

SPORTING AND EXPORTING EUROPEAN HUMAN
RIGHTS LAW

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I. INTRODUCTION

The attention to the interactions between human rights and sports has steadily increased in the last twenty or thirty years. The 1993 Vienna World Conference on Human Rights did not mention sports in its Declaration and Program of Action.¹ Since then, other World Conferences on different human rights issues have made explicit references to the possibility of human rights violations taking place in the context of sports and the possibilities of sports in promoting and facilitating the enjoyment and respect of human rights.²

The European Court of Human Rights (“ECtHR”) has been ruling more and more on issues touching directly or indirectly on sports.³ In particular, the ECtHR has decided several cases dealing with arbitration in sports and on disciplinary actions in the context of sports.⁴ It is a phenomenon that I call “sporting European human rights law.” Part of this process takes place in the European Court of Justice⁵ and in the activities, resolution,

1. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993).

2. See Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, ¶¶ 83(m), 183, 280(d), U.N. Doc. A/CONF.177/20 (Sept. 15, 1995) (promoting increased access to sports for women and girls worldwide); see also World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action*, ¶ 218, U.N. Doc. A/CONF.189/12 (Aug. 31, 2001) (urging the practice of sports without discrimination).

3. See generally Jakub Czepek, *Sports in the Case-Law of the European Court of Human Rights*, 20 ESPAÇO JURÍDICO J.L. 251, 252 (2019) (discussing EctHR case law on sports related issues).

4. See discussion *infra* The European Court and CAS.

5. See generally RICHARD PARRISH, *Sport and the European Court of Justice, in SPORTS LAW AND POLICY IN THE EUROPEAN UNION* 80–108 (Simon Bulmer et al. eds., 2003) [Hereinafter, Parrish, Sports Law] (providing an early analysis of this process).

and treaties adopted by the European Union (EU)⁶ and the Council of Europe.⁷

Simultaneously, since its establishment in 1984, the Court of Arbitration for Sport (CAS) has been adjudicating professional sports disputes, transforming itself into “the beating judicial heart” of the international sports legal regime.⁸ CAS is fulfilling its original goal of becoming a “supreme court of world sport,”⁹ a “kind of Hague Court in the sports world,”¹⁰ which encompasses a “centralized supreme judicial authority.”¹¹ Today, CAS sits at the apex of the complex pyramid of sports arbitration.¹² This is quite incredible for a body that once was considered a “kangaroo court.”¹³ In the growing number of sports arbitrations, there are more and more references either directly to the European Convention on Human Rights (the European Convention)¹⁴ or indirectly by referring to human rights or substantive public policy that includes human rights.¹⁵

6. See Consolidated Version of the Treaty on the Functioning of the European Union arts. 6(e), 165(1), 165(2), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU] (conferring to the EU the competence to support or supplement the actions of the Member States in the field of sport).

7. *Sports and Human Rights*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/sport/sport-human-rights> (last visited Apr. 25, 2024).

8. Antoine Duval, *Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport*, 2017 Y.B. OF INT'L SPORTS ARB. 3, 4.

9. Richard H. McLaren, *Twenty-Five Years of the Court of Arbitration for Sport: A Look in the Rear-View Mirror*, 20 MARQ. SPORTS L. REV. 305, 306 (2010) (quoting Juan Antonio Samaranch).

10. *Speech Delivered by Mr. Juan Antonio Samaranch IOC President*, 176 OLYMPIC REV. 314, 317 (1982); JOHAN LINDHOLM, THE COURT OF ARBITRATION FOR SPORT AND ITS JURISPRUDENCE 4 (2019) (quoting Juan Antonio Samaranch).

11. STEPHAN NETZLE, *The WADA Code 2015: The Most Relevant Changes. Part 1: The view of the Federation*, in ARBITRATING DISPUTES IN A MODERN SPORTS WORLD / 5TH CONFERENCE CAS & FSA/SAV LAUSANNE 2014, 3, 8 (Michele Bernasconi ed., 2016).

12. JACK ANDERSON, MODERN SPORTS LAW: A TEXTBOOK 77-78 (Bloomsbury 2010).

13. Steffi Jose, *From Sport's Kangaroo Court to Supreme Court: How the Court of Arbitration for Sport Can Legitimize Anti-Doping Law*, 20 SW. J. INT'L L. 401, 403 (2014).

14. See PIERRE CORNU ET AL., HUMAN RIGHTS PROTECTION IN EUROPE IN THE CONTEXT OF SPORTS ORGANISATIONS' DISCIPLINARY AND ARBITRATION PROCEDURES (Council of Eur. 2018) (discussing the relevance of the European Convention on Human Rights to sports arbitration).

15. See Michael Geistlinger & Stephan Gappmaier, *Some Thoughts on the Role of the European Convention on Human Rights in the Jurisprudence of the Court of Arbitration for Sport*, 3 Y.B. INT'L ARB. 307, 309 (2013) (discussing a Swiss

On the rare occasions that CAS applies human rights standards, it uses almost exclusively European standards. Additionally, by reviewing the decisions of CAS in a very limited way, the Swiss Federal Tribunal (STF) could, indirectly and under limited circumstances, apply the European Convention to determine if the CAS awards are compatible with public policy and thus valid decisions. Some athletes have asked the STF to set aside awards on human rights grounds.¹⁶ Finally, the ECtHR could review the STF's decisions and exercise control, applying European human rights standards over the procedures and merit decisions of CAS. I call this phenomenon "exporting European human rights law"¹⁷ into sports.

The sporting and exporting of European human rights law is part of a broader process of "righting sports law." By "righting sports law" I refer to the recognition of the right to participate in sports as a human right; the realization of human rights in the sports field; the independent monitoring of sporting governing bodies (SGBs) using human rights standards;¹⁸ the promotion of human rights in sports practices, competitions, and mega-sporting events; the adoption of human rights policies by SGBs; and the increasing attention to rights violations in sports by human rights organs.¹⁹

tribunal's consideration of public policy principles when setting aside a CAS award).

16. See CORNU, *supra* note 14, at 41 (discussing the three pending court cases against Switzerland, where the applicants accuse Switzerland of violating their human rights "through the decisions of the TFS which denied their applications to set aside CAS awards for breach of Convention"); Tribunal Fédéral [TF] June 11, 2001, 4P.64/2001 (Switz.), as reprinted in DIGEST OF CAS AWARDS II 1998-2000, 767 (Mattieu Reeb ed., 2002) (discussing the case of N., J. and others v. Fédération Internationale de Natation, which involved athlete request to set aside award based on violation of the right to a hearing.).

17. I am aware that the process I refer to in the text could be called "importing," as CAS and the TSF import European human rights law rather than an active role of the European Court in "exporting" its case law. I prefer to use exporting only for the purpose of this article given the closeness in sound between sporting and exporting.

18. In this article, I refer to SGB as a global term to include the International and National Olympic Committees and the international, regional and national sporting federations.

19. See generally Peter Donnelly, *Sport and Human Rights*, 11 SPORT IN SOC'Y, 381 (2008) (discussing the achievement of human rights through sports and the rights of persons to participate in sports).

The process of “righting sports law,” including the recognition of fundamental procedural rights in sports disciplinary mechanisms, deepens a parallel judicialization trend in sports arbitration.²⁰ Many sports organizations’ disciplinary procedures and the functioning of the CAS are becoming “increasingly judicial in nature, taking state structures as their model.”²¹

However, CAS does not fully provide a “a coherent and credible” remedy for dealing with human rights abuses taking place in the sport field.²² The current situation, described as a “phantom regime,” has three critical flaws: “the lack of access afforded to aspiring complainants, the ineffectiveness of the institutions that adjudicate cases, and the inadequacy of the law they apply.”²³ This Article concentrates on the third aspect, particularly on the use of international human rights law by CAS.²⁴

Given the intersection of “righting sports,” “sporting rights,” and “exporting European law” developments, CAS could become a place where SGBs’ commitments and obligations regarding human rights could be enforced. This prospect raises many unanswered questions regarding CAS’ capacity to manage human rights arguments.²⁵ Hence, the actual interaction of CAS with human rights law and the ECtHR with CAS must be constantly scrutinized. This Article explores in particular whether CAS consistently applies universal human rights standards.

20. See generally COURTNEY HILLEBRECHT, *Progress and Pushback in the Judicialization of Human Rights*, in *SAVING THE INTERNATIONAL JUSTICE REGIME: BEYOND BACKLASH AGAINST INTERNATIONAL COURTS* 1, 3 (Cambridge Univ. Press 2021) (judicialization of international human rights since WWII) (discussing the judicialization of international human rights since WWII). Some have regretted that like other arbitral bodies, CAS has experienced the “Americanization” of litigation. See Richard Pound, *Sports Arbitration: How it Works and Why it Works*, 1 MCGILL J. DISP. RESOL., no. 2, 2015, at 82.

21. CORNU, *supra* note 14, at 21.

22. Daniel West, *Revitalising a Phantom Regime: The Adjudication of Human Rights Complaints in Sport*, 19 INT’L SPORTS L.J. 2, 3 (2019).

23. *Id.* at 4.

24. For an alternative mechanism proposal to deal with human rights abuses in the context of sports, see generally WORLD PLAYERS ASS’N, *ENSURING ACCESS TO EFFECTIVE REMEDY: THE PLAYERS’ STRATEGIC PATHWAY TO JUSTICE* (2021) (proposing alternative pathways to effective remedy including the creation of legitimate sport and human rights grievance mechanisms and support system for victims).

25. Antoine Duval & Daniela Heerdt, *FIFA and Human Rights – a Research Agenda*, 25 TILBURG L.REV. 1, 8 (2020).

Section II of the Article begins by giving a brief description of sports arbitration and the CAS. Sections III, IV and V explore the phenomena of righting sports law and sporting European human rights law. The practice of CAS using or rejecting European human rights law is illustrated and problematized in section VII. The Article then turns to the oversight of CAS by the ECtHR and the Court of Justice of the European Union (CJEU) (Section VI)²⁶ and the STF (Section VIII). It also examines the possibility of using the New York Convention on Arbitration (New York Convention) to potentially challenge CAS awards on human rights grounds (Section IX). The Article concludes (Section X) with some brief reflections, calling for a more consistent and less Eurocentric use of international human rights law by CAS.

II. SPORTS ARBITRATION AND THE COURT OF ARBITRATION FOR SPORT

Currently, arbitration constitutes the main method for resolution of sport-related disputes.²⁷

26. In this article I refer generally to the CJEU to cover the different judicial institutions of the current European Union. This generic reference includes the original 1952 single court called the Court of Justice of the European Coal and Steel Communities (renamed in 1958 as the Court of Justice of the European Communities (CJEC)), the General Court created in 1988 (known as the Court of First Instance), and the Civil Service Tribunal, created in 2004. The Treaty of Lisbon provides that the CJEU subsumes these other bodies. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 9F, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon] (“The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised court.”).

27. See, e.g., Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220529(a) (providing that an aggrieved party “may obtain review by [an] arbitration and mediation provider”); see, e.g., *Basketball Arbitral Tribunal [BAT]*, FIBA BASKETBALL, <https://www.fiba.basketball/bat> (last visited Oct. 15, 2022) (outlining the role of BAT in providing services for rapid resolution of sports disputes through arbitration); *Tribunale Nazionale di Arbitrato per lo Sport*, COMITATO OLIMPICO NAZIONALE ITALIANO, <https://www.coni.it/en/institutional-activities/national-court-of-arbitration/establishment.html> (last visited Oct. 15, 2022) (arbitration set up by the Italian Olympic Committee); *Chambre Arbitrale du Sport*, FRANCE OLYMPIQUE, <https://cnosf.franceolympique.com/cnosf/cat/4/394.php> (last visited Oct. 15, 2022) (outlining the key characteristics of the Arbitral Chamber for Sport).

For example, in anti-doping matters, States are required to recognize arbitration as the preferred method of dispute resolution, “subject to human and fundamental rights.”²⁸ Professional athletes are forced not only to accept all the regulations of sports international federations, but also to submit all their disputes to arbitration (and internationally) to CAS.²⁹ Given that athletes have to accept CAS arbitration, the arbitration court is subject to the European Convention’s panoply of rights.³⁰ Even if athletes can seek judicial remedies, their sports careers tend to be short, making long legal disputes unadvisable.³¹

In 1984, the International Olympic Committee established CAS in Lausanne, Switzerland.³² CAS settles legal disputes in the sports realm.³³ Its arbitral awards are similarly enforceable to the judgements of domestic courts.³⁴ CAS “decides on vital interests of the global sports system and on the fates of thousands of athletes.”³⁵ Currently, CAS resembles a civil court when dealing with contractual matters, an administrative tribunal when ruling on SGBs’ actions, a constitutional court when interpreting and applying the constitutive documents of the different SGBs, and a criminal court when dealing with anti-doping

28. World Anti-Doping Agency [WADA], *Revised World Anti-Doping Code 2021*, art. 22.6 (Apr. 7, 2003) [hereinafter WADA Code].

29. International Olympic Committee [IOC], *Olympic Charter*, Rule 61 (2) (Aug. 8, 2021).

30. See Lloyd Freeburn, *Forced Arbitration and Regulatory Power in International Sport - Implications of the Judgment of the European Court of Human Rights in Pechstein and Mutu v. Switzerland*, 31 MARQ. SPORTS L. REV. 287, 300-03 (2021) (noting that compulsory sports arbitration means that the rules of international federations are also then compulsorily applied against participants).

31. ANTOINE DUVAL, *The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman*, in THE LEGACY OF BOSMAN: REVISITING THE RELATIONSHIP BETWEEN EU LAW AND SPORT 81, 100 (Antoine Duval & Ben Van Rompuy eds., 2016).

32. *History of the CAS*, CT. OF ARB. FOR SPORT, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Oct. 15, 2022).

33. Ct. of Arb. for Sport [CAS], *Code: ICAS Statutes (A)(S1)* (Feb. 01, 2023), <https://www.tas-cas.org/en/icas/code-icas-statutes.html>.

34. *Frequently Asked Questions*, CT. OF ARB. FOR SPORT, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited on Oct. 15, 2022).

35. GRIT HARTMANN, *TIPPING THE SCALES OF JUSTICE - THE SPORT AND ITS “SUPREME COURT”* 7 (2021), <https://www.playthegame.org/media/hfefk4em/tipping-the-scales-of-justice-the-sport-and-its-supreme-court.pdf>.

matters.³⁶ CAS decisions affect a vast range of sport stakeholders, particularly professional athletes. Furthermore, CAS exercises some powers of an administrative and constitutional court when deciding disputes on the functioning of SGB.³⁷ CAS itself has asserted its role as exercising “judicial review,”³⁸ by overruling the norms of sports federations.³⁹ The CAS appeal process acts as a cassation court “harmonizing global sports law.”⁴⁰

The first CAS proceedings took place in 1986 with the first award issued in 1987.⁴¹ The court’s caseload has increased dramatically over time,⁴² and it now decides cases involving seventy-three different sports.⁴³ From its establishment until 2022, CAS has registered 9,695 proceedings.⁴⁴ In 2022 alone CAS registered 830 cases.⁴⁵ This number is as large or larger than the dockets of other major arbitral tribunals and human rights adjudicatory bodies. On the arbitral side, CAS is as active if not more than the Permanent Court of Arbitration (204 cases in 2022),⁴⁶ the International Court of Arbitration

36. See Kendall Thielemann, *The Court of Arbitration for Sport: Where are the Sidelines to its Authority?* 45 N.C. J. INT’L L. 47, 51 (2020) (describing CAS’s different jurisdictional models for different types of cases).

