WOMANHOOD POLICING IN SPORT AND HUMAN RIGHTS VIOLATIONS: A LOOK AT DIFFERENCES IN SEXUAL DEVELOPMENT (DSD) REGULATIONS BY WORLD ATHLETICS AND THE TRANSGENDER BAN THROUGH A HUMAN RIGHT'S LENS

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DEDICATION

To all those existing beyond the gender binary, your existence is an indication that human beings are a beautiful tapestry called here for a reason not human doing. You are enough in the words of the Thuli Zuma you are one hundred trillion cells weaving tapestry. This is for all of us who know the freedom beyond the gender binary.

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ACRONYMS AND ABBREVIATIONS

BPfA	Beijing Declaration and Platform for Action
CAS	Court of Arbitration for Sport
CCPR	International Convention on Civil and Political Rights
CEDAW	United Convention on the Elimination of all forms of Discrimination Against women
ICESR	International Convention on Economic Social and Cultural Rights
DSD	Differences in Sex Development
ECtHR	European Court of Human Rights
FIMS	International Federation of Sports Medicine
IAAF	International Association of Athletics Federation
IOC	International Olympic Committee
IHRL	International Human Rights Law
PILA	Swiss Private International Law Act
SFT	Swiss Federal Tribunal
SGB	Sport Governing Body
SCPC	Swiss Civil Procedure Code
VCLT	Vienna Convention on the Law of Treaties
WA	World Athletics
YP	Yogyakarta Principles
YP+10	Yogyakarta Principles plus 10

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Introduction

1.1. Background

'What is unfair is not Caster, Christine and Beatrice's abilities, but the sex binary that disproportionately targets them.'[1]

The rise of Namibian athletes Christine Mboma and Beatrice Masilingi to the Olympic stage made the world revisit an ongoing debate about how female athletes with naturally high testosterone have an unfair advantage over their competitors.[2] This is a debate where words such as 'integrity' and 'level play field' are thrown at the layperson to justify discrimination.[3] Additionally, the judgement passed down in *Mokgadi Caster Semenya v International Association of Athletics Federation (Caster Semenya case)*[4] that the South African Olympic runner must take medication to reduce the testosterone her body naturally produces to continue competing in women short distance track events reveals that the world is still patriarchal and policing of women's bodies is still prevalent. The gender inequality became clear when American swimmer Michael Phelps, through a test, confirmed that his body produces less lactic acid than that of his competitors and the world said he was lucky to have such a significant genetic advantage.[5]

International regulatory bodies for sports continue to perpetuate the belief that biology is a fact and based on that fact, only cisgender men can have advantage over other sexes.[6] This ideology has been used throughout history to imprison and restrict

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1 A V Menon 'Sexism in the double standards: Justice for Caster Semenya' (2020) at https://www.alokvmenon.com/blog/2020/9/12/sexism-in-the-double-standards-justice-for-caster-semenya (accessed on 12 July 2022).

2 Reuters 'Namibian sprinters resurrect 'paradox' of DSD rules' 3 August 2021 *Openly News* https://news.trust.org/item/20210803064559-0mwc5 (accessed on 23 July 2022).

3 As above.

4 Mokgadi Caster Semenya v International Association of Athletics Federation CAS 2018/0/5794 (*Caster Semenya* case)

5 M Hesse 'We celebrated Michael Phelps's genetic differences. Why punish Caster Semenya for hers?' 2 May 2019 *The Washington Post* https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss-genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539_story.html (accessd on 12 July 2022)

6 E Crumley 'Seb Coe: "Biology trumps gender"' 20 June 2022 *Athletics Weekly* https://athleticsweekly.com/athletics-news/seb-coe-biology-trumps-gender-1039957642/ (accessed 17 July 2022).

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the capacity of women to decide over their bodies and what spaces they can have access to.[7] Women like Caster Semenya have to prove through tests that they do not threaten womanhood as constructed in sport and in society at large. Such regulations want the world to forget the peculiarities of Michael Phelps and Usain Bolt who have genetic advantages over their counterparts.[8]

Sport is viewed as a unifier of nations, cultures, races and gender and thus, it is often easy to overlook human rights violations that exist within the space. However, a look at history reveals the many injustices committed to preserve the integrity of sport.[9] Nevertheless, sport is one of the institutions which essentialises the gender divide and gender binary. It is founded on the very principle that women or female bodied persons cannot outperform men or male bodied persons.[10] Masculinity and femininity boundaries are reproduced and reinforced in sport.[11]

World Athletics (WA) developed the eligibility regulations for female classifications based on Differences in Sex Development (DSD regulations herein) to determine who can access the protected category of women's sport.[12] Such regulations mandate various tests for those who have been identified on the tracks not to fit the female according to the 'white gaze' and if found to have high levels of testosterone they are banned from participating in long distance runs.[13] This has targeted intersex women whose physical appearance do not fit the discriminatory definition of femininity and in most cases, they are often called transgender in the media bringing a factor of conflation.[14]

1.1. Research problem

The failure of the human rights discourse and approach into sport regulation poses a problem in the world.[15] The creation of the individual in international law bordering on

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7 Menon (n 1 above).

8 K Matlack 'The gender policing of women athletes is a violation of human rights' (11 August 2016) *Medium* https://medium.com/the-establishment/the-gender-policing-of-women-athletes-is-a-violation-of-human-rights-f209b373863d (accessed 06 June 2022).

9 E McDonagh et al *Playing with the boys: Why separate is not equal in sports Oxford University Press* (2008) 2-10.

10 As above.

11 As above.

12 World Athletics C3.6 Eligibility Regulations for the Female Classification.

13 As above.

14 As above.

15 Matlack (n 8 above)

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the experience of male persons reproduces inequalities and reinforces patriarchy as in sport. Such has the potential of undoing the progress made with regards to gender protections and cement sexist, racist and transphobic notions in the global space. It is noteworthy that such a failure has also side-lined athletes who come from the global south especially Africa which begs the question whether the DSD regulations are policing women through the lens of whiteness or not.

1.1.1. Significance of the research problem

Human rights as provided for under instruments of law are important for the equality and dignity of all. Therefore, recognising the failures of the human rights law instruments implores the world to rethink how best dignity can be recognised. The continuation of promulgation of treaties on top of treaties which were built with gender, sex, and sexuality bias has not been comprehensively dealt with. This is because human rights instruments seek a monopoly of standard despite limited in perspective.

The relationship of the human rights frameworks with private institutions is one that is built on shaky ground because racism, transphobia and sexism still have traction in the international space. Although this research posits that biology and science are not a fact, it does not seek to engage in the qualification and disqualification of the biology rhetoric as such, the debate would be explored in a limited manner. It has established that since time immemorial biology instead of 'real biology' has been used to dehumanise other people.[16] It ought to be noted that for biology to be real all characteristics of being human has to be taken into account.[17] As such to define real biology, is to dispute the factuality of science in defining biology. Therefore, the postulate here is that human beings are complex and variant beings and that is real biology.[18]

1.2. Research objectives

This study will be guided by the following objectives;

- To de-gender sports and human rights as institutions
- To highlight and evaluate the gendered discrimination in sports

16 O Oyewumi *The Invention Of Women Making An African Sense Of Western Gender Discourses University Of Minnesota Press(*1997) 1-10

17 Menon (n 1 above).

18 As above.

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1.3. Research questions

The main research question is: Can a human rights approach be adopted to respond to the discrimination posed by the DSD regulations in sport?

To answer this question the following sub-questions would be asked:

i. Within the human rights framework on sex and gender, is there an agreed definition of womanhood and femaleness?
ii. Are sport governing bodies (SGB), as private entities, obliged to apply human rights law standards in issues of sex and gender?
iii. What is the nature of the human rights violations posed by the DSD regulation?

1.4. Methodology and approach

This research will employ desktop research to make a conclusion and recommendation on how sport should integrate transgender and DSD women in women's elite sport. A multi-disciplinary approach will be adopted first by looking at not only peer reviewed scholarship but also opinion and lived experiences pieces bordering on sentiments and emotions. The arguments made in the Caster Semenya would be explored as an approach to understand various positions on the issue and other case law which have challenged sex testing in sport would be considered.

The research will draw on feminist queer and trans theory to make an expansive understanding on womanhood and policing in sport. It does this while also incorporating a human rights approach to highlight the inequalities and find inclusive solutions to the problem at hand. Using such approaches, it becomes intersectional and not informed just by one ideology. This produces a wide range of understanding of the problem under study.

1.5. Limitation of the study

The limitation of this study is the particular focus on the DSD regulations to assess the policing of womanhood in regards to transgender and intersex people. Additionally, the focus is on the WA as it seeks to refine female classification rules.

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1.6. Literature review

1.6.1. Biology and gender in sport a colonial construct

The impartiality of science and reason touted as empirical and devoid of biases is a falsehood if unchecked can further cause polarisation. The idea that such notions of science and reason are not subject to emotion is a trump card used to silence conversations that seek to advocate for human rights. The notion negates that human being and behaviour are complex, and as such, require human rights and dignity approach to ensure that nothing is used to the disadvantage of other people.

Oyewumi wrote a book in 1997 focusing on the use of biology in the construction of the body.[19] The premise is that biology as destiny rhetoric, is a product of Western ideology and in particular, identifies the American reproduction of the concept.[20] Looking at the interaction of biology rhetoric with the lives of Yoruba women, the book brings forward relevant questions to the falsity that biology is empirical and cannot be challenged. The writer contends that the body as we understand it, is reproduced through a gaze. This gaze is invited by the notion that the body is central to the social order. Such gaze seeks to control and gate-keep the characteristics of the body in pursuit of validation of self. Offered as an analysis is the production of the Arian race in Nazi that through sight, the regime sought to control the body through its physical features visible to the eye. Furthermore, the gaze here is recognised to be a product of the West and has been given the status of world view and sense as it interacts with Yoruba people.

Tamale[21] *et al,* brought an interesting argument in their scholarship by comparing the case of Michael Phelps and Caster Semenya. They posit that the two athletes have bodies that according to the sporting world and biology are unconventional and exceptional. The difference between the two is that one is a woman from a rural place in South Africa and the other is a heterosexual white man from a privileged socioeconomic background.[22] In making such an argument Tamale brings out the notion that biology as understood now is a product of colonisation and such needs to be deconstructed in a bid for decolonisation.[23] Tamale's analogy into the issue of sex

19 Oyewumi (n 16)1-10
20 As above.
21 S Tamale *Decolonisation and afro-feminism* (2018) Daraja Press: Ottawa.
22 As above 95.
23 Tamale (n 20) 265

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and gender hinged on decoloniality and Afrocentrism to present how power and erasure are used in the production of knowledge. This is done with caution not to reproduce the victim essentialism of the African colonisation. However cautious as it is, bold stances are taken by this scholarship. Uncomfortable truths are brought to the academic discourse.

1.6.2. DSD regulation and the white gaze

For decades SGBs have policed women participation in sport through sex testing and such went on unchecked to the point that it has become a norm although such tests were never justified. Sex verification practices started back in the 1940 as a reaction to the rumours that some countries were bringing men to compete as women in sport.[24] As such in the 1960s sport regulatory bodies came up with a systematic sex testing for women in sport entrenching the idea that some women were more than male than female.

Monitoring, examination and modification of intersexual bodies have never been inclusive or respectful.[25] Sports officials decide that some women no longer qualify as female athletes. Narrow hipped, broad shouldered and pronounced muscled women are then assumed to be men – this is the white gaze of sports.[26] From being identified through their high performance and their physical attributes the DSD regulation mandates them to undergo testosterone testing to determine their level of the hormone in which case if found to be above the threshold they are banned from elite sports unless they take medication to lower such testosterone. The accepted testosterone threshold is 5 nmol/L OF testosterone of which is not clear as to why that level.[27]

Lindsay Pieper traces the history of sex and gender testing from the time when women were given access to sport until the promulgation of the DSD regulations by the WA.[28] The scholar stresses that the process of gender and sex verification has

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24 J Harper Sporting gender: *The history, science and stories of transgender and intersex athletes*(2020) Rowan and Littlefield.

25 M G de Marailla Muste 'You ain't woman enough: Tracing the policing of intersexuality in sports and clinic (2022*) Social and Legal Studies* 847-870.

