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**Dilemma of Competitive Equality: Transgender vs Cisgender Athletes in Women's
International Sports Competition**

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Abstract

This research aims to solve the human rights issue of the participation of transgender female athletes in international sports competitions in the women's division. This study applies the normative judicial research method with the collective legal material techniques through library research and is descriptive-analytical. The existence of transgender female athletes generates two perspectives: inclusivity as a human right for transgender female athletes and unfair competition for cisgender female athletes. This issue occurs due to the physiological advantages possessed by transgender female athletes from the high level of testosterone they have, which creates unfairness in sports competition for cisgender female athletes, and the policies of international sports organizations that exclude the participation of transgender female athletes who have experienced puberty to take part in international sports competitions. Several controversial cases have sparked debate in the international community, such as the Tiffany Newel case in the running competition and the Lia Thomas case in the swimming competition; both are female transgender athletes who won sports competitions in the women's division. Although a transgender individual already has inherent human rights regulated through international law, these rights could not be a basis that overrides the rights and freedoms of other people. In this case, the right to equal and safe competition for cisgender women. The solution to this problem is to develop an 'open category' that aims to ensure the participation of all world athletes in sports competitions regardless of gender or gender identity.

Keywords: Discrimination, Fairness, Human Rights, International Sports Competition, Transgender.

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A. INTRODUCTION

Tiffany Newel, a transgender female athlete, has won first place in the 1,500m indoor long-distance running competition for women aged 50-54 years in Canada.² In addition, she also ran the 5000m Canadian running competition in the time of 18:02,30, breaking the women's Canadian record by six seconds. It is the first time a trans woman has set the Canadian record. Even though Tiffany Newel has fulfilled her requirements as a transgender athlete to compete in the women's division, her victory still creates a dilemma in international sports. The International Consortium on Women's Sport has reprimanded the transgender female athlete (hereinafter "**transwoman athlete**") because her victory resulted from an unfair advantage for cis women athletes (hereinafter "**cis women athletes**"). The win also became a polemic among the international community. It drew criticism because Tiffany Newel is a biologically male who competes among cisgender women and is also the first trans woman athlete to set a national record in a Canadian women's running competition.

Criticism of the victory of a transwoman athlete does not only occur in athletics competitions but also affects Lia Thomas, a female transgender swimming athlete from America. Lia Thomas is a transgender woman who has become a swimming athlete and previously represented her university in men's swimming competitions. However, in 2019, she transformed herself into a transgender person and took part in the women's swimming competition, which won several matches and broke the women's swimming

record.³ Lia Thomas's participation and her issue after winning the competition is quite similar to Tiffany Newel's case, in which Lia Thomas had lowered her testosterone levels according to the terms and conditions that apply to be able to compete in the competition. However, this still raises criticism and opinion from the perspective of society, which varies between activists who fight for transgender rights and people who fight for fairness for cisgender women. According to Dr. Ross Tucker, a Sports Physiologist, Lia Thomas can be scientific proof that the terms and conditions for lowering testosterone levels do not eliminate the biological superiority of a man.⁴

Cisgender people are the ones who recognize their gender identity according to the sex identified at birth. Meanwhile, transgender people are the ones who have changed sex organs through surgery or define themselves as different from the sex determined at birth, such as someone who was born as a man but identifies as a woman and vice versa.⁵ Lesbian, Gay, Bisexual, Transgender, and others ("**LGBT+**") are some individuals or a community for those with a different sexual orientation from a heterosexual person or identify as a gender outside the gender binary. The sign (+), which can be interpreted as 'others' in LGBT+, is intended as a form of inclusion for those with a sexual orientation or gender identity other than those mentioned in the meaning of 'LGBT' to comprehend people who have their understanding of gender identity and

² Schemmel, Alec. "Trans Runner Wins another Women's Race One Year after Breaking Record, Angering Critics." *abc15 News*, 28 February 2023, <https://wpde.com/news/nation-world/trans-runner-wins-another-womens-race-one-year-after-breaking-record-angering-critics>. Accessed 21 May 2023.

³ Powell, Michael. "What Lia Thomas Could Mean for Women's Elite Sports" *The New York Times*, 29 May 2022, <https://www.nytimes.com/2022/05/29/us/lia-thomas-women-sports.html>. Accessed 18 June 2023.

⁴ *Ibid.*

⁵ Stephanie Watson, "Cisgender." *WebMD*, 13 November 2023, <https://www.webmd.com/a-to-z-guides/cisgender-overview>. Accessed 21 May 2023.

sexuality.⁶ For example, the sign (+) means for those identifying as 'queer,' which means sexual orientation and gender identities other than straight and cisgender, 'questioning' for those still exploring their sexuality or gender identity, and many more. As part of the LGBT community, the existence of transgender people still could be classified as a minority. Based on global survey data published by Statista, only 2% of the population from 27 countries identify as transgender.⁷ The fact that transgender people are a minority made them encounter some challenges, such as acts of discrimination and violations of human rights.⁸

The LGBT+ community generally advocates for the global recognition of specific human rights for LGBT+ individuals. It is because LGBT+ people can not fully enjoy the human rights that bind everyone universally. Human rights are inherent rights that every person possesses from birth, universally binding to protect human life wherever individuals exist.⁹ The right is legally inherent to all people because they are human beings, not a gift from the state or society. Thus, the state must respect, guarantee, and fulfill human rights for all human beings. Although in their history, several countries have initiated international legal instruments to protect human rights, such as the Magna Carta, Bill of Rights,

Declaration of Independence, and many more.¹⁰ However, no country that recognizes the importance of human rights contradicts the principles outlined in the Universal Declaration of Human Rights ("UDHR") because it is part of customary international law. The rights outlined in the UDHR should also apply to LGBT+ individuals, as they are equal to the human community.

