Broadening Protections? The European Court of Human Rights' Discourse on Gender-Based Violence against Trans and Intersex Persons

Giovanna Gilleri
Postdoctoral Research Fellow
Department of Legal, Language, Interpreting and Translation Studies
University of Trieste

Erika Miyamoto
Postdoctoral Research Fellow
Department of Political and Social Sciences
Forlì Human Rights Interdisciplinary Center
University of Bologna

This paper is included in *The Italian Review of International and Comparative Law* 2/2025, 331-362. ISSN 2772-5642 | EISSN 2772-5650.

1. Introduction[1]

International human rights law, as any specialized regime, has its own jargon. Speaking "human rights" means sharing the same instruments of knowledge, and the knowledge to understand them. On the one hand, indeed, the language of human rights provides its users

[1]In line with the interdisciplinary nature of GenDJus project, this paper was conceived as a joint work. However, to meet the Italian academic requirements, the writing process has been divided in the following way: Erika Miyamoto authored Sections 2.1, 3.2 and 4.2, while Giovanna Gilleri wrote Sections 2.2, 3.1 and 4.1. Introduction and Conclusion are co-authored. We wish to thank Carmelo Danisi, Nuno Ferreira, Gianluca Pontrandolfo and Chiara Sarni for their comments on an earlier draft of this paper. We are grateful to the participants of the 'GenDJus International Experts Seminar' (University of Sussex, 31 January 2025), as well as those of the two international conferences where this research was presented, namely the 'XXI Conference of Young Scholars of International Legal Studies: The Use of Human Rights Language in International and EU Law' (University of Trento, 5-6 December 2024) and 'Feminist Approaches to Human Rights' (University of Palermo, 5-6 December 2024). Any mistakes are our own. This paper is part of the interdisciplinary research project 'Rights and Prejudice: Linguistic and Legal Implications of Gendered Discourses in Judicial Spaces (GenDJus)' [P2022FNH9B / CUP J53D23017220001] financed by the Italian Ministry of Education and the European Union (Next Generation EU funding scheme); Piano Nazionale di Ripresa e Resilienza (PNRR) – Missione 4 "Istruzione e ricerca" – Componente 2 "Dalla ricerca all'impresa" - Investimento 1.1, Avviso Prin 2022 PNRR indetto con Decreto Direttoriale n. 1409 del 14 settembre 2022: https://www.gendjus.it..

with the means to communicate and express concepts rooted in the field of human rights. On the other hand, embracing the vocabulary of human rights implies adopting a specific lens to scrutinize reality, and thereby interpret it. "Human rights" is not only a specific discipline of international law or a system of sources deployed by many actors, but it is also a way to look at, and be in, the world.[2] As a specialized regime, "human rights" manages specific types of problems by specific techniques and in view of specific objectives according to a shared ethos.[3] As a tool of knowledge, "human rights" carries a language which constitutes a mode of exploration of past and present circumstances, and future expectations, that influences itself the way in which the information is transmitted.[4] In other words, if we decide that we discuss human rights – premises, norms, practices, implications – we should assume that we have shared values underlying the language that helps us read reality through a specific lens. That the view through this lens may be distorted is a different story.[5]

Specialized regimes are like matryoshkas: inside a specialized regime lies another specialized regime – there is no end to (sub-)specialization. This paper addresses one of these matryoshkas: that of *gendered* human rights, which refers to the ways in which human rights law both reflects and reinforces social constructions of gender.[6] These constructions shape whose suffering is recognized, whose dignity is protected, and whose bodies are rendered visible or invisible under legal scrutiny. Human rights are *gendered* because they are determined in their interpretation and application by gender-based dynamics, including

[2] Martti Koskenniemi refers to this as "doubling" (*Verdoppelung*), the mechanism whereby "an instrument of knowledge is reconceived as the object of knowledge": KOSKENNIEMI, *The Gentle Civilizer of Nations the Rise and Fall of Modern International Law 1870-1960*, Cambridge, 2001, p. 242.

[3] On the bureaucratization of the administration of justice, see COHEN, "Judges or Hostages? The Bureaucratization of the Court of Justice of the European Union and the European Court of Human Rights", in DAVIES and NICOLA (eds), *EU Law Stories*, Cambridge, 2017, p. 58 ff.

[4] KOSKENNIEMI, "The Fate of Public International Law: Between Technique and Politics", *The Modern Law Review*, 2007, p. 1 ff., pp. 1-32.

[5] KENNEDY, "The International Human Rights Movement: Part of the Problem?", *Harvard Human Rights Journal*, 2002, p.101 ff., pp. 101-125.

[6] Among others, CHARLESWORTH, "Feminist Critiques of International Law and Their Critics", *Third World Legal Studies*, 1994, p. 1 ff.

implicit biases in judicial reasoning, the normalization of cis-heteronormative identities, and the prioritization of certain forms of victimhood that align with dominant gender roles [7]. This is particularly evident in the way in which the European Court of Human Rights ("ECtHR" or "the Court") speaks "human rights" in two decisions on trans and intersex rights: *X and Y v. Romania*[8] and *Caster Semenya v. Switzerland*[9] respectively. In both judgments, while the Court recognized the violations, it has nevertheless perpetuated standardized configurations of gender power differentials. Consequently, human rights require a gender-sensitive reading through the lens of gender-focused theories. This study is a critical endeavour inspired by feminist and queer methods[10], that are used to dismantle binary configurations of gender identity, sex characteristics and sexual orientation, along with the patriarchal assumptions of international law. All this implies that studies on gender relate to a whole range of subjective postures concerning personal identifications, sexual and romantic interactions, as well as variety of sexed bodily features. Indeed, this enquiry is part of a broader jurilinguistic project on gender-based prejudices, biases and stereotypes embedded in the discourse of national, supranational, and international courts.[11] The aim of this paper is, indeed, to find some silences in the ECtHR's reasoning while connecting them to the stereotyped conceptions of gender relations embedded in the mainstream human rights discourse.

The ECtHR was conceived with human rights as its primordial and foundational language. It is a human rights institution, working with human rights as its legal frame, deciding based on human rights as its technical vocabulary, and living through human rights

---

[7] ibid.
[8] *X and Y v Romania*, Application No. 2145/16 and 20607/16, Chamber, Judgment of 19 April 2021.
[9] *Semenya v Switzerland*, Application No. 10934/21, Chamber, Judgment of 11 July 2023.
[10] *Inter alia*, OTTO (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks*, London and New York, 2018; FINEMAN, JACKSON and ROMERO (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, London and New York, 2009; GILLERI, *Sex, Gender, and International Human Rights Law: Contesting Binaries*, London and New York, 2024;
[11] More information on the methods and objectives of the interdisciplinary research project "Rights and Prejudice: Linguistic and Legal Implications of Gendered Discourses in Judicial Spaces (GenDJus)", *cit. supra* note 1, can be found at https://www.gendjus.it.

as its existential agenda. Over the decades, gender has entered this jargon as an analytical category, offering the Court an additional tool to grasp the socio-cultural dynamics underlying human rights breaches.[12] In fact, the ECtHR has played a significant role in addressing gender-based violence (GBV) through its interpretation of various provisions, including Articles 2 (right to life), 3 (prohibition of torture), and 14 (prohibition of discrimination). The Court's evolving jurisprudence reflects a growing recognition of GBV as a human rights violation, as upheld in landmark cases such as *Opuz v. Turkey*, where the ECtHR decided to examine the circumstances through the prism of Article 14, even if other violations had already been found.[13] For instance, the ECtHR has extended its interpretation to protect women from violence rooted in gender discrimination.[14] In this context, the interplay between the ECtHR's case law and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ("Istanbul Convention")[15] may enable the Court, as we additionally propose in this paper, to broaden its vocabulary on GBV, recognizing violence against trans and intersex individuals as falling within the same human rights framework. The Istanbul Convention, in force since 2014, complements the ECtHR's efforts by explicitly addressing violence against women and domestic violence. Article 3(c) of the Convention defines "gender" as the socially constructed roles, behaviors, and attributes that society considers appropriate for women and men. This definition is crucial for extending protections beyond the binary understanding of gender,

[12] *J.L. v Italy*, Application No. 5671/16, Chamber, Judgment of 27 May 2021; *Konstantin Markin v Russia*, Application No. 30078/06, Grand Chamber, Judgment of 22 March 2012; *E.B. v France*, Application No. 43546/02, Grand Chamber, Judgment of 22 January 2008.
[13] *Opuz v Turkey*, Application No. 33401/02, Chamber, Judgment of 9 June 2009, para. 202; see DANISI, "How Far Can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in Its Nondiscrimination Jurisprudence", *International Journal of Constitutional Law*, 2011, p. 798 ff., p. 799.
[14] RISTIK, "Protection from Gender-Based Violence before the European Court of Human Rights", *Journal of Liberty and International Affairs*, 2020, p. 71 ff., pp 71-88.
[15] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 ("Istanbul Convention").

which historically focused on violence against women, to include also gender-based discrimination affecting trans and intersex individuals.

Indeed, while gender has been intended for a long time as synonymous with women,[16] queer feminist scholars have progressively debunked the myths surrounding it. Namely, that gender is women's affair; that a gender analysis does not benefit men; that gendered power relations assume women's subordination by men; that gendered discourse cannot harm men; and that men and women exhaust the possibilities of gendered subjects.[17] Relying on feminist and queer literature, this research shows the limitations of the ECtHR's language in framing abuses against intersex and trans persons. Unfolding some of the above narratives, this paper explores *X and Y* and *Semenya* from the perspective of GBV and intersectional discrimination. It demonstrates that "gender" in the Court's vocabulary remains relegated to women only, with *other* gendered violations, such as those targeting trans (*X and Y*) and intersex (*Semenya*) people, remaining therefore unspeakable through the grammar of gender. Discrimination is invisible in the Court's discourse on the violation suffered by X and Y in relation to the imposition on two trans men of medical intervention as a requirement for legal gender recognition. Instead, in *Semenya,* the Court recognized a violation of the prohibition of discrimination on the basis of sex, but it did not delve into the intersectional nature of the infringement – discrimination and violence against an *intersex woman* from the *Global South*.