26 Reuters (n 2).

27 See R2.2 (a) ii World Athletics (n 12).

28 L Pieper *Sex testing: Gender policing in woman's sport (*2016) University of Illinois Press 175-177.

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always been unnecessary no matter the justifications in history.[29] This position is revealed as a shift from sex control to femininity testing and it is analysed from historical processes of gender and sex testing.[30] As such the processes are viewed as tools to eliminate competitors deemed too strong, too fast and too masculine for women's sport.[31] This, Pieper contends is the control of womanhood which is arbitrary.

Furthermore, Pieper ventures into discrediting the idea of fair play as touted by WA in justifying the implementation of the female eligibility rules.[32] On this it is contended that fair play has never been the underpinnings of the world of sport which is built around the sheer ability of the body to exceptionally outperform other bodies. A recount of genetic abilities of different bodies is given to show how fair play can never find justifications in using biology contentions of body differences.[33] Consequently the notion that sport is segregated on the basis of biological differences between the female and male body is also refuted using history of the practice. Recognising that they had no sport of their own, women in Ancient Greece created their own space for sport.[34] The issue to be underlined here is the historical exclusion of women from sport which was remedied by creation of the women's category. However, Pieper contends it was not full access to sport because it was created under the illusion of performative justice. It was never the intention of the Olympic Movement to recognise women's sport as real sport because they still held the perception that women do not belong in sport.[35]

Hamilton[36] incorporates the recent rulings in elite sport to try to understand the debate on the DSD regulations. This is done in unpacking the International Federation of Sports Medicine (FIMS) 2021 consensus statement on the justification of the DSD regulations.[37] They make the argument that any regulation that seeks to regulate access to competitions in sport should be based on peer reviewed scientific evidence

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29 As above, 175-177.
30 As above.
31 As above.
32 Pieper (n 27) 7-8.
33 As above.
34 As above.
35 As above.
36 BR Hamilton *et al* 'Integrating transwomen and female athletes with differences of sex Development (DSD) into elite competition: The FIMS 2021 consensus statement' (2021) *Sports Medicine* 1402.
37 As above 1409.

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which should be proactively disclosed to relevant policy makers.[38] In making such an argument they entertain the idea that regulation is necessary in sport but fail to recognise that such regulation is only with regard to women's sport as there exists no equivalent for male athletes.[39] A concession is made that there is a danger of using DSD regulations under the rationale that science is development. Hamilton bases their argument on the idea that DSD conditions are rare, therefore it is not easy to come up with agreed rules for individuals with such differences to participate in sport. Furthermore, they posit that the prevalence in the presence of DSD women in the general population could be a sign for integration.[40] This however does not take into consideration that not all individuals in the world have tested for DSD. There exists a possibility that even those who the DSD regulation see as ciswomen could on a spectrum be intersex. The laudable approach by the article is the separation of the discussion regarding DSD women and transwomen while recognising the intersections of the two issues without conflation. This separation is done not only to essentialise the boundaries, but also to understand the inequalities that are experienced by the two identities in sport.

As a form of integration, one could make a value judgement from Hamilton's scholarship that there is need for the regulatory bodies to test all athletes of the DSD so as to understand the prevalence of the identity. However, Wiesemann[41] postulates that there is a right not to know one's sex as such testing would be problematic. In bringing out this argument Wiesemann brings the gender verification practice under the scope of ethics and uses the premise of general diagnosis to understand the right not to know in medical practice.[42] The author makes reference to international standards of human genetics testing which holds that genetic testing should not be sanctioned without the free and informed consent of the individual concerned and disapproves of such testing, if it leads to stigmatisation and victimisation of the individual.[43]

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38 Hamilton (n 35) 1410-1411

39 As above

40 Hamilton (n 35) 1404

41 C Wiesemann 'Is there right not to know one's sex? The ethics of gender verification in women's sports/competition' (2011) *Journal of Medical Ethics* 216-220.

42 As above 216-217.

43 Wieseman (n 40) 217-218.

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It is concluded that the harms by the regulations outweigh the benefits which are here considered dubious as they are footnoted by exclusion. This author contends that the harm has implications of extending beyond women in sport to those not in sport because the existence of gender verification tests overrides medical ethics.[44] The right not to know in medicine provides that one only needs to know which they sought medical assistance for and such is based on free and informed consent.[45] The DSD regulation preys on the fear of exclusion from sport and then subjects women to demeaning tests without really appreciating their consent. Wieseman further contends that individuals in most, if not all cases, do not understand the power of genetic information in their lives which could drastically change their lives.[46]

1.6.3. Womanhood, intersexuality and transgenderism in sport

The conceptual foundations of the term 'women' were coined with racial connotations to only refer to white female bodied persons. As defined by the time, it was understood to be an advanced state of mental physiological, emotional and anatomical specialisation only achieved by the civilised.[47] The civilisation in this case was on the basis of the colour of skin and as such only white persons could attain and access womanhood. Such resulted in the concept and being of women racialized in bid to maintain the lie that white people were more human than other races.[48]

In their book[49], Schuller postulates that the sex binary is an invention of the 19th century by race scientists who sought to justify white supremacy. They engage and unpack the ideology that was constructed that the ability of white people to display a visual difference between male and female made them superior. The racist problem of the race eugenics has been privatised and institutionalised in spaces such as sport because with the emancipation of the black individual they also had to be inducted into the sex binary society without confronting and acknowledging its racist foundations. Schuller offers a historical analysis of race, science and sex in the nineteenth century thereby giving a better understanding as to why the world today is still grappling with the idea of policing the sex boundaries. However, this book does not acknowledge

44 As above.
45 As above, 219
46 Wieseman, (n 40)
47 K,Schuller *The biopolitics of feeling: Race, sex and science in the nineteenth century (2018).*
48 As above.
49 As above.

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that even though gender policing started as a white supremacy idea it has found popularity even in other races.[50] As such the conversation has become one of monopolies as to who holds the power to limit access for other people.

De Maralla Muste[51] is one scholar who interrogates the construction of womanhood by making the argument that the policing of intersexuality in sports and clinics dictates that there are those who are not woman enough. They did this by tracing how policing of women in sport came about to better understand the real issue behind DSD regulations. Furthermore, they brought the margins of medicine and sports into focus and made an analysis of how womanhood is a product of social engineering which then discovered gender markers.[52] The author makes a compelling argument that woman policing is not confined to sports but is also prevalent in the general population. This they substantiated by using the example of intersex genital mutilations, a practice used to fit intersex individuals neatly into the categories of being woman or man.[53] Furthermore the scholarship holds that throughout, there have been inconsistencies of defining the gender binary clearly an indication that gender is not a fixed phenomenon, but rather informed by our limited understanding of human beings.[54] It is therefore trite to concede that the DSD regulations are not based on clear biology which makes their application unjust and discriminatory.

In their conclusion and recommendations, the author made the observations that sport regulations are not concerned with integrity of women's sports rather they seek to regulate how far women or female bodied individuals can go as athletes.[55] Additionally they were of the view that if we are to entertain the argument of levelling the playing field, all genetic advantages have to be regulated.[56] Following the logic employed by SGBs in their rationale to sex test female athletes, they argued that male athletes who have unusually high levels of endogenic testosterone or androgen levels that exceed the "normal male range" should also be banned from competing in men's sport unless they take inhibitors.[57] While such a recommendation would bring some

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50 As above.
51 De Marailla Muste (n 24) 847-870.
52 As above 848-849.
53 De Marailla Muste (n 24) 852-853.
54 As above.
55 De Marailla Muste (n 24) 870
56 As above.
57 De Marailla Muste (n 24) 860-863.

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fairness, the author acknowledges that there is no empirical data to support such an approach. However, this research contends that for a system that does not want to police manhood it is self-defeating to search for such data.

The relationship between testosterone and high performance is purely based on assumptions and Cooky *et al.* explored this. They have observed that no study has attributed to successful athletes having high levels of testosterone.[58] In a study by Healy which profiled 693 elite athletes on the basis of endocrine it was found that there is a complete overlap of testosterone levels in both males and females.[59]

Zerilli invokes the woman's question through an analysis of the political theory, looking at the works of Rousseau, Burke and Mill. They explored the construction as the disorderly citizen in the political space.[60] As a critique to works of the three works they contend that woman is used as scapegoat for lack of definitions which then turns such a field of endless inquiry and probing without certainty.[61] The certainty of the woman question is within political thinking and that the personal as touted to private is very political and only by the inclusion of the question of citizenry. The departure from the margins of citizenship by this scholarship demarcates that before being a global citizen one is a national citizen. Therefore, a woman should be viewed as a citizen of her country entitled to claim justiciable rights under the Bill of Rights as contained in that state's constitution. The critique by Zerilli refutes the definition of woman as the gatekeeper of culture and embodiment of chaos.[62] They say this idea of viewing 'woman' as the guardian of culture seems to romanticise the idea that women are only to be found in social creation.[63] Offering the analysis of womanhood existing only as far as the theatre, their analogy is that history through postulates of Rousseau always wanted to label womanhood as a performance, a perversion of the man who has the womb. In that regard they still implore the use of political theory to understand the 'womanhood question'.[64]

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58 As above.

59 ML Healy and others 'Endocrine in 693 elite athletes in the post competition' (2014) *Clinical Endocrinology* 1-12.

60 LMG Zerilli *Signifying woman: Culture and chaos in Rousseau, Burke, and Mill* (1994) Cornell University Press 1-140.

61 As above.

62 Zerilli(n 59)1-15.

63 As above.

64 Zerilli (n 59) 138.

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1.7. Structure

In addressing the research problem five chapters will be employed. The first chapter will be the introduction delimiting itself to situating the research topic through a background discussion to bring the problem and justify its relevance. The second chapter will focus on the nature of womanhood and how it is constructed in human rights instruments. This looks at the practice of human rights systems creating supplementary conventions with specific focus on women's rights and how that adds to the conversation on womanhood and gender. The chapter then applies that discussion to womanhood policing in sport. Chapter Three will then focus on a rights analysis and human rights approach to bring out the human rights violations thereto. Chapter four would interrogate the relationship between human rights system and sports regulatory system in a bid to find a process of making a human rights approach reach the regulations. This would look at the legal personality of SGBs and interrogate whether such personality is immune to the jurisdiction of the human rights system. The final chapter would seek to solve the paradox at hand by offering robust recommendations as to how woman policing can be abolished. The chapter also concludes the thesis.

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2. Conceptualising womanhood from a human-rights perspective

2.1. Introduction

Women's rights are human rights is a rhetoric used to dispel the notion that women's rights are special rights separate from the generic human rights. The practice of creating supplementary Treaties focusing on comprehensive protections of women in the human rights space is one that has been misconstrued to mean that separate rights are being created instead of an extension of the existing human rights. To label women as vulnerable is a matrix of understanding and undoing the past and prevailing inequalities faced by women. It is not a precursor that those labelled as women or female would always be in that state. This chapter attempts to interrogate the construction of womanhood/femaleness focusing on the definitional underpinnings of the Convention on Elimination of all Forms of Discrimination Against Women (CEDAW)[65] and other human rights instruments. It is aimed at finding out whether there exists an agreed definition of womanhood and femaleness in international human rights law and if there is, does it follow principles of inclusion and human dignity.

2.2. Another space for discourse

To provide a better understanding on how a woman is defined within society, this research examines the use of the term by social media users on various platforms, namely Instagram, Facebook, YouTube, and TikTok to present the debate within individuals in society. It is also done with recognition of the rise of influence held by content creators in understanding and misunderstandings of world issues.[66] Social media has platformed important discussions and movements on the woman question with content creators critiquing the academic discourse of being alienated from the people.[67] Such a platform cannot be ignored because despite its limitations, it reveals somewhat the public perceptions on issues. This approach is then an attempt to include views expressed online dubbed the new society to balance the analysis of the concept 'woman'.

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65 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: https://www.refworld.org/docid/3ae6b3970.html (accessed 15 October 2022)

66 Stellar 'The rise of online feminism and empowered influencers' (2021) at https://stellar.io/the-rise-of-online-feminism-and-empowered-influencers/ (accessed on 10 October 2022)

67 Stellar(n 65 above)

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Using the question 'what is a woman?' social media platforms such as Twitter, Facebook, YouTube and TikTok were searched. Even the most preposterous views of social media users were explored. There are no rules of engagement for an academic discourse on the platform; anyone can say whatever they are feeling and sometimes copy from peer reviewed scholarship. Note that social media is used as a search engine not as a platform/place of research.