In implementing human rights internationally, discrimination is the main issue that often occurs against violations of an individual's rights. The definition of discrimination can have different meanings. Based on the study of international law, discrimination is an act that differentiates, excludes, limits and prioritizes a person or a group of people based on race, color, religion, descendants, ethnicity, or gender, which has an impact in obtaining recognition and enjoyment the freedom and rights of an individual's in the field of political, economic, social, cultural, and other areas of life.¹¹ Discrimination is an action against someone's rights that must be prohibited or could risk justifying it for specific reasons.¹² Discrimination in human rights does not apply narrowly but has a broad definition in its application. This expansion means that particular actions cannot be called discriminatory in making distinctions based on specific prohibitions to provide equitable rights for everyone. In the development of the international community, it is necessary to have an action that differentiates one from another, and it is not a wrongful action according to the norms of international law due to its purpose for the greater good.¹³ Based on this understanding, discrimination

⁶ Council of Europe. "LGBT+." Council of Europe, Gender Matters, <https://www.coe.int/en/web/gender-matters/lgbt->. Accessed 18 June 2023.

⁷ Statista Research Department, "Share of People Identifying as Transgender, Gender Fluid, Non-Binary, or Other Ways Worldwide as of 2021, by Country." *Statista*, 9 January 2023, <https://www.statista.com/statistics/1269778/gender-identity-worldwide-country/>. Accessed 21 May 2023.

⁸ Suzanne M. Marks "Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People" *Health and human rights*, Vol. 9 No. 1, 2006, p.33.

⁹ Nyoman Krisnanta Davendra. "Eksistensi Hukum Internasional Dalam Penerapan Hak Asasi Manusia", *Ganesha Law Review*, Vol. 4 No. 1, 2022, pp.3-4.

¹⁰ *Ibid*, at 4.

¹¹ Lerner, Natan. *Group Rights and Discrimination in International Law* Second Edition. Kluwer Law International, 2003. Google Books, <https://books.google.co.id/books?id=t0VJmJg1kCMC&printsec=frontcover#v=onepage&q&f=false>, p.31.

¹² *Ibid*.

¹³ *Ibid*, at 32.

can occur in various forms of human life in the international community.

In international sports, forms of discrimination often emerge, considered acts that violate human rights, especially for trans women athletes. For example, the world track and field athletics institute or World Athletics ("**WA**") has published a ban on participating in international competitions for trans women athletes who have experienced male puberty through regulations called "Eligibility Regulations for Transgender Athletes," which took effect on March 31, 2023.¹⁴ Before WA's policy, World Aquatics also took similar steps regarding the participation of transwoman athletes, otherwise known as the Federation Internationale de Natation ("**FINA**"), which had formed a policy regarding the eligibility of transgender athletes in participating in international sports competitions, namely the "Policy on Eligibility for The Men's and Women's Competition Categories" which took effect on June 20, 2022. As an organization that governs international aquatic competitions, this policy has prohibited the participation of trans women athletes by the terms and conditions that apply in participating in all FINA competitions and setting FINA world records in the women's category.¹⁵ The impact of both policies is a 'double-edged blade,' meaning that some people support it, especially cis women athletes and people who are against it, such as transgender activists. International controversy occurs from two perspectives: discrimination against trans women athletes

due to losing their right to compete in international sports competitions and the competitive fairness given to cis women athletes.

While participation in sports competitions is one of the human rights, ensuring inclusiveness for transgender individuals in international sports must also consider maintaining fairness in competition for cisgender athletes, specifically in the women's division. Concerning this issue, international law, scientific evidence, and other credible sources are the basis for comprehending the impact of trans women athletes in international sports competitions and providing solutions to create an adequate space for cis women athletes. The author in this article is not part of the LGBT+ community and does not support the LGBT+ community in any form.

Research in this article primarily analyzes the problems arising from the participation of transgender athletes, especially in women's sports competitions, through the perspective of human rights possessed by a transgender person. Even though transgender are part of the LGBT+ community, the critique from this research will not discuss further concerning the LGBT+ community. Discussion regarding LGBT+ is only related to their existence as they integrate with transgender people who demand equal rights to be recognized internationally.

B. INTERNATIONAL LAW PERSPECTIVE ON TRANSGENDER RIGHTS

In international human rights law, the existence of LGBT+ people is not regulated directly regarding the position of their human rights. However, as a human being, human rights for LGBT+ people are still attached to international human rights legal instruments in general, such as the UDHR and the International Covenant on Civil and Human Rights Political Rights ("**ICCPR**").

¹⁴ Rodrigo Perez Ortega. "World Athletics Banned Transgender Women from Competing. Does Science Support the Rule?" *Science*, 4 April 2023, <https://www.science.org/content/article/world-athletics-banned-transgender-women-competing-does-science-support-rule>. Accessed 21 May 2023.

¹⁵ Fahey, Ciaran. "World Swimming Bans Transgender Athletes from Women's Events." AP News, 23 June 2022, <https://apnews.com/article/transgender-swimmers-new-rules-fina-world-governing-body-c17e99d3121fa964336458b57ae266f7>. Accessed 18 June 2023.

