to international human rights treaties. He assesses whether the right to health as guaranteed under international human rights law matches what is being provided by different states at the national level. Whereas this writer’s research informs the current research in terms of international human rights standards on the right to health, the current research takes the discussion further by assessing the implications of the 2018 IAAF Rules on the right to health. This research, therefore, differs from Kinney’s paper. He focused on the right to health generally and did not measure the right against rules and regulations affecting athletes.

As for Rubenson, his research aimed to illustrate the importance of the right to health (Rubenson “Health and Human Rights” 2002 *Health Division Document* 12). According to Rubenson, the fact that all states are bound by international human rights obligations implies that they have a duty to guard against human rights violations. Rubenson underscores the importance of protecting human rights and ensuring that each state fulfils this duty. This writer’s research is different from this research, which is concerned with the right to health *viz-a-viz* female athletes of a different sexual development. The work of Fick and his colleagues focused on the relationship between health and human rights (Fick, London and Coomans *Toolkit on the Right to Health* (2011)). The authors formulated a criterion to be utilised in assessing whether the right to health is being fulfilled. They also stressed that the government has the duty to realise the right to health. While human rights protection forms the basis of the analysis in this note, these authors’ work

differs from the analysis in this article because the current discussion measures the 2018 IAAF Rules against the human right to health.

The right to health in South Africa is entrenched in the Constitution and as is consistently being alluded to, it ought to be protected. As regards this right in the context of South Africa's Constitution, Moyo wrote about the realisation of socio-economic rights in South Africa (Moyo "Realising the Right to Health in South Africa" 2016 *Foundation for Human Rights* 21). He highlighted the gap between access to health care services in the public and private sector. He argued that the apartheid system has in one way or the other contributed to the way the health care system is operating. Related to Moyo's research, this research will also turn to South African law in considering the right to health. However, it differs from Moyo's research because it narrows the discussion down to an analysis of how the right to health would be infringed upon should athletic associations and medical practitioners at the national level consider breathing life into the 2018 IAAF rules. Bermon and Garnier's research of 2017, which has since been challenged by various scholars, focused on how testosterone contributes to the performance during competitions of athletes with different sexual development (Bermon and Garnier "Serum Androgen Levels and their Relation to Performance in Track and Field: Mass Spectrometry Results From 2127 Observations in Male and Female Elite Athletes" 2017 *British Journal of Sports Medicine* 1309–1314). These writers' focused on the connection between testosterone levels and athletic performance, which though mentioned in passing here, is not the crux of the argument in the present discussion.

Pielke's research directly confronts the IAAF Rules and the scientific justification behind these rules (Pielke, Tucker and Boye "Scientific Integrity and the IAAF Testosterone Regulations" 2019 *International Sports Law Journal* 1–9). The writers critique the scientific research that was conducted by the IAAF as a justification for the IAAF Rules as rolled out in 2018. They question the scientific integrity of the rules and argue that they pose a threat to, and could potentially violate the rights of, female athletes. The writers, however, emphasised the scientific motivation of the IAAF Rules in relation to the rights of females in athletics. Therefore, the argument in this note takes the debate further by weighing the IAAF Rules against human rights standards the right to health. Karkazis and her colleagues, in two separate publications of 2012 and 2018, also confronted the IAAF Rules head-on (Karkazis, Jordan-Young, Davis and Caporesi "Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes" 2012 *The American Journal of Bioethics* 3–16; Karkazis and Carpenter "Impossible 'Choices': The Inherent Harms of Regulating Women's Testosterone in Sport" 2018 *Journal of Bioethical Inquiry* 579–587). In the analysis, the writers focused on the implication of the IAAF Rules on the right to dignity and privacy. The writers underscore that even though the IAAF avers that no athlete is under obligation to undergo treatment, the fact that female athletes who refuse to undergo such treatment can't compete in international races itself constitutes a violation of human rights. Taking the discussion further, the argument in this note demonstrates how the health of female athletes with different sexual development will be affected. The difference one can point out compared to Karkazis *et al's* research is that the argument in this

note concentrates on the right to health, while Karkazis's research outlined how the IAAF Rules affect human rights in general.

The Court of Arbitration for Sport (CAS) pronounced itself on the 2018 IAAF Rules in which the CAS took a decision to uphold them on 1 May 2019. This decision was appealed in the Swiss Federal Supreme Court. In September 2020, this Court upheld the decision of the CAS. The implication of this is that the 2018 Rules are now the international norm on this subject. Despite this being the position, a question that still warrants resolution is whether these rules- now constituting the international norm, are in accord with the international and national human rights standards on the right to health. This issue is resolved in the negative, thus, demonstrating these Rules' continued controversial nature despite the decisions of the CAS and the Swiss Federal Court.

3 The 2018 IAAF Rules

3.1 Understanding the 2018 IAAF Regulations

The IAAF recognises that males and females develop differently, especially after puberty. Hence, athletic competitions are divided into two categories, namely males and females. The IAAF deems it unfair to expect females to compete with males. According to the IAAF, "No female would have serum levels of natural testosterone at 5 nanomoles per litre or above unless they have DSD or a tumour" (IAAF Eligibility Regulations for Female Classification 2018). The IAAF believes that male athletes have a high testosterone level that makes them more advanced when compared with female athletes (IAAF Eligibility Regulations for Female Classification 2018). In addition to the two categories mentioned above, the IAAF also recognises that there are certain individuals who have congenital conditions that bring about typical development of their chromosomal, gonadal and anatomic sex which is known as the difference of sexual development or intersex. Therefore, female athletes with different sexual development are not recognised by the IAAF as being female or male, because they have traits of both male and female. For a female athlete with Difference of Sexual Development (DSD) – "that means her levels of circulating testosterone (in serum) are five nanomoles per litre or above and who is androgen-sensitive", certain criteria need to be adhered to in respect of selected races in competitions at an international level (IAAF Eligibility Regulations for Female Classification 2018).