The first observation made using this search method in which without refining the search algorithm the question of what is a woman is polarising.[68] Users use the situation in the United States as a point of departure to express their views on the matter. As the algorithm is refined by adding the value Africa we are directed to mixed reactions to a documentary titled 'What is a woman' by one Matt Walsh a journalist in the United states of America.[69] This essentially brings the tension between the conservatives and progressives as constructed in the West political spaces. Although it may seem regarding this issue the world seems to live in America but not in America. This tension would not be engaged to avoid essentializing issues in America to be the whole picture in the woman debate.

Impressions from this exercise are as follows: a wide range of users express the idea that the woman question as complicated, is a product of political idiocy.[70] Two analogies are used.[71] The first analogy is a simple question which demands a look at biology which they postulate that it points to reality that a woman is an adult female.[72] Secondly some offered the idea that the term or concept becomes a complicated phenomenon because it is defined for men and by men.[73] Second impression is that one cannot define the concept by using the term again in the definition.[74] This is what

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68 Facebook 'What is a woman' https://www.facebook.com/MattWalshBlog/videos/matt-walsh-asks-maasai-tribe-what-is-a-woman/699468024464831/ (accessed on 14 October 2022)

69 As above

70 As above

71 Twitter 'The only reason you find the question, 'What is a woman,' complicated, is if you are trying to appease adult human males and their enablers by giving away women's rights' at https://twitter.com/CallOnKali/status/1579164271384354817 (accessed on 14 October)

72 As above

73 Twitter 'Men sitting around pontificating "what is a woman" and coming up with any answer other than "adult human female" is, without a doubt, the most sexist act imaginable' (2022) at https://twitter.com/salltweets/status/1578870620023947265

74 As above see the interactions on the comments.

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they call circular definition and to some extent the rules of ontology supports this. It follows that those who define woman as someone who identifies as woman do not really define the concept. Lastly it can be said that although social media users stand on the basis that the academic discourse seems to be limited in capturing the definition of woman they still reference academic research and theories in their own interpretation of the concept.[75]

2.3. A simple question not so simple

To define womanhood, one has to look at what is the common understanding of what it means to be a woman in society. There is no one agreed definition used for “woman" mostly because the term was defined by those who wanted to qualify who can access femininity and who cannot.[76] In ahistorical times it was defined to justify hierarchical organisation of society.[77] At some point it was defined as an exercise to divide labour while some viewed it as a matter of identity. Other definitions considered it as a reflection of reality and cannot be changed. It then follows that this research proposes that all of the definitions have to be considered to truly understand the concept of womanhood.

2.3.1. Sex and gender

The conflation of sex and gender is something which is not only confined to generic speech but found in academia too.[78] The concepts are different and similar at the same time. Different in their conception but same in the sense both are constructed through contracts in society. Additionally, they influence each other’s understanding, hence the conflation.

Sex can be understood from five perspectives.[79] Firstly, sex is believed to be biological to suggest that one has to refer to the reproductive potential of a body to

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75 ‘ S Kano ‘The moon has feminine energy’ (2022) https://www.tiktok.com/@swiry_nyar_kano/video/7152854666869591302?is_copy_url=1&is_from_webapp=v1&lang=en&q=swiry%20nyar%20kano&t=1665683113589 (accessed on 13 October 2022)

76 V Sauz ‘No way out of the binary: A critical history of the scientific reproduction of sex’ (2017) Journal of Women in Culture and Society 6-24.

77 D Gonzalez-Salzberg ‘The accepted transsexual and the absent transgender: A queer reading of the regulation of sex/gender by the European Court of Human Rights’ (2014) 29 American University International Law Review 807.

78 E Meyer ‘Designing Women: The definition of “woman” in the Convention of all Forms of Discrimination Against Women’ (2016) Chicago Journal of International Law 553-590.

79 A F Sterling Sexing *the body: Gender politics and the construction of sexuality* 2000.

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determine their sex. The second perspective relates to implores us to understand sex from chromosomal construction of X and Y which happens at the exchange between sperm and the egg. Therefore, it is a general rule that those who have XX chromosomes would be constructed as women while XY would be men.[80] Third perspective is gonadal development which involves testes or ovaries or a combination of all. The gonads are believed to be producers of hormones which are responsible for growth and sexual development which brings the fourth perspective to sex which hormonal characteristics. The hormonal sex postulates that those who produce high testosterone and able to make use of it are men while those with high oestrogen are women. At birth the visibility of the external genitalia is key determinant of sex and most if not all the time sexing is based on this, disregarding other factors and this is the fifth perspective to the construction of sex.[81]

For the understanding of sex as binary all the discussed perspectives have to be in agreement, but sometimes sex characteristics are not in alignment. Gender, although to be understood as a concept of its own from sex can be understood to form the sixth understanding of sex. Often seen as a product of sexing a social and "biological" ordering of beings into male and female. To assign sex at birth demands a social response which then triggers the gender socialisation of a person.[82] From gender reveal parties, choice of names, clothing colours, toys, and hair the process is deeper than just the words boy and girl.[83] Gender becomes a behaviour and a social condition learned through interactions of persons producing identity, expression, roles and performance.[84]

2.3.2. Race and colonialism

Race is a factor in defining the concept of womanhood/femaleness because historically the fight to be a woman was divided on the basis of race.[85] There is no denying that the gender binary is a product of white imperialism dispersed to the world through colonisation.[86] This is not to suggest that in "black" communities there was no

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80 As above.

81 As above.

82 Sterling (n 78): K B Stockton 'Gender has a history and its more recent than you may realise' (2022) The MIT Press Reader at https://thereader.mitpress.mit.edu/gender-has-a-history-and-its-more-recent-than-you-may-realize/ (accessed on 08 October 2022)

83 As above.

84 As above.

85 As above.

86 Schuller (n 46)100-105

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recognition of sexual differences in human beings. Black here is used to refer to the communities which were colonised and whose race was considered to be remnants of the past, and therefore not capable of impressibility for civilisation by eugenics.[87]

Using biology of the eugenics, race was constructed to justify hierarchy. Such construction of race put white men at the top of the hierarchy followed by white women and then black men.[88] This structure then supports the pathologization of the black woman who is viewed as not woman enough for not being able to be distinguishable from their male counterpart.[89] Although it is sufficient that race and gender are linked, Tamale implores that such a factor needs to be disregarded in the construction because it is a colonial product of prejudice.[90] This comes with a caution of essentializing the concept of race in defining women with the matrix of Africanness.[91] Through colonisation came the imposition of the nuclear family which further legitimated the binary of the two sexes/genders.[92] This came with the imposition of the two headed families allowing for the visibility of gender to the process of socialisation.[93] Unlike in an extended family setup where gender is somewhat blurred. In a nuclear family as, it was conceptualised, the reference point of the whole structure is the husband and wife; the father and the mother; masculine and femininity complementarity but in an extended family, the idea is about resource and labour sharing.[94]

2.3.3. Biological definition

When United States of American supreme court judge Ketanji Brown was asked to define what a woman is, she said she could not, because she is not a biologist and this has been interpreted to mean that to define the term woman one has to reference biology.[95] However, the biology definition of woman is one that comes with its own

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87 As above.

88 M Lugones 'The coloniality of gender' (2008) Worlds and Knowledge Otherwise: M Lugones 'Towards a decolonial feminism' (2010) Hypatia.

89 Schuller (n 46) 175.

90 Tamale (n 13) 4-6

91 As above

92 Tamale (n 13); *See also* H McCwen 'Inventing family: Colonial knowledge of family and coloniality of the pro-family activism in Africa' Africa Today (2021).

93 As above.

94 As above

95 The New York Times 'A demand to define 'woman' injects gender politics into Jackson's Confirmation hearings' (2022) at https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-woman-definition.html (accessed on 14 October 2022)

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prejudice and inconsistency.[96] Feminists posit that one is not born woman but becomes one.[97]

The generic definition of woman used by biologists which has gained traction in the current exclusionary politics postulates that a woman is an adult female human.[98] As per such definition an adult is one who has reached the reproductive stage of development or sexual maturity. To define adulthood with reference to reproduction is arbitrary because it assumes that all adults should have the capacity to reproduce. Thus, qualifying one assertion that people have made that a woman is a man with a womb and capacity to create life and nurture it.[99] Another factor from the biology definition is the term female of which is defined as organisms whose bodies are oriented to produce larger gametes in dioecious species.[100] This is often used to suggest the factuality of biology which can never be challenged. However, dioecious as categorisation of species is a binary construction which was created through erasure or invisibility of those who threaten the binary nature of the dioecious species.[101]

The essentialization of reproductive capacities of the body to define womanhood can be attributed to this definition. It seeks to view bodies in the manner that within the analogy of reproduction there is no challenge that can be levelled against the notion that 'biology is a factual reality'.[102] Using such analogy, reproductive capacities of those with the womb and capacity to fall pregnant was seen as incapacitating to be in public where civil and political rights are granted.[103] First wave feminists had such a task to prove that reproductive differences of men and women did not in any way take away the citizenship of the woman.[104] Biology is a fact, then becomes a rhetoric to suggest that what has been decided by rules of science is free from error, emotion and limitations of society and therefore immutable.[105] Biology

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96 Oyewumi (n 16).
97 C Rodrigues 'Being and becoming: Butler reads de Beauvoir' (2020) Cadernos Pagu.
98 Schuller (n 46) 100-105.
99 Oyewumi (n 16).
100 Dioecious has since been refined n the study of plants.
101 T Lanquer Making sex: *Body and gender from Greeks to Freud* 1990 Harvard University Press
102 Schuller (n 46) 100-105.
103 Rodrigues (n 94 above).
104 SE Nicholson 'Defining woman: From the first wave to integral feminism' in SE Nicholson and VDFisher(eds) Integral voices on sex, gender and sexuality: Critical inquiries (2014)
105 Schuller (n 46) 35.

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ignores the implications of such sex in the social sphere. Maybe there is a positive value of this approach in that as long as biology demarcation is as far as understanding the bodily functions and need of such a body without prejudice, then such can be the focus. Although that could be the case, an arbitrary use of such value exists when biology seeks to create a monopoly in defining who can be identified as woman.

The "biology as a fact", rhetoric basis is found in natural science as a field of study and understanding. It is touted that the natural sciences use standardised methods which produce facts and as such it does not make assumptions.[106] It is evidence based and finds legitimacy after testing and proving that the knowledge is just as it is laying the foundations for the nature and reality of things as the premise of the factuality of biology rhetoric.[107] To challenge such, the standardised methods, have to be followed and show an existence of a different fact. This may seem full proof and free of error but that is not the case. Before making a scientific finding, one makes a hypothesis and fixates on proving it for novelty and recognition.[108] Findings not proving the hypothesis are considered but rarely explored as long as the hypothesis is proved or sometimes, the findings discredit the hypothesis and findings speaking to the hypothesis are given little attention.[109] This is the production of commonality by majority becoming the general rule and minority viewed as exceptional or anomalous.[110]

Additionally, the standardised methods of science are a product of agreements from those in science. Detached from the society as they would like to be positioned they are still products of different factors such socialisation, power, religion and politics.[111] In their crafting of scientific methods, they cannot escape their personal politics and socialisation.[112] Furthermore, the pressure of objectivity of science runs the risk of reproducing the same knowledge without novelty and critical thinking.[113]

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106 H Krebs 'The making of a scientist' (1967) Nature 255 1441-1445.
107 Krebs (n 103 above).
108 As above.
109 As above.
110 As above.
111 Lanquer (n 98 above).
112 As above.
113 As above.

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2.4. International human rights law and woman

To define 'woman'' using the international human rights law framework, this research first explores law of persons to better understand the construction of persons in the legal sphere. This approach is adopted because human rights law confers rights on individuals and personification is regarded as the gateway to individuation.[114] Furthermore the law of persons is the basis of legal rights and human rights are in fact legal rights. Alternatively, it is a general concession that one is a person before being sexed. Although that might be true the paradox of personhood vis-à-vis womanhood/femaleness still persists. Are women persons and if they are does that end their womanhood.

Various theories have been offered to define what a person is in the legal sphere. It is also important that the law has been developed to view persons from two points of view being the categorisation into natural and juridical. From positivists, realists, rationalists to naturalists. The underpinning idea is that personification is the basis of personhood.[115] This essentially means that entities are to be personified for the purposes of the law. It is through personification that we become individuals to accord respect and dignity. As such, in law, we are treated as legally unique and detached from one another without counting less or more than the other. As a matter of departure, the theories will be discussed under arithmetic conclusion, intelligent conclusion and inherent dignity headings. This is on the basis that this research makes an observation that personhood is an arithmetic conclusion on the basis of law; an intelligent conclusion through the ability to subdue the body for the purposes of reason and a recognition of inherent dignity on the basis of existing in a corporeal human body.