Following this Introduction, the paper first presents the circumstances and the relevant legal profiles of *X and Y*, as well as *Semenya* (Section 2). It then explains the two major loopholes in the Court's gendered human rights grammar, i.e. the lack of a gender frame in

---

[16] OTTO, "International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry", in DAVIES and MUNRO (eds), *The Ashgate Research Companion to Feminist Legal Theory*, London and New York, 2013, p. 197 ff.

[17] See, *inter alia*, HALLEY, *Split Decisions: How and Why to Take a Break from Feminism*, Princeton, 2006; GILLERI, "Human Rights' Harmful and Harmless Gendered Outlaws", in PAIGE and O'HARA (eds), *Queer Encounters with International Law*, p. 153 ff.; FINEMAN, "Introduction: Feminist and Queer Legal Theory", in FINEMAN, JACKSON and ROMERO (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, London and New York, 2009, p. 1 ff.

the recognition of ill-treatment and the missing interpretive layer of intersectional discrimination (Section 3). We identify possible reasons for this silence in the Court's overall conception of gender, demonstrating first why the Court is unable to pronounce the word "gender" in intersex- and trans-related cases and then what interpretive leap reference to the Istanbul Convention may trigger (Section 4). We conclude that for the Court to protect the rights of intersex and trans people – and any other gendered subject – to be free from gender-based discriminatory ill-treatment, it will need to fully embrace the language of *gendered* human rights.

2. The Decisions in a Nutshell

As a preliminary step, we summarize below the circumstances of *X and Y v. Romania* and *Caster Semenya v. Switzerland*, and we identify the reasons for which these cases address human rights concerns which are crucial for the protection of trans and intersex individuals. A reflection on the language of the ECtHR in these decisions, as well as its impact on trans and intersex rights, will follow in the subsequent sections, presenting the main elements of the critical analysis of the cases.

2.1. *X and Y v Romania*

In *X and Y v. Romania*, the applicants, two transgender men, sought legal gender recognition in Romania. Both had lived as men from a young age and had taken steps toward social and medical transition.[18] However, their efforts to amend their legal gender markers, forenames, and national identification numbers were met with resistance from Romanian courts, which tied legal gender recognition to medical procedures such as gender-affirming surgery. The first applicant only sought legal recognition of his gender identity, while the second applicant

[18] *X and Y* case *cit. supra* note 6, paras. 4-11 and 34-37.

additionally requested permission to undergo gender-affirming surgery.[19] The Romanian courts, on the basis of the ECtHR jurisprudence, had required proof of gender-affirming surgery before granting legal recognition of the applicants' gender.

In the case of the first applicant, after Romanian courts denied his request for legal gender recognition, he left Romania and eventually moved to the UK, where he received a Gender Recognition Certificate. However, his Romanian ID continued to identify him as female, causing significant administrative and professional difficulties abroad.

The second applicant initially requested permission to undergo gender-affirming surgery alongside his request for gender recognition. After initial complications, the second applicant ultimately underwent surgery, following which Romanian courts granted legal gender recognition. Notably, the second applicant had Turner syndrome, which classifies them as intersex. Without delving into this detail, the ECtHR nevertheless highlights the close connection between trans and intersex rights, particularly in relation to safeguarding individuals from non-consensual medical interventions. Following the dismissal of their requests by the national courts, X and Y addressed the ECtHR, invoking the violation of Article 3 (prohibition of torture), Article 6 (right to a fair trial), Article 8 (right to respect for private and family life), Article 12 (right to marriage), Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination) ECHR.

The ECtHR analyzed this case primarily through the lens of Article 8 ECHR, by considering two key aspects: the Romanian legal framework for gender recognition and the conformity with human rights of gender-affirming surgery as a precondition for such recognition. The Court noted that while Romanian law permits gender marker changes

[19] *Ibid.*, paras. 12-26 and 38-57.

following a judicial decision, there was no consistent practice across national courts regarding the requirements for such decisions.[20]

The applicants argued that Romania had failed in its negative obligations by requiring surgery for legal gender recognition. However, the ECtHR assessed the case through the state's positive obligations. The Court observed that Romanian law permitted legal gender recognition following judicial approval. Reviewing twenty national decisions, it identified a lack of consistent criteria across courts. While not challenging the requirement of judicial involvement, the Court cited Council of Europe and UN recommendations advocating for gender recognition procedures that are "quick, accessible, and transparent."[21] In light of the divergent domestic rulings, it concluded that the Romanian procedure lacked sufficient transparency.[22] Moreover, the Court addressed the requirement for gender-affirming surgery and, while acknowledging the importance of accurate civil records, emphasized the need to balance this with the individual's right to legal recognition of their gender identity.[23]

Here, the ECtHR compared the applicants' situation to similar cases such as *A.P., Garçon, and Nicot v. France*,[24] where the Court had ruled against the requirement of sterilization as a precondition for gender recognition. Although in the present case the Court did not focus on sterilization specifically, it similarly raised concerns about the invasiveness of medical procedures and their impact on a person's physical integrity. The Court held that forcing individuals to undergo such surgeries placed them in an "impossible dilemma,"

[20] *Ibid.*, para. 157.
[21] *Ibid*., paras. 51, 81, and 168. The Court cited, for example, Resolution 2048 of the Council of Europe Parliamentary Assembly adopted on 22 April 2015 and UN General Assembly's Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152) published on 12 July 2018.
[22] *Ibid*.
[23] *Ibid.*, paras. 145-149.
[24] *A.P., Garçon, and Nicot v France*, Application No. 79885/12, 52471/13 and 52596/13, Chamber, Judgment of 6 April 2017.

according to which they had to choose between their right to physical integrity and their right to gender recognition.[25]

The ECtHR noted that Romania had failed to provide any public interest justification for imposing such an invasive requirement, leaving the applicants in a state of prolonged vulnerability and distress. Considering European trends away from invasive medical requirements, the Court found no justification for Romania's stance. Consequently, the ECtHR concluded that the requirement for gender-affirming surgery violated Article 8 of the Convention.

By recognizing the undue burden placed on individuals who are required to undergo medical procedures in order to have their gender legally recognized, the decision in *X and Y v. Romania* reflects an important step toward more inclusive gender recognition policies. The ruling has critical implications for trans and intersex individuals in Romania and across Europe, as it affirms that legal recognition should not be contingent on undergoing surgery that may be unnecessary, unwanted, or unattainable. It also serves as a vital reminder of the importance of protecting physical integrity and respecting individuals' right to self-identify without imposing invasive medical procedures as legal conditions.

However, the outcome of *X and Y v. Romania* is not entirely favorable. Despite the progress made, true self-determination for transgender individuals in the realm of legal gender recognition remains a distant goal,[26] as well as the depathologization of the path leading to that recognition itself.[27] Trans existences remain invisible at worse, or recognisable

---

[25] *X and Y* case *cit. supra* note 6, para. 165.

[26] BOB, "*X and Y v Romania*: A Partial Solution to an Impossible Dilemma?", *OER Osteuropa Recht*, 2022, p. 438 ff., pp. 438-452. See also MOSS, "No XY chromosome? Europe's Tumultuous Relationship with Gender Difference Laid Bare in *X and Y v Romania*", *Australian International Law Journal*, 2021, p. 219 ff., pp. 219-227.

[27] BASSETTI, "Human Rights Bodies' Adjudication of Trans People's Rights: Shifting the Narrative from the Right to Private Life to Cruel and Inhuman or Degrading Treatment", *European Journal of Legal Studies*, 2020, p. 291 ff., pp. 291-325.

for the law only through medicalized processes at best. Eventually, trans people have a name only subject to the satisfaction of externally-imposed medico-legal criteria.

Moreover, as we will argue below,[28] the Court decided not to conduct a separate analysis of the case under the other articles raised by the applicants, notably Article 14, which could have provided a more comprehensive examination of the issues at hand considering the discriminatory nature of the violation.

2.2. *Caster Semenya v Switzerland*

In the second case considered in this study, *Semenya v Switzerland*, the ECtHR dealt with gender categorizations in high-level sport competitions. South African runner Caster Semenya, internationally well-known for her records in middle-distance races (800 to 3000 m), complained about the International Association of Athletics Federations' (IAAF) – currently World Athletics' – "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)"[29] (DSD Regulations) requiring her to decrease her testosterone levels in order to be able to participate in international competitions in the female category. Semenya was therefore facing a dilemma: either to accept to undergo a hormone treatment or to abandon international competitions. Having refused the former, she was no longer able to compete internationally. Semenya's legal actions challenging the DSD Regulations before an arbitral panel of the Court of Arbitration for Sport (CAS),[30] which has its seat in Lausanne and, on appeal, the Swiss Supreme Federal Tribunal,[31] were rejected. More precisely, the CAS dismissed Semenya's request for arbitration, finding, quite

[28] See *infra* Section 3.
[29] World Athletics, 'Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (DSD Regulations)' (2018).
[30] Court of Arbitration for Sport: *Caster Mokgadi Semenya and Athletics South Africa v International Association of Athletics Federations*, CAS 208/O/5794 and CAS 2018/O/5798, Award of 30 April 2019.
[31] Federal Supreme Court of Switzerland, *A. v. International Association of Athletics Federations (IAAF) & Athletics South Africa (ASA)*; *Athletics South Africa (ASA) v. A. & International Association of Athletics Federations (IAAF)*, Cases 4A_248/2019 and 4A_398/2019, Judgment of 25 August 2020.

paradoxically, that the DSD Regulations were discriminatory but necessary, proportionate and reasonable to meet the legitimate aim of the IAAF – ensuring fair competition. The Swiss Federal Court upheld the CAS' decision. Due to the limitedness of its power of review in the area of international arbitration, it also noted that its powers were restricted to evaluating whether the CAS award was incompatible with commonly-held principles of public policy[32] – and it found no incompatibility.