The IAAF proceeds on the premise that relevant athletes with different sexual development have a high testosterone level compared to a female with lower testosterone levels (IAAF Eligibility Regulations for Female Classification 2018). Therefore, the assumption is that such athletes have an unfair advantage when competing with other females and stand a greater chance of winning (IAAF Eligibility Regulations for Female Classification 2018). It is against this backdrop that the IAAF enacted rules that regulate the eligibility of these athletes. This implies that relevant athletes will only participate in the identified competitions internationally if they meet the eligibility criterion (IAAF Eligibility Regulations for Female Classification 2018). In developing these rules, the IAAF has noted categorically that it is

keen on respecting the dignity and privacy of intersex athletes and does not seek to redefine athletes' gender (IAAF Eligibility Regulations for Female Classification 2018). According to the regulations, if athletes want to participate in 400, 800 and 1500 metre races at an international level, they have to undergo an assessment and treatment to ensure that their testosterone levels are within the range of 5 nanomoles per litre. The IAAF's feels that "The regulations exist solely to ensure fair and meaningful competition within the female classification, for the benefit of the broad class of female athletes" (IAAF Eligibility Regulations for Female Classification 2018). An athlete will therefore not be eligible to compete if she refuses to lower her testosterone levels to the acceptable level in terms of the Regulations (IAAF Eligibility Regulations for Female Classification 2018).

On the face of it, the requirement to have testosterone lowered seems optional. But refusing to submit to treatment would essentially mean the end of an athlete's career. She will not be allowed to compete under the female classification. The relevant athletes are to be assessed so that the IAAF can determine whether the intersex athlete has had their testosterone levels lowered so that they can then compete in the female category. This assessment is to be conducted by a specialised medical investigator (IAAF Eligibility Regulations for Female Classification 2018). Therefore, the IAAF would call upon athletes who in their opinion meet the eligibility criteria to identify themselves for investigation by the IAAF Medical Manager (IAAF Eligibility Regulations for Female Classification 2018). Furthermore, the Medical Manager is also vested with the authority to investigate any woman who appears suspicious. This implies that if the Medical Manager is of the opinion that an athlete under the female category seems to have both male and female traits, such athlete will be subjected to the assessment (IAAF Eligibility Regulations for Female Classification 2018). With this set-up, it could be argued that the IAAF rules are violating the right to privacy and dignity of intersex athletes because the latitude that the Medical Manager has in investigating female athletes seems too wide and unreasonable (Karkazis *et al* 2012 *The American Journal of Bioethics* 3–16; Karkazis and Carpenter 2018 *Journal of Bioethical Inquiry* 579–587).

The 2018 IAAF Rules state that the IAAF respects the dignity of all individuals, as well as individuals with a different sexual development (IAAF Eligibility Regulations for Female Classification 2018). This seems to imply that relevant athletes are afforded the same rights as any other individual. The IAAF further states that it aims to put measures in place for the relevant athletes to ensure fair and meaningful competition (IAAF Eligibility Regulations for Female Classification 2018). These regulations will be imposed on females with a different sexual development. This is because the IAAF claims that such athletes have a higher natural testosterone level, which gives them an unfair competitive advantage over any normal female (IAAF Eligibility Regulations for Female Classification 2018). The testosterone levels of female athletes with a difference of sexual development must therefore be regulated.

Furthermore, the IAAF has noted that there is scientific consensus and evidence from the field that intersex athletes have a higher level of testosterone, which enhances their performance (International Association of Athletics Federations "IAAF Publishes Briefing Notes and Q&A on Female

Eligibility Regulations” (2019-05-07) *Press Release*; Bermon and Garnier 2017 *British Journal of Sports Medicine* 1309–1314; Handelsman, Hirschberg and Bermon “Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance” 2018 *Endocrine Reviews* 803–829). Some research holds a contrary view, however (Pielke *et al* 2019 *International Sports Law Journal* 1–9; Pielke “Caster Semenya Ruling: Sports Federation is Flouting Ethics Rules” 2019 *International Journal of Science* doi:10.1038/d41586-019-01606-8); Sönksen, Bavington, Boehning, Cowan, Guha, Holt, Karkazis, Ferguson-Smith, Mircetic and Böhning “Hyperandrogenism Controversy in Elite Women’s Sport: An Examination and Critique of Recent Evidence” 2018 *British Journal of Sports Medicine* 1481–1482; Sönksen, Holt, Böhning, Guha, Cowan, Bartlett and Böhning “Why Do Endocrine Profiles in Elite Athletes Differ Between Sports?” 2018 *Clinical Diabetes and Endocrinology* 1540).