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Nevertheless, all the rights declared to protect human rights universally cannot be thoroughly enjoyed by everyone, especially the LGBT+ group, due to discriminatory and exclusion acts from society.¹⁶ Therefore, the international community decided to make a general principle that directly protects human rights for LGBT+ people to become universal guidelines, namely The Yogyakarta Principles.¹⁷ The main objective of The Yogyakarta Principles is that regardless of gender identity or sexual orientation, every human being has the right to obtain the absolute human rights enumerated in international law and the implementation of the granting of human rights to LGBT+ people as an effort to acknowledge human rights for every human. In addition, the principles also state that international human rights laws prohibit all forms of discrimination, including those based on sexual orientation and gender identity.¹⁸ These rights cover all aspects of life, including civil, cultural, economic, political, and social rights, in which sexual orientation and gender identity are integral to actualizing human rights.

The main problem faced by transgender people is not getting full international recognition, and they often get discrimination from society even though the UDHR has regulated the fundamental rights that every human being has, including transgender people. Article 2 of the UDHR has stated that everyone is entitled to all the rights and freedoms outlined in the declaration without any exceptions, including sex differences.¹⁹ In addition, Article 7 of the UDHR also states that everyone has the right

to live without discrimination.²⁰ These two articles have proven that the UDHR has guaranteed human rights without any exceptions, entitled to freedom and the right to live without discrimination, so it should also protect transgender people. The interpretation of both rights is that discriminatory actions such as exiling transgender people could violate the human rights of transgender people. Discrimination against transgender people often arises when participating in international sports competitions, even though transgender people also have the right to participate in these activities. Article 1 Paragraph (1) of the ICCPR states that all peoples have the right to self-determination and to be free in pursuing social and cultural development.²¹ The first element in the article, 'the right to self-determination,' can be interpreted with the efforts of transgender people who 'think' that their gender identity is different from the gender determined at birth. It is important to note that the right of self-determination is given to the term 'peoples,' which is ambiguous and difficult to define. However, in general application, the meaning of that term is given to the groups of individuals linked by common characteristics in the societies, purposely to protect the right of self-determination for communities in improving their culture and providing a variety of communities.²² The related common characteristics define 'peoples' as a group, such as common historical tradition, shared identity, cultural homogeneity, linguistic unity, and others.²³ Since Article 1 of ICCPR does not limit the

¹⁶ Bonny Ibhawoh, "Human Rights for Some: Universal Human Rights, Sexual Minorities, and The Exclusionary Impulse", *International Journal*, Vol. 69, No. 4, 2014, p.614.

¹⁷ "The Yogyakarta Principles", March 2007, <https://www.refworld.org/pdfid/48244e602.pdf>. Accessed 18 June 2023.

¹⁸ See p.9, Preamble of The Yogyakarta Principles.

¹⁹ See Article 2 Universal Declaration of Human Rights.

²⁰ See Article 7 Universal Declaration of Human Rights.

²¹ See Article 1 paragraph 1 International Covenant on Civil and Political Rights.

²² McCorquodale, Robert, "Self-determination: A human rights approach" *International & Comparative Law Quarterly*, Vol. 43, No. 4, 1994, p.859

²³ Quane, Helen, "The United Nations and the evolving right to self-determination" *International & Comparative Law Quarterly*, Vol. 47, No.3, 1998, p.539.

definitions of 'peoples,' it results if a group is recognized as 'peoples,' they are entitled to the right.²⁴ So that it relates to the transgender community that shares a common identity, which is gender identity. Thus, transgender people still have this right to exercise the freedom to determine themselves regarding their gender identity. In addition, as part of developing social and cultural life, participating in international sports competitions is a right for everyone. Although the ICCPR does not explicitly ensure the rights of transgender people, the rights stipulated in the Covenant should also protect the right to live and develop for transgender people.

In 2007, the International Commission of Jurists, the International Service for Human Rights, and human rights experts worldwide established The Yogyakarta Principles to provide the human rights of LGBT+ people. Principle 25 of the Yogyakarta Principles about The Right to Participate in Public Life states that every citizen has the right to take part in public affairs without discrimination of sexual orientation or gender identity.²⁵ Principle 25 point B clarifies that the state must eliminate stereotypes and prejudices that hinder or limit participation in public life. The interpretation of this principle is that transgender people have the right to participate in international sports competitions as part of public affairs without discrimination or policies that limit the participation of transgender people in public life. In addition, Principle 26 about The Right to Participate in Cultural Life requires the state to ensure all people have the opportunity to participate in cultural life through legislative, administrative, and other measures.²⁶ Various international sports competition institutions, such as World

Athletics, have implemented Principle 26 by establishing policies in 2019 to allow transgender athletes to participate in international sports competitions with terms and conditions. It is important to remember that the Yogyakarta Principles do not bind states as international law, nor have they been officially regulated by the United Nations ("UN"). The Yogyakarta Principles purposely can become a guide in standardizing international human rights law, primarily related to sexual orientation and gender identity, to deal with human rights and LGBT+ issues.²⁷

However, it is a fact that the fundamental human rights of LGBT+ people still need to be fully enforced because the international community must acknowledge the reality that transgender people and the LGBT+ community have been part of the world for a long time. The group is also a human being who has inherent dignity and rights. Human rights violations, such as discrimination against these groups, cannot be carried out arbitrarily. According to Theodoor van Boven, human rights are formed through fundamental human rights, referred to as supra-positive rights, as an actualization of the international community. Supra-positive rights indicate that the legitimacy of basic human rights is related to the international community's acceptance, such as the UN.²⁸ That means all evolution of human rights could become universal human rights with the international community's approval. Suppose it is related to the development of the human rights struggle of LGBT+ people. In that case, the UN has recognized the existence of LGBT+ people through *resolution A/HRC/RES/27/32*, which addresses "*Human rights, sexual orientation,*

²⁴ *Ibid*, p.560.

²⁵ See Principle 25 The Yogyakarta Principles.

²⁶ See Principle 26 The Yogyakarta Principles.