2.4.1. Arithmetic conclusion

According to this first theory, the basis of a person is the law. The arithmetic conclusion analogy combines postulates of a legalistic approach to international law. As such, a legal person is a fictitious abstraction of the law; a value to understand the equation of legal relations. In this theory the body is seen as an illustration of legal relations rather than definitive.[116] It is only revived to determine the extent of the ability of law to control

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114 N Ngaire 'Our legal lives as men, women and persons' (2004) Cambridge University Press 621-642.

115 As above.

116 Ngaire (n 111) 626-627.

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society.[117] This is mostly viewed as defining the subject of law without the constraints of naturalism and metaphysics. Hans Kelsen postulates that a person is 'the unity of a complex of legal obligations and legal rights and as such cannot exist outside the law.' [118] Using this definition some writers have recommended the substitution of the term person entity, to capture the idea that human beings and other objects only gain personality in law through recognition of legal relations.[119] Another contention supporting the arithmetic value of personhood holds that the person is a use of the legal language.[120] It comes with the position that the law has the autonomy to come up with its own concept defined within the precincts of legality. Such concepts do not have to be defined according to the lay man understanding of it. There is no need to reference rules of linguist, scientist or psychologist. It is then postulated that to define 'person' one has to look at the legal circumstances/facts seeking to use the concept.

2.4.2. Rationalism

From a rationalist point of view a person in law is an entity with the capacity to act rationally.[121] This brings the ability to reason intelligently as the central character of a person. In tandem with such an idea is capacity to sue and be sued as a simplified definition to qualify as a legal person.[122] Rationality, historically and legally, has been a character of the liberal subject who is the subject of legal rights. It has been also viewed as a factor free from emotion and passion.[123] As such it has been developed to evangelise for the idea that only those sexed as men can be rational. Take for example the principle of reasonable man on a Clapham bus in criminal law, although man has been interpreted in modern law to mean human, its foundation was gendered and excluded women.[124]

Thus, it has been asserted that on the basis of intelligence, a person is constructed as an entity with the ability to understand and respond to the demands of the law.[125]The fixation with the mental capacities of personhood contends that a

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117 As above.

118 Kelsen H Pure theory of law 1957 as cited in Ngaire (n 111 above)

119 Kelsen (n 115)

120 N Ngaire *Law's meaning of life: Philosophy, religion, Darwin and legal person* (2009).

121 As above.

122 Ngaire (n 111) 628.

123 As above.

124 As above.

125 As above.

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person is to be understood in relation to their brain and mind function. It is therefore generally understood that for such a mind to be free, such has to be embodied in a body free from illness, pregnancy, childhood, disability and most certainly is not explicitly sexed.[126]

Following the postulates of Kant who contends that humans are beings who are able to embody and hold physical selves and focus on the higher matters of the mind, rationalists support the idea that full legal personality is when a subject exercises free and effective control over their body.[127] In that regard Kant called for the preservation and chastising of the body for the development and preservation of reason.[128] The pursuit of trade and pleasure is a product of reason. However, pleasure should not cloud the ability to reason. Applying this analysis to marginalisation of women, we see from histories of feminism that the female body was hypersexualised to suggest that they are more controlled by the pleasures of sex and sexuality.[129] Therefore, to subdue such, they were confined and traded in private to men. Kant was a proponent of the notion that sex is for procreation and those who derived pleasure fell short of rationality.

Kant's theory further invokes the concept of bodily integrity which strictly analysed, reveals a puritan analogy to the body.[130] It interacts with religious contentions of inviolability of the body where it is proposed that the body is a house of the soul made in the image of god.[131] As such, it should be free from all impurities and should be distanced from others.[132] However this concept also underlines autonomy of will which, as further explained, recognises that whereas the person has free will, they ought to use that to exert authority over their physicality not becoming subordinates of the body.[133] The principle of inviolability uses the analysis of distance to suggest that one has the ability to exclude others from their person unless they consent to touch within legal relations.[134] On this, the perspective of marriage is offered

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126 As above.
127 Ngaire (n 111 above) 627.
128 Ngaire (n 117 above) 59.
129 Tamale (n 13 above).
130 Ngaire (n 117 above) 155.
131 As above.
132 As above.
133 As above.
134 As above.

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that a woman's capacity to exclude others from her body is limited by this legal relationship. Therefore, it follows that marriage as it was, gave close proximity and access to the husband.[135] However, this general rule has changed since the 1990s but still, its effect is still seen in the institution of marriage.[136] From such analysis we can infer that a woman was defined as a person whose autonomy and integrity can be limited by legal relations.

If sport reduced the chances of the woman's body to fall pregnant as it was contended, then participation in it was improper use of the body. Therefore, access could only be allowed to those who could engage and still procreate at the end. Although this analysis seems to be preposterous, it has to be engaged more especially with how most of the time when a woman rises to the Olympic stage almost every time, she is asked of her marital status. Would this be viewed as an exercise to find if she has a man to subdue her body?

2.4.3. Inherent dignity

Another theory which is naturalist holds that personhood comes with the recognition of the inherent dignity in a human being. This integrates legality with a corporeal person who is the bearer of rights. Legal relations should recognise and give effect to human dignity since such cannot exist without the natural person. This invokes the idea of embodiment which holds persons as biological beings.[137] The existence of a corporeal body which is of human species invokes the need to recognise dignity without considering any other status.[138]

The sexed human being in the legal system is said to be illiberal and defeats the whole idea of individuality.[139] As such some have postulated that the law is not obliged to view human beings through the binary of sex. It is argued that sex is factor which demands differential treatment of the individuals. This goes against the idea of the law of creating uniformity and certainty.[140] While the woman remains sexed, the idea of an unsexed human being erases her from the protections of the law and her dignity is

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135 As above.
136 Ngaire (n 111).
137 Ngaiire (n 117).
138 As above.
139 Ngaiire (n 111) 629.
140 As above.

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decided by those with access to such protections.[141] This is a disregard of the history which only viewed women as objects of trade for the individual as constructed by this legal sphere.

2.4.4. CEDAW and womanhood

The CEDAW is the most wide-reaching international instrument which was created to offer protections to women worldwide. However, this convention does not define the term "woman/female" despite its centrality and that the purpose is the category status 'woman'.

In a scholarship aimed at interpreting the provisions of the CEDAW to include trans-women, Meyer argues that the instrument defines women in terms of the combination of an array of factors.[142] Such factors include but are not limited to biological, anatomical, genetic, gender performance, and/or gender identity.[143] Meyer implores the rules of interpretation as provided by the Vienna Convention on the Law of Treaties (VCLT) to attribute such an inclusive definition to the term 'woman.'[144] The convention makes use of concepts such as gender and sex in its provisions such it is conclusive that the woman question is answered using the two concepts.[145] Sex and gender as defined in this chapter are concepts to be understood as society evolves. Such exercise does not end as such CEDAW adopts an intersectional approach towards the concept keeping them open to extension.[146]

2.4.5. Beijing Declaration and Platform for Action

Promulgated and unanimously adopted by 189 states in 1995 the Beijing Declaration and Platform for Action (BPfA) [147] presents a turning point in the women's rights movement. The Declaration offers the most progressive blue-print when advocating for women's rights and equality. However, its history reveals that woman was sought to be defined inclusive of factors such as sexuality and sexuality with the fear of

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141 As above
142 Meyer (n 77) 555.
143 As above
144 As above
145 As above
146 Meyer (n 77) 577.
147 United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, available at: https://www.refworld.org/docid/3dde04324.html (accessed 13 October 2022)

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political opposition to the Declaration.[148] Such gives a conclusion that defining 'woman' is dependent on the political context of the exercise.

2.4.6. Yogyakarta Principles

The Yogyakarta Principles (YP) crafted as the international human rights standard to be applied in the protections of people of diverse sexual orientation and gender identity has been viewed as the most comprehensive non-binding instrument which calls for equal protection of dignity for everyone.[149] The YP creates nothing new but builds on the rights contained in the binding legal instruments of IHRL and offers direction in regard to obligations to protect and promote the rights.[150] The use of gender identity in its provisions implores this research to consider it when thinking of defining womanhood in IHRL. The Yogyakarta Principles do not define what a woman is. It stays away from the woman question. However, using its background, text and critiques, we can make a conclusion as to what it adds or takes away from the concept.

Self-defined gender identity

In the preamble the Yogyakarta Principles (YP) define gender identity as follows: [151]

> [E]ach person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.

This is a circular definition which presumes that the term gender is understood. Nonetheless it still brings forward the idea that gender and sex are different but related.[152] Such holds that although sex can influence gender there exist a plausible reality that at birth the sex assigned is incongruent with gender through developmental

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148 A Vakulenko 'Gender and international human rights law: the intersectionality agenda' in S Joseph and A McBeth *Research Handbook on International Human Rights Law* (2010) 196.

149 International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at: https://www.refworld.org/docid/48244e602.html (accessed 15 October 2022)

150 Preamble of The Yogyakarta Principles.

151 Preamble of The Yogyakarta Principles.

152 As above.

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and growth stages.[153] Sex here is viewed as something assigned at birth whether it is material fact or not, the text do not explain.

Gender expression and sex characteristics

As a matter of development and responding to emerging issues the YP through the ten plus principles brings the issue of gender expression and sex characteristics into play.[154] The concept is defined with reference to the definition of sexual orientation and gender identity as provided in the first principles before additions. Gender expression is defined as physical expression of someone's gender identity through presentation of different articles.[155] Sex characteristics are physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.[156] This reverts us back to the analysis of the perspectives of sex. However, the YP do not demarcate who gets to claim what sex or gender using these characteristics. We can then infer that using gender identity, gender expression and sex characteristics one can define for themselves their gender as long as they do not encroach into another people's identity.

Who is everyone?

The provisions of this instrument use the concept of everyone as bearers of rights.[157] It replaces the concept of every individual as constructed by the human rights discourse as the starting point of rights holders. However, before adopting everyone as the language of departure 'all human beings' is used as reference of conception. It follows by this analysis that everyone is all human beings who are intersectional in their being and their intersectionality should be used to take away their rights.

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153 As above

154 International Commission of Jurists (ICJ), The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, 10 November 2017, available at: https://www.refworld.org/docid/5c5d4e2e4.html (accessed 15 October 2022)

155 Preamble of The Yogyakarta Principles Plus 10

156 As above

157 The Yogyakarta Principles

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The YP do not exist without criticisms on the basis of the 'woman question'. One scholar contends that they are a threat to the woman as an entity.[158] Their contention is based on the idea that these principles were crafted by heterosexual men who sought legal protections for their sexual fantasies.[159] In tandem with that notion, they invalidate the existence of trans-women by contending that theirs is an eroticisation of femininity which makes them identify. They only recognise the value of the YP as far as they speak to sexual orientation.[160] This critique is biased firstly on the basis that it refers to trans-women as heterosexual men who are obsessed with women bodies.[161] Secondly, we can see the essentialization and policing of the trans-woman, who are problematised as such not recognising the existence of trans-men. It is clear here that the issue is who can access the woman space which has over-emphasised inequalities and privileges. From that, trans and intersex exclusionary feminist believe in this unfounded fear that greater access of diverse identities to the woman space would undo progress of human rights.

2.4.7. Maputo Protocol

The promulgation of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[162] brings a new factor in understanding femaleness and womanhood. The Protocol employs the African context to the understanding of 'woman' created as a response to the African's woman human rights issues. This instrument stems from the African Charter on Human and Peoples' Charter (The Charter)[163]. The Maputo Protocol has deep foundations in the CEDAW, YP and BPfA discussed above but seeks to add the construction of humanness of one person is dependent on the other.[164]

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158 S Jeffreys 'Enforcing men's sexual rights in international human rights law' (2018) Routledge 1-16: S Jeffreys 'Gender Hurts: A feminist analysis of the politics of transgenderism' (2014) Routledge.

159 As above 5-6.

160 S Jeffreys 'Enforcing men's sexual rights in international human rights law' (2018) Routledge 12-13.

161 As above

162 African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, available at: https://www.refworld.org/docid/3f4b139d4.html (accessed 15 October 2022).