Semenya, therefore, approached the ECtHR, alleging that she had been subjected to discriminatory treatment on the basis of her DSD, resulting in a naturally higher level of testosterone (Article 14 in conjunction with Article 8). She further complained about the violation of her right to an effective remedy owing to the Swiss Federal Court's limited power of review (Article 13) in relation to the prohibition of inhuman or degrading treatment (Article 3), the right to a fair hearing (Article 6), the right to private life (Article 8) and the rights to non-discrimination (Article 14). The Court found a violation of the prohibition of discrimination (Article 14) in conjunction with the right to respect for private life (Article 8) and a violation of the right to an effective remedy (Article 13). Accordingly, the Third Section concluded that Switzerland had failed to secure protection to the applicant's right to be free from discrimination and had guaranteed her insufficient institutional and procedural safeguards to have her complaints examined effectively. This chamber judgment was then referred to the Grand Chamber on 6 November 2023.

Semenya has been hailed as a breakthrough for the world of sport and international arbitration.[33] In fact, the ECtHR was asked to evaluate, for the first time in sports arbitration, the violation of substantive rights rather than procedural ones – another "first time" for the

[32] CHANDA and SAHA, "An Analytical Study of the Human Rights Concerns before the CAS with Reference to Caster Semenya", *The International Sports Law Journal*, 2022, p. 314 ff., pp. 314-331.
[33] ANTHONY, "Caster Semenya's Victory at the ECHR: A Landmark Case for Athletes' Human Rights", Law in Sport, 27 October 2023, available at <https://www.lawinsport.com/topics/item/caster-semenyas-victory-at-the-echr-a-landmark-case-for-athletes-human-rights>.

judgment.[34] Something has radically changed in practice in the sport arena: sport federations must conform with the Convention while issuing their regulations, so that these are not overturned in possible subsequent proceedings before the CAS, where human rights standards apply.[35]

Behind these disruptive – and for some arguable[36] – jurisdictional implications lies a landmark decision for the rights of intersex athletes and people. All that glitters isn't gold, however. "Caster Semenya won her case, but not the right to compete,"[37] Human Rights Watch declared. Why? Because Semenya can pursue her legal battle, but, at the time of writing in March 2025, World Athletics has publicly refused to suspend the DSD Regulations.[38] Besides the World Athletics' attitude nullifying in practice the judicial achievement, the judgment itself has some limitations. As the next Section will demonstrate, the ECtHR should have problematized two aspects of the infringements. First, the

[34] How could a South African national (Caster Semenya) challenging the validity of regulations issued by a private entity located in Monaco (IAAF/World Athletics) turn to the ECtHR? The answer of the Third Section is that the Convention applies to horizontal relationships between individuals and entities with no direct connection to Switzerland, because the Switzerland Federal Tribunal is the appellate court for the CAS' arbitral awards, and Switzerland becomes a protector of human rights in global sports. That the possibility to challenge a CAS decision before the Swiss Federal Tribunal justifies the nexus between the case and Switzerland had already been specified in *Mutu and Pechstein v Switzerland*: *Mutu and Pechstein v. Switzerland*, Application Nos. 40575/10 and 67474/10, Chamber, Judgment of 2 October 2018. There, the Court explained that its jurisdiction follows from this nexus. From a human rights perspective, this reasoning makes sense because otherwise professional athletes would be left without protection should their complaints be rejected by the CAS as the only body competent for this type of disputes resolution. The greater consequence is the ECtHR's unprecedented global reach, with *Semenya* providing the ECtHR with an expanded jurisdiction over any regulations adopted by international sports bodies and challenged before the CAS. A consequence that was criticized in the dissenting opinion: "the majority has dramatically expanded the reach of this Court to cover the whole world of sports. Such an expansion can only be done on very sound legal grounds, which in our view are not present": *Caster Semenya v. Switzerland*, Application No. 10934/21, Judgment of 11 July 2023, dissenting opinion of Judges Grozev, Roosma and Ktistakis, para. 122. On the purported extraterritoriality of *Semenya*, see THIN, "The Questionable 'Extraterritoriality' of Switzerland's Jurisdiction in the Semenya Case (ECtHR)", EJIL: Talk!, 13 June 2024, available at: <https://www.ejiltalk.org/the-questionable-extraterritoriality-of-switzerlands-jurisdiction-in-the-semenya-case-ecthr>.

[35] WIATER, "A Human Rights Breakthrough in Sports Law? The ECtHR Chamber Judgment in *Semenya v. Switzerland*", Verfassungsblog, 26 July 2023, available at: <https://verfassungsblog.de/a-human-rights-breakthrough-in-sports-law>.

[36] REID and WORDEN, "Caster Semenya Won Her Case, But Not the Right To Compete", Human Rights Watch, 18 July 2023, available at: <https://www.hrw.org/news/2023/07/18/caster-semenya-won-her-case-not-right-compete>.

[37] *Ibid.*,

[38] World Athletics, "Press Release", 11 July 2023, available at: <https://worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023>. See JAMES, "A Victory for Caster Semenya – but Still No Right to Compete", *The International Sports Law Journal*, 2023, p. 149 ff., pp. 149-150.

intersectional matrix of the discrimination, based on the interaction of multiple axes of hierarchical subordination. Second, the gendered nature of the degrading and inhuman treatment. Similar conceptual lacunae are present in *X and V v. Romania* – we are now going to scrutinize these restraints in the Court's human rights vocabulary.

3. Some Implications of the Court's Gendered Discourse

The discourse of the ECtHR in the two decisions examined in this paper is characterized by many conceptual gaps. What we call "silences" are two human rights frames that are missing in the Court's discourse. The first silence is ill-treatment as a possible violation – according to us and certain dissenting opinions – and particularly discriminatory ill-treatment based on gender. The second silence concerns the existence of discrimination and its nature.

3.1. The Lack of a Gender Lens in Ill-Treatment

In both cases examined in this paper, severe psychological and physical harm inflicted on certain individuals because of their sex characteristics (*Caster Semenya*) or gender identity (*X and Y*) is not framed as ill-treatment on the basis of gender.

Starting from *X and Y v. Romania*, the Court highlighted significant progress in the legal recognition of transgender individuals. However, it also underscores the absence of a gender-sensitive approach in addressing ill-treatment, particularly under Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment—though it did acknowledge the invasive nature of the surgery and the resulting period of "vulnerability, humiliation and anxiety".[39]

[39] *X and Y* case *cit. supra* note 6, para. 165.

While the inderogable nature of Article 3 is (almost)[40] widely accepted, the provision remains one of the most difficult norms of the Convention to interpret, due to the contested meaning of the proscribed actions.[41] As is well-known, the interpretive work of the Court has clarified that Article 3 requires that the conduct should reach a minimum threshold of severity for it to fall under the scope of the provision.[42] The minimum level of severity test is relative, depending on the circumstances of the case, including the physical and psychological effects of the treatment, its duration, the sex, age and state of health of the victim.[43] The Court may rely on additional elements such as the purpose, motivation or intention of the ill-treatment,[44] the context where the ill-treatment was inflicted and, where applicable, the vulnerable situation of the victim.[45]

Starting from *Bouyid v. Belgium*,[46] severity is now accompanied by the criterion of necessity. In *Bouyid*, where the Court was asked to judge whether slaps inflicted on a minor and an adult in police custody were in breach of Article 3, the Grand Chamber adopted a new principle, that has been applied in the subsequent case-law.[47] According to this principle, any

[40] Debates on the absolute character of the prohibition seem to have concluded: MAVRONICOLA, "Is the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment Absolute in International Human Rights Law? A Reply to Steven Greer", *Human Rights Law Review*, 2017, p. 479 ff., pp. 479-498; GREER, "Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law? A Reply to Graffin and Mavronicola", *Human Rights Law Review*, 2018, p. 297 ff., pp. 297-307.

[41] CASSESE, "Prohibition of Torture and Inhuman or Degrading Treatment or Punishment", in MACDONALD, MATSCHER and PETZOLD (eds), *The European System for The Protection of Human Rights*, Leiden, 1993, p. 225 ff.

[42] Yet the intensity of the pain or sufferance inflicted as the criteria for distinguishing torture from cruel, inhuman and degrading treatment has been challenged by many: NOWAK and MCARTHUR, "The Distinction Between Torture and Cruel, Inhuman or Degrading Treatment", *Torture*, 2006, p. 147 ff., pp. 147-151.

[43] *Muršić v Croatia*, Application No. 7334/13, Grand Chamber, Judgment of 20 October 2016, para. 97.

[44] Although, as the Court stressed, the absence of any intention to harm or humiliate a person cannot exclude a violation of Article 3: *Nicolae Virgiliu Tănase v Romania*, Application No. 41720/13, Grand Chamber, Judgment of 25 June 2019, para. 122.

[45] *Khlaifia and Others v Italy*, Application No. 16483/12, Grand Chamber, Judgment of 15 December 2016, para. 160.

[46] *Bouyid v Belgium*, Application No. 23380/09, Chamber, Judgment of 28 September 2015, paras. 100–101.