²⁷ Cviklová, Lucie, "Advancement of Human Rights Standards for LGBT People through the Perspective of International Human Rights Law", *Journal of Comparative Research in Anthropology and Sociology*, Vol. 3, No. 2, 2012, p.48.

²⁸ Davidson, Scott, *Human Rights*, Buckingham: Open University Press, 1993, pp.55-56.

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and gender identity." The resolution aimed to eliminate violence and discrimination against LGBT+ people in all forms, resulting from a vote with approval from 25 countries, disallowance from 14 countries, and abstentions from 7 countries.²⁹ The rejection and void of votes from 21 countries indicate that not all international communities accept the legitimacy of LGBT+ human rights, so it cannot bind the LGBT+ community completely.

Nevertheless, the LGBT+ community must also be aware that their existence contradicts the norms of several countries that specifically rejected *resolution A/HRC/RES/27/32*, such as Indonesia, Saudi Arabia, Morocco, and many more.³⁰ Thus, human rights regarding LGBT+ people need to be regulated on an international legal basis that each country can ratify, following the basic norms upheld by each country. Therefore, human rights for LGBT+ people can be applied through the theory of international law dualism so that it will recognize the protection of human rights for everyone and equality for every country. Dualism theory has determined that there are differences between international law and national law, even though both have the same international responsibilities. In this theory, any international agreement can only be legally binding when a country has adopted it through a transformation process following its respective national policies.³¹ The implementation of dualism theory could support the existence of international legal instruments regarding LGBT+ through the

transformation and adjustments of each state to provide their municipal law.

C. INCLUSIVITY IN WOMEN'S INTERNATIONAL SPORTS COMPETITION

The participation of trans women athletes in international sports competitions in the women's division has become the world's attention.³² This problem arises from two perspectives: the involvement of transwoman athletes is inclusivity, and the involvement of transwoman athletes creates unfair competition. Historically, in international sports competitions, especially in aquatic sports, the separation between the categories of men's and women's competitions has become a significant aspect of international sports competitions.³³ The purpose of separating the two types is a commitment from sports organizations to ensure equal opportunities for male and female athletes to succeed in sports competitions and to ensure fair competition and safety in physical competition. The background in achieving this goal is the performance gap between the two types of athlete gender, especially when biologically male athletes experience puberty, creating physical and other advantages that outperform biologically female. Transwoman athletes yield unfair competition by having physiological benefits such as greater muscle mass, higher oxygen storage capacity, superior bone density, and a bigger heart because they are biologically male.³⁴ The

²⁹ See resolution adopted by the Human Rights Council 27/32 *Human rights, sexual orientation and gender identity*.

³⁰ See resolution adopted by the Human Rights Council 27/32 *Human rights, sexual orientation, and gender identity*.

³¹ Marian, Brindusa. "The Dualist and Monist Theories. International Laws Comprehension of these theories." *The Juridical Current*, Vol. 1, 2007. pp. 17-18.

³² Mncwabe, Sammy. "World Athletics Regulations on Transgender Women Athletes Risk Human Rights Violations, Rights Group Say." CNN, 24 March 2023, <https://edition.cnn.com/2023/03/24/sport/world-athletic-s-transgender-athlete-regulations-reaction-spt-intl/index.html>. Accessed 19 July 2023.

³³ See Policy on Eligibility for The Men's and Women's Competition Categories, FINA.

³⁴ Brassil, Gillian R. and Jeré Longman, "Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions'." *The New York Times*, 18 August 2020, <https://www.nytimes.com/2020/08/18/sports/transgend>

physiological advantages that trans women athletes have are the main essentials to excel in international sports competitions such as athletics and aquatics competitions. Those characteristics can provide benefits to individuals assigned male at birth and previously competed in the male division, which some argue could create an unfair advantage for trans women athletes. In addition, trans women also have gone through male puberty, one of the leading causes that give them physiological changes that tend to outperform cisgender women.³⁵

Based on scientific research conducted by Harper J. on the performance of Male to Female athletes proves that the terms and conditions that allow transgender athletes to participate in international sports competitions by lowering their testosterone levels do not affect the physical dominance of a transwoman athlete.³⁶ Scientific studies assessed the performance of trans women athletes who competed in both male and female divisions of long-distance running competitions, demonstrating that their performance remained unaffected after transitioning.³⁷ Furthermore, a study conducted by Gooren and Bunck proves that changes to a person's physiological elements, such as height, hand size, and foot size, do not change after transitioning to being transgender.³⁸ This research was conducted on Female to Male and Male to Female

Transgender, including testosterone levels, muscle mass, hemoglobin, and insulin-like growth factor. This study compared the muscle mass possessed by a Male to Female Transgender who tends to be more enduring than that of a Female to Male Transgender. The remaining muscle mass transgender women have gives them an advantage over cisgender women.

In 2014, the case of Dutee Chand v. Athletics Federation of India (AFI) and the International Association of Athletics Federations ("IAAF") of the Court of Arbitration for Sport ("CAS") concerning the validity of the IAAF regulations *Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition*. The purpose of this regulation is to limit the participation of female athletes with testosterone levels that exceed the acceptable limits of an average woman, which is called a difference of sexual development ("DSD"). The main issue of this case is due to the regulation being considered unlawful discrimination against female athletes with superior natural physical characteristics. Furthermore, the law formed through assumptions linked between testosterone levels and athlete's performance, and the purpose of the regulation is considered disproportionate.³⁹ However, the IAAF rejected all arguments used against the law entirely. CAS has ruled regarding the case to grant Dutee Chand's request partially and stated that the IAAF regulations would be void if the IAAF did not submit concrete evidence to CAS to prove the performance advantages of female athletes with high testosterone levels.