163 F Viljoen 'An introduction to the Protocol the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) Wash and Lee 16.

164 T Snyman and A Rudman 'Protecting transgender women within the African human rights System through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33 Stellenbosch Law Review 57.

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Article 2 of the Protocol defines women as 'persons of the female gender including girls.' As such it has been leveraged upon the definition that other diversities of 'woman' can be attributed to this definition.[165] In an analysis, the notion of female gender combines the biology and social construction of the body allowing for a much flexible conception of womanhood. However, such a combination can be misused to exclude considering the subjectivity of femaleness within different spaces in society.[166] By including girl in the definition refutes the reproductive capacity defining factor in the biologist definition of 'woman'. This is without prejudice to reproductive rights as provided by the instrument.

2.5. Conclusion

This chapter has implored various theories and of gender and sex in an attempt to find within international human rights law text the definition of womanhood. This a complex and yet simple question which raises many issues in biology, sociology, gender discourse and human rights. An umbrella conclusion can be made that womanhood is a concept devised to understand inequalities but ends up essentializing the issue. This then makes a notion that those who identify with the concept are to be scrutinised and policed to prove if indeed they suffer the inequalities. The concept of woman has been constructed in international human rights (IHRL) with gender bias not being dealt with. It may be unconscious or conscious in the sense that IHRL still views womanhood as a supporting subject to the liberal subject or there is a genuine misconception that essentializing the gendered subject is the only way for women equality. International human rights standards are not cast in stone. They are flexible to change in response to emerging issues and bodies.

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[165] Article 2 Maputo Protocol (n 158).

[166] As above.

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3. International human rights system and sport regulatory system

3.1. Introduction

The failure of the human rights system to reach the domain of sport especially when it comes to women's sport is perturbing. This unresponsiveness of the human rights machinery calls for an analysis of the relationship between the frameworks in international human rights law (IHRL) domain and sport domain. This is to answer the question whether SGBs are obligated to apply human rights law and be brought under the jurisdiction of human rights mechanisms. It is therefore the focus of this chapter to outline an overview of the frameworks of IHRL and sport, focusing on their mechanism of compliance and implementation of human rights standards. A general impression of the frameworks is given with specific focus on the United Nation human rights system as it is the highest international human rights system while on the other hand of the sports system, an appreciation of the development of sport law (*Lex sportive*) from the synthesis of characteristics of sport governance and international organisation regulations will be explored.

3.2. Structure of international human rights law

The nature of international human rights law (IHRL)is based on free will of states.[167] Through consent, states or governments choose to be bound by international commitments regarding human rights and this is done through becoming party to the various instruments outlining human rights owed to individuals.[168] With this comes the overarching obligation by the states to put in place the laws and policies necessary for protection of human rights and to regulate private and public practices that impact individuals' enjoyment of those rights[169]. In that regard, states can be thought as the grantors and/or violators of human rights making them the primary subject of IHRL.[170] IHRL is constructed to be free from politicking thus allowing it to be an unbiased machinery to test the compliance of state practices against the general obligation of human rights.[171] However global power dynamics prove this to be futile because there

167 United Nations 'International human rights law' (2022) OCHR at https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law (accessed on 21 September 2022) .

168 F Viljoen *International human rights law in Africa* (2012) Oxford University Press.

169 S Joseph and J Kyreakakis 'The United Nations and human rights in S Joseph and A McBeth Research Handbook on International Human Rights Law (2010) 1.

170 As above.

171 As above.

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exists, a notion that human rights are a product of the global north politicking. IHRL is not cast in stone thus it is dynamic and flexible to respond to emerging issues.

3.2.1. Normative framework

The common standard of achievement for human rights, the Universal Declaration on Human Rights (UDHR) is worthy of first mention when discussing the normative framework of IHRL. This is so because the Declaration is the first in human history to codify basic civil, political, economic, social and cultural rights that all human beings should enjoy.[172] The Declaration exists not as a binding instrument rather encapsulates the international aspiration when it comes to human rights and through practice it has since become part of international customary law.[173] Nonetheless, in the year 1966 the UN promulgated two treaties bearing the contents of the UDHR. These are the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR) of which combined with the UDHR formed what has come to be known as the international bill of rights.[174] Considering emerging issues which require specific framework, other specialised treaties on human rights have since been developed.

3.2.2. Institutional Framework

The normative framework of IHRL creates core international structures and organisations mandated with the monitoring of human rights. This mandate is in twofold being the promotion and protection of human rights through various processes.[175] Such organisations include the United Nations Office of the High Commissioner for Human Rights, treaty based human rights Committees and the International Labour Organisation's systems for enforcing labour rights.[176] The general mandates of the aforesaid monitoring bodies involves ensuring the effective implementation and compliance with human rights prescriptions.[177]

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172 United Nations 'International human rights law' (2022) OCHR at https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law (accessed on 21 September 2022).

173 As above.

174 As above.

175 S Joseph and J Kyreakakis 'The United Nations and human rights in S Joseph and A McBeth Research Handbook on International Human Rights Law (n 165) 1.

176 As above.

177 As above.

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3.3. Sports governance/Lex sportive

Sport is governed through self-regulation subject to the laws of the SGB's domicile.[178] This self-regulation is the cornerstone of association that every association has the discretion to come up with laws and rules to govern themselves.[179] Such stems from the constitutional guarantee of freedom of association and demands no entity should unnecessarily limit the discretion.[180]

The pursuit for uniformity in sport pushed through transnational boundaries resulting in a gradual shift towards self-regulation through privatisation.[181] This demanded organising and SGBs came into being to address the demand. Through mobilisation and association, the Olympic Movement was conceived. Governed by the Olympic Charter the Movement is dispensed under the supreme authority of the International Olympic Committee (IOC).[182] The IOC creates a monopoly of a product in sport laying out what to be followed for an activity to be licenced as an elite or professional sport and members apply this to be recognised under this monopoly.

Through a series of contractual relationships, the rules and regulations developed by these bodies are implemented worldwide.[183] The IOC emerged and packaged sport as a commodity to the world. To do that they had to set parameters of activities by controlling the nature and contents that became the rules of engagement for the sport they chose to institutionalise. Within that institutionalism the IOC reigns supreme over a variety of International Federations (IFs) (for specific sporting codes) and the National Olympic Committee.[184] These are obligated to follow the rules of the IOC.[185] Failure by a national federation or a national Olympic committee to comply with and enforce domestically the rules of the relevant international federation or IOC, jeopardises its participation in international competitions.[186]

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178 AD Marco 'Human rights in the olympic movement: The application of international and European standards to the Lex sportive' (2022) Netherlands Quarterly of Human Rights.

179 S Boyes 'Sports law: Its history and growth and the development of key sources' (2012) Cambridge University Press.

180 As above.

181 As above .

182 Boyes (n 175).

183 R Negocio 'Lex sportiva: From legal efficacy to trans constitutional problems' (2014) *Brazil University Periodic Journal.*

184 Negocio (n 179).

185 As above.

186 As above.

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Athletes then have to affiliate with federations and national committees for them to be considered for competitions. Such affiliations come with the right to compete and the duty to submit to the federal power of governing bodies.[187] The athlete does not have the discretion not to join a national federation since membership is an imposition by the IFs that are the gatekeepers of recognition and release of licences to compete.[188]

The interaction of the above characters then produces a body of law applicable to sport issues called *Lex sportive* which is the normative framework of the sport movement.[189] It is a law produced from the combination of factors of international law and internal factors of domestic legal orders.[190] The primary subjects of such a law seems to be sporting federations however greater impact is on the athlete whose power and personhood is not comprehensively represented in the formulation of the *Lex sportive*.[191]

3.3.1. Normative framework

The general rule of regulatory power in sport, responsibility for sport's governance and regulation lies with the private and 'voluntary' sports body.[192] SGBs are autonomous private institutions with legal capacity distinct from states. The laws applicable to the issues arising from this domain are to be found in their constitutive document.[193] For the reason that the International Olympic Committee asserts to be the umbrella organisation for the Olympic movement which essentially covers all sport the Olympic Charter[194] would serve as the high normative framework for this research. However, its analysis would be directed toward the WA Constitution of which its regulations are under study. As such it is asserted by this research that the Olympic Charter and WA's Constitution makes the normative framework for *Lex sportive.*

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187 S J Clark 'Why sports law' (2017) Stanford Educational Journal 151.
188 As above.
189 As above.
190 As above.
191 A Duval 'Lex Sportiva: A Playground for Transnational Law' (2013) 19 The European Law Journal 822–842.
192 Negocio (n185).
193 As above.
194 International Olympic Committee 'Olympic Charter' 1983.

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3.3.2. Olympic Charter

The Olympic Charter is the authoritative document of the Olympic Movement. It lays out basic rules and conceptual core of the Olympic movement being the Fundamental Principles of Olympism (Fundamental Principles) and the supreme authority of the IOC. All members are bound by the charter.

3.3.3. World Athletics' Constitution

WA is an international sport federation dispensing all activities in athletics.[195] Its regulations are under this study therefore the constitutive document of the organisation would be considered as part of the normative framework of *Lex sportive*. Focus is on status provision granting legal personality to the organisation, rights creating and dispute resolution provisions. On the basis of this Constitution the organisation is created as a juristic person under the laws of Monaco and that is where it is domiciled.[196] Its disputes resolution mechanism creates a mandatory jurisdiction by the CAS to decide on issues they have failed to address.[197]

3.3.4. Court of Arbitration for sports (CAS)

The CAS was established in 1982 by the Code of Sport Related Arbitration[198] (Code) and it is regarded as the most qualified court to deal with sport issues.[199] Therefore it enjoys body supremacy in dispute settlement in the world of sport. Initially it was created as a forum to address private sports disputes and such is seen by its reluctance to apply human rights as such invokes public international law.[200] The Court administers three types of arbitration process which are ordinary, appeals and anti-doping.[201] Furthermore the CAS is subject to Swiss Private international law Act (PILA) and Swiss Civil Procedure Code (SCPC) to govern its process and awards.

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195 World Athletics Constitution 2019 as amended and approved by Congress on 18 November 2021, effective from 1 December 2021.

196 Article 1 (n191).

197 As above.

198 Code of Sport Related Arbitration 2020 (CAS Code).

199 D Panagiotopoulos 'Court of Arbitration for Sports' (1999) Jeffrey S. Moorad Sports Law Journal.

200 M J Mittens 'The Court of Arbitration for Sport and its global jurisprudence: International pluralism in a world without national borders' (2014) Ohio State Journal on Dispute Resolutions.

201 R38, R47 CAS Code.

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CAS uses principles of arbitration in sports disputes. Arbitration as a method of settlement has both advantages and disadvantages.[202] The disadvantages are concerning the human rights discourse. Nonetheless the flexibility of choice in the laws to be applied has to be recognised. However, the private nature of arbitration allows for further side-lining and silencing of human rights application in the process.[203] For those issues of public interest such a mechanism is disadvantageous and alternatively the process can be long and costly for the victim. Considering the power dynamic between the victim and the SGBs this reveals an imbalance of power giving the organ an opportunity to exert undue influence on the case.

Although the above contention presents the generic formula of arbitration, the mechanism in sport has been developed into a hybrid creature.[204] Sport presents it as the main process of settling disputes despite it generally being an alternative dispute resolution.[205] Therefore, such hybrid development has brought a complete understanding of arbitration in sport which essentially discards other characteristics of the mechanism depending on the circumstances of the case.[206] One would find that certain arbitration decisions would be published while others apply strict confidentiality.[207] For example, in situations considered to be of wider public interest such would be published thus creating a precedent to be followed and reconstruct certain regulations.[208]

Extraordinary autonomy under Swiss Association law

As submitted by the Swiss government in *Petchstein and Mutu v Switzerland*, CAS functions on the basis of an association and 'rules totally independent from the state'.[209]This reckons that CAS like any association incorporated under the Swiss association enjoys autonomy without interference. This autonomy can be traced non-economic nature of associations which in the present nature of SGBs being commercialised calls for a review.[210]The Swiss Federal Tribunal (SFT) is allowed

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202 Mittens (n 196).