[47] Inter alia, *A.P. v Slovakia*, Application No. 10465/17, Chamber, Judgment of 28 January 2020, para. 62; *Pranjić-M-Lukić v Bosnia and Herzegovina*, Application No. 4938/16, Chamber, Judgment of 2 June 2020, para. 82; *Zakharov and Varzhabetyan v Russia*, Application Nos. 35880/14 and 75926/17, Chamber, Judgment

conduct by law enforcement officers *vis-à-vis* a person that diminishes human dignity constitutes a violation of Article 3 – and dignity, as we will see shortly, is essential for the respect of the right.[48] The principle applies especially to the use of physical force against an individual where it is not made strictly necessary by their conduct.[49] In this way, the introduction of "necessity" does not replace the severity test that still operates where the treatment took place when the applicant was wholly under the control of the state agents and the Court also wishes to characterize the treatment as inhuman treatment or torture.[50]

The Court has repeatedly stated that the prohibition of ill-treatment is a "value of civilization closely bound up with respect for human dignity" and "respect for human dignity forms part of the very essence of the Convention […] alongside human freedom."[51] However, it has nevertheless struggled to develop a sophisticated understanding of the dignity of trans and intersex existences. For the Court to express a more genuine understanding of the latter, it should evaluate these identities and the situation of coercion among the relevant circumstances of the case to be taken into consideration in the severity threshold test, as we will show below. We therefore maintain that ill-treatment on the basis of gender identity,

---

of 13 October 2020, paras. 70–74; *Roth v Germany*, Application Nos. 6780/18 and 30776/18, Chamber, Judgment of 22 October 2020, para. 72; *Navalnyy and Gunko v Russia*, Application No. 75186/12, Chamber, Judgment of 10 November 2020, paras. 43–48; *Ilievi and Ganchevi v Bulgaria*, Application Nos. 69154/11 and 69163/11, Chamber, Judgment of 8 June 2021, paras. 58–62.

[48] MAVRONICOLA, "*Bouyid v. Belgium*: The 'Minimum Level of Severity' and Human Dignity's Role in Article 3 ECHR", *Cyprus Human Rights Law Review*, 2020, p. 12 ff., pp. 12-13.

[49] *Bouyid* case, *cit. supra* note 44, para. 101.

[50] See *Yusiv v Lithuania*, Application No. 55894/13, Chamber, Judgment of 4 October 2016, paras. 61–62; *R.R. and R.D. v Slovakia*, Application No. 20649/18, Chamber, Judgment of 1 September 2020, paras. 160–161; *M.B. and Others v Slovakia (no. 2)*, Application No. 45322/17, Chamber, Judgment of 1 April 2021, para. 74; *Lapunov v Russia*, Application No. 28834/19, Chamber, Judgment of 12 September 2023, paras. 107–110. Yet this is the concern expressed by the dissenting judges in their separate opinion – that the majority's judgment "may impose an unrealistic standard by rendering meaningless the requirement of a minimum level of severity for acts of violence by law-enforcement officers": *Bouyid v Belgium*, *cit. supra* note 44, Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para. 7.

[51] *Pretty v the United Kingdom*, Application No. 2346/02, Chamber, Judgment of 29 April 2002, para. 65; *Svinarenko and Slyadnev v Russia*, Application Nos. 32541/08 and 43441/08, Grand Chamber, Judgment of 17 July 2014, para. 118; *Bouyid* case, *cit. supra* note 44, para. 81. See also *Vinter and Others v the United Kingdom*, Application Nos. 66069/09, 130/10 and 3896/10, Grand Chamber, Judgment of 9 July 2013.

including the imposition of medical procedures such as gender-affirming surgery, should be recognized as a form of inhuman or degrading treatment.

In the context of *X and Y v. Romania*, the Court acknowledged the applicants' prolonged periods of anxiety, and humiliation but failed to characterize these experiences as violations of Article 3. This omission reflects a broader issue within the Court's case law, where gender-based harm is not adequately framed within the framework of ill-treatment, despite growing international recognition of such harm as inherently linked to gender identity.[52] While the Court emphasized procedural rights under Article 8, it overlooked the severe psychological and physical harm caused by mandatory medical interventions.[53]

The lack of a gendered approach to ill-treatment is surprising since gender identity plays a central role in the experiences of transgender individuals, particularly in contexts where legal recognition and medical requirements intersect.[54] By treating trans harm as a secondary issue or relegating it to procedural rights under Article 8, the Court reinforces trans invisibility, failing to engage with the societal and structural forces that pathologize and marginalize trans identities. In the case of *X and Y v. Romania*, the applicants faced severe psychological distress, anxiety, and humiliation due to the state's legal requirements for gender-affirming surgery. The imposition of such medical interventions as a precondition for legal gender recognition forced transgender individuals into what the ECtHR called an "impossible dilemma": either undergoing invasive surgeries to align their physical characteristics with their gender identity or being denied legal recognition altogether[55]. This dilemma, which severely impacted their mental well-being, was primarily discussed under

---

[52] BASSETTI, *cit. supra* note 25, p. 291.
[53] WINTER *et al*., "Transgender People: Health at the Margins of Society", *The Lancet*, 2016, p. 390 ff., pp. 390-400.
[54] DUNNE, "Legal Gender Recognition in Europe: Sterilisation, Diagnosis and Medical Examination Requirements", *Journal of Social Welfare and Family Law*, 2017, p. 497 ff., pp. 497-500. See also, SZYDŁOWSKI, "Gender Recognition and the Rights to Health and Health Care: Applying the Principle of Self-Determination to Transgender People", *International Journal of Transgenderism*, 2016, p. 199 ff., pp. 191-211.
[55] *X and Y* case *cit. supra* note 6, para. 165.

Article 8 of the Convention, focusing on the right to private life. However, the physical and psychological harm endured due to the state's rigid requirements also raises important considerations under Article 3, which remains inadequately explored through a gender lens.

In failing to fully integrate a gender-sensitive analysis into its consideration of Article 3, the Court missed an opportunity to recognize the unique and severe harm inflicted on transgender individuals when they are forced to choose between their physical integrity and their right to gender recognition. The intervening organizations, including Transgender Europe and ILGA-Europe, highlighted that mandatory medical requirements for gender recognition violate dignity and self-determination, advocating alignment with evolving international standards.[56] While the Court did acknowledge the problematic nature of such requirements under Article 8, it did not extend this reasoning to the realm of Article 3, where the psychological and physical harm could have been framed as ill-treatment based on gender identity.

A gender-sensitive interpretation of Article 3 could transform the legal landscape for transgender individuals by explicitly recognizing the psychological trauma and physical risks they face as forms of inhuman or degrading treatment. In *X and Y v. Romania*, the requirement for gender-affirming surgery was linked not only to physical harm but also to a profound sense of alienation and emotional distress, which should have been recognized as a violation of human dignity under Article 3. This failure to address gender-based harm limits the potential of the Court's judgment to protect transgender individuals from state-imposed ill-treatment comprehensively.

[56] *Ibid.*, paras. 135-139.

Let us move to *Semenya*. Here, the applicant complained that forced medical examinations and hormone treatments without therapeutic purposes severely impacted her physical and psychological integrity.[57]

Yet the ECtHR found the applicant's complaints inadmissible because they were manifestly ill-founded.[58] The motivation is paradoxical: the complaint was ill-founded because Semenya had renounced to compete and therefore was "not actually subjected to any of the medical examinations or treatments."[59] This conclusion contrasts with the Court's case law, precisely *S.P. and Others v Russia*, where it referred to two factors that may amount to ill-treatment: the infliction of psychological suffering (regardless of physical acts of ill-treatment) and the threat of ill-treatment.[60] Further, for the Court, the humiliation and stigmatization allegedly suffered by the applicant did not reach the threshold of severity under Article 3.[61] It is maintained here that the physical changes imposed, accompanied by medical verifications and the psychophysical consequences, make the DSD Regulations regime a form of ill-treatment.

Applied to women athletes with DSD, the DSD Regulations impose the reduction of testosterone levels higher than 5nmol/L for a six-month period prior to competition and thereafter continuously for as long as the athlete wishes to remain eligible.[62] The hormonal eligibility criteria constitute, indeed, a medically unnecessary interference, providing for

---

[57] *Ibid.*
[58] *Ibid.*, para. 217. For some this may constitute a potential question to be assessed by the Grand Chamber in the forthcoming judgment: SHAHLAEI, "The Caster Semenya Judgment of the ECtHR: Why It Should Not be the Final Whistle?", EJIL: Talk!, 25 July 2023, available at: <https://www.ejiltalk.org/the-caster-semenya-judgment-of-the-ecthr-why-it-should-not-be-the-final-whistle/>.
[59] *Semenya* case *cit. supra* note 7, paras. 214-215.
[60] *S.P. and Others v Russia*, Application No. 36463/11 and 10 others, Chamber, Judgment of 2 May 2023, paras. 90–92.
[61] *Semenya* case *cit. supra* note 7, para. 216.
[62] World Athletics, "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (DSD Regulations)" (2018), Section 2.3(b). What has been debated is the scientific foundation of the regulations and the CAS ruling, which are deemed to be based on questionable research findings: see, *inter alia*, MAHOMED and DHAI, "Global Injustice in Sport: The Caster Semenya Ordeal – Prejudice, Discrimination and Racial Bias – Medicine and the Law", *South African Medical Journal*, 2019, p. 548 ff., pp. 548-551.