Additionally, in 2018, the IAAF established the *Eligibility Regulations for the Female Classification (Athletes with Differences of Sexual Development)*, which

er-athletes-womens-sports-idaho.html. Accessed 21 May 2023.

³⁵ Kumar, Abhishek, "Inclusiveness or unfair advantage? Debate over trans athletes in sports intensifies." *Wion*, 26 June 2022, <https://www.wionews.com/sports/incusiveness-or-unfair-advantage-debate-over-trans-athletes-in-sports-intensifies-492057>. Accessed 21 May 2023.

³⁶ Pitsiladis, Y. (et. al.), "Beyond fairness: the biology of inclusion for transgender and intersex athletes", *Current Sports Medicine Reports*, Vol. 15, No. 6, pp.386.

³⁷ *Ibid.*

³⁸ Ingram, Benjamin James and Thomas, Connie Lynn "Transgender Policy in Sport, A Review of Current Policy and Commentary of the Challenges of Policy Creation." *Current Sports Medicine Reports*, vol. 18, no. 6, June 2019, pp.241-242.

³⁹ See Overview of the Case para 4, CAS 2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF).

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replaced the *Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition* regulations to continue fulfilling the requirements of the CAS decision. The IAAF formed the law by publishing background explanations and scientific evidence supporting the performance advantages of female athletes with high testosterone levels that exceed the average limit of a cisgender woman through the '*Explanatory Notes of the IAAF Eligibility Regulations for the Female Classification.*' The scientific evidence and statements that the IAAF has carried out are as follows:⁴⁰

1. Based on the case of *Chand v IAAF & AFI* (CAS 2014/A/3759), men have a significant advantage in size, strength, and power compared to women because a man's testosterone level since puberty is much higher than a woman's.
2. The impact of these performance advantages will cause unfair and unequal competition between female and male athletes, potentially reducing women's participation in sports, so the IAAF has separated the competition categories between women and men.
3. Most female athletes have lower levels of testosterone in their bodies than a male possess. Female athletes' testosterone levels are between 0.12 to 1.79 nmol/L circulating in the blood, while males' testosterone levels are 7.7 to 29.4 nmol/L after puberty.
4. The evidence and data collected by the IAAF with experts prove that high testosterone levels in female athletes will increase muscle mass, strength, and high levels of hemoglobin. Specifically, suppose a woman's testosterone level (0.9 nmol/L)

increases to that of a man's (7.3 nmol/L). In that case, this will increase muscle mass by 4%, muscle strength by 12-26%, and hemoglobin level increase by 7.8% of the average limit for a woman.

5. This evidence could show that female athletes who have DSD with similar testosterone levels possessed by a man will provide a significant performance advantage compared to average cisgender women, so regulations that require athletes who have DSD to lower testosterone levels to equal a person's normal levels women to participate in competitions in the women's category can be justified.
6. This regulation aims to ensure fair and meaningful competition, especially in the women's division, and the greater good for cisgender female athletes.
7. This regulation does not aim to question or consider the sex or gender identity of a female athlete. Still, it maintains respect for the dignity of every DSD athlete.
8. The separation category between women and men in sports categories by the IAAF is due to the performance advantages that male athletes possess, which include 10-30 times higher testosterone levels than female athletes since puberty causes a bigger size, power, and strength. Therefore, this separation is necessary to protect fair competition in women's division sports and avoid competitive dominance by male athletes.

The DSD female athletes are similar to trans women athletes; both have higher testosterone levels than the average levels of cis women athletes. Hence, trans women athletes will have the same impact on sports

⁴⁰ See Explanatory Notes IAAF Eligibility Regulations for the Female Classification.

competition in the women's division as DSD female athletes. High testosterone levels in DSD and transwomen athletes will undoubtedly lead to unfair competition. Because of that, international sports competitions need a policy that separates cis women athletes and trans women athletes to protect the fundamentals of sports competition, especially in the women's division.

Based on trans women athletes' advantages, this fact is why several international sports organizations form policies that prohibit transwoman athletes from participating in international sports competitions in the women's division if they have experienced male puberty. Several international sports institutions believe ensuring competitive fairness in sports competitions is necessary because biologically, female athletes have lower physiology than biological male athletes.⁴¹ In ensuring competitive fairness, one way to make this happen is to lower the natural testosterone level of a transwoman athlete because high testosterone levels will significantly improve an athlete's sporting performance. Even though testosterone levels have a significant role in the superiority of an athlete's performance, transwomen athletes will still have other advantages from the male body they used to have. Hence, it causes the need for a policy that prohibits the participation of transwomen athletes in competing in the same competition as ciswomen athletes.

Sports governing bodies such as WA and FINA have built a policy that helps to ensure competitive fairness. WA, through the Eligibility Regulations for Transgender Athletes 2023, has provided terms and conditions for a transgender athlete who wants to take part in world athletics

competitions. WA formed this policy to create a fair and meaningful competition space to provide equal opportunities for all world athletes to participate in international athletics competitions. This regulation has banned trans women athletes from participating in the World Rankings Competition and breaking World Records in the athletics sports women's classification. In the rules, Article 3B regarding Eligibility Conditions for Transgender Female Athletes states that to take part in world competitions, the athlete must fulfill several conditions, including a written official declaration to the medical manager that their gender identity is female, never having experienced male puberty or must maintain testosterone levels below 2.5 nmol/L.⁴² WA has acknowledged that there is a physical advantage possessed by a transwoman athlete through higher levels of testosterone than a female biologically since male puberty.⁴³ Based on the purposes and facts set out in this regulation, WA hopes that all world athletic athletes can compete in competitions according to their gender identity classification while respecting the dignity of all individuals, including transgender athletes. Forming this policy is in coherence with the hope that athletics sports will continue to uphold inclusivity and competitive fairness at the international sports level.