203 As above.

204 As above.

205 Pechstein & Mutu v Switzerland Applications no. 40575/10 and no. 67474/10) (ECHR 324 (2021).

206 Mittens (196).

207 As above.

208 As above.

209 Pechstein & Mutu case see writ submitted by the Swiss government.

210 M Baddeley 'The extraordinary autonomy of sport bodes under Swiss law: Lessons to be

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limited review jurisdiction to overturn CAS decisions if they are against public policy. A decision against public policy would be one that cannot be imagined to be applicable looking at the rules set by SGBs.[211]

European Court of Human Rights (ECtHR) can be seized to review the decision of the SFT but to get to that process all the arbitration routes from SGBs have to be followed. The ECtHR has used this authority in *Mutu case* to pronounce that indeed the arbitration in sport is forced but at the same time recognising its validity.[212] However, the dissenting judgement held that CAS arbitration does not meet the threshold to be considered as a court of law because of its dependence on the IOC and IFs. The ECtHR offers an opportunity for the application of IRHL. However, such a process proves to be long and costly. Furthermore, the process runs the risk of reproducing the idea that sports law is a creature of Europe.

Pop up CAS

Considering the nature of urgency when it comes to sporting disputes the CAS has evolved to have pop up courts at any place.[213] This in a human rights scene presents the ability to stop a violation from being continuous, however due to the lack of application of human rights standard, violations still continue. Despite it being a laudable approach responding as a matter of urgency to disputes, this could be detrimental to the parties in that although the court is an expert in the *Lex sportive*, it is not an expert in other areas of law which may arise in the matter.[214]Additionally, for an athlete to prepare a case within that period seems futile.

3.4. Interaction of private institutions and international human rights law

From the above discussion it is clear that states are primary grantors of human rights and bear the responsibility to promote and protect them. Failure to do so raises state responsibility to hold them accountable and remedy the situation.[215] This invokes the principle of due diligence to have state control the activities of non-state actors in interacting with human rights. It is also clear that sport is governed by private institutions making them non-state actors as corporations. This makes them seem to

drawn' (2019) The International Sports Law Journal 3-17.

211 Judgment of DSD Regulations [2020] Swiss Federal Tribunal 4A_248/2019 and 4A_398/2019.

212 Pechstein & Mutu case.

213 Mittens (196).

214 As above.

215 As above.

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be no under no obligation to heed human rights law in their processes.[216] Therefore, when the WA makes the assertion that as a private institution they are not bound by standards of IHRL such *prima facie* seem to be true however such need to be qualified (or refuted).

3.4.1. An opportunity in sport justice

The interaction of sport and justice is one that is invoked by the fact that while the IOC and IFs reserves the independence to make relevant and necessary regulations in sport, those affected should have the opportunity to challenge such if a dispute arises.[217] Now since such is expected to be settled by the CAS, there must be a clear and precise process of engagement to factor in justice.[218] Justice connotes fairness and the rule of law in all that is done.[219] It is more concerned with process, application and the end result. On that note, sport justice is to be defined as the idea that in all sport disputes the process and result should uphold the Fundamental Principles of Olympism while giving effect to all principles of justice.[220]

Rule of law and fairness as pillars of justice are interpreted differently by various scholars. The generic definition would be the unbiased dispensation of justice following clear law and the idea that no one in society is above the law. To clarify this, it has been postulated that there are eight sub rules to this principle. These are mostly in reference to the state which has the authority to make and implement laws which dispense justice. However, since SGBs do make regulations and laws such principles can apply. Furthermore, the CAS has touted to be dispensing sport justice by ensuring that the principles of rule of law are applicable.

Sport justice as it is implemented seems to only be concerned with the postulates of natural justice although other forms of justice exist beyond that.[221] In that

216 T Shinohara 'Which state should be held responsible for the implementation of positive obligations under the ECHR n sports related disputes' (2021) *The International Sports Law Journal*.

217 Mega-Sporting Events Platform for Human Rights 'Remedy for human rights the sport context' (2017) Sporting Chance White Paper https://www.ihrb.org/uploads/reports/MSE_Platform%2C_Remedy_Mechanisms_for_Human_Rights_in_the_Sports_Context%2C_Jan-2017.pdf (accesed on 26 September 2022)

218 M Coccia 'International sports justice: The Court of Arbitration for Sport' in M Colucci and K. Jones (Eds.)*International and Comparative Sports Justice* (2013).

219 As above.

220 As above.

221 As above.

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regard the failure of sport law to adequately protect fundamental human rights is something that does not uphold sport justice as touted to be. In invoking the idea of justice in sport the WA should be obligated to apply and implement human rights through its regulations.

However, CAS proceedings are too expensive and would seem to be accessible to those who are elite superstars with the financial ability.[222] As per Article R64 of the CAS Code, to file a case, an Appellant must pay a non-refundable fee of Swiss Francs 1000 to the court.[223] Such defeats the principle of access to justice reserving to the elite who can afford the legal fees. Another demand is that the parties must pay an advance on the cost of arbitration and must bear the cost of their own witnesses.[224] Considering the need for expert witnesses in such cases involving the DSD regulations would be costly. Even with the introduction of pro bono list cases and financial and process help is not sufficient.[225] The resources possessed by SGBs creates an imbalance in the arbitration process and as such, defeating the idea of justice.[226]

3.4.2. Dispensing a human right

Sport has been developed from activities which hinge on human rights.[227] As such there has been effort in the international space to hold it as a human right thus demanding sport governing bodies to think and implement human rights standards to dispense it. It then follows that sport as a human right is interrelated to other human rights which need not to be limited in the domain.[228] The analogy of this contends that no matter what self-regulatory power the SGB holds the fact that sport is a human right such autonomy is limited as far as human rights are concerned. By exploring the efforts of constructing sport as a human right, it is then qualified that institutions

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222 A Duval 'The Court of Arbitration for Sport after Pechstein: Reform or revolution' (2015) Asser International Sports Blog at https://www.asser.nl/SportsLaw/Blog/post/the-court-of-arbitration-for-sport-after-pechstein-reform-or-revolution (accessed on 11 October 2022).

223 Article R65.2 CAS Code.

224 Article R64.2 and R64.3 CAS Code.

225 Coccia (n 214 above).

226 As above.

227 Mega-Sporting Events Platform for Human Rights 'Championing human rights in the governance of sports bodies'(2018) at https://www.ihrb.org/uploads/reports/Championing_Human_Rights_in_the_Governance_of_Sports_Bodies%2C_MSE_Platform.pdf. (accessed on 21 September 2022).

228 As above.

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governing sport are obligated to apply human rights standards to issues in the domain.[229]

3.4.3. Window of effective application through the Ruggie Principles

The UN Guiding Principles on Business and Human Rights were promulgated in 2011 through the then Special Representative of the United Nations (UN) Secretary General on the issue of human rights and transnational corporation's responsibility John Ruggie.[230] The Principles were formulated as part of the 'protect, respect and remedy' initiative aimed at reinforcing protection of human rights with regards to non-state actors.[231] This was the genesis of a much conscious effort at international level to manoeuvre and control the legal boundaries between the private sector and human rights.[232] Leveraging on state duty to protect against human rights violations by third parties including businesses; the corporate responsibility to respect human rights and the need for more effective access to remedies as the key principles, the Principles provide a minimum standard to be applied.[233] Despite being a progressive step towards human rights protection and implementation these are not binding but still add a clear stance to be used when approaching human interactions with non-state actors. Additionally, the heavy reference on International Labour Organisation's framework and UN treaties present the Principles as an extension, hence the clarification of the binding instruments therefore should be considered as authoritative.

By leveraging on state duty, the Principles reaffirms the position of IHRL that the state is the primary duty bearer when it comes to human rights.[234] However this comes with the recognition of the shift in global power changing the landscape of relations in international law.[235] Global corporations have accrued power and interact more with people, demanding an exploration of how to best ensure that such relations

[229] As above.

[230] UN Human Rights Council, Protect, respect and remedy: a framework for business and human rights:
report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 7 April 2008, A/HRC/8/5, at: https://www.refworld.org/docid/484d2d5f2.html (accessed 8 October 2022).

[231] As above.

[232] S Byrne and J A L Ludvigsen 'Sport mega event governance and human rights: The 'Ruggie Principles',responsibility and directions' (2022) Leisure Studies.

[233] UN Human Rights Council (n 226 above).

[234] Principle 1 Ruggie Principles.

[235] S Bryne et al (228).

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do not exclude human rights considerations.[236] As a general rule here the Principles are clear that in such relations the state is not responsible for human rights violations by private corporations. However, responsibility would be attributed if there is failure to respond and prevent violations by non-state actors under their jurisdiction. In essence failure to regulate the private sector would attract state responsibility.[237] This has been confirmed in regional communications such as *SERAC v Nigeria*[238] proving that such failure would have the state liable for violations and the immunity of private entities is limited.

The pillar discussed above invokes state duty to regulate sport governing through national laws to prevent human rights violations. As such in their duty to protect and promote human rights, states have to create an enabling environment for such rights to thrive. Therefore, if private entities are able to hide behind the non-state actor rationale such points to a failure by the state. This position has gained traction in IHRL as various Committees have outlined state roles and responsibilities in regulating private actions with regards to their mandates.

A more relevant pillar of the Principle to the issue of sport is the second one. It provides for the situation of corporate responsibility.[239] Private entities are required to respect human rights[240]. The existence does not absolve the state from responsibility. [241]To dispense this corporate duty, an entity has to put into place: a public commitment to respect human rights in its institutional policy; due diligence process aimed at tracking, documenting and analysing human rights issues such as informing the practices and policies formulated and an effective remedy process to address human rights violations and such need to be easily accessible.[242] The Principles put forward the need for accessible effective remedies in case of violation. [243] They place on the

236 As above.

237 As above .

238 Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001).

239 Principle 2 Ruggie Principles.

240 As above.

241 As above.

242 J G Ruggie 'For the game for the world: FIFA and human rights' (2016) Corporate Responsibility InitiativeReport 68.

243 Principle 3 Ruggie Principles.

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state the duty to enact necessary instruments through relevant means to outline the process of remedying violations stemming from private corporations.[244]

3.5. Failure of integration into sports

The question of human rights violations in sports has not been comprehensively dealt with under the scope of IHRL.[245] This continues despite various scholarships having made the human rights violations visible to the world.[246] Such scholarships have recommended and supported the idea of embedding human rights law in the sporting system. They have further explored the possibility of applying the United Nations Guiding Principles on Business and Human Rights after situating the sporting system as a subject of business/company law.[247] With this application comes the recommendation that through the guiding principles there should be a specialised monitoring system for human rights violations within the corporate realm which would reach sport. Furthermore, other scholarships have explored the terrain of how to effectively cease human rights mechanisms to implement human rights in sports. Such is laudable and recognises partly, the problem under the scope of this research. However, they do not engage in the 'woman' question. Therefore, it is the intention of this sub-chapter to invoke the gender question as part of the failure of the human rights system to reach the sport domain. Nonetheless a generic analysis of the reasons of failure would firstly be explored.

3.5.1. Explanation of the failures

Institutional incompetency

From the discussion of the *Lex sportive* it is clear that SGBs claim to be impenetrable by the human rights system on the basis of self-regulation. The assertion is that SGBs are private institutions which have autonomy to control their issues without being subjected to external influence, especially the human rights system. [248]

244 As above.

245 CP Gonzalez 'The effective application of international human rights law standards into the sporting domain:Should the UN monitoring bodies take centre stage' (2022) International Sports Law Journal.

246 As above.

247 As above.

248 As above.

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Lack of familiarity of the two systems

Sports law is relatively new to the world. This novelty of sports law is not easily applicable to other fields of law such as human rights law.[249] Additionally, human rights mechanisms have shied away from the development of sport law due to its technical underpinnings.[250]

Nature of the human rights violations

Sport is an event and usually violations thereto require prompt response as the activities are on-going.[251] This then means that there is not enough time to access the human rights system. Furthermore, the requirement to exhaust local remedies works to the disadvantage as the sports mechanisms can prolong the matter until one gives up on the idea of approaching a human rights mechanism.

Alienation of victims

The general outlook towards those who seek to bring SGBs to human rights mechanisms is that they are being problematic and spoiling the good sport.[252] As such to guard their autonomy, SGBs go on massive campaigns to label victims as problematic and demanding special treatment. The WA has heavily funded studies which support their arbitrary position at the exclusion of those affected.[253] Other sportspersons come out to rally behind these SGBs resulting in the end of careers for most athletes.[254] The media also weighs in and most of the time supports the institution's self-regulation.[255] These flow to the general audience, who amidst sensationalisation and problematization of the victim they want the game to continue as disputes halt the good sport.