The IAAF Rules only allows those female athletes who meet the prescribed criteria to compete in the selected races (IAAF Eligibility Regulations for Female Classification 2018). This implies that the IAAF is determined to ensure that relevant athletes with a different sexual development compete only if they meet the eligibility conditions. The IAAF Rules further stipulate that the eligibility conditions only apply to participation by a relevant athlete in the female classification (IAAF Eligibility Regulations for Female Classification 2018). Therefore, these conditions may not be imposed on any other competition except for a competition on an international level and only for the races of 400 metres, 800 metres and 1500 metres. In terms of the IAAF Rules, females with a different sexual development must comply with the regulations to be eligible to compete with their peers. According to the Rules, for a Relevant Athlete to be eligible to compete she must meet several conditions (IAAF Eligibility Regulations for Female Classification 2018). Firstly, she must be recognised as a female or intersex. Secondly, she must reduce her blood testosterone level to a level below 5 nanomoles per litre for at least six months. Lastly, her blood testosterone level must continuously remain at 5 nanomoles for as long as she wants to compete.

3.2 *The Court of Arbitration for Sport and selected cases brought to the CAS against the IAAF Rules*

The Court of Arbitration for Sport (CAS) is an international court that deals with disputes related to sports (Reilly “Introduction to the Court of Arbitration for Sport (CAS) & The Role of National Courts in International Sports Dispute: A Symposium” 2012 *Journal of Dispute Resolution* 63). The court was formed in 1984 and since then, it has exercised its power to rule on disputes arising in international sport. The Court deals with these disputes in a specialised way by considering both rights and obligations of athletes and sports bodies (Reilly 2012 *Journal of Dispute Resolution* 63). Moreover, the CAS usually deals with procedural rules and regulation and has been found to succeed in matters of this nature (Reilly 2012 *Journal of Dispute Resolution* 63). The jurisdiction of the CAS is triggered “whenever the parties have agreed to refer a sports-related dispute to CAS” (Code of Sports-related Arbitration 2019) and it is on this basis that athletes, including Caster

Semenya, approached the CAS. With this set-up, athletes who object to the IAAF rules are given the opportunity to oppose the rules and seek relief from the CAS.

A number of cases have been brought to the CAS in relation to disputes that have arisen in international sports or competitions. For the purposes of this discussion, however, the focus is on cases that concern the IAAF Rules, or rather cases that challenged the IAAF Rules. In the case of *Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)* (CAS 2014/A/3759), the appellant was challenging the validity of the IAAF rules governing the eligibility of females with a high level of testosterone to participate in international competitions. The rules that were challenged were the "Regulations Governing Eligibility of Females with Hyperandrogenism to compete in Women's Competitions" (2011 IAAF Regulations). The athlete was challenging the IAAF rules on a number of grounds. Firstly, they felt that the rules unlawfully discriminated against female athletes having different characteristics. Secondly, they were of the opinion that the rules were based on factual assumptions about the relationship between testosterone and athletic performance (see summary or case in Branch "Dutee Chand, Female Sprinter With High Testosterone Level, Wins Right to Compete" (2015-07-27) *New York Times*). Thirdly, the appellant contended that they were not based on any legitimate objectives, and fourthly, they were not an authorised form of doping control. The IAAF was the second respondent in the matter and it vehemently rejected these grounds.

It should be noted that the appellant, Ms. Dutee Chand, is an athlete from India and she had participated in international competitions for quite some time before the 2011 IAAF Regulations were rolled out. However, due to her physical appearance and complaints lodged by other athletes, the IAAF instructed the Athletics Federation of India to investigate with a view to determining her gender. The appellant was subjected to a medical examination without her consent and the reasons behind conducting such examinations were not disclosed to her (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). The Athletics Federation of India submitted a report to the IAAF stating that they were not sure of her gender and that she had a high level of testosterone. Upon receiving the report, the IAAF notified Dutee that due to her condition of having a high level of testosterone, she would not be eligible to compete under the female category (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). This decision was informed by the 2011 IAAF Regulations. In terms of the 2011 IAAF Regulations, the acceptable level of testosterone for females who desired to compete in female races was 10 nanomoles per litre in the blood or less. Dutee did not meet this criterion. The 2011 Regulations, like the 2018 Regulations, were based on the debatable premise that there is a nexus between levels of testosterone and athletic performance.

The CAS considered the facts of the case and held that the IAAF failed to establish that the 2011 Regulations were necessary for purposes of organising female competitions which are fair and meaningful (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). Furthermore, according to the CAS, the

IAAF failed to provide sufficient scientific evidence about the relationship between a high testosterone level and improved performance by intersex athletes (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). This implies that the IAAF did not prove that female athletes with a high level of testosterone have an advantage over other females. To the CAS, this made it unwarranted to exclude them from competing in the female category. The court held that it could not uphold the IAAF regulations (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). The CAS gave the IAAF the opportunity to submit further evidence concerning intersex female athletes (*Dutee Chand v Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF) supra*). It is in trying to comply with the order of the CAS that the IAAF developed research on the nexus between athletic performance and testosterone (Bermon and Garnier 2017 *British Journal of Sports Medicine* 1309–1314) and ultimately compiled new rules applicable to intersex athletes. These rules came into force in April 2018 (the 2018 IAAF Rules).