In addition, FINA, through the Policy on Eligibility for The Men's and Women's Competition Categories (from now on "**FINA Inclusion Policy**"), has provided conditions for aquatic athletes to participate in international underwater sports competitions. This policy was formed based on the mission of FINA itself to be responsible for developing aquatic sports and

⁴¹ Ficsher, Mia and Jennifer McClearen. "Transgender Athletes and the Queer Art of Athletic Failure." *Communication & Sport*, vol. 8, no. 2, April 2020, p.150.

⁴² See Article 3B point 3.2 Eligibility Regulations for Transgender Athletes, 2023. World Athletics.

⁴³ See Article 1 point 1.1.2 Eligibility Regulations for Transgender Athletes, 2023. World Athletics.

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setting the eligibility criteria for sports competitions. The purpose of this policy is FINA's commitment to providing equal, fair, inclusive, and non-discriminatory opportunities to all aquatic athletes who wish to participate in sports competitions under FINA. In the FINA Inclusion Policy section F concerning The Eligibility Requirements for Competition and for Setting FINA Records in the Men's and Women's Categories Article 1, it has been stated that all aquatic athletes will comply with every requirement in this policy to get equal opportunities to participate in FINA aquatics sports competitions and set a FINA world record or any other competition under the auspices of FINA without distinction based on their legal sex, gender identity or gender expression.⁴⁴ Regarding eligibility for transwomen, athletes or athletes whose gender identity is female in this policy can participate in sports competitions under FINA or other sports recognized by FINA on the condition that they have never experienced male puberty in any form.⁴⁵ The interpretation of this requirement means that the FINA Inclusion Policy has prohibited trans women athletes from participating in international sports competitions under the auspices of FINA.

Based on the unfair advantages of trans women athletes, this forbidding regulation has provided adequate competition for cis women athletes. Following the purposes set by the two sports organizations, banning transgender athletes will provide fair and meaningful competition for two genders: men and women. Forming these policies will increase public confidence in the international sports system, which supports the validity of the gender binary and the basis of the sport's fundamentals,

namely competitive fairness.⁴⁶ Nevertheless, it also does not discriminate against or violate the human rights trans women athletes. Through the regulations, WA and FINA can provide an equal opportunity for all cis women athletes to compete fairly and meaningfully in international athletics competitions. The regulation protects the human rights of cisgender women to participate in international sports competitions fairly, and therefore, it cannot be considered a violation of human rights.

D. THE REGULATIONS THAT FORBID TRANSGENDER ATHLETES' PARTICIPATION DO NOT VIOLATE HUMAN RIGHTS

The policies established by WA and FINA should not be considered violations of human rights for transgender athlete groups. It is because the regulation base is on the primary goal of creating fair and meaningful competition for cis women athletes. In addition, if transgender human rights activists fight for the rights of transgender athletes as a form of inclusivity in international sports competitions, then they should not use the basis of human rights to ignore the rights and freedoms of others. The legal reason for that statement is in Article 30 of the UDHR concerning the limitation of interpretation of the universality of human rights.

Article 30 of the UDHR states that:

*"Nothing in this Declaration may be interpreted as implying for any State, group or person **any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.**"*

Article 30 of UDHR means states, groups, or people should not use the universality of human rights as a justification for actions that disregard the rights of others based on 'human rights.' It also means that

⁴⁴ See Article F point 1 Policy on Eligibility for The Men's and Women's Competition Categories, 2022. FINA.

⁴⁵ See Article F point 4 Policy on Eligibility for The Men's and Women's Competition Categories, 2022. FINA.

⁴⁶ Mia Ficsher and Jennifer McClearn, *supra* note 1 at 152.

the UDHR has limited interpretations of using human rights, which have the potential to override the rights and freedoms of a person. International sports competition pertains to the right to freedom for cisgender athletes to compete equally. The acts of transgender people who demand to compete among cis women athletes based on 'human rights' indeed override cisgender rights. Not only is it regulated in Article 30 of the UDHR, but the ICCPR has also limited the interpretation of the rights and freedoms regulated in the Covenant through Article 5, paragraph 1, which reads as follows:

*"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or **at their limitation to a greater extent than is provided for in the present Covenant.**"*

In fact, according to the article, the limitations on the interpretation of rights and freedoms in the ICCPR aim to avoid actions that exceed the limits of the provisions stipulated in the Covenant. There is an emphasis through this article that, indeed, every right and freedom regulated in the ICCPR has limitations so that it cannot arbitrarily justify an action. In international sports, one's rights and freedoms in participating in sports competitions need to be limited so as not to suppress the rights of others.

Concerning the right to compete and participate in sports, it has been conducted in Principle 4 of the Fundamental Principles of Olympism, which states that sport is part of human rights, and everyone can have the opportunity to participate in sports without discrimination of any kind by prioritizing fair play.⁴⁷ This principle creates a perception that a transgender person also has the right to

participate in sports. Although in practicing international sports, organizations such as WA and FINA have formed policies that limit the participation of transgender athletes in participating in sports competitions and are considered a form of discrimination against transgender athletes. However, the truth is that applying discriminatory regulations is necessary proportionately to achieve the bigger goal, namely ensuring an adequate space in sports competitions.⁴⁸

The dilemma between transgender and cisgender athletes and the need to acknowledge the rights of ciswomen athletes could go through the 'prima facie' basis in ensuring fairness and equality in sports competitions.⁴⁹ Prima facie means that if two values are in the same position, then one of them must be chosen to take precedence over the other values. In this matter, the human rights of cisgender athletes need to come first based on practical considerations that precede general goods over individuals. The rights of cisgender people that come first do not mean eliminating the rights of transgender athletes. Nevertheless, based on an overview providing the benefits to the people, such action can be justified to realize the right to fair competition for cisgender athletes.