3.5.2. A gendered system

In pursuit of creating the individual entitled to human rights, the human rights system further reinforces the binaries of gender relegating women to the status of ever vulnerable and in need of protection. 'Gendered' as an adjective here attributes to the

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249 S Patel, S 'Gaps in the protection of athletes' gender in sport: A regulatory riddle' (2021) *The International Sports Law Journal* 257-275.

250 As above.

251 Patel (n 245) 267.

252 Patel (n 245) 259.

253 As above.

254 As above.

255 As above.

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reproduction of inequalities and marginalisation of those who were since time immemorial not afforded dignity and freedoms.

With access to voice and platform, the male subject created human rights after touching each other in wars. Touching here metaphorically seeks to invoke the principle of inviolability of the body.[256] As such, the IHRL sphere becomes male centred. This, as scholars have contended, is the androcentric nature of human rights premised on two analysis being; speaker position in creation and the liberal individual is with the male experience.[257] Such androcentrism theory holds that, positioned in the process of making human rights historically and to this day is the man. The woman voice is to be involved in special committees delegated for gendered discussions only and even in those spaces the male experience still reigns. Human rights institutions do not represent the intersectionality of the populations in their organisational structure and continues to platform the male story.[258]

The historical foundation of human rights law through the dichotomy of private and public seeks to depoliticise an already political personhood. Viewing the public domain as containing issues of employment, trade and industry determines what to be offered priority in a society. As such sexual and reproductive issues are demarcated to issues of othering as a rationale to de-prioritise other bodies viewed irrational to be considered in the public sphere.

According to Romany, women are aliens in relation to human rights law and instruments.[259] It uses a feministic critic to analyse the structure of international human rights instruments. The main argument is that the reinforcement of the idea of private family life and public political life by human rights frameworks essentially relegates women to the ahistorical private sphere of oppression.[260] By placing the idea that the world is aware of the plight of women, it questions the inaccessibility of justice by

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256 As above

257 L Parisi 'Feminist perspectives on human rights' (2017) Oxford University Press.

258 UN Women 'Representation of Women in the United Nations System' (2011) at https://www.un.org/womenwatch/uncoordination/documents/overview/unsystem/unsystem-infographic.pdf (accessed on 12 October 2022); *See also* UN Women 'Improvement in the status of women in the United Nations System' (2019) at https://www.unwomen.org/en/digital-library/publications/2021/07/improvement-in-the-status-of-women-in-the-united-nations-system-2021 (accessed on 12 October 2022).

259 C Romany 'Women as aliens: A feministic critique of the public/private distinction in international human rights law' (1993) Harvard Human Rights Journal 87.

260 As above

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women through IHRL. Despite being an outdated scholarship, its postulates still find relevance to this discussion.

Botting, in exploring the human rights foundations of universalism, canvassed an interesting argument by positing that the subject of human rights is the liberal subject.[261] Botting contends that the liberal subject is constructed in the masculine at the disadvantage of the feminine.[262] Furthermore the existence of competing dualisms reproduces the patriarchal inequalities.[263] This creates the notion that to be with human rights is to be masculine and to be without is to be without.

From the above literature, this research makes the contention that IHRL has been formulated to validate the male experiences weaving out largely those of the female. Despite laudable efforts by the human rights mechanisms to platform the female experience already, the notion that the male is the mainstream while the female is the other, still exists. It is therefore conclusive that the two contend that the human right standard as created by IRHL is gendered and in using formal equality principles beholds those outside the commonality of the liberal character to a sphere where their dignity is not recognised

3.6. Conclusion

This chapter has shown the ordering of international human rights and sport regulatory systems. The two systems seem to be parallel to each other, therefore giving the impression that one is immune from the other. It is a general rule that the primary obligation for human rights protection and promotion rest with the state but a non-state actor also has the responsibility of ensuring that their activities do not violate such standards. Although there is a rise of principles and standards speaking to the existence of sports law, which is supreme to any law in the domain of sport, such should always be mindful that sport access involves athletes who under IHRL have rights. Without athletes, sport cannot exist and without human rights, the dignity to be able to perform in sport is diminished. As such, through the Ruggie Principles the human rights community seeks to hold SGBs to account for human rights violations.

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261 E H Botting *Wollstonecraft, Mill, and Women's Human Rights* 2016 Yale University Press 70.

262 As above

263 Botting (n 256) 75

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4. Interrogating the human rights framework

4.1. Introduction

This chapter focuses on the human rights implications of the regulations engaging the argument that discrimination by the WA is necessary. To do so it will explore the nature of the regulations and their justifications before discussing the human rights violated in detail. It must be established that although this research views and has analysed international human rights law as gendered, this chapter uses the principles of the same discourse as they are the closest standard to understand human rights violations. The analysis here incorporates other fields of study such as medicine, sociology, psychology and economics to add and revise the existing human rights standard.

4.2. DSD regulations and justifications

The WA's DSD came into effect on 8 May 2019 and state that events from 400m to the mile including 400m hurdle races,800m,1500m,1-mile races and combined events over the same distances require any athletes who have DSD to meet certain criteria to be able to participate.[264] In implementing these regulations the WA has completely disregarded the human rights violations associated with the practice and has gone on to support studies seeking to establish that indeed they are necessitated by the protection of women. [265]

There exist many human variations which offer athletic advantage but there is no ban on such.[266] Responding to this concern the WA asserts that these other variations are not the reason behind the categorisation of sport to female and male.[267] They allege that the world agrees that there exists an advantage by men over women when it comes to sport hence the separation.[268] This allegedly is owed to the levels of testosterone which is high in males making them develop stronger skeletal and

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264 World Athletics C3.6 Eligibility Regulations for the Female Classification

265 S Mahomed and A Dhai 'Global injustice in sport: The Caster Semenya ordeal, prejudice, discrimination and racial bias' (2019) South African Medical Journal.

266 Pieper (n 18).

267 World Athletics 'Explanatory Notes: IAAF Eligibility Regulations for the Female Classification' (2019) at https://worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg (accessed on 15 October 2022).

268 As above.

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muscular systems.[269] The assertion is based on the notion that biology and science are a fact and are not subject to error. It further gives credence to the idea that through testosterone men are superior to women.

The WA fails to recognise that categorisation of sport into the two categories of male and female was in essence affirmative action at least that is what this research seeks to present.[270] It was a way to create opportunities and encourage women participation in sport, recognising that men have had a long time to take up space in sport. The issue was never development differences owed to testosterone as that would create the impression that women's bodies are inferior to men's bodies in sport.

4.2.1. Protected class

The DSD justified on the basis of preserving the protected class of women brings another semantic and epistemological issue which need to be engaged before traversing the human rights violations of the regulations. In the construction of this protected class it is clear that such class excludes intersex women with high levels of testosterone. Inferring from the justification on the basis of testosterone, the protected class women are smaller, not strong and slower than the average male because from puberty their testosterone does not influence their growth and development.[271]

Schneider in traversing the idea of protected contends that the category of women's sport as protected is linked to the idea of fair play.[272] Using separation of sport into male and female categories, she contends that creation of women only space gives credence that governing bodies should seek certification to exclude.[273] As such, the onus for inclusion is on the human rights to justify inclusion of those excluded.[274] This creates an illusion that there is sport and there is women's sport, an abstract creature outside real sport.

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269 As above.

270 Pieper (n 18).

271 World Athletics (n 262).

272 A Schneider 'Girls will be girls, in a league of their own: The rules for women's sport as a protected category in the Olympic games and the question of 'doping down'' (2020) Sport, Ethics and Philosophy 478-495.

273 As above.

274 Schneider (n 267) 479-480.

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The 'protected class' is a reproduction of privilege for the 'women' body which fits neatly into the gender binary.[275] It holds that if women cannot access male privilege in the dichotomies of society then a privilege specifically for them has to be created. Such privilege creates a contestation as to who can access it and with history of othering those who cannot reproduce. Femininity as required by the patriarchy are then excluded. At the end this is a divide and digress tool masking and maintaining the patriarchy to prevent disturbing the male dominance which demands everyone to be a white middle class and cisgendered man who is complemented by the white woman who accommodates his privilege.

4.2.2. The elusive notion of fair play

Fair play invokes the existence of fairness in sport.[276] A generic definition of fairness is impartial and just treatment or behaviour. A reflection alludes that essence. Fairness holds that one in interacting with another in a domain affecting them both should not have unequal advantage over the other.[277] For the eligibility regulations what is touted to be fair is the physical equality of women.[278] This seeks to homogenise women athletes as the basis for them to compete on equal terms and it is problematic on two levels.

This essentially limits the performance of women.[279] This is a demoralising and complacent creating mechanism which results in partial access to sport by women. As such it, is made a norm to question an athlete's abilities within the women's category because breaking the proverbial ceiling makes them men. In that case is the women's category viewed as a passage to real sport of which if one wants to remain in has to consider not outperforming the set standards.[280] Secondly, there are many factors that make an athlete have an advantage over others. Ranging from genetics, class, training to passion, one cannot point to one factor as the only advantage an athlete has.[281]

275 As above.
276 Pieper (n 18) 7-8.
277 As above.
278 As above.
279 Pieper (n 18).
280 As above.
281 As above.

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4.2.3. DSD regulations as a policing tool

The creation of a body in this socially contracted world is subject to processes and policies. More often than not, the processes negate the complexities of the body and create a body alien to reality.[282] Bodies are a result of past intentional doings negative and positive. It is therefore paramount to recognise that their creation is not limited to biological underpinnings but are shaped by and through interactions of power.[283] Those who wield power would in most cases contribute toward the creation and the epistemological foundations of the body. This then makes them the governors of the body deciding the limits of such a body. [284] The DSD were created from a place of power by an organisation which never believed in the inclusion of women in sport.[285] Their promulgation pays homage to the foundations of the WA that women have no place in sport and as such, their womanhood has to be regulated.[286]

4.2.4. Global south and global north responses

While the global south views the DSD regulation as extension of colonial policing of non-white bodies, the global north sees them as rules of fairness and integrity keeping in sport.[287] Although these views are at opposites, they essentially lead to one conclusion being the gender and sex binary understanding of the human body. Ranging from the support by global south of the athletes in question as far as they raise their flag but on their policies of still upholding the binary marginalisation to the global north support of the regulations as far as they essentialise the protection of women against those who are not woman enough.[288]

The rejection of the intersex existence by the African fan base is indicative of cis-heteronormative nationalism. In such a rejection, it alluded that intersex is a concept of the West in a bid to exclude African female athletes out of sports.[289] This erases the intersex identity and demands that athletes should be fit into the female and male category without acknowledging their diversities. This position only appeals to the

282 De Marailla Muste (n 17).

283 A Posbergh 'Defining 'woman' A governmentality of how protective policies are created in elite women's sport' (2022) International Review for the Sociology of Sport 1-21..

284 Posberg (27) 4-7.

285 As above.

286 As above.

287 Tamale (n 13) 110.

288 As above.

289 Tamale (n 13) 114-118.

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African nationalism as far as the athlete exists within the parlance of sport and beyond the athlete would not be afforded dignity in this rejection. Tamale contends that without understanding the issue at hand, supporters sought to prove beyond reasonable doubt that indeed Caster Semenya is a woman.[290] The conflation and erasure of identity is done to hold her as the national treasure but only as far as they can feminise her. This can be seen by Drum feature of Caster Semenya in a dress and makeup presenting her to the world as feminised by this process.[291]

4.3. Human rights violations

4.3.1. The right to equality and non-discrimination

The DSD seeks to contradict this right by targeting a select group of people.[292] CEDAW specifically calls for sport participation as an area where men and women should have equal access to.[293]The regulations are prima facie discriminatory in the sense that they only exist on women's sports while there exists no equivalent in men sport.[294] Such is in contradiction with the equal access called by the CEDAW. A further analysis reveals that it seeks to discriminate against 'intersex' women who already exist as marginalised in this gender binarized system. The subjectivity of the DSD regulations is an extension of racism and sexism which further violates the right to equality and non-discrimination.[295] On the basis of observations of the body's physicality and performance, an athlete can be targeted for testing on suspicions of onlookers and complaints of those who feel threatened on the track.[296]

4.3.2. The right to privacy and dignity

WA proclaims that there is confidentiality in the process of applying the DSD regulations. However, this does not seem to be true.[297] The chain of events following gender testing reveals the confidential information they tout to be protecting.[298] The ban in participating by an athlete in the track events regulated by the DSD is quite revealing to the world that there was a sex and gender testing. The admission of the

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290 As above.