Caster Semenya, a female South African athlete, lodged a complaint against the IAAF rules before they came into force in 2018 (International Association of Athletics Federations (2019-05-07) *Press Release*). She argued that the rules of the IAAF of 2018 are discriminatory in that they eliminate intersex athletes from participating in international competitions (International Association of Athletics Federations (2019-05-07) *Press Release*). She also stressed that intersex individuals have naturally occurring testosterone levels, thus, making it improper to unfairly discriminate against them based on the fact that they have higher testosterone levels than other females. Confronted with this complaint, this time around things turned out differently and the CAS upheld the 2018 IAAF Rules. On 1 May 2019, the Court held that the IAAF had adduced sufficient scientific evidence proving that female athletes with high levels of testosterone have an unfair advantage, especially when competing with other female athletes with lower levels of testosterone (International Association of Athletics Federations (2019-05-07) *Press Release*). Therefore, such athletes are not eligible to compete unless they reduce their testosterone level to a certain level and maintain it for as long as they want to be deemed competent or eligible to compete. It must be reiterated, however, that in recent times, research has displaced conclusions that a nexus exists between athletic performance and high levels of testosterone (Pielke *et al* 2019 *International Sports Law Journal* 1–9; Pielke 2019 *International Journal of Science*; Sönksen *et al* 2018 *British Journal of Sports Medicine* 1481–1482; Sönksen *et al* 2018 *Clinical Diabetes and Endocrinology* 1540).

The CAS decision was appealed by Semenya and Athletics South Africa before the Federal Supreme Court of Switzerland. The Swiss Federal Supreme Court ruled, among others, that it cannot subject the CAS decision to any form of legal control (Press Release of the Swiss Federal Supreme Court “DSD Regulations: Caster Semenya’s appeal against the decision of the Court of Arbitration for Sport dismissed” 8 September 2020). By ruling as such, the Court seemed to suggest that the CAS decision would not

subjected to any form of legal scrutiny or any applicable legal principles. The Swiss Court ruled that if the CAS decision violated fundamental and widely recognised principles of public order, it would revisit it. The Court, however, found that no such violation was established (Press Release of the Swiss Federal Supreme Court 2020). It added that the CAS decision could not be challenged in light of expert opinion in demonstration of the fact that testosterone levels impacted on athletic performance. The need to ensure fair competition in sports, the Court noted, was a justifiable reason to uphold the IAAF Rules. The Court reasoned that in these circumstances, a violation of the right to dignity and freedom from discrimination does not arise (Press Release of the Swiss Federal Supreme Court 2020). This note demonstrates that despite the decision of both the CAS and Swiss Court, the IAAF Rules impact on a number of fundamental rights including the right to health and this of itself leaves debates pertaining to these Rules far from settled.

4 The IAAF Rules through the lens of the international and national human rights standards on the right to health

We now live in an era where it is expected that human rights inform every decision taken by states, individuals, persons, or organisations. Not surprisingly, there are various international instruments that entrench fundamental rights at the international, regional, and national levels. Notable among those at the international level is the International Covenant on Social, Economic and Cultural Rights (1966). It must be noted that often, when rules are made at an international level, states replicate these rules at the national level. (In terms of the IAAF regulations, it is averred as follows: “Female athletes who do not wish to lower their testosterone levels will still be eligible to compete in the female classification at competitions that are not International Competitions: in all Track Events, Field Events, and Combined Events, including the Restricted Events.” Often, before athletes are considered for competitions at the international level, they have to first compete nationally. This makes this rule counterproductive in the sense that the absence of the prospect of going all the way to international competitions may influence national competitions to invoke international rules with a view of setting the pace for national athletes to compete internationally. On this disclaimer by the IAAF, see International Association of Athletics Federations, 2018. Eligibility Regulations for Female Classification (Athlete with Differences of Sexual Development) for events from 400 metres to the mile, including 400 metres, hurdles races, 800 metres, 1500 metres, one-mile races, and combined events over the same distances, 26 April 2018. <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classification> (accessed 2019-10-17). (IAAF Eligibility Regulations for Female Classification 2018)). Therefore, in assessing the IAAF Rules through the human rights lens, human rights standards or the right to health at the national level will also be considered. At the national level, focus will be placed on South Africa simply because the rules profoundly placed South Africa in the limelight on account of Caster Semenya being a South African athlete who felt targeted by the 2018 IAAF Rules.

4 1 *The importance of the right to health*

The right to health is not limited to access to health care. It also encompasses a duty on the part of the government to make sure that citizens live in a healthy environment (Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health, Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000). The right to health should not only be upheld by the state but also be respected in sectors such as the workplace (General Comment No. 14, 2000). Moreover, in order to achieve the highest possible standard of health, the state should maintain conditions which enable individuals to enjoy health without any prejudice or discrimination (General Comment No. 14, 2000). Furthermore, the right to health forms part of the international standard of human rights and cannot be separated from other rights. The right to health includes freedoms and entitlements which include the right of an individual to be in control of his or her health and body and to be free from non-consensual medical treatment (General Comment No. 14, 2000). The entitlements include the right to a health system that affords everyone an equal chance to enjoy the right to health. Therefore, all individuals must be given similar opportunities to attain the uppermost level of health (General Comment No. 14, 2000).

While states are the ones that sign up to the international human rights treaties from which human rights standards are derived, in recent times, there have been persuasive arguments to the effect that businesses and international organisations such as the IAAF should bear the responsibility of ensuring that their dealings accord due regard to human rights (Office of the High Commissioner for Human Rights “Guiding Principles on Business and Human rights” 2011). What then are the human rights standards on the right to health? And do the IAAF Rules stand human rights scrutiny? The next subsections attempt to answer this question.