37. Duval, *supra* note 8, at 5.

38. WCM-GP v. Fédération Internationale Motocycliste, CAS 2003/A/461 & 471 & 473, ¶ 30 (Ct. Arb. for Sport, Aug. 2003).

39. See, e.g., Hellenic Olympic Comm. & Kaklamanakis v. Int’l Sailing Fed’n, CAS OG 04/009, ¶ 24 (Ct. Arb. for Sport, Aug. 24, 2004) (asserting that CAS has the power to overrule the rules of a sport federation if it acts with “a lack of good faith or not in accordance with due process”).

40. Lorenzo Casini, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, 12 GER. L.J. 1317, 1332 (2011).

41. McLaren, *supra* note 9, at 306.

42. LINDHOLM, *supra* note 10, at 61.

43. *Id.* at 39.

44. *Statistics*, COURT ARB. FOR SPORT, https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2022.pdf (showing registered proceedings include ordinary (1,551); appeal (7,221); ad hoc (161); anti-doping (75); mediation (105) and consultation (82) procedures). See also, HC X. v. Ligue Suisse de Hockey sur Glace (LSHG), CAS 86/1 (Ct. Arb. for Sport, Jan. 30, 1987), <https://jurisprudence.tas-cas.org/Shared%20Documents/1.pdf> was the first award rendered by CAS. The case involved a dispute between an ice hockey coach, an ice hockey club and the Swiss Ice Hockey Federation regarding a disciplinary sanction; Erika Hasler, *Back to the Future: The First CAS Arbitrators on CAS’s First Award (TAS 86/1, HC X. c. LSHG) and Its Evolution Since Then*, 2016 Y.B. INT’L SPORTS ARB. 3, 3.

45. *Statistics*, *supra* note 45.

46. PERM. CT. ARB, ANNUAL REPORT 20 (2022), <https://docs.pca-cpa.org/2023/07/341817ff-pca-annual-report-2022.pdf>.

of the International Chamber of Commerce (946 cases),⁴⁷ the London Court of International Arbitration (327 cases),⁴⁸ and the International Center for Dispute Resolution (755 in 2022).⁴⁹ Compared to the number of cases decided by human rights institutions, CAS is a quantitatively important adjudicatory body. The Inter-American Court of Human Rights has issued 401 decisions since its establishment in 1979 and its sister, the Inter-American Commission on Human Rights, had 3,629 pending petitions by the end of 2022.⁵⁰ The African Court of Human and Peoples Rights has registered 342 cases since 2004 and the African Commission on Human and Peoples Rights has 220 pending communications.⁵¹ The UN Human Rights Committee has registered 4,121 communications concerning 94 States parties since 1977, of which 211 were registered in 2021.⁵² The European Court of Human Rights, by far the most active body, had more than 74,000 pending communications by the end of 2022, a year in which it communicated 6,822 applications and delivered 4,168 judgments.⁵³ Currently, thirty-eight percent of all CAS published decisions correspond to football-related disputes and forty-five percent to doping matters.⁵⁴ The Olympic Charter requires the exclusive submission to CAS of “any dispute arising on the occasion of, or in connection with, the Olympic Games.”⁵⁵ Particularly, Olympic athletes are subject to the same requirement.⁵⁶ International federations

47. INT’L CHAMBER OF COM. [ICC], ICC DISPUTE RESOLUTION 2020 STATISTICS 9 (2021), <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/#anchor-download>.

48. LONDON CT. INT’L ARB., ANNUAL CASEWORK REPORT 7 (2022), <https://www.lcia.org/News/lcia-news-annual-report-on-2022-updates-on-the-lcia-court-and.aspx>.

49. 2022 ICDR Case Data Infographic, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/sites/default/files/document_repository/AAA430_ICDR_Case_Data_2022.pdf (showing latest disaggregated data from 2022).

50. INTER-AM. CT. H.R., ANNUAL REPORT 44 (2022) and INTER-AM. COMM’N H.R., ANNUAL REPORT 299 (2022).

51. *Statistics*, AFRICAN CT. HUM. & PEOPLES RTS., <https://www.african-court.org/cpmt/statistic> (last visited Apr. 25, 2024); AFRICAN COMM’N HUM. & PEOPLES RTS., 52ND AND 53RD COMBINED ACTIVITY REPORTS ¶ 35 (2022).

52. Human Rights Committee, *Report* at 22 (2022).

53. EUROPEAN CT. HUM. RTS., ANNUAL REPORT 139 (2022).

54. LINDHOLM, *supra* note 10, at 40.

55. *See Olympic Charter*, *supra* note 29 (providing that any disputes regarding the IOC are to be submitted to the CAS for resolution).

56. *Id.*

also generally demand national federations and athletes to bring their complaints to CAS.⁵⁷ CAS arbitration also resolves all appeals regarding the World Anti-Doping Code (WADC) involving an international event or athlete.⁵⁸ The STF has recognized that a “CAS arbitration clause is typical of the sport requirements,” and that “there is practically no elite sport without consent to sport arbitration.”⁵⁹

The International Federation for Equestrian Sports (FEI)⁶⁰ was the first major international federation to accept CAS jurisdiction,⁶¹ while the International Amateur Athletic Federation (IAAF, currently World Athletics) and Federation Internationale de Football Association (FIFA) were the last Olympic Games federations to do so.⁶² Today, almost all sports federations and all national Olympic committees recognize CAS.⁶³

The Code of Sports-related Arbitration and Mediation Rules (the CAS Code) regulates all aspects of CAS’s institutional

57. See Clifford J. Hendel, *Jurisdiction of the CAS – The Basics*, INT’L ARB. INSIGHTS: CAS & LEX SPORTIVA, Apr. 2017, at 12, 12 (highlighting the prominence of CAS). Notably, U.S. professional leagues, Formula 1, and English Football have not accepted CAS as the final arbitration mechanism. See, e.g., Gabrielle Kaufmann-Kohler & Henry Peter, *Formula 1 Racing and Arbitration: The FIA Tailor-Made System for Fast-Track Dispute Resolution*, 17 ARB. INT’L 173, 174 (2001).

58. WADA Code, *supra* note 28, at art. 13.2.1.

59. Tribunal Fédéral [TF] Feb 13. 2012, 4A_428/2011 ¶ 3.2.3 (Switz.). Translation by the author.

60. Interestingly, the first case to challenge CAS independence in front of the STF involved the FEI. See *Gundel v. Int’l Fed’n for Equestrian Sports (FEI)*. See also Bundesgericht [BGer] Mar. 15, 1993, 119 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 271, 275 ¶ 3(b) (Switz). As it will be explained later, *Gundel* led to major changes in CAS and the establishment of ICAS.

61. ANDERSON, *supra* note 12, at 79.

62. See McLaren, *supra* note 9, at 315.

63. For examples of sports federations see, e.g., Badminton World Fed’n [BWF], *BWF Judicial Procedures*, art. 38.1 (Nov. 11, 2020); International Surfing Association [ISA], *Rulebook and Contest Administration Manual*, Chapter 2 (III) (vi) (f) (i) (June 2021); International Bobsleigh and Skeleton Federation [IBSF], *Statutes*, art. 18.3 (July 2022). For examples of National Olympic Committees, Comité Olimpico Argentino [Argentine Olympic Committee], *Estatuto*, arts. 11.3, 23.8, 31, 66, (May 31, 2021); Singapore National Olympic Council [SNOC], *Constitution*, art. 8.2.2 (May 27, 1947); Comité Olimpico de Mocambique [Mozambique Olympic Committee], *Estatutos*, art. 36 (Feb. 6, 2010).

and procedural functioning. The International Council for Arbitration for Sport (ICAS) was established to “facilitate the resolution of sports-related disputes through arbitration or mediation and to safeguard the independence of CAS and the rights of the parties.”⁶⁴ Out of the twenty members of ICAS, four are appointed by the International Federations; four by the Association of the National Olympic Committees; four by the IOC; four “are appointed by the twelve members of ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;” and “four are appointed by the eighteen members of ICAS listed above, chosen from among personalities independent of the bodies designating the other members of the ICAS.”⁶⁵

ICAS President also serves as the president of CAS.⁶⁶ ICAS has the crucial responsibility of appointing the close list of CAS arbitrators.⁶⁷ The CAS List of Arbitrators totals almost four hundred arbitrators appointed for a renewable four year term.⁶⁸ The vast majority are European men with a business background.⁶⁹ Arbitrators and mediators cannot act as lawyers for any party before CAS.⁷⁰

While CAS has an Ordinary and an Appeals Arbitration Division,⁷¹ most cases are dealt with by the CAS Appeals Division.⁷² According with Article R27 of the CAS Code, CAS has jurisdiction over any dispute directly or indirectly linked to sports involving “matters of principle relating to sport or matters of pecuniary or other interests relating to the practice or the development of sport and. . . any activity or matter related

64. *Code: ICAS Statutes*, *supra* note 33, at S2.

65. *Id.* at S4.

66. *Id.* at S9.

67. *Id.* at S6(4).

68. *Id.* at S13. *List of CAS Arbitrators by Nationality*, CT. ARB. FOR SPORT, https://www.tas-cas.org/fileadmin/user_upload/Liste_des_arbitres_par_nationalite_2022_sans_ADD_17.05.22.pdf (last visited Oct. 16, 2022).

69. *See* LINDHOLM, *supra* note 10, at 269–74 (providing that out of “the 2,194 arbitrator appointments found in the studied CAS decisions, more than 77 percent went to arbitrators based in Europe,” and stating generally that non-Western CAS arbitrators are rare and female arbitrators are even rarer).

70. Ct. Arb. for Sport, *Code of Sports-Related Arbitration*, at S18 (Jan. 1, 2020) [hereinafter *Code of Sports-Related Arbitration*].

71. *Id.* at S20.

72. *See Statistics*, *supra* note 45 (providing that out of 9,695 procedures from 1986 to 2022, 7,721 were appeal procedures).

or connected to sport”⁷³ CAS can determine *ex officio* that a dispute is not admissible.⁷⁴

CAS headquarters are located in Lausanne with two permanent offices in Sydney and New York, and *ad hoc* divisions functioning during the Olympic Games and other mega-events, such as the FIFA World Cup.⁷⁵ The CAS Code provides that the seat of CAS is Lausanne regardless if the decision comes from one of the decentralized or *ad hoc* divisions.⁷⁶ The headquarters in Lausanne has significant legal consequences, as it provides that CAS proceedings are governed by Swiss law and that the STF has jurisdiction to review CAS awards.⁷⁷

In terms of the applicable law, in the Ordinary Procedure, the parties have the freedom to choose the substantive governing law and in case of no choice, Swiss law applies.⁷⁸ CAS can be authorized by the parties to decide *ex aequo et bono*.⁷⁹ Regarding the Appeals Arbitration Procedure, CAS “shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties.” If there is no choice, CAS uses “the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate.”⁸⁰ As a result, the primary default rules applied in appeals to CAS are sport regulations, which make very few specific references to human rights, limiting the impact of human rights standards in sports arbitration.⁸¹ On appeals, CAS has the power to review *de novo* the facts and the law unbound by the findings of the previous instance.⁸² It may

73. Code: ICAS Statutes, *supra* note 33, at R27.

74. Luigi Fumagalli, *Review of CAS Jurisprudence Regarding Jurisdiction and Admissibility*, CAS BULL., no 1, 2016 at 14, 16.

75. Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515, 519-20 (2001).

76. Code: ICAS Statutes, *supra* note 33, at S1.

77. See Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT’L DISP. SETTLEMENT 217, 220 (2010) [hereinafter, Rigozzi, *Challenging Awards*] (explaining that almost all awards to date of the article were international awards rendered under Swiss law).

78. Code: ICAS Statutes, *supra* note 33, at R45.

79. *Id.*

80. *Id.* at R58.

81. U.N. High Comm’r for Hum. Rts., *Intersection of Race and Gender Discrimination in Sport*, ¶¶ 44-45, U.N. Doc. A/HRC/44/26 (Jun. 15, 2020) [hereinafter, OHCHR Race and Gender].

82. Code: ICAS Statutes, *supra* note 33, at R57.

annul (fully or partially) a decision replacing it with a new one or sending it back to the prior decision maker.

A unique aspect of CAS procedure is its speed, secured by, among other things, truly short time limits.⁸³ In Ordinary Arbitration Proceedings, the parties may agree to expedite the procedure.⁸⁴ The Ad Hoc Division typically renders its awards within twenty-four hours.⁸⁵ The ECtHR recognized CAS as a “specialised body which is able to give a ruling swiftly and inexpensively.”⁸⁶ The CAS Code allows the issuing of provisional measures to prevent additional harm.⁸⁷

Procedurally, even though some CAS awards are publicly available, most proceedings are held *in camera* unless the parties specifically agree otherwise, or at the athlete’s request if the dispute relates to their misconduct.⁸⁸ Hearings can be held anywhere; even by video conference.⁸⁹ Finally, CAS has a legal aid fund for athletes who need it.⁹⁰

CAS’s existence and legitimacy has been recognized by multiple national and international tribunals. As the STF put it in its leading case, *Lazuntina*, CAS meets a real need as the only specialized international institution resolving sports disputes promptly and inexpensively.⁹¹ CAS has gradually acquired the confidence of sporting circles being recognized as a pillar of international sport.⁹² The multiplicity of international sports competitions held in various countries, organized by institutions located across the globe and open to athletes worldwide,

83. *Id.* at R59 (requiring communication of the award’s operative portion within three months); *see, e.g., id.* at R49 (allowing a twenty-one-day appeal window).

84. *Id.* at R44.4.

85. *See, e.g., Makhnev v. Int’l Ski Fed’n*, CAS OG 22/02, ¶¶ 3.1, 3.6 (Ct. Arb. for Sport Ad Hoc Div., Feb. 1 2022) (narrating timetable: the case was introduced on January 27, 2022, at 8:30 AM, a hearing was conducted on January 28th, 2022, at 4:00 PM and that same day the Operative Part of the Award was adopted with the Grounds of the Award being published on February 1st, 2022).

86. *Mutu & Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, ¶ 98 (Eur. Ct. H.R., Oct. 2, 2018).

87. *Code: ICAS Statutes*, *supra* note 33, at R37.

88. *Id.* at R57.

89. *Id.* at R28 and R44.2.

90. *Id.* at S6.

91. Tribunal fédéral [TF] May 27, 2003, 129 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] III 445 (Switz.).

92. *Id.*

warrants “recourse to a single and specialised international arbitral tribunal [that] facilitates a certain procedural uniformity and strengthens legal certainty.”⁹³

CAS has stated that “competitive sport must be performed in accordance with the same uniform rules” in order to be able to compare them.⁹⁴ Concentrating jurisdiction at a single arbitration forum secures the principle of uniformity and the “consistency of rules and decisions” and to preserve the global character of international sports.⁹⁵ Given the specific rules of the Olympic Committee and most SGBs, the recourse to CAS is mandatory rather than completely the free will of the parties. The Federal Swiss Tribunal supported the mandatory existence of sports arbitration and the limited, if any, true consent of athletes to such arbitration.⁹⁶ The STF recognized the hierarchical structure of competitive sport,⁹⁷ leaving only a “fairly hypothetical situation where a famous athlete is so well known that he is able to dictate his conditions to the international federation governing his sport.”⁹⁸ In most situations, athletes lack enough power over their sports federations and must accept the SGB rules.⁹⁹ Therefore, professional athletes wishing to participate in a competition organized by a SGB that has a mandatory arbitration clause in its regulations has the sole option of accepting such clause.¹⁰⁰ Athletes either agree with the mandatory arbitration or renounce professional practice of their sport and watch the competitions on television or practice their sport in their garden.¹⁰¹ The ECtHR acknowledged in *Mutu* the forced arbitration character of CAS jurisdiction.¹⁰²

The necessity for and legitimacy of CAS is met with a broad degree of deference by domestic courts, including U.S. ones.