mandatory medical testing and drug delivery whose benefits for the individual are not clear.[63] Rather, the regime sets out a system of forced checks and treatments that corners athletes who have naturally high testosterone levels but want to compete in the female category. These have to make the "impossible choice"[64] – an analogous expression to the "impossible dilemma" of *X and Y v. Romania* – between accepting to be subject to such treatments or renouncing to compete. Indeed, faced with this complex dilemma, Caster Semenya originally underwent hormone treatment for a certain period, during which she won 800 meters World Championships in 2011 and the Olympic Games in London in 2012 – but side-effects were significant. Semenya stopped the treatment after the CAS had temporarily suspended the IAAF regulations in force at that time (antecedents of the DSD Regulations),[65] in an interim award delivered in the case of Dutee Chand in 2015.[66] Three years later, the IAAF adopted the DSD Regulations, but this time Semenya refused to comply with them.[67]

The genealogy of the harm suffered by Caster Semenya is gendered in nature. It originates first of all from her being a woman. DSD Regulations establish the medicalization of gender providing for medical tests to draw the boundaries of the female category. Gender becomes medicalized when it is the target of medicine-based narratives of truth determining the nature of individuals relying on medical data and assessments.[68] *Semenya* is eloquent in

---

[63] There is no consensus on the opportunity of using testosterone as a predictor of athletic performances: HOLZER, "What Does It Mean to Be a Woman in Sports? An Analysis of the Jurisprudence of the Court of Arbitration for Sport", *Human Rights Law Review*, 2020, p. 389 ff., pp. 389-393.; KRECH, "The Misplaced Burdens of 'Gender Equality' in Caster Semenya v. IAAF: The Court of Arbitration for Sport Attempts Human Rights Adjudication", *International Sports Law Review*, 2019, p. 66 ff., pp. 66-76.

[64] KARKAZIS and CARPENTER, "Impossible 'Choices': The Inherent Harms of Regulating Women's Testosterone in Sport", *Journal of Bioethical Inquiry*, 2018, p. 579 ff., pp. 579-587

[65] For an historical overview of the rules and regulations applied to athletes with DSD in high-level women's sporting events, see CAMPORESI, TEETZEL and OSPINA-BETANCURT, "Conflicting Values, Implicit Norms, and Flawed Evidence: A Critical Review of World Athletics's Eligibility Criteria to Compete in the Women's Category from 2009 to 2024", *The International Sports Law Journal*, 2024, p. 82 ff., pp. 82-96.

[66] Court of Arbitration for Sport, *Chand and AFI v. IAAF*, CAS 2014/A/3759, Interim Arbitral Award, Judgement of 24 July 2015.

[67] *Semenya* case *cit. supra* note 7, paras. 4-14.

[68] 'Medicalization' consists in defining a social phenomenon through medical language, so that it can be categorized, assessed, and treated by standard medical services: CONRAD, *The Medicalization of Society: On the Transformation of Human Conditions into Medical Disorders*, Baltimora, 2007. While medicalization can lead

this sense, with testosterone-suppressing treatment being imposed as an eligibility condition for the athlete to run in the category of "women", so that she can prove she has testosterone levels that are "typical" of "true" women.

There is another element that substantiates the claim that *Semenya* is a case of gender-based ill-treatment: Semenya has certain sex characteristics, therefore the type of suffering she has been subject to is reserved to that specific group of women with certain characteristics, as we will see broadly in the next subsection. This form of discriminatory ill-treatment achieves the minimum level of severity required for an inhuman and degrading treatment to fall within the scope of Article 3. According to the ECtHR's well-established case-law,[69] indeed, the assessment of this threshold depends on many factors,[70] including the duration of the treatment, the connected physical or mental effects, and, in some cases, the age, sex and state of health of the victim.[71] The severity test may rely on other factual circumstances, such as the context (of tensions, emotions, etc…), the potential vulnerability of the victim's situation and the purpose of the ill-treatment, along with the underlying motivation.[72] Notably, to reach such a threshold, the author's will is not relevant for the assessment of the nature of the conduct. For instance, in a case on forced sterilization, *V.C. v Slovakia*, the ECtHR clarified that the conduct attained the threshold of severity even if the medical staff did not intend to ill-treat the applicant.[73] Yet this was not the reasoning embraced by the Court, despite the broad references to the Council of Europe Parliamentary

---

to some beneficial consequences, such as increased access to healthcare, using the language of medicine to describe gendered subjectivities can have negative social effects, such as constructing sexed/gendered identities as deviant, different from the norm, thereby exposing them to further stigmatization. See JOHNSON, "Rejecting, Reframing, and Reintroducing: Trans People's Strategic Engagement with the Medicalization of Gender Dysphoria", *Sociology of Health & Illness*, 2019, p. 74 ff; RUFF, "Trans-cending the Medicalization of Gender: Improving Legal Protections for People Who are Transgender and Incarcerated", *Cornell Journal of Law and Public Policy*, 2018, p. 127 ff., p. 131.

[69] *Identoba and Others v Georgia*, Application No. 73235/12, Chamber, Judgment of 12 May 2015, para. 65.

[70] *Keenan v. the United Kingdom*, Application No. 27229/95, Chamber, Judgment of 3 April 2001, para. 110.

[71] *Muršić v Croatia*, Application No. 7334/13, Grand Chamber, Judgment of 20 November 2016, para. 97.

[72] *Khlaifia and Others v Italy*, Application No. 16483/12, Grand Chamber, Judgment of 15 December 2016, para. 160.

[73] *V.C. v Slovakia*, Application No. 18968/07, Chamber, Judgment of 8 November 2011, paras. 117–119.

Assembly's resolution on GBV and discrimination against women in the world of sport[74] and the connected explanatory memorandum.[75]

Judge Serghides presented a partially concurring and partially dissenting opinion, disagreeing with the majority who found the complaint under Article 3 ill-founded. He argued, instead, for the admissibility of the complaint in the light of the severe physical and psychological harm to her dignity,[76] to be considered, according to his view, cumulatively in its different aspects of discrimination, human dignity, personality rights and privacy.[77] Eventually, Judge Serghides argued that physical and psychological harm to Semenya's dignity warranted admissibility under Article 3, emphasizing the importance of consent.[78]

3.2. The Lack of an Intersectional Lens in Discrimination

Discrimination is neglected in both decisions. In *X and Y*, it is literally absent, while in *Semenya* it is investigated only limitedly, without considering its intersectional nature, i.e. the fact that it is rooted in multifaceted forms of subordination. Let us look closely at the two judgments.

In *X and Y v. Romania*, the Court demonstrated a reluctance to apply first discrimination, and, consequently, an intersectional lens under Article 14 ECHR. Despite compelling arguments from the applicants and interveners, the Court predictably declined to address discrimination explicitly.[79] This oversight not only limits the potential impact of the judgment but also overlooks the broader inequalities faced by transgender individuals in a structurally cisnormative society.

---

[74] Parliamentary Assembly of the Council of Europe, "The Fight for a Level Playing Field: Ending Discrimination Against Women in the World of Sport", Resolution 2465 (2022), available at: <https://pace.coe.int/en/files/31398/html>, para. 8.
[75] ESTRELA, "Explanatory Memorandum", Doc. 15611 (22 September 2022), available at: <https://pace.coe.int/en/files/30258>, para. 21.
[76] *Semenya v Switzerland*, *Partly Concurring, Partly Dissenting Opinion of Judge Serghides*, para. 14.
[77] *Ibid.,* para. 14.
[78] *Partly Concurring, Partly Dissenting Opinion of Judge Serghides, cit. supra* note 76, para. 17.
[79] *X and Y* case *cit. supra* note 6, paras. 22 and 169.

Although Article 14 prohibits discrimination, the ECtHR often avoids addressing discriminatory dimensions explicitly, but rather frames violations against LGBTIQA+ individuals narrowly through privacy and family life.[80] In fact, it is quite common – and highly criticized – that violations against LGBTIQA+ people are scrutinized through the prism of the right to private and family life.[81] In *X and Y v. Romania*, the applicants argued that cisgender individuals are not subjected to the same intrusive medical or legal conditions that transgender individuals face when seeking legal recognition of their gender identity.[82] Cisgender people, whose gender identity aligns with their biological sex, do not have to undergo medical procedures or lengthy legal processes to have their gender recognized. In contrast, transgender individuals are burdened with a series of requirements, including medical interventions such as gender-affirming surgery, to achieve the same recognition. This discrepancy in treatment is inherently discriminatory, as both cisgender and transgender individuals should have equal access to gender recognition without invasive prerequisites.[83] Despite the applicants' identification of the comparator to assess whether discrimination has effectively occurred, the Court did not find it necessary to investigate the facts under Article 14, considering Article 8 sufficient to prove the violation.[84] This narrow approach reflects a broader pattern in the ECtHR's jurisprudence, in which the prohibition of discrimination

[80] FREDMAN, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", *Human Rights Law Review*, 2016, p. 273 ff., p. 301.
[81] CANNOOT, "The Pathologisation of Trans* Persons in the ECtHR's Case Law on Legal Gender Recognition", Netherlands *Quarterly of Human Rights*, 2019, p. 14 ff., pp. 14-35; BASSETTI, *cit. supra* note 25, p. 291.
[82] *X and Y* case *cit. supra* note 6, para. 22.
[83] CARDOSO, "Trans Rights in the European Union – 'Sex' v. 'Gender' on the Path Towards Equality and Non-Discrimination", *UNIO – EU Law Journal*, 2023, p. 51 ff., pp. 51-62.
[84] *X and Y* case *cit. supra* note 6, para. 171. On the Court's difficulty to find a comparator aa one of the reasons for its reluctance to recognize discrimination against trans persons, BEURY, "Vague Comparisons and Unstable Grounds: The European Court of Human Rights and the Prohibition of Discrimination against Trans Persons", in PAIGE and O'HARA (eds), *Queer Encounters with International Law: Lives, Communities, Subjectivities*, London and New York, 2024, p. 48 ff.