4 2 *The right to health under international human rights law*

4 2 1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was adopted in 1948 by the General Assembly. It is the first international instrument of human rights to be codified. The UDHR has acknowledged a number of human rights such as the right to be equal before the law and the right to health care (UDHR 1948, articles 1 & 7). However, it must be noted that because it is a resolution by the United Nations General Assembly, the UDHR is not binding on any State. This notwithstanding, arguments have been advanced to the effect that the instrument could have attained the status of customary international law (Govindjee, Holness, Goosen, Van der Walt, Crouse, Olivier, Shaik-Peremanov, Kruger, Holness and Fesha *Introduction to Human Rights Law* (2016) 8). Therefore, the main purpose of the UDHR was to reach a common understanding of the human rights and the essential freedoms contained in the United Nations Charter (Crouse *et al Introduction*

to Human Rights Law 8). Article 25 of the UDHR provides that “everyone has the right to a standard of living adequate for the health and well-being of himself including food, clothing, housing, and medical care and social service.” This implies that the right to health is a broad concept as it includes all the prerequisites for one to lead a healthy lifestyle and not be subjected to unhealthy conditions that may lead to harm.

Female athletes with different sexual development are protected by the UDHR which entrenches the right to health in very strong terms. A conclusion can therefore be drawn to the effect that the IAAF rules are transgressing the UDHR. Such an argument would rest on the view that these rules do not protect intersex athletes but rather, seek to indirectly expose them to medical treatments that may have a negative impact on their health. Research has established that treatment requiring female athletes to lower their testosterone levels could have dire consequences, including depression, compromised bone and muscle strength, fatigue, excessive thirst, and disruptions to carbohydrate metabolism (see e.g., Jordan-Young, Sönksen and Karkazis “Sex Health and Athletes” 2014 *British Medical Journal* (doi: <https://doi.org/10.1136/bmj.g2926>)). These athletes’ right to an adequate standard of living will therefore likely be infringed upon, as the rules have dire health consequences. As noted, intersex athletes also have naturally occurring testosterone, which makes it problematic to subject them to treatment that has dire health consequences.

4 2 2 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 but came into force in 1967 upon ratification by State Parties. This treaty is dedicated to the second generation of rights which include *inter alia* economic, social and cultural rights. Furthermore, most countries have expressly accepted that the right to health is also considered to be a human right (see national constitutions generally). Therefore, countries that have ratified this Covenant are obliged to carry out the object and purpose of this Covenant (Vienna Convention on the Law of Treaty 1969, article 26). The international human rights standards not only oblige states to uphold the right to health care, but also to take positive action in ensuring that all individuals maintain a healthy standard and utilise the available resources to make sure that the right is upheld (Committee on Economic, Social and Cultural Rights General Comment No. 14).

The ICESCR requires State Parties to take reasonable steps within their available resources to progressively realise these rights (article 2). (In addition, the right to health is guaranteed under several other international human rights instruments, including article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, article 11.1(f) and article 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979, article 24 of the Convention on the Rights of the Child of 1989. At the regional level, notable amongst the instruments is article 11 of the revised European Social Charter of 1961, article 16 of the African Charter on Human and Peoples’ Rights of 1981, and article 10 of the Additional Protocol to the American Convention

on Human Rights in the Area of Economic, Social and Cultural Rights of 1988). This implies that State Parties may not always be expected to act immediately when implementing such rights. Rather states are given reasonable time to give effect to these rights (Committee on Economic, Social and Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations – Article 2, par. 1, of the Covenant, adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990). Notably, State Parties are not always expected to give immediate effect to socio-economic rights because these rights place a heavy burden on State Parties (Committee on Economic, Social and Cultural Rights General Comment No. 3). Therefore, the enjoyment of these rights may not always be fully guaranteed as it requires economic and practical resources, and planning. However, the Committee on Economic, Social and Cultural Rights has observed that “while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect” (Committee on Economic, Social and Cultural Rights General Comment No. 3). The Committee also implores states to take action, including steps to enact relevant legislation to enforce the right to health (Committee on Economic, Social and Cultural Rights General Comment No. 3). In terms of article 12 of the ICESCR, “everyone has the right to the enjoyment of the highest attainable standard of physical and mental health conducive to living a dignified life.” This means that states must provide health care services and ensure that no one is denied access to health. One cannot be in a position to live a dignified life if this right is neglected.

Requiring female athletes with naturally higher levels of testosterone and who want to participate in international sports to undergo treatment will have an impact on their health, and begs the question – is this justifiable in today's free and democratic society? It does appear that the IAAF is concerned about allegedly leveling the playing ground for female athletes with little to no regard to the side effects on health. There is no doubt that such an approach would infringe on the right to health of these athletes as guaranteed under article 12 of the ICESCR. Moreover, requiring that athletes with naturally occurring testosterone reduce their testosterone level goes against the notion of dignity as envisaged in article 12 of the ICESCR. At an international level, the Human Rights Council, through its Resolution of 2019, has added voice to the values contained in international human rights treaties. The Human Rights Council has accordingly urged states to see to it that sporting bodies and associations not enforce the IAAF regulations given how they threaten human rights, including the right to health (Human Rights Council Resolution “Elimination of Discrimination against Women and Girls in Sport” 2019).