Actions considered discriminatory in prohibiting transwoman athletes from participating in international sports competitions, as implemented by WA and FINA, are not a violation of human rights. Several cases regarding the prohibition and human rights of transgender athletes have gone through the CAS, such as the case of Caster Semenya v. The IAAF. Through that case, CAS has stated that although the policies of international sports institutions are discriminatory, referring to the currently available evidence, discrimination in

⁴⁷ See Principle 4 of the Fundamental Principles of Olympism.

⁴⁸ See Sport and Human Rights, Overview from A CAS Perspective at 4

⁴⁹ *Ibid.*

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international sports competitions is necessary, reasonable, and proportionate.⁵⁰ The main reason for justifying this action is through evidence proving that the performance advantages of a transwoman athlete originate from biological factors, not the gender identity.⁵¹ It likewise linked historically that sports competitions have separated men and women, emphasizing the human rights of cisgender female athletes as the legal gender binary used by the international community. The basis of this separation is that a man has a physical advantage when competing among women in the same category. Therefore, if a biological man becomes a woman through surgery or identifies his gender as a woman and competes against biological women, it will cause unfairness, especially for cis women athletes. The dominance of transwoman athletes will also threaten the future of cis women athletes if their participation continues to be allowed. CAS believes implementing policies on transgender athletes is a form of protection for cisgender athletes as a form of the integrity of international sports, especially for the women's division. The policy aims to create a fair competition space as one of the main principles of a sports competition. Therefore, to achieve the greater good in creating fair competition rights for ciswomen athletes, implementing a policy prohibiting transgender athletes from competing among cisgender athletes is a must for all international sports institutions.

E. COEXISTENCE OF TRANSGENDER AND CISGENDER ATHLETES: PROVIDING EQUAL INTERNATIONAL SPORTS COMPETITION

The world's rapid development requires that the international community recognize that the concept of binary gender is starting to no longer apply in the world because of the emergence of transgender, non-binary, and other gender identities. The impact of these developments has created a dilemma in international sports competition between the inclusiveness of transgender athletes and fair competition for cisgender athletes, so it requires the right solution in providing equal rights for all athletes without the exception of their gender identity as the fulfillment of their human rights.

In 2021, the International Olympic Committee ("IOC") recognized the dilemma of issues currently occurring in international sports competitions. Based on this, the IOC has issued principles for international sports organizations to address this problem through the *IOC Framework on Fairness, Inclusion, and Non-Discrimination based on Gender Identity and Sex Variations*. The IOC formed the framework to direct sports organizations that carry out international sports competitions to be able to develop new criteria that can be applied in their respective types of sports so that they can still ensure safe, fair, and inclusive competition as well as non-discrimination against gender identity and sex of an athlete. Principle 1 concerning Inclusion states that everyone must be able to participate in sports regardless of gender identity or sex safely, and sports institutions must together recognize and take action to form inclusiveness for all athletes through steps to create a competitive sports environment without discrimination.⁵² In establishing new criteria in sports competition, international sports organizations ought to pay attention

⁵⁰ See para 626, CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations.

⁵¹ See para 560, CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations.

⁵² See Principle 1 Article 1.1-1.3. IOC Framework on Fairness, Inclusion, and Non-Discrimination on the Basis of Gender Identity and Sex Variations, 2021.

to Principle 4 regarding Fairness which contains the following:⁵³

- 1. Provide understanding in related categories that no athlete has an unfair and disproportionate competitive advantage resulting from the transition of one's body outperforming other athletes.**

In applying the new criteria for sports competition, sports institutions need to provide an understanding to every athlete in that category that no athlete has an unfair advantage due to transitioning from cisgender to transgender. This provision aims to eliminate the perception that a transwoman athlete has a performance that tends to be superior to a cis woman athlete. In addition, enforcing this provision will create a fair sports competition for all athletes participating in these new criteria inclusively without limiting one's participation in sports competitions.

- 2. Prevent risks related to the physical safety of other athletes.**

Establishing new criteria in sports competitions outside the women's and men's categories aims to prevent physical protection risks for every athlete. The physical advantages possessed by a transwoman athlete have the potential to harm unfairly ciswoman athletes, causing a sports competition to become unequal. In forming new criteria, especially for sports competitions that require physical contact, it will be equal and safe for cis women athletes and provide the same opportunities for trans women athletes.

- 3. Prevent athletes from claiming a gender identity different from the identity used consistently to enter a particular competition category.**

This provision aims to limit the various genders that exist today. Restrictions on using one's gender identity desire to prevent an athlete who is inconsistent with their gender identity from gaining certain advantages in participating in specific competition categories. By creating restrictions on gender identity, it will make equal competition for all athletes and the integrity of the sports competition.

Through these principles, the IOC has stated that everyone has the right to participate in sports without discrimination and respect their rights and dignity as human beings. The IOC hopes to create a fair and safe sports competition space for every athlete, especially in the women's sports competition category.

According to the Framework on Fairness, Inclusion, and Non-Discrimination based on Gender Identity and Sex Variations from the IOC, the establishment of a new category for international sports competitions can be a solution to address the problem of inclusiveness of trans women athletes and unfair competition for cis women athletes. This solution can be the best and most balanced approach, especially to solve the issues by prohibiting the participation of transgender athletes from competing with cisgender athletes by forming a new category in international sports competitions. This category is an 'open category' that aims to provide an opportunity for any athlete who wants to participate in international sports competitions without exception, including gender identity, especially transgender athletes. The development of an 'open

⁵³ See Principle 4 Article 4.1. IOC Framework on Fairness, Inclusion, and Non-Discrimination on the Basis of Gender Identity and Sex Variations, 2021.