93. *Semenya v. Switzerland*, no. 10934/21, ¶ 111 (Eur. Ct. H.R., July 11, 2023) (“a ‘centralised’ system for handling disputes in the domain of sport has its advantages, in particular, in order to guarantee a certain coherence and consistency in the case-law, internationally, through the CAS.”).

94. *Stichting Anti-Doping Autoriteit Nederland v. W.*, CAS 2010/A/2311 & 2312, ¶ 19 (Ct. Arb. for Sport, Aug. 22, 2011) (internal references omitted).

95. *Id.*

96. Tribunal fédéral [TF] Mar. 22, 2006, 4P.172/2006, ¶ 4.3.2.2 (Switz.).

97. *Id.*

98. *Id.* (translation supplied by author).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Mutu & Pechstein*, nos. 40575/10 and 67474/10, ¶ 113.

For instance, the District Court for the Northern District of Florida said that “the United States Courts have no power to right the wrong perpetrated upon one of its citizens” by an “arbitrary and capricious” CAS decision.¹⁰³ Another district court recognized that the current system provides the athlete with ample avenues open to them via appealing to CAS with a *de novo* review, and eventually to the STF.¹⁰⁴

However, there is still litigation going on in most international federations that challenges forced arbitration in front of CAS. One decision of a Brussels court, *RFC Seraing*, considered the claim that, since the arbitration clause in FIFA statutes is general and does not contain a reference to a defined legal relationship, it cannot be recognized under Belgian law.¹⁰⁵ ICAS minimized the Belgian court’s ruling as a “drafting error” with no impact on “the jurisdiction of CAS globally.”¹⁰⁶ Similar to its reaction to *Mutu*, CAS interpreted *RFC Seraing* in a narrower way than the media’s interpretation.¹⁰⁷ However, this case could lead to questions regarding the power, structure, and effectiveness of CAS.¹⁰⁸ The decision sent a “shockwave through sport’s governing bodies.”¹⁰⁹ Nevertheless, in several awards, CAS has asserted the primacy of its rulings over domestic courts given

103. *Gatlin v. U.S. Anti-Doping Agency*, No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657, at *1-2 (N.D. Fla. June 24, 2008).

104. *Armstrong v. Tygart*, 886 F. Supp. 2d 572, 582-83 (W.D. Tex. 2012).

105. Cour d’Appel [CA] Brussels (18 chambre F) (Belg.) Aug. 29, 2018, No. 2016/AR/2048 (as required by the New York Convention) at 16. See Thielemann, *supra* note 36, at 57 (discussing the decision of the Brussels court).

106. Media Release, Int’l Council of Arb. for Sport, Statement of the Int’l Council for Sport (ICAS) Regarding the Case RFC Seraing/Doyen Sport/FIFA/UEFA/URBSF (Sept. 11, 2018), <https://www.tas-cas.org/en/media/media-releases/article/statement-of-the-international-council-of-arbitration-for-sport-icas-regarding-the-case-rfc-serain.html>.

107. See, e.g., Javier Silles, *Sport’s legal system shaken by ruling in Seraing case*, AS (Sept. 6, 2018), https://en.as.com/en/2018/09/05/soccer/1536164687_519265.html (characterizing the decisions as a “historic sentence which could shake the core legal system of the sporting world”); James Diamond, *Brussels court rules “enforced arbitration” of CAS is illegal*, INSIDE THE GAME (Sept. 9, 2018), <https://www.insidethegames.biz/articles/1069768/brussels-court-rules-enforced-arbitration-of-cas-is-illegal> (article says that the Belgian court’s decision “declared that the CAS cannot have exclusive rights to settle legal disputes in football”).

108. Thielemann, *supra* note 36, at 58.

109. Steven A. Bank, *FIFA, Forced Arbitration, and the U.S. Soccer Lawsuits*, 30 J. LEGAL ASPECTS SPORT 1, 6 (2020).

that disregard for CAS decisions could lead to the exclusion of the athletes or SGBs from international competitions.¹¹⁰

The increased caseload of CAS brings more cases involving human rights issues before CAS panels. Some worry about the consequences of CAS hearing those cases, as CAS arbitrators “generally lack human rights expertise.”¹¹¹ The OHCHR echoed this critique.¹¹² In an attempt to respond to this assessment, CAS published a document supposedly detailing its approach to human rights¹¹³ and highlighting the twelve “CAS arbitrators with specific expertise in human rights” out of a list of 421 current CAS arbitrators.¹¹⁴ Concerningly, one of the authors of the piece, Estelle de La Rochefoucauld, who has served as CAS counsel for the last eighteen years,¹¹⁵ previously used Wikipedia as her main source to define “fundamental rights” in a prior article.¹¹⁶

110. Union Cycliste Internationale (UCI) c/ Iñigo Landaluce Intxaurreaga & Real Federación Española de Ciclismo (RFEC), TAS 2006/A/1119 ¶ 49-50 (Ct. Arb for Sport, Dec. 19, 2006); Union Cycliste Internationale (UCI) c/ Aitor Gonzalez & Real Federación Española de Ciclismo (RFEC), TAS 2006/A/1120 ¶ 47 (Ct. Arb. for Sport, Dec. 20, 2006); World Anti-Doping Agency vs Federación Mexicana de Fútbol, CAS 2006/A/1149 and 2007/A/1211, ¶ 26-30 (Ct. Arb. for Sport, May 16, 2007); Agence Mondiale Antidopage (AMA) c. ASBL Royale Ligue Vélocipédique Belge (RLVB) & Iljo Keisse, TAS 2009/A/2014 ¶ 77-79 (Ct. Arb for Sport, July 6, 2010); Yanina Wickmayer c. Vlaams Doping Tribunaal (VDT) & TAS 2009/A/2021 & Agence Mondiale Antidopage (AMA) c. VDT, Fédération flamande de tennis (VTV) et Yanina Wickmayer, TAS 2009/A/1995 ¶ 36 (Ct. Arb. for Sport, Dec. 3, 2012).

111. JOHN G. RUGGIE, “FOR THE GAME. FOR THE WORLD.”: FIFA & HUMAN RIGHTS 26 (Harvard Kennedy School 2016).

112. OHCHR Race and Gender, *supra* note 81, ¶ 46.

113. See generally ESTELLE DE LA ROCHEFOUCAULD & MATTHIEU REEB, CT. OF ARB. FOR SPORT, SPORT AND HUMAN RIGHTS: OVERVIEW FROM A CAS PERSPECTIVE (Nov. 28, 2023) (describing CAS position on human rights in sport regulations and arbitration).

114. Search results for all arbitrators, COURT OF ARBITRATION FOR SPORT, <https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html?GenSlct=2&nmIpt=> (Last visited Apr. 27, 2024).

115. Estelle de La Rochefoucauld, LINKEDIN, <https://www.linkedin.com/in/estelle-de-la-rochefoucauld-524b5a7/?originalSubdomain=ch> (last visited Nov. 4, 2022).

116. Estelle de La Rochefoucauld, *The Fundamental Rights of the Parties Before the CAS*, CAS BULL. no. 1, 2021 at 33.

III. RIGHTING SPORTS LAW

The interest in human rights protection in the sports ecosystem is a relatively new phenomenon. The Declaration and Program of Action of the 1993 Vienna World Conferences on Human Rights¹¹⁷ did not mention sports at all. Since then, other World Conferences such as the Beijing on Women¹¹⁸ and the Durban on Racism,¹¹⁹ the Second World Assembly on Aging,¹²⁰ or the 2030 Agenda for Sustainable Development¹²¹ made explicit references to human rights violations taking place in the context of sports or the role of sports in promoting and facilitating the enjoyment and respect of human rights.¹²² Despite an *ad hoc*, incoherent, intermittent, and patchwork approach, the United Nations as well as other regional inter-governmental organizations are increasingly demonstrating a concern about securing full respect for human rights in the sports field. I call “*righting sports law*” the use of international human rights to, among other things, recognize the practice of sports and physical activity as a human right¹²³; monitoring the

117. *Vienna Declaration*, *supra* note 1.

118. *Beijing Declaration*, *supra* note 2, ¶¶ 83 (m), 107 (f), 183, 280 (d).

119. *Durban Declaration*, *supra* note 2, ¶¶ 86; 218.

120. Report of the Second World Assembly (A/CONF.197/9)

121. G.A. Res. 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, ¶ 37 (Oct. 25, 2015).

122. See generally Carmen P. González, *The effective application of international human rights law standards to the sporting domain: Should UN monitoring bodies take central stage?*, 22 INT'L SPORTS L.J. 152 (2022), <https://doi.org/10.1007/s40318-021-00209-8> (discussing how human rights violations in sports have been unsatisfactorily addressed by UN human rights mechanisms).

123. See ZACK BOWERSOX, INTERNATIONAL SPORTING EVENTS AND HUMAN RIGHTS: DOES THE HOST NATION PLAY FAIR? 154 (Lexington Books, 2018) (addressing the right to leisure as a fundamental right for the international sporting community); see generally Janet E. Lord & Michael Ashley Stein, *Social rights and the relational value of the rights to participate in sport, recreation, and play*, 27 BU INT'L L.J. 249 (2009) (discussing the development of the normative content of the social right to participate in sport, recreation, and play).

functioning of SGB,¹²⁴ including the respect,¹²⁵ promotion,¹²⁶ and/or violation of human rights in sports practices,¹²⁷ competitions and in mega-sporting events;¹²⁸ adopting human rights policies by SGB;¹²⁹ and increasing attention to sports by inter-governmental organizations and particularly human rights organs.¹³⁰ For instance, the Committee on the Elimination of Discrimination against Women (CEDAW) raised concerns about the lack of full participation of women and girls in sports and that there are not enough States' efforts to promote and support such participation.¹³¹ CEDAW further noted the low representation of women in SGBs,¹³² recommending that States

124. See *Recommendation of the Committee of Ministers to Member States on the Principle of Autonomy of Sport in Europe* CM/Rec(2011)3, COUNCIL OF EUROPE (Feb. 2, 2011), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805b4d00 (discussing the importance of good governance principles in SGBs); See generally Trista Turley, *When the Escape Ends Responsibility of the IOC and FIFA at the Intersection of Sport Law and Human Rights*, 6 NOTRE DAME J. INT'L COMP. L. 145, 165 (2016) (arguing that major governing bodies of international sport should and can assume a greater role in the field of human rights).

125. United Nations Children's Fund [UNICEF], *Children's Rights in Sports Principles*, at 7 (2018), https://childinsport.jp/assets/downloads/Children's_Rights_in_Sport_Principles_English.pdf (commitment to respect and support the rights of children).

126. G.A. Res. 67/17, ¶ 1 (Nov. 28, 2012); Human Rights Council Res. 27/8, U.N. Doc. A/HRC/RES/27/8, at ¶ 2 (Oct. 3, 2014); United Nations Educational, Scientific and Cultural Organization [UNESCO], *Kazan Action Plan*, ¶ 22 (July 15, 2017). See generally Brendan Schwab, 'Celebrate Humanity': *Reconciling Sport and Human rights Through Athlete Activism*, 28 J. LEGAL ASPECTS SPORT 170, 206 (2018); Julie H. Liu, *Lighting the Torch of Human Rights: The Olympic Games as a Vehicle for Human Rights Reform*, 5 NW. J. HUM. RTS. 213, 235 (2007).

127. Donnelly, *supra* note 19, at 391.

128. See generally MEGA-SPORTING EVENTS PLATFORM FOR HUMAN RIGHTS, CHAMPIONING HUMAN RIGHTS IN THE GOVERNANCE OF SPORTS BODIES 9 (2018) (discussing how to embed respect for human rights into mega-sporting events).

129. For an example of how human rights policies were adopted by FIFA, see generally RUGGIE, *supra* note 111.

130. See, *infra* notes 132-141 and accompanying text.

131. Comm. on the Elimination of Discrimination against Women, Concluding observations on the initial report of the State of Palestine, U.N. Doc. CEDAW/C/PSE/CO/1, ¶ 40(b) (July 25, 2018); Comm. on the Elimination of Discrimination against Women, Concluding observations on the fifth periodic report of Kazakhstan, U.N. Doc. CEDAW/C/KAZ/CO/5, ¶ 41(e) (Nov. 12, 2019).

132. Comm. on the Elimination against Women, Concluding observations on the fourth periodic report of Botswana, U.N. Doc. CEDAW/C/BWA/CO/4, ¶ 39 (Mar. 14, 2019).

pursue substantive gender equality in sports.¹³³ The Committee on the Rights of Persons with Disabilities (CRPD) was concerned with the lack of information about access to mainstream sporting facilities for persons with disabilities, and the lack of sporting activities for children with disabilities.¹³⁴ Due to the lack of support for deaf sports, the CRPD recommended the State to allocate specific budgets to promote the right of persons with disabilities, particularly children with disabilities, to participate in sport on an equal basis with others.¹³⁵ The Committee on Racial Discrimination (CERD) has addressed the issue of racism in sports.¹³⁶ CERD was alarmed with “the rise and trivialization of racism and xenophobia in sports stadiums and the media, including social networks.”¹³⁷ This situation may create a climate conducive to racially motivated violence; thus, CERD recommended the State to “firmly combat hate speech in the media, including social networks, and in sports stadiums.”¹³⁸ There are also some individual cases dealing with human rights issues in the context of sports being decided by regional¹³⁹ and universal human rights bodies.¹⁴⁰

133. Comm. on the Elimination of Discrimination against Women, Concluding observations on the seventh periodic report of Italy, U.N. Doc. CEDAW/C/ITA/CO/7, ¶ 44(d) (July 24, 2017).

134. Comm. on the Rts. Of Persons with Disabilities, Concluding observations on the initial report of France, U.N. Doc. CRPD/C/FRA/CO/1, ¶¶ 60, 61(b) (Oct. 4, 2021).

135. *Id.* at ¶ 60.

136. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, U.N. Doc. CERD/C/ISR/CO/13, ¶ 7 (June 14, 2007).

137. Comm. on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth and twenty-first periodic reports of Algeria, U.N. Doc. CERD/C/DZA/CO/20-21, ¶ 11 (2018).

138. *Id.* at ¶ 12.

139. *See, e.g.*, Emérita Montoya González v. Costa Rica, Case 11.553, Inter-Am. Comm’n H.R., Report No. 48/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 1 (1996) (Inter-American Court of Human Rights ruled on petition alleging that the municipal organizers of athletic competitions in Costa Rica discriminated against women athletes).