4 2 3 The African Charter on Human Rights and Peoples Rights

The African Charter on Human Rights and Peoples Rights (Banjul Charter) adopted in 1986 falls within the category of regional mechanisms that protect human rights in Africa. The treaty recognises a number of rights including civil, political, economic, social and cultural rights. The African Commission

on Human and Peoples' Rights (the Commission) states that states must avoid unnecessarily *restricting* rights and uphold the rights protected by various international human rights instruments. Human rights violations weaken the public's confidence in the rule of law (African Commission on the Human and People's Rights General Comments No. 2. on Article 14.1(a), (b), (c) and (f) and Article 14.2(a) and (c) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2014). The Commission has further emphasised that Africa is facing a unique situation and that environmental, economic, and social rights are the core elements of human rights in Africa (African Commission on the Human and People's Rights General Comments No. 2). This Commission has also underscored that the right to health entails effective access to health-related education and information on sexual and reproductive health (African Commission on the Human and People's Rights General Comments No. 2). Buttressing this right under this Charter, this right has been interpreted to encompass freedoms including the freedom to control one's body, health, and sexual and reproductive organs (African Commission on the Human and People's Rights General Comments No. 2). Moreover, the right to health entails freedom from any unlawful interference such as non-consensual medical treatment, experiments, forced sterilisation, and inhuman and degrading treatment (African Commission on the Human and People's Rights General Comments No. 2).

Article 16 of the African Charter on Human and Peoples' Rights states that "everyone has the right to enjoy the best attainable state of physical and mental health". This implies that it is important that everyone be afforded the right to health, be it physical or mental so that they can lead a dignified life. It is also critical to note that although the right to health is recognised by international law as forming part of human rights, there is need to implement and enforce the right at the national level. The Commission has emphasised that the right to health does not necessarily entail the right to be healthy, but refers to health care and other factors relevant to living a healthy life (African Commission on the Human and People's Rights General Comments No. 2). It has further stated that it includes *inter alia* access to safe water, adequate sanitation, the supply of safe food, nutrition, housing, and healthy occupational and environmental conditions (African Commission on the Human and People's Rights General Comments No. 2). The Commission has also underscored that it is aware of the fact that many people in Africa do not enjoy the right to health to its full extent because poverty is a problem in African countries. This makes it impossible to assure full enjoyment of this right (African Commission on the Human and People's Rights General Comments No. 2). The issue of poverty as noted by the Commission brings the fairness of the IAAF Rules sharply into focus. If treatment is to be administered and it negatively affects the health of African athletes, this would mean that African countries will be burdened, because such athletes will seek treatment to reverse the effects of unwarranted treatment. Moreover, African athletes would have to approach health facilities and medical practitioners in African states to receive treatment. In administering such treatment, these facilities and practitioners would indirectly play a role in undermining the right to health as guaranteed under the African Charter on Human and Peoples' Rights, since as already noted, the treatment envisaged has negative effects on health.

4 2 4 Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa

The Protocol to the African Charter on Human and People's Rights on the Right of Women in Africa is also called the Maputo Protocol. It was adopted in 2003 and came into force in 2005 (Protocol to the African Charter on Human and People's Rights of Women in Africa 2005). It is recognised as the first international treaty that paid much attention to women's human rights especially those specific to the African context, such as women in armed conflict. Moreover, it complements the African Charter as it focuses more on women's rights in Africa. The African Commission has emphasised that African women must be afforded the right to the highest attainable standard of health which includes *inter alia* sexual and productive rights (African Commission on the Human and People's Rights General Comments No. 2). It has further stressed that State Parties have a duty of guaranteeing that women have access to education that is related to health (African Commission on the Human and People's Rights General Comments No. 2). This implies that states must create a platform that will enable women to have access to information relating to health. Article 14(1) of the Maputo Protocol provides that "State Parties shall ensure that the right to health of women including sexual and productive health is respected and promoted." This means that states are under a duty to provide a health system that will cater for the needs of women as well. Furthermore, Article 14(2) of the Maputo Protocol stipulates that "State Parties shall take appropriate measures to provide for health systems that are accessible and affordable."

The main purpose of the abovementioned Protocol is to uphold the interest of women due to the fact that they were previously disadvantaged and have over the years suffered discrimination. It would, however, appear that the IAAF rules violate the objectives of this Protocol in that women who have naturally occurring testosterone are being discriminated against in the area of athletic competitions. The IAAF submits that women with a high level of testosterone may not participate with other female athletes unless they reduce their testosterone level (IAAF Eligibility Regulations for Female Classification 2018). By doing this, these rules are discouraging women from participating in sport because of the fear of being subjected to unnecessary examinations. Furthermore, intersex athletes are at risk because the treatment may affect their health. This means that the IAAF rules are infringing upon the right to health.

4 2 5 The United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

It is of importance to understand the nature and origin of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Special Rapporteurs are experts appointed by the Human Rights Council to scrutinise and provide feedback about a country's condition or a special human rights theme (United Nations Commission on Human Rights United Nations Special

Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 2006). It must be noted that it is an honorary position, meaning that the experts do not receive any remuneration. One of the objectives of the Special Rapporteur is to gather information from all significant sources that pertain or rather deal with the realisation of the right to the enjoyment of the highest attainable standard of the physical and mental health (United Nations Commission on Human Rights United Nations Special Rapporteur). Therefore, the Special Rapporteur may measure the IAAF rules against the aforesaid right and can achieve this through research. They also have the duty to report on the status of the realisation of the right to health all over the world (United Nations Commission on Human Rights United Nations Special Rapporteur).