291 As above.

292 OHCHR, "Intersection of Race and Gender Discrimination in Sport," (2020) A/HRC/44/26 at https://undocs.org/en/A/HRC/44/26 (accessed 09 August 2022).

293 Art 10 and 13.

294 As above.

295 Tamale (n 13) 114.

296 As above.

297 n 262.

298 OHCHR (n 287) para 34e.

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same athlete to male sports as WA contends to be an option for athletes with DSD also reveals what they contend to be confidential. Dignity cannot be maintained in a process that seeks to refute the identity of a person. The CAS ignored this prevailing factor that being intersex is not to be treated as cheating demanding scrutiny. In applauding the way, the WA conducted their sex testing without recognising the encroachment on a person's body on the basis of a practice not proved necessary anywhere but in sport, the CAS upheld the notion that womanhood is to be qualified.[299]

4.3.3. The right to health

The pathologisation of intersex women through the DSD regulations poses a threat and is a violation to the right to health on physical, mental, psychological and sociological levels, as such, violating all the basic tenets of health[300]. Such right is provided as a socio-economic right under article 2 of the CESR. According to studies, it has been concluded that requiring women to lower their testosterone could lead to harmful consequences including but not limited to depression, excessive fatigue, weakened bone and muscular system, excessive thirst and compromised carbohydrates metabolism.[301] The panel of the CAS reviewing Ms Semenya's case conceded that the process of undergoing intimate examinations to determine the extent of her gender and sex was 'highly intrusive and could result in psychological harm'. Hence, the regulations do more harm than good.[302] The Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health has stressed that informed consent to any medical intervention goes beyond mere acceptance and must be voluntary and sufficiently informed in order to protect human dignity and autonomy.[303]

4.3.4. The right not to know

The right not to know is held against medical professionals at institutional level,[304] and as provided by Article 19 of CCPR which allows one to seek and access information at the same time limiting what information they want to receive. There is harm in

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299 As above.

300 C Emma and T M Mphidi 'The IAAF rules on testosterone levels and the right to health' (2021) Obiter 410-428.

301. As above.

302 Caster Semenya v IAAF (n 3).

303 OHCHR: Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health A/64/272, para. 26.

304 Wiesemann (n 19) 216-217.

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gender testing as implemented through the DSD regulations because certain information especially when not solicited on free will can be damaging. More often than not the diagnosis of DSD comes as a shock to athletes.[305] One may argue that sex testing here is done with the consent of the athlete, therefore she has forgone the right to not to know.[306] However, is it consent if one's livelihood and right is threatened. Consent here is given under duress and mostly without relevant information on the issue.[307] Athletes most of the time do not understand the implications of sex determination.[308]

4.3.5. The right to freedom from torture and other cruel, inhumane or degrading treatment

Invasive and degrading medical interventions are required of athletes who have high testosterone. Although the WA contends that hormonal therapy to reduce levels of testosterone is scientifically proven to be safe, the absence of real consent from athletes poses a threat to dignity.[309] This is done by refuting the identity of the athlete contending that they are not woman enough. Athletes are punished for existing as they are, by refusing them access unless they follow what the WA touts to be protecting the average woman. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, alongside other mandate holders, have emphasised that while the 2018 IAAF regulations do not force athletes to undergo any assessment or treatment, they leave athletes with the choice of either undergoing these intrusive medically unnecessary assessments or being subjected to treatments with negative impacts on their health and well-being.[310] Such treatments also entail the risk of harm to physical and bodily integrity that may amount to violations of the right to be free from cruel, inhuman or degrading treatment or punishment and even torture.[311]

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305 As above.
306 As above.
307 Wiesemann (n 19) 217-218.
308 As above.
309 World Athletics (n 262).
310 Human Rights Council: Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment 2021 A/HRC/28/68/Add.1.
311 As above.

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4.3.6. The right to work

The right to work hinges on the participation of one in activities of production and servicing in society resulting in gain for adequate living. Different institutions are allocated resources from the greater society to facilitate production and servicing of the society. This could be public or private allocation happening through indirect and direct injection of resources into the institution. Sport as an institution is built on this allocation from being given legal personality to operate and funding from either the state or private individuals. As such, it finds itself being a custodian of resources from the society to dispense entertainment and economic value from sport. One then seeks access to work through qualifications and in the case of sports through recognition of physical performance. The Female Eligibility Regulations seek to exclude from work women on the basis of sex characteristics.[312] This limits the right to access work on the basis of an unjustified factor.

4.4. Situating the DSD Regulations and gender testing as a harmful practice

IHRL has created a common standard in the view of qualifying a practice. Thought in the perspective of sexual and reproductive health rights, this standard scrutinises practices that involve issues surrounding concepts of sex, sexuality, sexual orientation, bodily integrity and autonomy and gender relations.[313] In the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), harmful practices are defined as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.'[314] This definition is further supported by the Joint General Comment No 18 by the UN Committee on the Rights of the Child (CRC Committee) and the UN Committee on the Convention on Elimination of all forms of Discrimination against Women (CEDAW Committee), which establishes the criteria of what constitutes a harmful practice:[315]

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312 OHCHR (n 298) para. 34b.

313 OHCHR: Harmful traditional practices affecting the health of women and children https://www.ohchr.org/Documents/Publications/FactSheet23en.pdf (accessed 15 October 2022).

314 Article 1 Maputo Protocol.

315 Joint general recommendation/general comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices, Committee on the Elimination of Discrimination against Women & UN Committee on the Rights of the Child (4 November 2014) UN Doc CEDAW/C/GC/31-CRC/C/GC/18 (2014) para 16.

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a) They constitute a denial of the dignity and/or integrity of the individual and a violation of human rights and the fundamental freedoms enshrined in the two Conventions;

b) They constitute discrimination against women or children and are harmful insofar as they result in negative consequences for them as individuals or groups, including physical, psychological, economic and social harm and/or violence and limitations on their capacity to participate fully in society or develop and reach their full potential;

c) They are traditional, re-emerging or emerging practices that are prescribed and/or kept in place by social norms that perpetuate male dominance and inequality of women and children based on sex, gender, age and other intersecting factors;

d) They are imposed on women and children by family, community members, or society at large, regardless of whether the victim provides, or is able to provide, full, free and informed consent.

The Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have repeatedly stressed that harmful practices are deeply rooted in societal contempt view that men are superior than women.[316] Both Committees have expressed concerns about the use of these practices "to justify gender-based violence as a form of 'protection' or control of women and children. The DSD has the same nuances that the committees are concerned about.[317] It was couched in a woman protectionist voice while in fact being harmful. Moreover, the regulations meet the set criteria as outlined in this analysis

4.5. Conclusion

The DSD regulations are a human rights violation and pose a threat to the equality and non-discrimination. From time immemorial to now, the practice seeks to police women's bodies using arbitrary scientific studies which have no basis. The human rights approach seems not to be reaching the violations within sport despite several reports written to stress the violations by the regulations. Leveraging on established human rights standards on harmful practices, the analyses situated the DSD within

316 As above para 3.

317 As above.

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such a perspective. This established that indeed, the discriminatory practice meets the criteria.

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5. Recommendations and conclusion

5.1. Conclusion

This research has established the existence of womanhood policing in sport and demonstrated that indeed the Differences in Sexual Development regulations by the World Athletics (WA) is another tool used to do such. Qualifying the practice as arbitrary in international law brought to the front is the process of conceptualising womanhood in human rights treaties and standards. It then follows that chapter two focuses on the definitional and construction underpinnings of woman as a subject of law and bearer of rights. The hypothesis, as established in the introductory chapter, that human rights on paper and practice are gendered. In establishing the obligations of SGBs in regards to human rights protections, Chapter three answers the question from such a hypothesis. With the need to highlight the harms of the DSD regulations on the athletes concerned, chapter four then applied human rights standard to the practices, stressing the need to rethink the analysis beyond the ambits of the law. To this end, this chapter revisits the research questions to put the findings in focus and provide recommendations to address the problem question.

In international human rights law, the concept of womanhood is used to understand the intersectional nature of the human being who is a bearer of human rights. Such appears to be inclusive of all diversities of those who would identify with it. However, the fact that it is constructed from the liberal subject ideology further perpetuates the arbitrary notion that to be an individual, one has to be a man.[318] The evolution of IHRL should engage in the woman question with equality and inclusion in mind, no identity should be constructed through essentialization of inequalities.[319] This demands a matrix where human rights should be dispensed to cater for both needs and wants of the body and be easily accessible to all and as such, ensuring affirmation of dignity.

It is established that corporations such as SGBs in general appear to have the discretion to decide whether to apply and promote human rights in their trade. However, considering the global shift in power relations between such bodies and human rights, it has been contended that a duty to protect and promote human rights

318 Romany (n 254).

319 Tamale (n 13).

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exists.[320] To hold WA accountable for human violations by the regulations, there is a need for an international consensus that 'corporate veil' (autonomy) in human rights be lifted.

Reflecting the way society is ordered, sport seeks to reproduce and reinforce the dichotomy of male and female. Diverse bodies present a threat to the binary ordering of sports' sex and gender.[321] The science touted to be used on rationalising the necessity of the regulations bestows superiority of the testosterone and makes it a male hormone. This essentially creates a hierarchy in sports with the male body considered more athletic than the female.[322] Thought of as a harmful practice under IHRL, the regulations seek to control women's bodies under the guise of protection

5.2. Recommendations

Sex and gender testing in sports is unnecessary and discriminatory, therefore it should be abolished. This research offers the following general recommendations in considering the abolishment of such a practice.

5.2.1. General recommendations

The right to work

Recognising that performance in sport is the criterion for an athlete and it seems to be excluding others who seek admission to sport, it is recommended that sport needs to be thought of from the perspective of the right to work. These recommendations implore that as long as one can be counted as an athlete, she needs to be recognised as an employee with benefits accruing thereto.

A mixed category

Considering that separation of categories in sport was an exercise to affirm women's access to sport, it is further recommended that the male and female categorisation of sport should be abolished. This would have all individuals perform under the same category. In every institution there has been a practice of gender quota and such should be applied in this model. All diversities that are applicable to the human being need to be explored and used to admit athletes into sport on equal basis. This then

[320] Ruggie (n 238).
[321] De Marailla Muste (n 17).
[322] As above.

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admits such athletes to participate for a tenured period to prevent monopolies by an athlete.

If the WA is to proceed with the DSD on the basis that testosterone, as genetic advantage is not celebrated in sport then there is need for research to establish a way to control male athletes' level of testosterone to level the playing field for everyone. As preposterous and prejudiced as it sounds, this is a strategic recommendation which would initiate an honest conversation. This is not to advocate for the violation of anyone's bodily integrity through doping down of testosterone.

E-sport

The fourth industrial revolution has imagined new ways of doing things. The terrain of e-sport has not gained traction due to the obsession with physical sport but if explored it could offer the same benefits. Virtual reality and e-sport presents an ability to include all without any distinction. This is recommended without having analysed the depth of e-sports. Hence, e-sport be explored.

Effective application of IHRL

The effective application of human rights in sports to hold institutions accountable is an exercise which recognises the limits of IHRL in respect to gendered rights. This research therefore implores states and WA to consider the following recommendations:

5.2.2. Recommendations to states

As the primary subject of human rights law, states should, through the principle of due diligence make sure that corporations are held accountable for their violations.[323] States are implored to:

i. Create enabling environment for intersex women to enjoy and claim human rights not just in sports but in all spheres. This creates consensus on the position of the primary subject of IHRL and it is bound to be reflected at a sport level;

[323] Gonzalez (n 241).

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ii. Revoke any immunity claimed by WA and national sport bodies, as such, allowing them to bring such bodies under the jurisdiction of the national courts to challenge the regulations potentially creating a precedent on the issue.[324]

5.2.3. Recommendations to WA

i. Revoke the DSD regulations and compensate all those who have been discriminated against by the regulations;
ii. Engage relevant stakeholders to establish a human rights approach in revoking the DSD regulations using UN Guiding Principles and as such, creating a network to address the lack of familiarity with IHRL;
iii. Provide a clear process in the creation of policies and such should put the athlete at the centre;
iv. Create a clear framework which ensures a duty of care by the institutions towards the wellbeing of athletes.[325]

Word count: 19 997.

324 Mega-Sporting Events Platform for Human Rights (n 223).
325 Human Rights Watch (n 221).

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