under the ECHR is often interpreted restrictively, compounded by the Court's lack of a clear and consistent understanding of what constitutes unequal treatment.[85]

But this is an old story: the ECtHR has examined an alleged violation of Article 14 in six cases[86] on trans rights, finding a violation only once.[87] The failure to examine these issues under Article 14 reflects the Court's continued reluctance to fully engage with violations against trans people as societal discrimination. Instead, the Court prefers to treat violations against trans people as an individual issue due to the personal "non-conforming" status of the applicant. Reasoning in terms of privacy and family life deprives the infringement of its social matrix.[88] Even in the landmark *A.M. and Others v. Russia*, where gender identity was finally recognized as a ground for discrimination, the ruling remained narrowly focused on parental rights and did not extend to broader issues like legal recognition or coercive medical requirements.[89] This limited framing reinforces the Court's cisnormative perspective, which constructs trans individuals as inherently different from cis persons, and fails to recognize the systemic discrimination they face. Ultimately, this approach obscures the institutional pathologization trans people endure to have their gender legally recognized, restricting their

[85] EQUINET, EUROPEAN NETWORK OF EQUALITY BODIES, *Compendium: Article 14 Cases from the Eur opean Court of Human Rights*, August 2020, pp. 10, available at: https://equineteurope.org/publications/compen dium-article-14-cases-from-the-european-court-of-human-rights/. See also, DANISI, *cit. supra* note 12, pp. 807. S ee, *P. and S. v Poland,* Application No. 57375/08, Chamber, Judgment of 30 January 2013; *Tysiąc v. Poland,* Ap plication No. 5410/03, Chamber, Judgment of 20 March 2007; *Fábián v. Hungary,* Application No. 78117/13, G rand Chamber, Judgment of 5 September 2017; *Belcacemi and Oussar v. Belgium,* Application No. 37798/13, C hamber, Judgment of 11 July 2017; *Dakir v. Belgium,* Application No. 4619/12, Chamber, Judgment of 11 July 2 017; *A.P., Garçon and Nicot* case *cit. supra* note 23.

[86] *Y. v Poland,* Application No. 74131/14, Chamber, Judgment of 17 February 2022*; Duğan v Türkiye,* Application No. 84543/17, Chamber, Judgment of 7 February 2023; *A.D. and Others v Georgia,* Application Nos. 57864/17, 79087/17 and 55353/19, Chamber, Judgment of 1 December 2022; *O.H. and G.H. v Germany,* Application Nos. 53568/18 and 54741/18, Chamber, Judgment of 4 April 2023*; A.H. v Germany,* Application No. 7246/20, Chamber, Judgment of 4 April 2023; *Csata v Romania,* Application No. 65128/19, Chamber, Judgment of 18 April 2023. To date, trans and gender diverse applicants have invoked the violation of the prohibition of non-discrimination in twenty-nine applications: BEURY, *cit. supra* note 85, p. 42.

[87] *A.M. and Others v Russia,* Application No. 47220/19, Chamber, Judgment of 6 July 2021, para. 73.

[88] BEURY, *cit. supra* note 85, pp. 43-44.

[89] See *supra* note 87, paras. 74-81.

rights to those who conform to domestically-oriented, cisnormative standards.[90] If the word and grammar of discrimination are missing in the ECtHR discourse on trans rights, it follows that intersectional challenges that transgender people face remain equally unheard. Intersectionality would have helped acknowledge discrimination experienced through overlapping identities, including gender, economic status, and healthcare access.[91] Instead, by refusing to engage with Article 14, the Court missed the opportunity to acknowledge the presence of discrimination, including its intersectional nature. Specifically, the Court failed to recognize that the discrimination faced by transgender individuals extends beyond gender identity alone, as it is compounded by other intersecting factors such as access to healthcare, economic barriers, and societal stigma. In order to understand the effective impact on the enjoyment of human rights of overlapping, including gender-driven, forms of discrimination, gender is to be considered, according to feminist queer method, an all-encompassing analytical lens. In fact, the Inter-American Court had already recognized mandatory medical interventions for gender recognition as discriminatory, highlighting the ECtHR's comparatively limited approach.[92]

Despite clear arguments from the applicants and supporting organizations, the ECtHR sidestepped the issue, focusing solely on procedural aspects under Article 8 while ignoring systemic inequalities. By omitting a discrimination analysis, the Court marginalizes transgender individuals and fails to recognize the intersecting forms of oppression they face. Achieving true equality requires the Court to go beyond procedural issues and address the ingrained discrimination affecting transgender lives.

---

[90] BASSETTI, "The Precarity of Trans Survival: Suicidality and the Right to Life", in PAIGE and O'HARA (eds), *Queer Encounters with International Law: Lives, Communities, Subjectivities*, London and New York, 2024, p. 26 ff.

[91] DE VRIES, "Intersectional Identities and Conceptions of the Self: The Experience of Transgender People", *Symbolic Interaction*, 2012, p. 49 ff., p. 67.

[92] Inter-American Court of Human Rights, *Opinión Consultiva Solicitada por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo*, OC-24/17, Advisory Opinion of 24 November 2017.

The situation is slightly different in *Semenya*, where it should be highlighted that the ECtHR has interpreted the category of "sex" listed under Article 14 as covering also "sex characteristics". For the Court, discrimination on the basis of sex also encompasses discrimination on the basis of sex characteristics. This is the first time in its case law for such a hermeneutic outcome for intersex individuals, who, like Caster Semenya, are discriminated against for their – genital, hormonal, gonadal, genetic – sex traits. Without ascribing sex characteristics to the "other status" ground that makes the provision an open clause with the list of grounds being non-exhaustive,[93] the Court nevertheless treated the Convention as a "living instrument" to be interpreted in the light of present-day conditions.[94]

Notably, the interpretive development incorporated in *Semenya* follows a model of judicial reasoning that has already been proposed in different contexts by other human rights bodies. A paradigmatic example is the protection against discrimination on the basis of sexual orientation through a broad interpretation of sex discrimination by the UN Human Rights Committee from *Toonen v Australia* onwards.[95] For the latter, the prohibition against sex discrimination enshrined in Article 26 of the International Covenant on Civil and Political Rights also comprises discrimination based on sexual orientation.[96]

---

[93] SHINOHARA, "The Protection of Intersex and Transgender Athletes from Discrimination under the European Convention on Human Rights", *International Sports Law Review Pandektis*, 2022, p. 193 ff., p. 201.

[94] *Inter alia*, *Tyrer v the United Kingdom*, Application No. 5856/72, Chamber, Judgment of 25 April 1978, para. 31; *Soring v the United Kingdom*, Application No. 14038/88, Chamber, Judgment of 7 July 1989, para. 102; *Schwizgbel v Switzerland*, Application No. 25762/07, Chamber, Judgment of 10 June 2010, para. 81; *Bayatyan v Armenia*, Application No. 23459/03, Chamber, Judgment of 7 July 2011, para. 102.

[95] UN Human Rights Committee, *Toonen v. Australia* (1994), Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992; UN Human Rights Committee, *Young v. Australia* (2003), Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000; UN Human Rights Committee, *Joslin v. New Zealand* (2002), Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999; and UN Human Rights Committee, *X v. Colombia* (2007), Communication No. 1361/2005, UN Doc. CCPR/C/89/D/1361/2005.

[96] This hermeneutic novelty – relying on "sex" to decide cases on discrimination against women, homosexual or bisexual people (as of *Toonen*), and intersex individuals (as of *Semenya*) – begs the legitimate question: does stretching the borders of a specific ground provide a legally stronger protection to a given group of individuals rather than the pluralizing categories? On the premises and the effects deriving from the multiplication of categories such as "gender identity" (in relation to trans people) and "sex characteristics" (in relation to intersex people), see GILLERI, *Sex, Gender, and International Human Rights Law: Contesting Binaries*, London and New York, 2024, p. 206.

Notwithstanding these legal innovations, the Court could have conducted a more fine-grained gender analysis in assessing the breach of Article 14.[97] The decision puts forward the interpretation of the ground of sex under the prohibition of discrimination as comprising discrimination on the basis of sex characteristics, thus drawing the line between the discriminated victim (intersex) and the non-discriminated comparator (endosex). Yet the Court neglects the investigation into other possible discriminatory patterns, namely between (intersex) women *versus* men, and athletes from the Global South *versus* athletes from the Global North. Has Caster Semenya been disfavoured over male runners? What role has the racial and ethnic factor, i.e. the fact that she is South African, played in the scrutiny she was subjected to?

The answer is that the ECtHR has avoided to examine the facts through the prism of intersectionality, which could have shed light on potential differential treatment on the basis of gender, race/ethnicity and sex characteristics – because Semenya is an *intersex woman* from the *Global South*. The DSD Regulations have a disproportionate impact on women from the Global South: to date, all the athletes targeted by the DSD Regulations and their antecedents come from the Global South, indeed.[98] Black feminine bodies are subject to gender verification processes – a sort of modern voyeurism of blackness[99] – aimed at forcing

[97] HOLZER, , "The European Court of Human Rights in the Caster Semenya Case: Opening a New Door for Protecting the Rights of Persons with Variations of Sex Characteristics and Human Rights in Sports", Opinio Juris, 4 August 2023, available at: <https://opiniojuris.org/2023/08/04/the-european-court-of-human-rights-in-the-caster-semenya-case-opening-a-new-door-for-protecting-the-rights-of-persons-with-variations-of-sex-characteristics-and-human-rights-in-sports/>.