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category' in international sports competitions can create inclusivity for athletes who are not cisgender, such as transgender, non-binary, genderqueer, and other existing genders.⁵⁴

The solution to creating an 'open category' should have been implemented by all international sports competition organizations, such as FINA, which have attempted to implement this new category. In the FINA Inclusion Policy part G regarding Competitive Opportunities Within and Outside of the Men's and Women's Categories, Article 6 conducts the solution that in the future, FINA will develop a new category, which reads as follows:

*"Athletes who do not meet the applicable criteria for the men's category or the women's category **may compete in any open events that FINA may develop in the future.** FINA will begin work following the final promulgation of this Policy to determine the feasibility of **establishing an open category in Aquatics sport disciplines, in which an athlete who meets the eligibility criteria for that event would be able to compete without regard to their sex, their legal gender, or their gender identity.**"*

Based on these provisions, FINA has endeavored to provide equal opportunities in aquatic sports for all athletes regardless of gender, legal gender, and gender identity. Efforts to establish an 'open category' can create inclusivity for all athletes, especially transgender, and ensure competitive fairness for cisgender athletes. The steps taken by FINA are the best steps to address this problem, and other international sports

organizations should implement similar measures taken by FINA. In addition, creating an 'open category' is the best way to provide fair opportunities for all female athletes without excluding gender identity, DSD traits, and other things that give a female athlete more performance advantages than an average woman. This category will benefit both groups, namely protecting the safety and competitive fairness for cis women athletes and providing opportunities to participate in sports competitions for transwomen athletes.

On the other hand, creating new categories in sports competitions can be considered the same reason as separating types between men and women. The direct purpose of separating the classes of women and men is to provide fair and meaningful competition for female athletes. Establishing a new category that separates transwomen athletes and ciswomen athletes is not necessary if, indeed, the participation of a transwoman athlete does not change equality in the women's division of sports competition.⁵⁵ However, the truth is that scientific evidence has proven that there are several physiological advantages that transwoman athletes cannot reduce for the sake of equality in competing among ciswoman athletes. The further reason for separating the categories is because of the biological differences between a woman and a man, which show that there is a dominance in performance and physiology that a man

⁵⁴ Reynolds, Allie and Hamidian Jahromi. "Transgender Athletes in Sports Competitions: How Policy Measures Can Be More Inclusive and Fairer to All." *Frontiers in Sports and Active Living*, vol. 3, 14 July 2020, p.3.

⁵⁵ Harper, Joanna, Martinez-Patino, Maria-Jose, Pigozzi, Fabio MD, Pitsiladis, Yannis "Implications of a Third Gender for Elite Sports." *Current Sports Medicine Reports* Vol. 17, No. 2, 2018, p. 43.

has.⁵⁶ These reasons show that performance advantages in sports are determined by a person's physical body, not by gender identity. If related to the dilemma in this problem, then a transwoman athlete who is biologically male will certainly have an unfair competitive advantage against a cis woman athlete. Hence, with the establishment of a new category, it is hoped that it can provide adequate sports competition for each 'gender' and the opportunity to compete proportionally with the biological standards of each 'gender.'

F. CONCLUSION

Based on Article 2 of the UDHR, everyone has the right to freedom and human rights including transgender people. However, the fact is that the human rights linked to transgender people require a form of internationally binding standardization because not all international communities can accept the presence of transgender and LGBT+ communities. By establishing human rights standards for LGBT+ people, each country can ratify them under the norms adopted by each country. The impact of human rights standardization would provide the inherent rights that LGBT+ people have as human beings; such discrimination and violations of human rights should be eliminated for LGBT+ people. The intention of giving these human rights cannot be interpreted as special rights but to respect them equally to obtain peace and equality. However, developing the standardization requires a thorough analysis due to the complexity of their existence. This means

that the LGBT+ community will receive human rights while following specific rules to ensure the impact they could have on the international community. In international sports, transgender as part of the human community has the right to participate in sports competitions. However, this right should also respect others' rights and freedoms, such as the right to fair competition, since, compared to biological females, trans women athletes have a different physical appearance that will benefit them from winning the competitions.

Studies and research prove that a transwoman athlete has a performance advantage because her testosterone level is higher than a ciswoman. These advantages make international sports competitions unfair for cis women athletes. In its development, international sports institutions such as WA and FINA have established policies prohibiting the participation of transgender athletes, especially trans women who have experienced male puberty in international sports competitions. This policy is not discriminatory practice because ciswomen athletes have the right to compete equally and safely with individuals who use the same gender identity assigned at birth. In addition, based on the current available evidence, CAS believes that discrimination in international sports competitions is necessary and reasonable to achieve the primary goal of the sport itself, namely fairness in competition.

The solution to this problem is to forbid the participation of transgender athletes in competing with cisgender for all International sports competitions by establishing an 'open category' for

⁵⁶ See para 558, CAS 2018/O/5794 Mokgadi Caster Semenya v. International Association of Athletics Federations.

international sports competitions to create equal and fairly competitive opportunities. The new category is the most suitable way to approach this issue and satisfy both parties because the competitions are open to all sex and gender identities with equitable classification. The IOC has recognized it through the Framework on Fairness, Inclusion, and Non-Discrimination based on Gender Identity and Sex Variations. One of the international sports institutions, FINA, has already begun to attempt this solution and should be followed by all other international sports organizations to create equal opportunities for participating in international sports competitions.

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