140. *See e.g.*, Comm. on the Elimination of Racial Discrimination, Comm’n No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002 (Apr. 14, 2002) (Committee ruled on the petition alleging violation of a violation by Australia of articles 2 of the International Convention on the Elimination of All Forms of Racial Discrimination); Comm. on Econ., Soc. and Cultural Rts., Comm’n No. 3/2014, U.N. Doc. E/C.12/58/3/2014, (Aug. 8, 2016) (ruling on

The impact of human rights law on sports tends to be limited by the traditionally important degree of autonomy that sports enjoy. Historically, courts have been reluctant to use national law protecting individual rights and liberties to externally regulate sports, particularly Olympic competitions, or to interfere with sports decisions and rule-making authority. In the legal realm, the principle of sports autonomy avoids direct legal regulation of the actions of SGBs, including the way that athletes are managed. It reflects a “hands-off,” “laissez-faire” attitude towards sports.¹⁴¹ As one court stated, tribunals disfavor “judicial entanglement with the internal operations of sports.”¹⁴² Autonomy means the possibility for SGBs to freely establish, interpret, and apply the rules of the game; to elect their leaders, without state or third parties undue interferences; to obtain and use adequate funds from public or other sources, without disproportionate obligations; and to carry out activities they freely choose.¹⁴³ The result is “a generous degree of legal insulation for sports leagues, administrators, and regulators, especially in the way that they manage athletes and structure the games.”¹⁴⁴ Some sports law specialists support this leeway by referring to the “extravagant interference [in sports] by domestic courts.”¹⁴⁵ Swiss law further insulates sports organizations’ self-regulation by affording considerable autonomy to SGBs and strong deference to arbitration awards.¹⁴⁶ This association’s autonomy under Swiss law is, however, not unlimited.¹⁴⁷ CAS has explained that an SGB cannot alter mandatory legal

discrimination against a foreign minor in respect of participation in youth soccer tournaments.).

141. Dionne L. Koller, *Putting Public Law into “Private” Sport*, 43 PEPP. L. REV. 681, 687 (2016).

142. *Davidovich v. Isr. Ice Skating Fed’n*, 140 A.3d 616, 632 (N.J. Super. Ct. App. Div. 2016).

143. CM/Rec (2011)3, *supra* note 124.

144. Koller, *supra* note 144, at 687-88.

145. JAMES NAFZIGER, *Lex Sportiva*, in LEX SPORTIVA: WHAT IS SPORTS LAW? 53, 59 (Robert Siekmann & Janwillen Soek eds., 2012).

146. *See generally* Margareta Baddeley, *The Extraordinary Autonomy of Sports Bodies under Swiss Law: Lessons to be Drawn*, 20 INT’L SPORTS L. J. 3 (2020) (discussing extraordinary autonomy that sports governing bodies enjoy under Swiss law).

147. *See* STEPHEN WEATHERILL, *Is There Such a Thing as EU Sports Law*, in LEX SPORTIVA: WHAT IS SPORTS LAW? 300, 305 (Robert Siekmann & Janwillen Soek eds., 2012) (discussing conditional autonomy of sports federations under EU law).

provisions.¹⁴⁸ Furthermore, the autonomy may be restricted if the pertinent association, such as the SGB, holds a dominant or monopolistic position.¹⁴⁹ Other restrictions to an association's autonomy may also be justified to protect personality rights and good faith.¹⁵⁰ Swiss courts have accepted judicial challenges to rules and decisions of SGBs and other sports associations limiting the traditional sport's autonomy.¹⁵¹

Additionally, for a long time, the private nature of sports governing bodies acted as a shield to the use of human rights law to oversee their operations or to challenge their policies.¹⁵² Sporting activity is commonly regulated by private law, as both SGBs and athletes are not states and supposedly freely contract with one another.¹⁵³ Sporting federations norms on national associations, clubs, and athletes are based on their will and consent.¹⁵⁴ However, SGBs and the CAS as central actors in governing international sports act functionally like a sovereign State. The public function of SGBs requires a move away from a purely private law mindset. In particular, the CAS should not be analyzed mainly as an international commercial or private arbitration court, but rather under those standards applicable to domestic courts.¹⁵⁵

These two factors—autonomy and the private nature of its activities—lead to a remarkable level of sports self-regulation.¹⁵⁶ The OIC and international sports federations act as global

148. Gibraltar Football Association (GFA) v. Fédération Internationale de Football Association (FIFA), CAS 2014/A/3776, ¶ 312 (Court Arb. for Sport, Apr. 27, 2016).

149. *Id.*

150. SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] DEC. 10, 1907, RS 210, ART. 28 (Switz.) (“1. Any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement. 2. An infringement is unlawful unless it is justified by the consent of the person whose rights are infringed or by an overriding private or public interest or by law.”).

151. *See* Baddeley, *supra* note 146, at 8 (“Progressively, courts changed their approach, both in cases of professional and amateur sports and granted judicial review in matters previously considered as “irrelevant” in law.”).

152. Duval & Heerdt, *supra* note 25, at 1.

153. Budapest Honvéd FC v. Kain Kandia Emile Traoré, CAS 2015/A/4280, ¶ 58 (Ct. Arb. for Sport, July 11, 2016).

154. Mathieu Montcourt v. Ass'n of Tennis Professionals (ATP), CAS 2008/A/1630, ¶ 7 (Ct. Arb. for Sport, May 13, 2009).

155. Duval, *supra* note 8, at 16.

156. Baddeley, *supra* note 146, at 3.

legislators setting common standards in international sports.¹⁵⁷ Domestic courts tend to generally defer to those international federations rather than reviewing or invalidating their rules and decisions, even if they infringe on athletes' rights.¹⁵⁸ For example, in *Martin v. International Olympic Committee*,¹⁵⁹ the U.S. Ninth Circuit Court rejected the athletes' gender discrimination claims for the men's track events which lacked a female equivalent in the Los Angeles Olympic Games.¹⁶⁰ The court justified: "[A] court should be wary of applying a state statute to alter the content of the Olympic Games[...]organized and conducted under the terms of an international agreement—the Olympic Charter."¹⁶¹ A British Columbia Court of Appeal rejected a similar gender discrimination claim regarding the Vancouver Olympic Games. In *Sagen v. Vancouver Organizing Committee for the 2010 Olympic & Paralympic Winter Games*,¹⁶² the court ruled that the non-inclusion of women's ski jumping while including men's ski jumping events did not breach the Canadian Charter of Rights and Freedoms.¹⁶³ A similar deferential approach led a U.S. court to reject discrimination claims by athletes seeking to march in the Olympic Games opening ceremony under flags of countries not recognized by the IOC.¹⁶⁴

SGBs and CAS have used the concept of political neutrality to argue against government intervention in sporting activities and in SGBs taking positions on human rights issues. According

157. KEN FOSTER, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence*, in *THE COURT OF ARBITRATION FOR SPORT 1984-2004*, 420, 438 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds., 2006).

158. Matthew Mitten, *The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries*, 30 OHIO ST. J. ON DISP. RESOL. 1, 7–8 (2014).

159. *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 673 (9th Cir. 1984).

160. *Id.*

161. *Id.* at 677.

162. *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games*, 98 B.C.L.R. 4th 141 (Can. B.C.).

163. *Id.* at ¶ 6. The Supreme Court of Canada rejected the appeal. *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games*, 2009 Carswell BC 3468 (Can. S.C.C.) (WL).

164. *See, e.g.*, *Spindulys v. Los Angeles Olympic Org. Comm.*, 220 Cal. Rptr. 565, 565–66 (Cal. Ct. App. 1985) (Court dismissed discrimination claims as a nonjusticiable political question); *Ren-Guey v. Lake Placid 1980 Olympic Games*, 72 A.D.2d 439, 441 (N.Y. App. Div. 1980) (Court dismissed the case as a political question, because the Department of State had elected to defer to the IOC in these matters).

to CAS, political neutrality “requires that no political interference whatsoever is exercised on the activities of a sporting organisation.”¹⁶⁵ Athletes must be free from political pressure to practice their sport.¹⁶⁶ An SGB violates the principle if it allows a “political issue to interfere with sporting activities.”¹⁶⁷

Many, particularly those from the SGBs and their attorneys, point out that recognizing human rights obligations of sporting organizations and the role of athletes in exercising such rights leads to the relativization of the political neutrality of sports.¹⁶⁸ Former president of the IOC Jacques Rogge said that “having influence on human rights is the task of political organizations and human-rights organizations. It is not the task of the International Olympic Committee to get involved in monitoring or lobbying or influencing.”¹⁶⁹ The implication that “politics and sport don’t mix” (or should not mix) continues to be popular.¹⁷⁰

The requirement of State action to extend constitutional, civil, and/or human rights protections adds another problem to the full recognition of the legal obligations of SGBs. In the U.S., courts consistently deny that the actions of any national or international SGBs constitute State action, thus not extending constitutional protections.¹⁷¹ Internationally, for instance, the World Athletic (formerly IAAF) asserted that it “is not a

165. Islamic Republic of Iran Judo Federation v. Int’l Judo Federation, CAS 2019/A/6500 & CAS 2019/A/6580, ¶105 (Ct. Arb. for Sport, March 1, 2021).

166. *Id.*

167. *Id.*

168. Antonio Di Marco, *Athletes’ Freedom of Expression: The Relative Political Neutrality of Sport*, 21 HUM. RTS. L. REV., 620, 636 (2021).

169. Hans Erik Naess, *In Pursuit of Clarity: A Critique of Sports Governing Bodies’ Conceptual Inconsistency in Human Rights Work*, 38 NORDIC J. OF HUM. RTS. 205, 205 (2020) [hereinafter Naess, *Clarity*].

170. Helen Lenskyj, *Sport Exceptionalism and the Court of Arbitration for Sport*, 4 J. OF CRIMINOLOGICAL RSCH., POL’Y & PRAC. 5, 9 (2018).

171. *See, e.g.*, Behagen v. Amateur Basketball Ass’n of the United States, 884 F.2d 524, 531 (10th Cir. 1989) (“we reject the jury finding of ‘state action’ in this case”); Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 194 (1988) (“the ABA’s formulation of those disciplinary rules was [not] state action”); Int’l Olympic Comm. v. San Francisco Arts & Athletics, 781 F.2d 733, 367-37 (9th Cir. 1986), *aff’d*, 483 U.S. 522 (1987) (“the absence of governmental involvement in the alleged discrimination [is] dispositive”); and DeFrantz v. U.S. Olympic Comm., 492 F. Supp. 1181, 1194 (D.D.C. 1980), *aff’d*, 701 F.2d 221 (D.C. Cir. 1980) (“we find that the decision of the USOC not to send an American team to the summer Olympics was not state action”).

public authority, exercising state powers, but rather a private body exercising private (contractual) powers. Therefore, it is not subject to human rights instruments.”¹⁷² The IAAF added that CAS “is competent to rule on all legal claims, including human rights claims,” requiring that national courts respect and enforce CAS decisions.¹⁷³ IAAF emphatically held that it “would defend any claim that was made in any national or international forum . . . (including, if necessary, on jurisdictional grounds).”¹⁷⁴

There are many different problems with this assertion. CAS’s rulings on human rights issues can be challenged at the end of the day in front of the ECtHR. Additionally, IAAF’s position is, to say the least, disingenuous. On the one hand, the IAAF challenges CAS’ power to apply international human rights standards by asserting that IAAF is not bound by human rights standards. On the other hand, the IAAF argues that CAS rules on “human rights claims” and that CAS awards should be “respected and enforced.” Hopefully, the recent report of the Human Rights Working Group set up by World Athletics will change these positions.¹⁷⁵ The Working Group recommended the adoption of a human rights policy and in particular a “change in mind-set” in the opposition to the application of human rights in athletics.¹⁷⁶

The question of State action could be reframed, particularly in the context of doping disputes. The adoption of international treaties¹⁷⁷ and the establishment of the World

172. Press Release, World Athletics, IAAF Publishes Briefing Notes and Q&A on Female Eligibility Regulations (May 7, 2019), <https://www.worldathletics.org/news/press-release/questions-answers-iaaf-female-eligibility-reg>.

173. *Id.*

174. *Id.*

175. WORLD ATHLETICS, HUMAN RIGHTS WORKING GROUP REPORT (2021).

176. *Id.* at 7.

177. *See, e.g.*, Council of Europe – Anti-Doping Convention, Nov. 16, 1989, E.T.S. No. 135; UNESCO International Convention Against Doping in Sports, Oct. 19, 2005, 2419 U.N.T.S. 201. Additionally, some human rights treaties refer specifically to sports, such G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, arts. 10(g), 13(c) (Dec. 18, 1979); G.A. Res. A/RES/61/106, Convention on the Rights of Persons with Disabilities, art. 30 (Dec. 13, 2006); Organization of American States, Inter-American Treaties A-70, Inter-American Convention on Protecting the Human Rights of Older Persons art. 22, June 15, 2015, 55 I.L.M. 985; and Ibero-American Convention on Rights of Youth, art. 33 (Mar. 1, 2008). (signed in 2005 in Badajoz, Spain, and entered into force on March 1, 2008), available

Anti-Doping Agency (WADA) as a hybrid public-private mechanism¹⁷⁸ renews interest in the debate on whether State action is involved in doping matters, including arbitration.¹⁷⁹ States are integrated, via private and public law instruments, into legislative and administrative processes, creating a complex multilevel enmeshment of public-private regulations and institutions.¹⁸⁰ It is arguably possible to assert the shared responsibility of States in this area.¹⁸¹ The adoption of the WADC¹⁸² and the International Convention against Doping in Sport¹⁸³ allows one to argue that, at least in the area of anti-doping, there is some State action. However, there is no clearly worded section on State delegation included in the Convention.¹⁸⁴ CAS stated that while its case law

at. <https://oij.org/wp-content/uploads/2017/01/Convenci%C3%B3n.pdf>. THERE IS AN OFFICIAL UN REGISTRATION: https://treaties.un.org/Pages/showDetails.aspx?objid=08000002802d5908&clang=_en

178. Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, 6 INT'L ORGS. L. REV. 421, 424 (2009); Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORGS. L. REV. 319, 455-46 (2009).

179. Maureen A. Weston, *Simply A Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport*, 38 GA. J. INT'L & COMP. L. 97, 120 (2009) ("The expanded role of the USADA and governmental adoption of international treaties which recognize the WADC and commit to enforce anti-doping rules upon athletes, re-energizes the debate on whether doping arbitrations involve state action and thus concomitant rights to due process and other constitutional safeguards.").

180. ANTOINE DUVAL, *Transnational Sports Law: The Living Lex Sportiva*, in OXFORD HANDBOOK OF TRANSNAT'L L. 493, 510 (Peer Zumbansen ed., 2020).

181. On shared responsibility in public-private partnerships, see generally LISA CLARKE, *PUBLIC-PRIVATE PARTNERSHIPS AND RESPONSIBILITY UNDER INTERNATIONAL LAW: A GLOBAL HEALTH PERSPECTIVE* (Routledge 2014) (discussing health oriented public-private partnerships as a possible analogy to be applied in the doping context).

182. *Revised World Anti-Doping Code 2021*, supra note 28.

183. International Convention Against Doping in Sport, Oct. 19, 2005, 2419 U.N.T.S. 201.

184. Antoine Duval, *Not in My Name! Claudia Pechstein and the Post-Consensual Foundations of the Court of Arbitration for Sport* 19 (Max Planck Inst. for Compar. Pub. L. & Int'l L., Rsch. Paper No. 2017-01, 2017), <https://ssrn.com/abstract=2920555> ("This soft endorsement, or 'low visibility delegation, could be used as an additional argument to support the validity of a forced jurisdiction of the CAS, but it does not constitute a formal state delegation, nor can it stand as an isolated foundation to legitimize the binding jurisdiction of the CAS".).

confirms that the European Convention should be considered, the ECHR does not apply directly in doping cases.¹⁸⁵

The State requirements have started to change in many jurisdictions. As this Article explains later, the ECtHR has established Swiss responsibility for certain features and actions of CAS as well as for the disciplinary actions, regulations, and procedures of Turkey's sporting bodies.¹⁸⁶ While many jurisdictions have strong constitutional provisions requiring State action in order to prompt the substantive and procedural protection of rights, courts have increasingly gone around some of the State action requirements in order to bring stronger protections for athletes and more oversight from courts. For instance, in *Comitis*, a South African court recognized the public function of the National Soccer League.¹⁸⁷ Additionally, given soccer's large support, the fate of professional players constitutes a matter of public interest. In this context, the constitutional rights of professional players should be protected.¹⁸⁸ American courts have been consistent in holding that most sporting institutions are private actors beyond the reach of constitutional protections.¹⁸⁹ However, some cases have taken a more expansive interpretation. For instance, in *Sternberg*, the New York district court stated that a sporting private association may be bound by constitutional obligations if their actions are "fairly attributable" to the government.¹⁹⁰ Rather than ruling that all actions of SGBs are private given their private character, the court understood that the determination of what conduct constitutes state action must be done on a case-by-case basis considering the specific facts and circumstances.¹⁹¹ In *Zee Telefilms*, the Indian Supreme Court was very clear that the SGB (Board of Control for Cricket in India or BCCI) does discharge some activities that are similar

185. *World Anti-Doping Agency v. Russian Anti-Doping Agency*, CAS 2020/O/6689, ¶ 210 (Ct. Arb. for Sport, Dec. 17, 2020).