The Special Rapporteur must also ensure that a country conforms to laws, policies and good practices that are beneficial to one's enjoyment of the uppermost standard of mental and physical health (United Nations Commission on Human Rights United Nations Special Rapporteur). This means that countries must engage in activities that do not infringe upon the right of everyone to enjoy the highest attainable standard of mental and physical health (United Nations Commission on Human Rights United Nations Special Rapporteur). Therefore, if the IAAF rules infringe upon the aforementioned right, the Special Rapporteur may advocate for the revision of controversial rules, in this case, the IAAF rules, to ensure that they are beneficial to the athletes' enjoyment of the highest standard of mental and physical health. Moreover, the Special Rapporteur must identify, through investigations, the obstacles encountered nationally and internationally regarding the implementation of the aforesaid right (United Nations Commission on Human Rights United Nations Special Rapporteur). The Special Rapporteur is obliged to determine whether the IAAF rules facilitate or hinder the implementation of the right mentioned above (United Nations Commission on Human Rights United Nations Special Rapporteur).

Furthermore, it is the responsibility of the Special Rapporteur to make recommendations on the measures necessary for the realisation of the right to enjoy the highest attainable standard of mental and physical health (United Nations Commission on Human Rights United Nations Special Rapporteur). The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has observed that the IAAF Rules are inappropriate because they undermine the right to health. The Special Rapporteur has therefore made recommendations to the IAAF, calling on it to abandon these rules (see the combined report to the IAAF by the United National 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, 2018). These calls have fallen on deaf ears, however.

4.3 The right to health under South African law

Although the IAAF Rules apply to international competitions, in some cases, their applications extend to national competitions. In this regard, national

athletics associations, in a bid to align their practice with international practice, on their own accord or as a requirement by the IAAF, may adopt the same rules as those in international competitions. If this is the case, the issue that would need to be resolved is whether the application of rules similar to the IAAF Rules would be in accord with South Africa's national laws. In addition, medical practitioners in South Africa may be approached by female athletes to have their testosterone levels lowered so as to conform to the 2018 IAAF Regulations. What implications would this scenario have for the right to health? This section engages with these issues.

4 3 1 The Constitution of the Republic of South Africa 1996

Prior to democracy in South Africa, the right to health was not recognised as forming part of human rights (Moyo 2016 *Foundation for Human Rights* 21). Furthermore, access to health care was based on race. Therefore, access to health care was a major challenge for black individuals (Moyo 2016 *Foundation for Human Rights* 21). The black race was not afforded proper health care services and was also denied access to information concerning health. This despite the fact that it was the most indigent race in South Africa at the time (Moyo 2016 *Foundation for Human Rights* 21). There was a turn of events in 1994 when a new political dispensation came about in South Africa. The new constitution was adopted and came into force in 1997, along with the Bill of Rights. Section 1 of the Constitution provides that "the Republic of South Africa's values are human dignity, equality, and advancement of human rights and freedoms." Therefore, among other things, the constitution seeks to redress the injustices that existed prior to democracy. Everyone is deemed to be equal before the law. No race is deemed superior to the other in the current constitutional dispensation.

Section 7 of the Constitution states that "the government has a duty to respect, promote, protect and fulfil people's rights." This means that the government must uphold the rights of all individuals when taking a decision that might affect human rights and to act positively in realising such rights. Moreover, as a sign that the right to health is important, the Bill of Rights includes section 27 of the constitution which provides that "everyone has the right to have access to health care services." Section 27(2) of the Constitution also provides that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights." The right to health is listed as one of the justiciable rights meaning it is legally enforceable. Therefore, if an individual's right to health has been infringed upon, he or she can approach the court for redress. It must also be noted that in terms of section 8 of the Constitution of South Africa, "the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." This means that the constitution has implications for the 2018 IAAF Rules in that, should medical practitioners in South Africa administer treatment geared towards lowering testosterone levels and making athletes eligible to compete in international or national competitions, they could be infringing on the constitution, since the Bill of Rights applies to natural persons also.

The World Medical Association has therefore called upon all medical practitioners to steer clear of implementing the IAAF Rules and administering treatment to female athletes for the purpose of making them eligible to compete in sports. The World Medical Association is a global federation that consists of the National Medical Association that deals with medical issues worldwide (World Medical Association “WMA Urges Physicians Not to Implement IAAF Rules on Classifying Women Athletes” 2019). The World Medical Association seeks to ensure that the highest standard of physical and mental health is accomplished by means of promoting good practice, medical ethics, and medical accountability internationally (World Medical Association). The World Medical Association operates on the premise that implementing the IAAF Rules interferes with the right to health. Thus, if medical practitioners in South Africa are to implement the 2018 IAAF Rules, challenges could arise in terms of their compliance with the right to health under South Africa’s Constitution as well as international human rights law on the right to health.

4 3 2 National Health Act (an example of legislation)

States that have ratified and accepted to be bound by treaties providing for the right to health ought to give effect to such rights, and states must go a step further by ensuring that the right to health is incorporated into their domestic laws. Section 231(4) of the Constitution provides that “any international agreement becomes law in the Republic when it is enacted into law by national legislation.” Therefore, the treaties mentioned above may be regarded as law in South Africa as they have been signed into law and national legislation. Moreover, South Africa has national legislation that gives effect to the right to health as provided for by the international treaties. The constitution requires the legislature to enact legislation giving effect to the right to health care. Hence the National Health Act was enacted by the legislature (National Health Act 61 of 2003). The National Health Act provides for a uniform health system that considers the right to health as envisaged by the constitution and other laws.