[98] See, *inter alia*, WINKLER and GILLERI, "Of Athletes, Bodies, and Rules: Making Sense of Caster Semenya", *Journal of Law, Medicine & Ethics*, 2021, p. 644 ff., p. 655 ff; PAPE OLY, "The Unlevel Global Playing Field of Gender Eligibility Regulation in Sport", *Human Rights Defender*, 2020, p. 41 ff., pp. 41-43; MAHOMED and DHAI, "Global Injustice in Sport: The Caster Semenya Ordeal – Prejudice, Discrimination and Racial Bias", *South African Medical Journal*, 2019, p. 548 ff., p. 550; KARKAZIS and JORDAN-YOUNG, "The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes", *Feminist Formation*, 2018, p. 1 ff., pp. 1-39.

[99] For a history of gender verification in sport, see LEIBEE, "Talking T at the European Court of Human Rights: The Human Rights Case Against Testosterone Restrictions for Female Athletes and How the Sports Community Should Respond", *Transnational Law and Contemporary Problems*, 2022, p. 168 ff., pp. 175-177. On the violations involved in sex testing, see HUMAN RIGHTS WATCH, "They're Chasing Us Away from Sport: Human Rights Violations in Sex Testing of Elite Women Athletes", *Human Rights Watch*, 2020.

black athletes, in this case, Caster Semenya, to assimilate to white Western standards of beauty.[100] In this way, the DSD Regulations support the enactment of a racialized regime[101] which, instead of celebrating exceptional athletes, scans them in search of biological explanations of their strength as an exotic alteration to be silenced.

4. Untold Power Imbalances

The identification of the loopholes in the ECtHR's reasoning in *X and Y v. Romania* and *Caster Semenya v. Switzerland* points to the areas of the human rights vocabulary that are alien to the Court's language or that remain unspeakable in their entirety. This is what this Section is aimed at: showing (1) the conceptual limitations to the interpretive reach of the Court and, at a later stage, (2) the hermeneutic possibilities that the gender vocabulary could provide, with a specific reference to the Istanbul Convention.[102]

4.1. What the Court Cannot Say

What is the place of intersex- and trans-targeting abuses in the ECtHR's gender vocabulary? Focusing on two cases helps highlight power imbalances – that *X and Y v Romania* and *Caster Semenya v Switzerland* indeed reflect. The gendered nature of the physical and psychological harm suffered by intersex and trans applicants remains hidden behind mainstream configurations of GBV. For these, "gender" is synonymous with women, and "gender-based violence" is a concern of women only, being the victims of a system of men-driven subjugation.[103] In this way, violence is unidirectional – from men to women – and

[100] BATELAAN AND ABDEL-SHEHID, "On the Eurocentric Nature of Sex Testing: The Case of Caster Semenya", *Social Identities*, 2020, p. 146 ff., pp. 146-165.
[101] CANNOOT et al., "Hormonal Eligibility Criteria in Women's Professional Sports Under the ECHR: The Case of *Caster Semenya v. Switzerland*", in BOILLET, WEERTS and ZIEGLER (eds), *Sports and Human Rights*, Cham, 2024, p. 102 ff.
[102] Istanbul Convention, *cit. supra* note 11.
[103] HALLEY, *cit. supra* note 13, pp. 17-18. Cf OTTO *cit. supra* note 12, p. 197.

assumes the gender binary. The reasons for this are multiple, relating to the historical fact that discrimination and violence disproportionately affect women.[104] Looking at the bigger picture, however, means taking full account of the plurality of (other) directions of the gendered abuse.

Traditional narratives describe domination as a prerogative of hegemonic masculinities and subordination as the typical feminine position. Consequently, not only are dominative and subordinate predestined postures, but they also monopolize the space of gender relations, excluding *other* possibilities of gendered (good or) harm. The stories of *X and Y* and *Semenya* cannot fit these dynamics, just like those of women harassing men, men assaulting other men,[105] or women hitting other women.[106] One might object that the two cases at stake are about gender identity (*X and Y*) and sex characteristics (*Semenya*), therefore not sex or gender. Broader interpretations of the latter, pushed forward by international human rights bodies, have, however, underlined that gender cannot be isolated from these two (and other) notions of gender identity and sex characteristics.[107] Gender identity is the inner aspect of gender, that is our sense of auto-identification with a certain gender, thus one

---

[104] And the increased emphasis on the issue with the adoption of Declaration on the Elimination of Violence against Women (adopted 20 December 1993) A/RES/48/104; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994, entered into force 5 March 1995) OASTS A-61; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6; Istanbul Convention, *cit. supra* note 11.

[105] CORRÊA et al., *Sexuality, Health and Human Rights*, London, 2008, p. 197; RUMNEY, "Gay Male Rape Victims: Law Enforcement, Social Attitudes and Barriers to Recognition", *International Journal of Human Rights*, 2009, p. 233 ff., pp. 233-250; SIVAKUMARAN, "Male/Male Rape and the 'Taint' of Homosexuality", *Human Rights Quarterly*, 2005, p. 1274 ff., pp. 1274-1306.

[106] See SJOBERG and GENTRY, *Mothers, Monsters, Whores: Women's Violence in Global Politics,* London, 2007; STEMPLE et al., "Sexual Victimization Perpetrated by Women: Federal Data Reveal Surprising Prevalence", *Aggression and Violent Behavior*, 2017, p. 302 ff., pp. 302-311. On women terrorists, see WARNER and MATFESS, "Exploding Stereotypes: The Unexpected Operational and Demographic Characteristics of Boko Haram's Suicide Bombers", *Combating Terrorism Centre at West Point*, 2017, p. 22 ff., pp. 22-32; FAZAELI, "Martyred Women and Humiliated Men", in FINEMAN and THOMSON (eds), *Exploring Masculinities: Feminist Legal Theory Reflections*, London and New York, 2013, p. 39 ff.

[107] "Gender is not synonymous with women but rather encompasses the social constructions that underlie how women's and men's roles, functions and responsibilities, including in relation to sexual orientation and gender identity, are defined and understood": United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" (2009), UN Doc. A/64/2011, para. 20. See also OTTO, "Transnational Homo-Assemblages: Reading 'Gender' in Counter-Terrorism Discourses", *Jindal Global Law Review*, 2013, p. 79 ff., pp 79-97.

cannot be detached from the other. Sex characteristics are the traits that make the body attributable to a certain – "one or the other" according to binary understandings – sex. Sex assignment at birth depends on the way in which the society classifies precisely those sex traits – as feminine or masculine always according to mainstream conceptions.

Actually, the ECtHR has occasionally hinted at non-binary gender understandings.[108] For example, in *Cossey v the United Kingdom*, a case on legal gender recognition, three dissenting judges recognized a gender that is neither a woman nor a man – "*she* falls somewhere between the sexes" [109] (emphasis added). Other shy recognitions of non-binary identifications have been expressed in *L v Lituania*,[110] concerning a pre-operative transsexual, and in the dissenting opinion of Judge Valticos in *B v France*.[111]

Overall, however, prevailing interpretations of GBV have been constructed around the scheme of man-perpetrator and woman-victim;[112] what falls out of this account is left without words. Looked from the outside perspective, human rights language is, therefore, partially speechless with restraints determining the existential loopholes that the law cannot reach. Here comes the limitation of the human rights language relying on narrow interpretations of gender imbalances. The Court cannot frame the violation against Semenya and against X and Y as gender-based ill-treatment because this is not part of the human rights vocabulary at its

[108] For an account of the possibilities for the ECtHR to abandon the binary scheme, see GONZALEZ SALZBERG, *Sexuality and Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law*, Hart, 2019, p. 192.
[109] *Cossey v the United Kingdom*, Application No. 10843/84, Chamber, Judgment of 27 September 1990, Joint Dissenting Opinion of Judges Palm, Foighen and Pekkanen, para. 5.
[110] "He remains a woman": *L v Lituania*, Application No. 27527/03, Chamber, Judgment of 11 September 2007, para. 57.
[111] "He found himself in a position where he was no longer completely a man, nor indeed truly a woman": *B v France*, Application No. 13343/87, Chamber, Judgment of 25 March 1992, Dissenting Opinion of Judge Valticos, joined by Judge Loizou, paras. 36–37.
[112] Alternative interpretations exist, but they represent a minority group. On women-victims as a stereotype, see United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" (2017), UN Doc. A/72/43280, para. 53. On women as terrorists, see *ibid.*, 29. On the integration of masculinities in the gender analysis of human rights infringements beyond the synonymous of gender equals women, United Nations General Assembly, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism" (2009), UN Doc. A/64/2011, paras. 31–32.

disposal, at least in relation to trans and intersex people. "Gender-based violence" is a significant to be used only with reference to violent men against vulnerable women. Outside these relations lies an array of subjective positionings that the human rights language cannot, to date, pronounce.

4.2. What the Court Might Say

Before coming to the conclusions, we wish to emphasise what the Court has not said but *might* say. What follows is an exploration of the potential impact of the Istanbul Convention on the ECtHR's interpretations of gender roles and relations. For instance, neither of the two judgments incorporates references to this instrument, while the definition of gender and discrimination against LBTI women it provides may prove promising for the Court to learn a new vocabulary – that of gender as an analytical category to examine the right of *any* individual.