186. See section "Overseeing national sporting disciplinary bodies."

187. *Coetzee v Comitis & Others* 2001 (22) ILJ 331 (Cape of Good Hope Provincial Division) at 17.8 (S. Afr.)

188. *Id.*

189. *NCAA v. Tarkanian*, 488 U.S. 179 (1988) (the NCAA cannot be deemed to be a State actor).

190. *Sternberg v. U.S.A. Nat'l Karate-Do Fed'n*, 123 F. Supp. 2d 659, 663 (E.D.N.Y. 2000); *Sterling v. NBA*, 2016 U.S. Dist. LEXIS 38076, *14 (there is no dispute that the NBA is a private actor).

191. *Id.*

to public duties or State functions.¹⁹² In those cases, if there is a violation of a constitutional obligation or rights committed by a private actor, the victim does not enjoy access to a constitutional remedy.¹⁹³ However, that does not mean that the SGB would not have to respond just because they are not a State actor. Under Indian law, the court stated, there should always be a remedy for violation of a right.¹⁹⁴ Constitutional courts in Colombia,¹⁹⁵ Chile,¹⁹⁶ and Peru¹⁹⁷ have allowed the use of constitutional remedies in order to enforce constitutional rights against SGB, recognizing that constitutional protections obligate private entities.

In sum, CAS adjudicates many if not most of the disputes related to international sports. CAS, as a Swiss private arbitration resolution mechanism, is not, as it will be explained later, designed nor equipped to fully address human rights complaints.¹⁹⁸

IV. INCORPORATING HUMAN RIGHTS POLICIES AND STANDARDS

Another trend in the process of righting sports is the inclusion of human rights references in the charters, policies and/or regulations of SGB. SGBs¹⁹⁹ started to refer to human rights standards in their constitutive documents.²⁰⁰

192. *Zee Telefilms Ltd. v. Union of India*, AIR 2005 SC 2677 (India).

193. *Id.*

194. *Id.*

195. *See generally* Corte Constitucional, [C.C.] [Constitutional Court], octubre 11, 2016, Sentencia T550/16, M.P: Aquiles Arrieta Gómez, Expediente T-5.489.438 (ordering compensation).

196. *See generally* Corte Suprema de Justicia [C.S.J.] [Supreme Court], 3 noviembre 2021, Rol de la causa: 56.134-2021 (Chile) (accepting a football club's appeal for protection from the SGB on human rights grounds).

197. *See generally* Tribunal Constitucional [T.C.] [Constitutional Tribunal], 1 octubre 2007, Exp No. 03574-2007-PA/TC 54 (Peru) (allowing the case to go forward).

198. OHCHR Race and Gender, *supra* note 81, ¶ 39.

199. *See, e.g.*, Jean-Loup Chappelet, *The Olympics' Evolving Relationship with Human Rights: An Ongoing Affair*, 25 *SPORT IN SOC'Y* 1, 17 (2022) (summarizing the various pressures and circumstances that have caused the Olympics' relationship with human rights to evolve).

200. In this section, I refer to the explicit mention of human rights but not to other expressions used by SGB such as "human dignity" or "non-discrimination." While those expressions are connected and related to

Traditionally, international federations resisted being subject to international human rights law in their operations and decisions. FIFA argued the inapplicability of the European Convention to CAS proceedings.²⁰¹ Similarly, FIFA challenged the use of the Charter of Fundamental Rights of the European Union by CAS.²⁰² The strongest and most vocal opponent of extending human rights protection into the sports field is World Athletics (previously the IAAF). It has stated that the European Convention only applies to a States Party and the IAAF is not a “State Party (nor a public authority of a State Party) and therefore is not bound by any obligations under the ECHR.”²⁰³

However, in May 2017, FIFA adopted a human rights policy.²⁰⁴ The policy explicitly commits FIFA to respecting human rights.²⁰⁵ Regrettably, FIFA denied the applicability of the European Convention even after adopting its Human Rights Policy.²⁰⁶ In its first award referring to FIFA’s Human Rights Policy, the CAS Panel avoided ruling on the merits of the allegation that FIFA’s decision to postpone dealing with the conflict between the Palestinian and Israeli Federations was a violation of the policy.²⁰⁷

The Olympic Charter recognizes that “the practice of sport as a human right”²⁰⁸ requires all National Olympic Committees to ensure that no athlete “has been excluded for racial, religious, or political reasons or by reason of other forms of

human rights, they do not cover all the elements of a human rights approach to sports. Naess, *Clarity*, *supra* note 169, at 211.

201. *Simunic v. FIFA*, CAS 2014/A/3562, ¶ 40 (Ct. Arb. for Sport, July 29, 2014).

202. *FC Midtjylland A/S v. FIFA*, CAS 2008/A/1485, ¶ 43 (Ct. Arb. for Sport, Mar. 6, 2009).

203. *Leeper v. Int’l Ass’n of Athletics Fed’ns*, CAS 2020/A/6807, ¶¶ 182-83 (Ct. Arb. for Sport, Oct. 23, 2020).

204. Press Release, FIFA, FIFA Publishes Landmark Human Rights Policy (June 8, 2017), <https://www.fifa.com/about-fifa/organisation/news/fifa-publishes-landmark-human-rights-policy-2893311>.

205. FÉDÉRATION INTERNATIONALE DE FOOTBALL ASS’N, FIFA’S HUMAN RIGHTS POLICY, arts. 1, 2, 5 (2017), <https://digitalhub.fifa.com/m/1a876c66a3f0498d/original/kr05dqyhwr1uhqy2lh6r-pdf.pdf>.

206. *Club Raja Casablanca v. FIFA*, CAS 2019/A/6345, ¶ 31 (Ct. Arb. for Sport, Dec. 16, 2019).

207. *Palestine Football Ass’n v. FIFA*, CAS 2017/A/5166 & 5405, ¶¶ 97-98 (Ct. Arb. for Sport, July 9, 2018).

208. *Olympic Charter*, *supra* note 29, at Fundamental Principles of Olympism ¶ 4.

discrimination.”²⁰⁹ This recognition does not mean that an athlete “is entitled . . . to participate in the Olympic Games.”²¹⁰ The IOC adopted the Athletes’ Rights and Responsibilities Declaration (the Declaration) in October 2018.²¹¹ The Declaration defines a “common set of aspirational rights” for athletes acknowledging that athletes and their interests are “integral to the Olympic Movement.”²¹² The IOC includes in Article 1.4 of its Code of Ethics “respect for international conventions on protecting human rights insofar as they apply to the Olympic Games’ activities.”²¹³ The contract of the IOC with the host city for the Olympic Games also includes as one of the Core Requirements the protection and respect of human rights.²¹⁴ And finally, the IOC adopted in September 2022 its “Strategic Framework on Human Rights.”²¹⁵ The inclusion of human rights in the IOC Charter as one of the Fundamental Principles of Olympism²¹⁶ is particularly important given that the Charter “is hierarchically the paramount body of rules governing the IOC’s activities.”²¹⁷ International federations²¹⁸ and national

209. *Id.* at 44.4.

210. Mitten, *supra* note 158, at 7.

211. Int’l Olympic Comm., *Athletes’ Rights and Responsibilities Declaration*, 133d IOC Session (Oct. 9, 2018), https://www.gymnastics.sport/site/pdf/safeguarding/IOC_Athletes_rights_and_responsibilities_declaration.pdf.

212. *Id.* at 1.

213. Int’l Olympic Comm., *IOC Code of Ethics*, IOC Code of Ethics and other texts, at 1.4 (2016), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Leading-the-Olympic-Movement/Code-of-Ethics/EN-IOC-Code-of-Ethics-2016.pdf>.

214. *See* Int’l Olympic Comm., *Host City Contract-Principles*, at 13.2.b. (Sept. 13th, 2017), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf#_ga=2.23601017.27995163.1593368116-923403167.1593368116 (requiring that the host NOC and the OCOG shall protect and respect human rights).

215. Int’l Olympic Comm., *Strategic Framework on Human Rights* (Sept. 2022) <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Strategic-Framework-on-Human-Rights.pdf>.

216. The Charter makes several references to the Fundamental Principles of Olympics. *See Olympic Charter*, *supra* note 29, at 5.1, 14.4, 18.3, 27.2.1, 40.2.

217. *COC & Scott v. IOC*, TAS 2002/O/373, ¶ 79 (Ct. Arb. for Sport, Dec. 18, 2003).

218. *See* Baumann v. IOC, Nat’l Olympic Comm. of Ger., & IAAF., CAS Ad Hoc Div. O.G. 00/006, ¶¶ 12-13 (Ct. Arb. for Sport, Sept. 22, 2000) (determining that the international federations are subject to the arbitration clause in the Olympic Charter).

Olympic committees²¹⁹ are bound by the Charter—the former by the Principles of Olympism as detailed in the Charter.²²⁰ In *Leeper*, CAS *obiter dicta* stated that a SGB is bound by the IOC Charter, (including the human rights principle), through its participation in the Olympic Movement.²²¹

Many other SGBs have incorporated human rights references into their documents. The recently approved Statutes of the International Fencing Federation (FIE) recognizes that the practice of sport is a human right.²²² While acknowledging political neutrality, FIE provides that the “spirit of . . . respect for human rights” requires “governments . . . where official competitions and other events of the FIE take place, to ensure that the principles of the Olympic Charter and this Code are scrupulously respected.”²²³ FIE requires national federations to “promulgate the defense of human rights.”²²⁴

The International Golf Federation (IGF) refers to human rights in at least two different documents. Its Code of Ethics requires “respect for international conventions on protecting human rights insofar as they apply to the IGF activities and any IGF Event or Competition.”²²⁵ Its Supplier Code demands that “suppliers shall respect internationally proclaimed human rights” and ensure that they are not complicit in human rights abuses. Suppliers shall ensure they provide remedies for any human rights violation “in a manner consistent with applicable

219. *Id.* at ¶14. See generally ALEXANDRE MIGUEL MESTRE, *THE LAW OF THE OLYMPIC GAMES* 15 (2009) (discussing the “formal submission of states to the primacy of ‘Olympic law’”).

220. *Islamic Republic of Iran Judo Fed’n v. Int’l Judo Fed’n*, CAS 2019/A/6500 & 2019/A/6580, ¶103 (Ct. Arb. for Sport, Mar. 1, 2021); *Chiba v. Japan Amateur Swimming Fed’n*, CAS 2000/A/278, ¶ 4 (Ct. Arb. for Sport, Oct. 24, 2000); *Nabokov v. Int’l Ice Hockey Fed’n*, CAS 2001/A/357, ¶ 18 (Ct. Arb. for Sport, Jan. 31, 2002); Baumann, *supra* note 218, ¶ 13; *Gibraltar Badminton Ass’n v. Int’l Badminton Fed’n*, CAS 2001/A/329, ¶ 4 (Ct. Arb. for Sport, May 25, 2001); *Swedish Nat’l Olympic Comm. v. Fédération Internationale des Luttes Associées*, CAS Ad Hoc Div. 08/OG/007, ¶ 3 (Ct. Arb. for Sport, Aug. 23, 2008).

221. *Leeper*, CAS 2020/A/6807, ¶ 277.

222. Int’l Fencing Fed’n, *Statutes*, Basic Principles p. 6 (Nov. 2023), <https://static.fie.org/uploads/32/163457-FIE%20Statutes%20ang.pdf>.

223. *Id.* at Ethical Code, p.55.

224. *Id.* at Ethical Code, p.56.

225. Int’l Golf Fed’n [IGF], *Policies and Charters*, p.31 art. 1.4 (Dec. 2021).

standards including the UN Guiding Principles on Business and Human Rights.”²²⁶

According to its Statutes, the Fédération Internationale de Gymnastique (FIG) “does not permit any violation of human rights amongst its members.”²²⁷ The Constitution of the International Powerlifting Federation establishes the observation of “human rights principles” as one of its objectives.²²⁸ In a more limited way, the Code of Conduct of the International Table Tennis Federation requires “respect for international conventions on protecting human rights.”²²⁹ The Code of Conduct of the Fédération Internationale de Volleyball (FIVB) recognizes the “respect for international conventions on protecting human rights insofar as they apply” to the FIVB activities.²³⁰ In the area of car racing, the Federation Internationale de l’Automobile (FIA)²³¹ and Formula 1²³² have made specific references to human rights in their Statutes or public positions. National Olympic Committees²³³ and regional sporting

226. *Id.* at 95.

227. Fédération Internationale de Gymnastique (FIG), *Statutes*, Art. 2.2 (Jan. 1, 2023), https://www.gymnastics.sport/publicdir/rules/files/en_Statutes%20Edition%202023.pdf.

228. Int’l Powerlifting Fed’n, *Constitution of the International Powerlifting Federation*, Art. 1.2.15 (Nov. 6, 2019), https://www.powerlifting.sport/fileadmin/ipf/data/about-ipf/constitution-by-laws/IPF_Con_By-Laws_2019_update.pdf.

229. Int’l Table Tennis Fed’n, *The International Table Tennis Federation Handbook*, p. 157 art. 6.1.4 (Aug. 1, 2021), https://documents.ittf.sport/sites/default/files/public/2021-08/2021ITTFHandbook_v2_clean_version_1.pdf.

230. Fédération Internationale de Volleyball, *FIVB Code of Ethics*, p.9 art 9.2.4 (Mar. 21, 2022), <https://www.fivb.com/en/thefivb/legal>.

231. *See* Federation Internationale de l’Automobile, *FIA Statutes*, Art. 1.2 (Jan. 1, 2024), <https://www.fia.com/fia-statutes-and-internal-regulations> (stating FIA’s commitment to the protection and promotion of human rights).

232. *See Statement of Commitment to Respect for Human Rights*, FORMULA1, <https://www.formula1.com/en/toolbar/statement-of-commitment-to-respect-for-human-rights.html> (last visited Nov. 4, 2022) (Stating Formula1’s respect for human rights and commitments thereunder).

233. *See e.g.* Australian Olympic Committee, *AOC Constitution*, arts. 4 & 5, (Apr. 30, 2022), <https://content.olympics.com.au/public/2022-05/AOC%20Constitution%20-%2030th%20April%202022.pdf> (incorporating human rights through the IOC principles of olympism and making additional commitments to secure human rights without discrimination).

organizations²³⁴ have also included references to human rights in their constitutive documents.