The National Health Act recognises the socio-economic imbalances and inequities of the health services of the past. The objectives of the aforesaid Act are to regulate national health, and provide uniformity in respect of health services across the nation, while respecting, promoting and fulfilling the rights of the people in the Republic. The National Health Act further ensures an environment that is not harmful to people’s health or well-being. This shows that South Africa has given effect to the right to health as provided for in international treaties and the constitution. As already alluded to, the objectives of the National Health Act are to promote, respect the health rights of everyone including athletes. This means that the rights of female athletes must be respected. One important question that would then stand to be resolved is whether, medical practitioners, in giving effect to the IAAF Rules, would be advancing the spirit and purpose of the National Health Act. Arguably they would not.

In addition, as already noted, the National Health Act recognises the socio-economic imbalances and inequities of the past and seeks to address these imbalances. Not all athletes may be financially stable and able to

afford the treatment required for them to meet the requirements of the IAAF Rules. These athletes, therefore, automatically, do not have a chance. Critical issues arise here again as regards whether enforcing the IAAF Rules would advance the spirit and purpose of the National Health Act, which includes addressing the injustices and socio-economic inequalities of the past. If addressing the injustices of the past is to be at center of the health care system, then discrimination against minorities such as athletes with different sexual development does not help in achieving that goal.

4 3 3 Case law (a selection)

The right to health is a justiciable right, and cases have been brought to courts where the aggrieved parties sought relief. Against this backdrop, if rules similar to the IAAF rules are applied in the context of South Africa, they may very well be challenged through reliance on the right to health, which as consistently noted, is justiciable. In the case of *Soobramoney v Minister of Health KwaZulu-Natal* (1998 (1) SA 765 (CC)), the Constitutional Court determined whether Mr. Soobramoney had to receive dialysis treatment in accordance with section 27 of the Constitution. The court considered the fact that that the government has a constitutional obligation to provide health care. The Court stated that the constitution stipulates that everyone is equal before the law. This implies that if the treatment was to be provided to Mr. Soobramoney it would mean that all individuals in his position must receive the same treatment. Therefore, it was reasonable to deny such treatment because if it was administered twice a week to a patient it would cost R60 000 per year. The court held that "if the government was to provide for such treatment the health budget would be severely affected as the treatment is expensive." It further stated that the "state's failure to provide for such treatment did not constitute a breach of the constitutional obligation as it lacks resources that would enable it to act positively." This case shows that although the government has the duty to uphold the aforesaid right, it is limited to act within its available resources. However, the fact that aggrieved parties can access the Court for redress suggests that there is room for the IAAF rules to be challenged. Thus, since intersex athletes are at risk of subjecting themselves to unwanted treatment aimed at reducing their testosterone level, such treatment may have a negative impact on the health of such athletes. This could constitute grounds for challenging any rules of such a nature in the context of South Africa as the health rights of athletes have to be respected.

In the case of *Minister of Health v Treatment Action Campaign* (2002 (5) SA 721 (CC)), the Constitutional Court stated that "the state must act reasonably to provide access to socio-economic rights and that this right does not entitle anyone to demand service to be rendered immediately." The court held that the government policy failed to uphold the right to health as it excluded individuals who should be included to prevent the mother-to-child transmission of HIV. In this case, the court held that "the government was in breach of the right to health by failing to provide for a treatment that would prevent the mother-to-child transmission of HIV." This is because the court found that the state had the necessary resources to provide for such treatment. These two cases discussed in this section illustrate two situations

in which the right to health can be judicially enforced. The first one deals with an individual in need of treatment which is deemed to be beyond the means of the state. In such a case, denying such treatment will be justified. The second case deals with a situation where the state has the necessary resources to provide for such treatment but fails to provide for such treatment. Such failure will amount to a breach of a constitutional obligation and the state may be ordered to act positively by providing for such treatment. In the aforesaid case, it was mentioned that the state must give effect to the right to health if it has available resources. The effects of treatment which intersex athletes will be subject to could be dire. This in itself constitutes a ground for challenging such rules were they to have effect in the South African context. Overall, therefore, implementing the IAAF Rules in South Africa could have the effect of opening the door to complaints before courts based on the right to health which, as has been consistently noted, is justiciable.

5 Conclusion

When the 2018 IAAF Rules were rolled out, there were mixed reactions from all corners, with the IAAF keen on defending these rules, while organs such as the Human Rights Council could not hold back their disappointment in the IAAF's developments. These rules continue to be the subject of profound debate and have even been challenged before the CAS which Court has had them upheld. The CAS decision was appealed in the Federal Supreme Court of Switzerland. This Court too upheld these Rules in September 2020. The September 2020 decision appears to lay debates on these Rules to rest. However, an understanding of the human rights implications of the IAAF Rules does suggest that this debate is far from being settled. The discussion in this note set out to answer this question with regard to the right to health. In the discussion, it has been demonstrated that the IAAF Rules are inconsistent with human rights standards at both the international and national level. The process of reducing the testosterone level of intersex athletes risks endangering the lives of athletes who decide to subject themselves to treatment for the sake of competing in international sports. While both the CAS and Swiss Court have upheld the IAAF Rules, the said rules rest on shaky ground when viewed from the perspective of fundamental rights such as the right to health.

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