The new vocabulary that the ECtHR might experiment with is one of gender in its all-encompassing applicability. This is not a theoretical exercise only, though. Scrutinizing the gendered meaning of any violation beyond those related to the domination of women by men, also known as "gender-based violence", would bring wider protections to all gendered subjects. Given the ECtHR geographical scope, (re)interpreting gender can start from the Istanbul Convention.[113]

In several key cases, the ECtHR has effectively relied on the Istanbul Convention to enhance ECHR provisions, interpreting the ECHR's guarantees through the lens of more specific international human rights obligations. This type of argumentation is not new to the ECtHR's mode of proceeding, indeed. For example, in *Talpis v. Italy*, the ECtHR invoked the Convention to shape the understanding of states' positive obligations under the ECHR

[113] Istanbul Convention, *cit. supra* note 11.

concerning domestic violence.[114] The Court used the Convention to emphasize Italy's failure to prevent violence against women, magnifying its interpretation of state obligations under the ECHR by integrating the Istanbul Convention's framework.[115] Through this reference, the Court integrated a "stricter due diligence standard", imposing heightened requirements on states to prevent and respond to GBV.[116] Additionally, in *Bălşan v. Romania*, the Court relied on the Convention's requirements for addressing domestic violence to criticize Romania's ineffective response to a woman's claims of abuse.[117] The Court found a violation of Article 3 and Article 8 of the ECHR, underscoring Romania's failure to uphold its positive obligations to protect women against domestic violence.[118]

Such cases reflect a broader interpretive shift, with the Istanbul Convention now informing both the ECtHR's rulings and broader human rights standards, including the CEDAW Committee's General Recommendation No. 35 of 2017.[119] This Recommendation builds on its predecessor, General Recommendation No. 19, integrating international advances, such as those embodied in the Istanbul Convention, to strengthen protections against GBV.[120]

The above-mentioned judgments thus illustrate how the ECtHR's reliance on the Convention serves to expand the scope of the ECHR, reinforcing human rights protections through a progressively wider interpretive approach. However, the use of such an interpretive approach is limited in the grammar of the two decisions discussed here. *X and Y* and *Semenya* are devoid of any reference to the Istanbul Convention. Consequently, the Court's selective

---

[114] *Talpis v. Italy*, Application No. 41237/14, Chamber, Judgment of 2 March 2017.
[115] *Ibid.*, para.129.
[116] DE VIDO, "States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights", *ESIL Reflections*, 2017, p. 1 ff., p. 2.
[117] *Bălşan v. Romania*, Application No. 49645/09, Chamber, Judgment of 23 May 2017.
[118] *Ibid.*, para. 79.
[119] CEDAW Committee, "General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19" (2017), UN Doc. CEDAW/C/GC/35, para. 8.
[120] CEDAW Committee, "General Recommendation No. 19: Violence against Women" (1992), UN Doc. A/47/38.

application of this interpretive method reduces its ability to address the diverse gender-based violations these cases present.

The Convention requires states parties to develop laws, policies and support services to eliminate violence against women and domestic violence. For the purposes of this investigation, the Convention matters due to the broad definition of gender enshrined in its Article 3(c), according to which "gender" shall mean the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men.'[121] Notably, this definition transcends the synonymy mentioned above of gender-equals-women, including both women and men. For this reason, we believe that the Convention is relevant also to *X and Y*, a case concerning two trans men. While maintaining the binary, the Istanbul Convention opens up to a mixity of gendered 'roles, behaviors, activities and attributes' that society ascribes to individuals.

What makes the Convention an instrument adequate to cover violations targeting intersex (such as Caster Semenya) and trans (such as X and Y) people is, first of all, the symmetrical consideration of men and women as involved with gender. True, femininity and masculinity exhaust the gender possibilities of Article 3(c). Yet the multiplicity of modes of being and behaving that the provision envisages can attach in many ways to femininities and masculinities – in the plural – from which can derive different, unpredictable combinations of genders. In fact, the second notable element of the definition is the absence of any reference to sex as the biological root of any gender.[122] For instance, other definitions of gender contained in international sources of human rights build on the premise that there are two

[121] Istanbul Convention, *cit. supra* note 11, Article 3(c). For an in-depth analysis of the definitions, see MERINO-SANCHO, "Article 3: Definitions", in DE VIDO and FRULLI (eds), *Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention*, Cheltenham, 2023, p. 108 ff.
[122] Some maintain that gender in the Convention refers to binary of sexes, as men and women, and to their social roles as a reflection of biological differences: NIEMI and VERDU, "The concepts of gender and violence in the Istanbul Convention", in NIEMI, PERONI and STOYANOVA (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention*, London and New York, 2020, p. 77 ff.

sexes (male and female) to which two genders are anchored (woman and man).[123] Anchoring gender to sex, however, has produced the gender normativity that limits the possibilities for gender performances to a limited range.[124] By ignoring naturalizing definitions of gender (and sex), the Istanbul Convention may ensure protection for intersex and trans individuals, like Semenya, X and Y, who have been subjected to ill-treatment on the basis of their gender. This is why we may try to imagine a different reasoning for the judgments, had the ECtHR relied on the Istanbul Convention. Gender under the Istanbul Convention clearly includes protection against inhuman treatment perpetrated because the individual's 'attributes' (quoting the provision) do not conform to masculine and feminine ideals.

Framing *Semenya* as a question of gendered ill-treatment would imply considering sex characteristics as inherently linked to gender as a category of analysis. Equally, the gender identity at the core of the dispute in *X and Y* is the internal aspect underlying the different "roles" and "behaviors" that social norms ascribe to individuals. The imposition of medical treatment as the requirement for legal gender recognition substantiates the claim that ill-treatment is aimed at targeting gender. There is no way out: asking to change physical attributes cannot but be a question of gender under Article 3(c) of the Istanbul Convention, which explicitly mentions 'attributes' among the aspects attracting social expectations.

Added to gender, the Istanbul Convention would have been useful to protect intersex women's rights in that it addresses discrimination[125] against LBTI women under Article

[123] The most famous definition comes from the Rome Statute, stating that "[…] it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society": Art 7(3), Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3. Cf GILLERI, *Sex, Gender, and International Human Rights Law: Contesting Binaries*, London and New York, 2024, pp. 35-37.

[124] BUTLER, *Gender Trouble: Feminism and the Subversion of Identity*, London and New York, 1990, pp. 24-25.

[125] On the right to equality and non-discrimination in the Istanbul Convention, see PERONI, "Fundamental Rights, Equality and Non-Discrimination Perspective", in DE VIDO and FRULLI (eds), *Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention*, Cheltenham, 2023, p. 123 ff.

4(3).[126] This provision mimics the prohibition of discrimination under Article 14 of the ECHR. Article 4(3) of the Istanbul Convention, however, introduces three specific grounds of discrimination, falling under the 'other status' provided under its peer, namely gender, sexual orientation and gender identity.

It is obvious that this provision could have been applied without interpretive doubt to *Semenya*, including the hypothetical recognition of the intersectional nature[127] of the discrimination on the basis of the explicit grounds of gender and sex characteristics. *X and Y*, instead, would have benefited from this provision subject to the reconfiguration of the Istanbul Convention as applicable to any gender via the broad interpretation of the definition of gender under Article 3(c) suggested above. Overall, it is Article 3(c) that carries, indeed, the real potential for the ECtHR to embrace a broad understanding of gender, thereby approaching many violations as gender-based.

5. Conclusion

The specialized regime of human rights is, at its core, a language system – one that conveys certain values, practices, and principles. Within this linguistic framework, gender has traditionally been interpreted in narrow, binary terms, focusing predominantly on women as victims of male-dominated violence. This binary understanding is reductive and excludes other gendered subjects, such as trans and intersex individuals, from receiving adequate legal recognition and protection. The Court's limited framing reflects an inability to expand the human rights discourse beyond traditional gender binaries. This creates a silence according to which trans and intersex rights become unspeakable through the existing grammar of gendered human rights.

[126] *Ibid.*, Article 4(3).
[127] See SOSA and MESTRE I MESTRE, "The Istanbul Convention from an Intersectional Perspective", in DE VIDO and FRULLI (eds), *Preventing and Combating Violence Against Women and Domestic Violence A Commentary on the Istanbul Convention*, Cheltenham, 2023, p. 5 ff.

The ECtHR's language in its case law on trans and intersex rights demonstrates significant gaps in how the Court conceptualizes and addresses GBV and discrimination. Through its reliance on privacy narratives under Article 8 ECHR, the Court systematically avoids engaging with the more socially entrenched issues of systemic discrimination based on gender identity or sex characteristics, as evidenced by the cases of *X and Y v. Romania* and *Caster Semenya v. Switzerland* discussed in this paper. The vocabulary employed by the Court remains largely cisnormative and fails to integrate an intersectional or gender-sensitive vocabulary that fully acknowledges the compounded inequalities experienced by marginalized groups of individuals.

For instance, in *X and Y v. Romania*, the Court missed the opportunity to apply an intersectional lens under Article 14 ECHR, thereby failing to recognize how gender identity intersects with other factors, such as access to healthcare and legal recognition, in producing discriminatory harm. The decision to scrutinize the case solely under the privacy framework of Article 8 exemplifies how the Court's language on trans rights remains tied to individual issues of identity, rather than structural discrimination. Similarly, in *Caster Semenya v. Switzerland*, while the Court did interpret sex discrimination as covering sex characteristics, it did not explore the intersectional nature of the discrimination faced by an intersex woman from the Global South. The Court's reluctance to engage with intersectionality limits its capacity to address the complex, layered forms of oppression that individuals like Semenya experience due to race, gender, and sex characteristics.

To rectify these linguistic as well as conceptual restraints, the ECtHR should embrace more comprehensive interpretations and vocabulary on gendered human rights that integrate concepts of intersectionality, gender identity, and sex characteristics. The Istanbul Convention, which provides a broader definition of gender, could serve as a pivotal tool in reshaping the Court's discourse despite its possible hermeneutic limitations. By expanding its

interpretive reach to include the Istanbul Convention's understanding of gender as a socially constructed category, the Court could recognize a wider range of gendered violations, including those targeting trans and intersex individuals. This shift would enhance the Court's ability to protect the diverse, multifaceted nature of gendered experiences in current societies, and thereby addressing the complex forms of violence and discrimination affecting individuals across the gender spectrum.