The adoption of human rights commitments in the constitutions, regulations, and/or policies of the different international organizations²³⁵ necessarily should affect how CAS settles disputes. Article 58 of the CAS Code determines that the disputes are decided according to “the applicable regulations.”²³⁶ Thus, in the case of all the SGBs that adopted human rights language in their documents, “human rights no longer just apply subsidiarily (if at all), but directly.”²³⁷ CAS has acknowledged that it “would have to assess the compliance of a particular FIFA decision or regulation with internationally recognized human rights.”²³⁸ However, as correctly pointed out by CAS, “a federation cannot opt out from an interpretation of its rules and regulations” considering principles “of human rights just by omitting any references in its rules and regulations to human rights.”²³⁹

The inclusion of human rights references by SGBs is a positive development. The explicit references to human rights standards provide additional legal arguments to the parties and arbitrators on the duty to comply with these norms. These provisions could serve as a socialization process within SGBs and

234. South-American Confederation of Football, *Estatutos* [Statutes], art. 4.1.b. <https://cdn.conmebol.com/wp-content/uploads/2018/12/Estatutos-Conmebol-2020-esp.pdf> (discussing promotion of human rights and guaranteeing no discrimination as objectives); Olympic Council of Asia, *Constitution*, art. 24.17.b. (Mar. 2019), https://oca.asia/media/oca_files/OCA_CONSTITUTION_AND_RULE.pdf (Describing the association’s connection Sports for All as a global human right in the section on ‘Sports for All Committee’).

235. For some critiques of these policies, cf. Hans Erik Naess, *Good Intentions, Vague Policies: A Thematic Analysis of Recommendations by the United Nations, the European Commission and the OECD on Sporting Events and Human Rights*, 4 J. GLOB. SPORT MGMT. 25 (2019) (Critiquing the overinvolvement of sports organizations as international actors without concrete engagements with human rights); Naess, *supra* note 169 (Describing how the endorsement of sports associations to human rights is merely ‘window-dressing’ unless complemented with concrete positions).

236. *Code: ICAS Statutes*, *supra* note 33, at R58.

237. Bodo P. Bützler & Lisa Schöddert, *Constitutionalizing FIFA: Promises and Challenges*, 25 TILBURG L. REV. 40, 46 (2020).

238. ROCHEFOUCAULD & REEB, *supra* note 113, at 1, 5 n. 3.

239. Tatyana Andrianova v. All Russia Athletic Fed’n, CAS 2015/A/4304, ¶ 45 (Ct. Arb. for Sport, Apr. 14, 2016).

the sports community in general on the value of human rights norms.²⁴⁰

V. SPORTING EUROPEAN HUMAN RIGHTS LAW

Since its establishment in 1959, the ECtHR has ruled and exerted influence on most issues that European society has faced.²⁴¹ Thus, it is not surprising that there are several cases dealing with sports-related matters in the Court's docket.²⁴² Sports are not the main focus of the docket of the Tribunal.²⁴³ Yet, the continuous growth of the social importance of sports suggests that sports related disputes will increase in the future.²⁴⁴ It is a phenomenon that I call *sporting European Human Rights Law*. This process clarifies the responsibility (albeit indirectly) of SGBs to guarantee and enforce human rights standards. Additionally, the ECtHR guided the positive obligations of States in guaranteeing that conventional rights are respected by SGBs. The European Tribunal has also recognized a role for the State in the sports ecosystem. No other human rights body has produced so many decisions in the sports field as the European Court.

240. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004) (Discussing how the practice of 'socialization' can inform state practices, translatable to the sports community).

241. See, e.g., Robert Spano, *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law*, 18 HUM. RTS. L. REV. 473, 477 (2018) (“[T]he Strasbourg Court has been very successful . . . at the level of providing justice on a case-by-case basis in many areas of contemporary political and social life.”).

242. See ECtHR, *Factsheet Sport and the European Convention on Human Rights* (Nov. 2023), https://www.echr.coe.int/documents/d/echr/fs_sport_eng (describing the Court docket as pertinent to sports cases); DANIEL RIETIKER, DEFENDING ATHLETES, PLAYERS, CLUBS AND FANS (Council of Europe 2022) (describing the ECtHR's role in resolving human rights disputes pertinent to sports).

243. See Cathérine Van de Graaf, *The Whereabouts Requirement: Does The ECtHR Protect The Right To Respect For Private And Family Life Of French Sport Professionals?* STRASBOURG OBSERVERS (Feb. 16, 2018), <https://strasbourgobservers.com/2018/02/16/the-whereabouts-requirement-does-the-ecthr-protect-the-right-to-respect-for-private-and-family-life-of-french-sport-professionals/> (Discussing one sports case before the ECtHR, but describing how sports are not the main focus of the Court).

244. Daniel Rietiker, *The European Court of Human Rights and FIFA*, 1 EUR. CONVENTION ON HUM. RTS. L. REV. 62, 63 (2020).

In the next Section, this Article highlights some of the sports issues that the Court has dealt with. The Court's docket of cases dealing with sports-related matters²⁴⁵ ranges from disputes where the sports matter is the central or most relevant issue to applications not necessarily related to a sports dispute but where the facts took place in the context of sports or involved persons related to sports.²⁴⁶ The cases cover a multiplicity of stakeholders in the sports ecosystem including professional,²⁴⁷ amateur,²⁴⁸ and former professional sportspersons,²⁴⁹ referees,²⁵⁰ SGBs officers²⁵¹ and athletes' representatives;²⁵² journalists,²⁵³

245. See, e.g., Van de Graaf, *supra* note 243 (discussing the Court's docket pertinent to sports and how the jurisdiction could further address such cases); see Rietiker, *supra* note 244 (explaining how the ECHR and ECtHR can contribute to FIFA's Human Rights Policy and how the Court's jurisdiction can be triggered in football-related cases).

246. See, e.g., *Đorđević v. Serbia*, no. 5591/10, ¶ 12 and 24 (Eur. Ct. H.R., Feb. 9, 2017) (football hooligans and other groups trying to harass the organizers of a Pride Parade).

247. See generally *Šimunić v. Croatia* (decision on the admissibility), no. 20373/17, ¶ 42 (Eur. Ct. H.R., Jan. 22, 2019) (football player convicted for convening hate speech at the end of a match); *Krgović v. Serbia*, no. 29430/06 (Eur. Ct. H.R., Sept. 13, 2016) (regarding a professional basketball player involved in a dispute with his former team).

248. See *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, ¶ 155-156 (Eur. Ct. H.R., Jan. 28, 2020) (holding that Article 6 of the Convention is not applicable to amateur players).

249. *Țiriac v. Romania*, no. 51107/16 (Eur. Ct. H.R., App., Nov. 30, 2021) (involving a former professional tennis player).

250. See *Rıza*, nos. 30226/10 and 4 others, for an example of a case where the Applicant was a referee.

251. See *Ekşioğlu and Mosturoğlu v. Turkey*, nos. 2006/13 and 10857/13 (Eur. Ct. H.R., June 15, 2021) (involving applicants who were former executives of a football club in Turkey). See also, *Valcke v. Switzerland*, no. 57476/19 (Eur. Ct. H.R., Nov. 8, 2021) (pending petition brought by the former General Secretary of FIFA).

252. See generally *Mediation Berti Sports v. Turkey*, no. 63859/12 (Eur. Ct. H.R., Jan. 29, 2018) (involving an applicant company that supports the negotiation of contracts for professional athletes).

253. See generally *Ressiot and Others v. France*, no. 15054/07 and 15066/07, (Eur. Ct. H.R., Jun. 28, 2012) (involving journalism rights found in Article 10 of the Convention).

fans,²⁵⁴ students in physical activities,²⁵⁵ property owners,²⁵⁶ persons with disability,²⁵⁷ or victims of human trafficking.²⁵⁸ In addition to individual athletes,²⁵⁹ the European Court granted standing to football teams²⁶⁰ and federations,²⁶¹ associations of

254. See generally *Hentschel and Stark v. Germany*, no. 47274/15 (Eur. Ct. H.R., Nov. 9, 2017) (involving spectators beaten by officers at a football stadium); *Maguire v. the United Kingdom*, no. 58060/13 (Eur. Ct. H.R., Mar. 3, 2015) (involving the targeting of a spectator based on the top worn to a football match in Glasgow).

255. See generally *Dogru v. France*, no. 27058/05 (Eur. Ct. H.R., Dec. 4, 2008) (involving a Muslim student who refused to remove her headscarf during physical education classes); *Kervanci v. France*, no. 31645/04 (Eur. Ct. H.R., Dec. 4, 2008) (involving a Muslim student enrolled in a public school who refused to remove her during physical education classes); *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12 (Eur. Ct. H.R., Jan. 10, 2017) (refusal of Muslim parents to send their daughters, who had not reached the age of puberty, to compulsory mixed swimming lessons as part of their public schooling).

256. See generally *Herrmann v. Germany*, no. 9300/07 (Eur. Ct. H.R., June 26, 2012) (landowner forced to accept hunting on his premises, even though he was morally opposed); *Chassagnou and Others v. France*, nos. 25088/94, 28331/95 and 28443/95 (Eur. Ct. H.R., Apr. 29, 1999) (involving farmers who sought to prohibit hunting on their properties); *Schneider v. Luxembourg*, no. 2113/04 (Eur. Ct. H.R., July 10, 2007) (involving a landowner owner morally opposed to hunting on her property), *Papastavrou and Others v. Greece*, no. 46372/99 (Eur. Ct. H.R., Nov. 18, 2004) (expropriation for the constructions related to the Olympic Games); *Belova v. Russia*, no. 33955/08 (Eur. Ct. H.R., Sept. 15, 2020) (involving expropriation for the constructions related to the Sochi Winter Olympic Games).

257. See generally *Larusson v. Iceland*, no. 23077/19 (Eur. Ct. H.R., May 31, 2022) (concerning lack access to social events and cultural activities for individual who uses a wheelchair).

258. See generally *Zoletic and others v. Azerbaijan*, no. 20116/12 (Eur. Ct. H.R., Oct. 7, 2021) (involving exploitation of laborers to construct Olympic facilities).

259. *Šimunić*, no. 20373/17.

260. See generally *FC Mretebi v. Georgia*, no. 38736/04 (Eur. Ct. H.R., July 31, 2007) (Football team lacked access to a court regarding a dispute related to a footballer's transfer).

261. See generally *Liga Portuguesa de Futebol Profissional v. Portugal*, no. 4687/11, (Eur. Ct. H.R., May 17, 2016) (labor dispute between a player and a federation); *Croatian Golf Federation v. Croatia*, no. 66994/14 (Eur. Ct. H.R., Dec. 19, 2020) (bankruptcy of the national golf federation); *Albania Wrestling Federation and Viron Bezhani v. Albania*, no. 11485/11 (Eur. Ct. H.R., Sept. 19, 2023) (enforcement of an arbitral award in a dispute related to the election of SGB officers); *Athletics South Africa v. Switzerland*, no. 17670/21 (Eur. Ct. H.R., Oct. 5, 2021) (complaint of South African athletic regulatory authority about excluding Caster Semenya from competition).

fans²⁶² or to promote sports,²⁶³ and sporting media.²⁶⁴ In cases involving legal entities, the SGB has to be directly impacted by the measure.²⁶⁵ The sport's entity does not become a victim by mere fact that an organization, as a member of a SGB, is bound by their regulations and had certain duties with a view to implementing them.²⁶⁶

The issues dealt with by the Court include fans' safety;²⁶⁷ hooliganism;²⁶⁸ discrimination;²⁶⁹ freedom of religion,²⁷⁰

262. See generally *Ass'n Nouvelle Des Boulogne Boys v. France*, no. 6468/09 (Eur. Ct. H.R., March 7, 2011) (involving a fan association of Paris Saint-Germain FC supporters); *Les Authentiks and Supras Auteuil 91 v. France*, no. 4696/11 (Eur. Ct. H.R., Oct. 27, 2016) (dissolution of football team supporters' associations, following different violent and racist activities).

263. See generally *Association de défense des intérêts du sport v. France*, no. 36178/03 (Eur. Ct. H.R., Apr. 10, 2007). (recognizing standing to associations if the challenged measure directly impacts the entity).

264. See generally *Hachette Filipacchi Presse Automobile and Dupuy v. France*, no. 13353/05 (Eur. Ct. H.R., Mar. 5, 2009) (Action Auto Moto Maganize published photographs of athlete advertising tobacco products); *Société de conception de presse et d'édition et Ponson v. France*, no. 26935/05 (Eur. Ct. H.R., Mar. 5, 2009) (Entrevue magaize public photos of athlete advertising tobacco products).

265. *Association de défense des intérêts du sport*, no. 36178/03, at 4 (the outcome of the procedure must be directly decisive for the right in question: a tenuous link or distant repercussions are not sufficient).

266. See *Athletics South Africa v. Switzerland*, no. 17670/21, ¶ 15 (Eur. Ct. H.R., Oct. 5, 2021) (complaint of South African athletic regulatory authority about the exclusion of Caster Semenya from competition).

267. See generally *Harrison and others v. United Kingdom*, Eur. Ct. H.R. App. 44301/13 (Mar. 25, 2014) (decision on the admissibility) (investigation of the death of supporters in the Hillsborough disaster in 1989); *Hentschel*, no. 47274/15 (complaint by football supporters for ill-treatment by the police).

268. See generally *Ostendorf v. Germany*, no. 15598/08 (Eur. Ct. H.R., Mar. 7, 2013) (football supporter held in police custody for four hours to prevent a fight between hooligans); *S., V. & A. v. Denmark*, nos. 35553/12, 36678/12 & 36711/12 (Eur. Ct. H.R., Oct. 22, 2018) (applicants' detention for over seven hours to prevent hooligan violence); *Seražin v. Croatia* (decision on the admissibility), no. 19120/15 (Eur. Ct. H.R., Oct. 9, 2018) (measures to deal with hooliganism); *Velkov v. Bulgaria*, no. 34503/10 (Eur. Ct. H.R., July 21, 2020) (fan was convicted twice –administratively and criminally – of the same offence of breaching the peace during a football match).

269. See generally *Negovanović and Others v. Serbia*, nos. 29907/16 and 3 others (Eur. Ct. H.R., Jan. 25, 2022) (discrimination against blind chess players in granting financial awards).

270. See *Dogru*, No. 27058/05 (involving a Muslim student who refused to remove her headscarf during physical education).

association,²⁷¹ and expression;²⁷² and the right to privacy,²⁷³ property rights,²⁷⁴ sexual violence,²⁷⁵ trafficking²⁷⁶ and corruption²⁷⁷ in the context of sports and/or physical activity or physical education. It has pronounced indirectly on issues related to security during sporting mega-events such as the Olympic Games.²⁷⁸

Some principles that emerge from the Court's case law include the role of the State in effectively combating violence in stadiums and the legitimate expectations of individuals to attend sports events with complete security.²⁷⁹ The State has a legitimate interest in preventing disorder and combatting racism and discrimination in sports activities.²⁸⁰ Sport as a social activity goes beyond physical activity, accomplishing other objectives and influencing social behaviors. Similarly, the equal

271. See generally *Croatian Golf Federation*, no. 66994/14 (complaint arguing that the decision to dissolve the Golf Federation due to bankruptcy was a breach of its freedom of association).

272. See generally *Hachette*, no. 13353/05 (conviction of the publishers and directors of two magazines for publishing tobacco advertising by the inclusion in a sports magazine photographs of a Formula 1 driver wearing the logo of a cigarette brand); *Ressiot*, no. 15054/07 and 15066/07 (investigations carried out at the premises of two sports newspapers and at the homes of journalists in the context of a judicial investigation of possible doping in cycle racing); *A.M. V. Turkey*, no. 67199/17 (Eur. Ct. H.R., Oct. 19, 2021) (sanctions imposed to a yoga trainer by The Turkish Federation of Sports for all for insulting the Prophet Mohammad); *de Carvalho Marques v. Portugal*, no. 29703/19 (Eur. Ct. H.R., pending).

273. *Mosley v. The United Kingdom*, no. 48009/08 (Eur. Ct. H.R., May 10, 2011) (dispute over newspaper publication of explicit material of a International Automobile Federation member).

274. See generally *Papastavrou*, no. 46372/99 (dispute concerning compensation for expropriated property).

275. See generally *A., B., & C.*, Eur. Ct. H.R. (2016) no.30808/11 (failure to investigate indigent sexual acts perpetrated by a sports coach).

276. See generally *Zoletic*, no. 20116/12 (involving exploitation of laborers to construct Olympic facilities).

277. See generally *Platini v. Switzerland*, no. 526/18 (Eur. Ct. H.R., Feb. 11, 2020) (related to an investigation of criminal mismanagement of finances and bribery).

278. See e.g., *A.D. & others v. Turkey*, no. 22681/09 (Eur. Ct. H.R., July 22, 2014) (concerning human rights violations after an individual was detained because they a suspected terrorist threat to the 2008 Beijing Olympics based on the determination of Chinese security officers).

279. See generally *Ass'n des Nouvelles Boulogne Boys v. France*, Eur. Ct. H.R. at 3 (2011).

280. See, e.g., Šimunić, *supra* note 247, ¶ 42.

treatment of players with and without disability is not only a legal obligation but it also enhances the country's reputation abroad and promotes inclusiveness domestically.²⁸¹ The Court has understood that athletes are role models²⁸² and recognizable figures. Those athletes should thus act accordingly and be aware of the negative reactions, including racist ones, that the public, in general, might have against them²⁸³ or the negative examples they might provide for the youth.²⁸⁴

Furthermore, the fight against doping in sports is a health concern in which the governing bodies of the sporting world owe responsibilities to both professional and amateur athletes as well as, in particular, young people.²⁸⁵ Doping sanctions pursue the legitimate aim of ensuring "equal and meaningful competition in sports," which is linked to the "protection of the rights and freedoms of others."²⁸⁶ The use of banned substances not only produces an unfair advantage over other athletes, but it is also "a dangerous incitement to amateur athletes, and in particular young people, to follow suit in order to enhance their performance, and deprives spectators of the fair competition which they are entitled to expect."²⁸⁷

A. *The ECtHR and CAS*

Of relevance for this Article, the Tribunal has decided cases directly involving CAS, the right to an effective and independent remedy in the context of a sporting dispute, and issues related to doping (one, if not the most, recurrent topic that

281. *Negovanović*, *supra* note 269, ¶ 88.

282. *See Šimunić*, *supra* note 247, ¶ 45 (a famous football player is a role-model for many football fans).

283. *Šimunić*, no. 20373/17, ¶ 45.

284. *FNASS*, nos. 48151/11 and 77769/13, ¶ 176. Similarly, CAS has referred to athletes as role models. *Chris Jongewaard v. Australian Olympic Comm. (AOC)*, CAS 2008/A/1605, ¶ 19 (Ct. Arb. for Sport, Sept. 19, 2008) (an athlete nominated for the Olympic Games is "presumed to be a person of good repute" and "perceived as both a leader and a role model").

285. *FNASS*, nos. 48151/11 and 77769/13, ¶¶ 165; 174-75.

286. *Id.* at ¶ 166.

287. *Id.* Similarly, CAS has found that fair play and health are the legitimate aims pursued by anti-doping regulations. *Elizabeth Juliano, Owner of Horizon v. Fédération Equestre Internationale (FEI)*, CAS 2017/A/5114, ¶ 66 (Ct. Arb. for Sport, Mar. 19, 2018).

CAS deals with).²⁸⁸ There are cases against States other than Switzerland because, despite CAS intervention, the challenge before the ECtHR did not involve the procedure or merits of CAS award.²⁸⁹ For example, in an award, CAS confirmed the sanctions imposed by FIFA against Croatian footballer Josip Šimunić for racist gestures at the end of an international game.²⁹⁰ At the same time, the Croatian authorities investigated the racist actions and fined him.²⁹¹ In his case to the ECtHR, the player challenged the Croatian sanctions. Despite that, the Tribunal also ruled against Šimunić without even mentioning the CAS arbitral award.²⁹²

Probably the most important cases related to CAS are *Semenya v. Switzerland*²⁹³ and *Mutu and Pechstein v. Switzerland*, both of which challenged the lawfulness of CAS proceedings. The latter case involved Adrian Mutu, a professional footballer, and Claudia Pechstein, a professional speed skater, who argued that they had not freely accepted the arbitration clauses, and that CAS was not an independent and impartial tribunal.²⁹⁴ Pechstein also complained about the lack of a public hearing at CAS.²⁹⁵

The ECtHR established its jurisdiction given that the acquiescence of the Swiss authorities in the acts of private persons (the CAS) within its jurisdiction may engage the State's responsibility.²⁹⁶ On the merits, the Court confirmed that the Convention allows the establishment of an arbitral tribunal to

288. INT'L COUNCIL OF ARB. FOR SPORT (ICAS), 2020 ANNUAL REPORT AND FINANCIAL STATEMENTS 17 (2021).

289. *Ali Riza*, Eur. Ct. H.R. at ¶ 21-24; *Croatian Golf Federation v. Croatia*, App. No. 66994/14, ¶ 38-39 (December 17, 2020), <https://hudoc.echr.coe.int/eng?i=001-206513>.

290. *Simunic*, CAS 2014/A/3562, ¶ 123.

291. *Šimunić*, no. 20373/17, ¶ 3.

292. *See id.* ¶¶ 2-6 (describing the circumstances of the case).

293. It is important to note that *Semenya* was decided by a 4-3 majority decision that could be referred to the Grand Chamber of the European Court. World Athletics note that the decision came from a "deeply divided" chamber and that it will be "encouraging" the Swiss Government "to seek referral of the case to the ECHR Grand Chamber." *See* Press Release, *World Athletics responds to European Court of Human Rights decision* (July 11, 2023), <https://worldathletics.org/news/press-releases/response-european-court-human-rights-decision-2023>.

294. *Mutu & Pechstein*, nos. 40575/10 and 67474/10, ¶ 51-52.

295. *Id.*

296. *Id.* ¶ 64.

try certain disputes.²⁹⁷ As the acceptance of such arbitration clauses includes the waiver of certain Convention rights, the consent should be free, lawful, and unequivocal. The Tribunal found that Mutu provided free consent;²⁹⁸ however, in the case of Pechstein, there was forced arbitration, meaning that the only possibility for her to practice her sport at a professional level was to accept the arbitration clause. In those circumstances, all the due process guarantees must be respected.²⁹⁹ The Court did not find a violation regarding CAS's alleged lack of independence.³⁰⁰ Instead, it found a violation of the Convention regarding the absence of a public hearing at CAS.³⁰¹ According to the Court, the dispute surrounding the doping sanction required a hearing subject to public scrutiny.³⁰²

Semenya, “the most famous international sports law case,”³⁰³ involved a South African middle-distance runner who challenged the World Athletics' Eligibility Regulations for the Female Classification (Regulations). These Regulations define the circumstances under which female and intersex sportspersons with particular kinds of differences of sex development (DSDs) can participate in international competitions. Caster Semenya complained that the requirement to lower her natural testosterone levels to participate as a woman violated the prohibition of inhuman or degrading treatment, her private life, discriminated against her, and violated the right to a fair hearing and to an effective remedy.³⁰⁴ *Semenya* directly challenged

297. *Id.* ¶ 94.

298. *Id.* ¶ 116–120.

299. *Id.* ¶ 115.

300. *Id.* ¶ 159.

301. *Id.* ¶ 183.

302. *Id.* ¶ 182.

303. Lena 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*, OPINIOJURIS, (Apr. 8, 2023), <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/>.

304. ECtHR Registrar Press Release ECHR 219, Discrimination against international-level athlete who was not afforded sufficient procedural safeguards when challenging World Athletics regulations (July 11, 2023).

CAS³⁰⁵ and STF³⁰⁶ rulings on substantive human rights, rather than the independence of CAS as in *Mutu*.

The ECtHR first ruled on its jurisdiction relying on *Mutu*. The Court conceded that Semenya was complaining before it of the compatibility with the Convention of the rules and actions of two non-State actors, the IAAF regulations (a private Monegasque association), and the award by the Swiss private association CAS. Thus, the Convention did not apply to them directly. However, to the extent that CAS award was reviewed by the STF, the case fell within Swiss jurisdiction even if the STF omitted explicit references to the Convention and only had a limited review power.

On the merits, the Court found that Semenya did not enjoy sufficient institutional and procedural safeguards in Switzerland to allow her to have her credible claims of discrimination examined effectively.³⁰⁷ Given CAS compulsory arbitration, Semenya could not apply to the ordinary courts, making CAS the only remedy available to her. Even if CAS conducted a detailed examination of the allegation of discrimination and applied a criterion similar to the Court's considerations, CAS failed to apply the Convention or the Court's precedents.³⁰⁸ Furthermore, the STF review of the CAS award was extremely limited, analysing only the compatibility of the arbitration award with the narrowly constructed public policy standards. As such, the STF did not conduct its own analysis of the compatibility of the regulations with the European Convention. This failure was a violation of the equality provision of the Treaty. For similar reasons, the Court found a violation of the right to an effective remedy. *Semenya* demonstrates that the sidestepping of international human rights law by the CAS, the STF, and other SGBs is no longer tenable.³⁰⁹

305. Mokgadi Caster Semenya v. Int'l Ass'n of Athletics Fed'ns, CAS 2018/O/5794 & 2018/O/5798 (Ct. Arb. for Sport, Apr. 30, 2019).

306. Tribunal fédéral [TF] Aug. 25, 2020, 4A_248/2019 & 4A_398/2019, 147 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 49 S. 50 (Switz.).

307. Semenya, no. 10934/21, ¶ 201.

308. *Id.* ¶¶ 174, 200.

309. Michele Krech, *Who Is Responsible for Ensuring Human Rights in Global Sport?: Takeaways From the ECtHR's Judgment in Semenya v. Switzerland*, VÖLKERRECHTSBLOG (Apr. 8, 3023), doi: 10.17176/20230804-224137-0.; Press Release, OHCHR, UN experts welcome European Court ruling upholding rights of women athletes in Semenya v. Switzerland (July 17, 2023), <https://www.ohchr.org/en/press-releases/2023/07/un-experts-welcome-european-court-ruling-upholding-rights-of-women-athletes-in-semenya-v-switzerland>.

The question of which State should have responsibility when CAS intervenes in a dispute was partly responded to in the parallel cases of Ali Riza against Switzerland and against Turkey.³¹⁰ The cases involve a professional football player and his contract with a Turkish club. The dispute was brought before FIFA dispute mechanisms, appealed to the Arbitration Committee of the Turkish Football Federation (TFF), challenged at CAS, and was then reviewed by the Swiss Federal Tribunal.³¹¹ Riza eventually filed two different applications against Switzerland and Turkey and requested the Court to join the claims. The Court ultimately refused joining the application by distinguishing the complaints about the procedural shortcomings before the CAS and the STF in the Swiss application from the legal issues raised against the proceedings before the TFF.³¹² With regard to the Swiss case, the Court considered that there was only a very tenuous link with Switzerland.³¹³ The FFT procedure had *a priori* no connection with the Swiss courts and did not have an international element. Furthermore, the awards of the Arbitration Committee were final and enforceable with no right of appeal to the CAS.³¹⁴ The fact that Riza could not access an independent tribunal in Turkey did not mean that an appeal to the CAS necessarily had to be opened.³¹⁵ Particularly, the flaws in the FFT procedure in Turkey did not mean that Switzerland should guarantee proceedings before an independent and impartial Swiss tribunal.³¹⁶

The Court then found Turkey to be in violation of the European Convention given the lack of independence and impartiality of the TFF Arbitration Committee.³¹⁷ At the same time, however, the Court determined that Switzerland did not

ohchr.org/en/press-releases/2023/07/un-experts-welcome-european-court-ruling-upholding-rights-women-athletes; Patricia Wiater, *A Human Rights Breakthrough in Sports Law?: The ECtHR Chamber Judgment in Semenya v. Switzerland*, VERFBLOG (July 26, 2023), <https://verfassungsblog.de/a-human-rights-breakthrough-in-sports-law/> [DOI: 10.17176/20230727-012136-0].

310. *Ali Riza v. Turkey*, nos. 30226/10 and 4 others, ¶¶ 21–24 (describing the procedural posture of the two cases).

311. *Id.* at ¶¶ 8–24.

312. *Id.*

313. *Ali Riza v. Switzerland*, no. 74989/11, ¶ 81 (Eur. Ct. H.R., July 13, 2021).

314. *Id.*

315. *Id.* at ¶ 82.

316. *Id.* (translation by the author).

317. *Ali Riza v. Turkey*, nos. 30226/10 and 4 others, ¶¶ 222–23.

violate Riza's rights.³¹⁸ Taken together, the twin *Riza* cases suggest that Switzerland is not the only State required to guarantee conventional rights in sports disputes, even when CAS and the STF intervene, and the international federation is based in Switzerland.³¹⁹ In *Riza v. Switzerland*,³²⁰ the Court found that CAS had given a convincing, detailed, and reasoned explanation about its lack of jurisdiction given the absence of an international element in the dispute.³²¹ Riza's submission to CAS was considered an application to a court with no jurisdiction in the particular case.³²² The judgment of the STF provided enough reasons to reject all grounds raised.³²³

A fourth case involving CAS was brought by Erwin Bakker, a Dutch cyclist,³²⁴ found guilty and fined and suspended for a doping offence.³²⁵ He challenged the decision to CAS, which not only confirmed the doping offense but extended the ban for life from cycling events.³²⁶ His appeal to the STF was declared inadmissible.³²⁷ In rejecting his application, the ECtHR reiterated that the Convention applies to disputes relating to the withdrawal of the right to exercise a profession given the permanent ban to participate in sports competitions as a professional cyclist.³²⁸ On the limitations on challenging CAS awards before the STF, the Court considered that States are not commanded to establish tribunals of appeal or cassation and that there could be limitations in particular regarding conditions of admissibility of an appeal.³²⁹ The Court reiterated that the restrictions on grounds of appeal of the CAS award were neither arbitrary nor disproportionate given the specificity of

318. *Ali Riza v. Switzerland*, no. 74989/11, ¶¶ 98; 120; 136.

319. See Tsubasa Shinohara, *Which states parties should be held responsible for the implementation of positive obligations under the ECHR in sports-related disputes?* 22 INT'L SPORTS L. J. 332, 333 (2022) ("Switzerland is not the only state to ensure the enjoyment of the ECHR's rights in sports-related disputes").

320. *Ali Riza v. Switzerland*, no. 74989/11, ¶ 91–92.

321. *Id.* ¶ 91–92.

322. *Id.* ¶ 94.

323. *Id.* ¶ 93.

324. *Bakker v. Switzerland*, no. 7198/07, ¶ 1 (Eur. Ct. H.R., Sept. 3, 2021).

325. *Id.* ¶ 29.

326. *Id.* ¶ 6.

327. *Id.* ¶ 50.

328. *Id.* ¶ 29.

329. *Id.* ¶ 30.

CAS.³³⁰ As CAS grants full review, covering both questions of law and findings of fact, there is no need for the STF to enjoy full powers of review.³³¹ The Court understood that the very restrictive interpretation of the public policy grounds were not unreasonable in this case.³³²

In *Platini*, the ECtHR dealt with the disciplinary proceedings brought against a famous retired footballer, president of UEFA, and vice president of FIFA, for some illegal payments.³³³ Platini submitted that his four-year suspension from any football related professional activity infringed his freedom to exercise a profession.³³⁴ The Court reiterated Switzerland's international responsibility (this time for alleged violations of substantive rather than procedural rights), for the same reasons developed in *Mutu and Pechstein*.³³⁵

On the substantive claims, the Court rejected Platini's arguments.³³⁶ The Court found that the sanction was neither excessive nor arbitrary given Platini's serious misconduct, his senior position in UEFA and FIFA, and the need to restore FIFA's reputation.³³⁷ The European Tribunal explicitly established that SGBs (in this case FIFA and UEFA) are private associations and as such, not directly subject to the European Convention.³³⁸ However, States may be required to adopt positive measures aimed at respecting the right to privacy even in the relationships of Platini with UEFA, FIFA and CAS.³³⁹ The Court analyzed, in particular, whether Platini enjoyed appropriate institutional and procedural protections, namely a system of courts before which he could submit his complaints, and whether those courts issued duly reasoned applications of the Court's case law.³⁴⁰ According to the Court, both CAS and the STF provided an exhaustive and detailed examination of

330. *Id.* ¶ 40.

331. *Id.* ¶ 47.

332. *Id.* ¶ 37–38.

333. *Platini*, no. 526/18, ¶¶ 3–9.

334. *Id.* ¶ 50.

335. *Id.* ¶¶ 36–38.

336. *Id.* ¶ 71.

337. *Id.* ¶ 70.

338. *Id.* ¶ 63.

339. *Id.* ¶ 60.

340. *Id.* ¶ 62.

the issues raised, providing Platini with the benefit of sufficient institutional and procedural guarantees.³⁴¹

In *Platini* and in several other cases (like *Semenya*), the Court determined that the practice of a profession (namely, sports) engages the applicability of several articles of the European Convention.³⁴² It remains to be seen if the definition of the practice of sports as a human right (as stated by the Olympic Charter and in other documents), will have any impact in the Tribunal's approach or create any potential additional obligations to States and SGBs.

B. *Overseeing national sporting disciplinary bodies*

The ECtHR has ruled also on the functioning and structures of national sporting disciplinary bodies. In a pair of Turkish cases, the Court required that an independent and impartial body solve sporting disputes. In the already mentioned *Riza* case, one professional and three amateur footballers as well as a football referee challenged the independence and impartiality of the TFF Arbitration Committee.³⁴³ The Court found a violation of the right to an independent tribunal given that the members of the Committee were biased towards football clubs due to their appointment by TFF's Board of Directors (predominately made out of current or former executives of football teams).³⁴⁴ The Court considered the TFF Board of Directors' strong influence over the Arbitration Committee and the large presence of members or executives of football teams as Directors of the TFF Board.³⁴⁵ Finally, there was a lack of enough safeguards from undue external interference. Importantly, given the structural problems found, the Court ordered specific reforms to be made to the disciplinary system.³⁴⁶

Dogan is a joint decision concerning sports sanctions and financial penalties imposed by the TFF.³⁴⁷ The applicants were sanctioned for their media statements or messages on social

341. *Id.* ¶¶ 66–70.

342. *Id.* ¶¶ 57–58.

343. *Ali Riza v. Turkey*, nos. 30226/10 and 4 others, ¶¶ 182–87.

344. *Id.* ¶¶ 182; 185; 211; 222–23.

345. *Id.* ¶ 222.

346. *Id.* ¶ 242.

347. *Doğan v. Turkey*, no. 48909/14, ¶ 1 (Eur. Ct. H.R., May 18, 2021).

media.³⁴⁸ The Court reiterated its *Rıza* findings regarding the Arbitration Committee's structural deficiencies and the absence of proper protections to the Committee members.³⁴⁹ In *Dogan*, the Court found a violation of a substantive right—in this case the freedom of expression.³⁵⁰ The Court held that the Turkish authorities failed to adequately balance the applicants' freedom of expression with the respect for the private lives of TFF board members and the aims of maintaining order and peace in football.³⁵¹ The Turkish rulings lacked sufficient justifications to the sanctions imposed.³⁵² *Dogan*, similarly to *Semenya* at the international level, suggests that sports disciplinary bodies and the domestic courts overseeing them are required to apply the European Convention and the criteria established by the ECtHR.³⁵³

C. *Doping and the relationship between disciplinary and criminal proceedings in the sport field*

The ECtHR has received different complaints related to doping. As doping sanctions constitute the highest number of cases reaching CAS, it is important to take a look at the Court's case law in this area. *Pechstein*³⁵⁴ and *Bakker*³⁵⁵ involved failure to pass doping tests; however, in their applications to the Court, the athletes did not bring a frontal attack against the strict doping regime as the French petitioners did in the *FNASS* case with the whereabouts rule.

FNASS concerns the requirement of a French law (based on WADA Code) for some professional athletes to notify their whereabouts for unannounced anti-doping tests.³⁵⁶ The athletes

348. *Id.*; *Naki v. Turkey*, no. 48924/16, ¶ 1 (Eur. Ct. H.R., May 18, 2021); *Tokmak v. Turkey*, no. 54540/16, ¶ 1 (Eur. Ct. H.R., May 18, 2021).

349. *Doğan*, no. 48909/14, ¶ 49.

350. *Id.* ¶ 44.

351. *Id.* ¶¶ 41–43.

352. *Id.* ¶¶ 41–42.

353. *Id.* ¶¶ 18–22.

354. *Pechstein v. Int'l. Skating Union*, CAS 2009/A/1912/1913, ¶ 12 (Ct. Arb. for Sport, Nov. 25, 2009).

355. *Bakker v. Koninklijke Nederlandsche Wielren Unie*, CAS 2005/A/969, ¶ 54 (Ct. Arb. for Sport, May 5, 2006) (finding that an athlete is negligent if he does not pay attention to the substances entering his body).

356. *Nat'l Fed'n of Sportspersons' Ass'n & Unions v. France*, no. 48151/11 & 77769/13, ¶ 11 (Eur. Ct. H.R., Apr. 18, 2018), <https://hudoc.echr.coe.int/eng?i=001-180442>.

are required to provide full quarterly information on their whereabouts including daily sixty-minute timeslot during which they would be available for testing. The applicants alleged that this mechanism unjustifiably interfered with their right to private and family life.³⁵⁷ The Court rejected such a claim, finding a proportional balance between the various competing interests.³⁵⁸ While the whereabouts requirement impacts the athlete's private life, the particular importance of the public interest in fair competition and protection of health justifies the restrictions imposed.³⁵⁹ The alternative and less restrictive measures could lead to an increase in doping.³⁶⁰

The Court has recognized the potential link between doping and criminal proceedings and the need to fully guarantee due process protections in those situations.³⁶¹ In *Eksioğlu*, the Court indicated that the presumption of innocence includes an assessment of how the criminal trial was conducted.³⁶² Additionally, if there are subsequent disciplinary procedures linked in any way to the criminal proceedings which have ended with a result other than a conviction, the applicant should be treated as innocent.³⁶³ Conventional due process guarantees are applicable if there is a clear connection between the criminal case and the sports disciplinary proceedings.³⁶⁴ The link exists if the sports proceedings are clearly correlated to the facts analyzed in the criminal case, and the disciplinary bodies base their reasoning solely on the contents of the criminal file.³⁶⁵

The categorization of doping disputes as criminal, quasi-criminal, or civil in nature is a controversial issue.³⁶⁶ Pursuant

357. *Id.* ¶¶ 114–28; 138–43.

358. *Id.* ¶ 191.

359. *Id.* ¶¶ 168; 177; 191.

360. *Id.* ¶¶ 189–91.

361. *See Eksioğlu & Mosturoglu v. Turkey*, nos. 2006/13 & 10857/13, ¶ 31 (Eur. Ct. H.R., June 15, 2021) (discussing procedural safeguards to the right to the presumption of innocence in all criminal matters).

362. *Id.*

363. *Id.*

364. *See id.* ¶¶ 31–33 (referencing the procedural aspects of the right to the presumption of innocence).

365. *Id.* ¶ 33.

366. *See generally* Salomeja Zaksaitė & Hubert Radke, *The Interaction of Criminal and Disciplinary Law in Doping-Related Cases*, 14 INT'L SPORTS L. J. 115 (2014) (discussing the classifications of doping disputes).

to its Code, WADA has to prove that an anti-doping violation has taken place.³⁶⁷ The standard of proof is “comfortable satisfaction.”³⁶⁸ The WADA Code defines this as “greater than a mere balance of probability, but less than proof beyond a reasonable doubt.”³⁶⁹ According to the WADA Code, the anti-doping rules are “not intended to be subject to or limited by any national requirements and legal standards” applicable in the criminal context.³⁷⁰

CAS³⁷¹ and the STF³⁷² so far have failed to analyze doping cases under the commonly known “Engel criteria”³⁷³—a criteria established by the ECtHR and applied in the context of sports but not yet in doping proceedings.³⁷⁴ According to the Court, the national legal characterization of a procedure cannot be the single criterion for the determination of whether a measure constitutes a criminal charge, penalty, prosecution, conviction and/or procedure.³⁷⁵ The determination of whether there was a “criminal charge” requires a body to analyze both the domestic legal classification and nature of the offense or the relevant measure and the severity of the “penalty.”³⁷⁶ In particular, the Court has stated, differently from the CAS and the STF, that the domestic classification is not decisive. The term “criminal” charge and penalty has an autonomous meaning under the Convention, requiring analysis of the “very nature” of the sanction in question.³⁷⁷ Given that in at least one case, CAS has

367. See WADA Code, *supra* note 28, at art. 3.1 (applying the burden of proof to all anti-doping organizations).

368. *Id.* at 26.

369. *Id.*

370. *Id.* at 17.

371. Union Cycliste Internationale v. Contador Velasco, CAS 2011/A/2384 & CAS/2011/A/2386 (Ct. Arb. for Sport, Feb. 6, 2012).

372. Bundesgericht [BGer] Mar. 15, 1993, 119 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 271 (Switz.).

373. See generally *Engel and others v. Netherlands*, nos. 5100/71 5101/71, 5102/71, 5354/72, 5370/72 (Eur. Ct. H.R., June 6, 1976) (discussing the criteria to be examined as to whether or not an offense would be a criminal charge).

374. See *Seražin v. Croatia*, no. 19120/15, ¶¶ 65–66 (Eur. Ct. H.R., Oct. 9, 2018) (analyzing the Engel criteria in a case relating to hooliganism in sports).

375. See *id.* ¶¶ 63–64 (discussing criteria required for the applicability of the principle of double jeopardy in criminal proceedings).

376. *Id.* ¶ 65.

377. *Id.* ¶ 68.

expressly acknowledged that the “disciplinary sanctions in doping cases are similar to penalties in criminal proceedings,” it may constitute a criminal charge.³⁷⁸ The ECtHR, however, has not been required to answer the question of whether the full panoply of criminal protections applies to doping cases with no connection to criminal investigations.

VI. INTERPLAY BETWEEN THE EUROPEAN COURT OF JUSTICE, THE ECtHR AND CAS

The Court of Justice of the European Union (CJEU), like its human rights counterpart, has been adjudicating sports-related cases for decades.³⁷⁹ *Walrave and Koch*, a case decided in 1974, was the first opportunity that the CJEU had to consider how, if at all, community law applies to the practices of sporting associations.³⁸⁰ Even if the CJEU is not a human rights tribunal, it nevertheless plays a significant role in ruling on rights cases, particularly since the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community adopting the Charter of Fundamental Rights.³⁸¹

The next paragraphs discuss the CJEU case-law given that CAS frequently references and follows European community

378. *D. v. Fédération Internationale de Natation*, CAS 2002/A/432, ¶ 27 (Ct. Arb. for Sport, May 27, 2003).

379. Some of the sport cases decided by the CJEU include Case 36/74, *Walrave v. Union Cycliste Int'l*, 1974 E.C.R. 1405 [hereinafter *Walrave and Koch*] (national origin discrimination); Case 13/76, *Dona v. Mantero*, 1976 E.C.R. 1334 [hereinafter *Dona and Mantero*] (permissible discrimination on purely sporting grounds); Case C-415/93, *Union Royale Belge des Sociétés de Football Ass'n ASBL v. Bosman*, 1995 E.C.R. I-5055 [hereinafter *Bosman*]. (quota system and transfer fees in football); Joined Cases C-51/96 & C-191/97, *Deliège v. Ligue Francophone de Judo*, 2000 E.C.R. I-2549 [hereinafter *Deliège*] (athlete is a service provider and giving deference to sporting rules on the selection of athletes to compete internationally); Case C-519/04 P, *Meca-Medina v. Comm'n Eur. Cmty*, 2006 E.C.R. I-7006 [hereinafter *Meca Medina*] (IOC anti-doping rules are not automatically of purely sporting interest).

380. See *Walrave and Koch*, Case 36/74, at 1417 (“the practice of sport is subject to Community law only in so far as it constitutes an economic activity”).

381. See generally Gràinne De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?* 20 MAASTRICHT J. EUR. & COMPAR. L. 168, 169-70 (2013) [hereinafter, De Búrca, *After the EU Charter*] (revealing a sharp rise in the number of cases citing or arguing a provision of the EU Charter of Fundamental Rights, indicating human rights adjudication before the CJEU has been augmented by the adoption of the Charter).

law (particularly competition law). The CAS's tendency to depart from European Convention and ECtHR case law stands in contrast to its attitude towards EU law. Thus, the role of the CJEU becomes more important. CAS appears to be more open to applying EU competition law than human rights standards. In the oft-cited *AEK* case, a CAS panel considered EU competition law despite parties' invalid agreement on its applicability.³⁸² CAS has even applied EU law to non-EU players and clubs. For example, in *Girondins de Bordeaux v. FIFA*, the CAS held that the EU right of freedom of movement of labor could apply directly "where justified by sufficient interests."³⁸³ In *Ekateringurg*, Russian basketball teams invoked the non-discrimination clause included in the EU Treaty to challenge the International Basketball Federation (FIBA) Europe Regulations Governing the Euro League Women competition.³⁸⁴ FIBA Europe, to the contrary, argued that Russian teams do not enjoy EU rights.³⁸⁵ The CAS Panel ruled that EU non-discrimination rights may apply to Russian situations involving economic activities in the EU, and that Community Law could be applicable in light of R58 of the CAS Code.³⁸⁶

Additionally, despite many challenges and difficulties, there is a judicial dialogue³⁸⁷ between the European Courts. The ECtHR also responds to the CJEU, as exemplified by *Sufi and Elmi*,³⁸⁸ where the Strasbourg court changed its interpretation of a provision of the Convention to favor a wider interpretation guaranteed by the CJEU in previous case-law.³⁸⁹

382. *AEK Athens v. Union Eur. Football Ass'ns*, CAS 98/200, ¶ 10 (Ct. Arb. for Sport, Aug. 20, 1999).

383. *Girondins de Bordeaux v. FIFA*, CAS 2012/A2862, ¶ 102 (Ct. Arb. for Sport, Jan. 11, 2013).

384. *UMMC Ekateringurg v. FIBA Europe e. V.*, CAS 2009/A/1788, ¶ 3 (Ct. Arb. for Sport, Oct. 29, 2009).

385. *Id.* ¶ 7.

386. *Id.* ¶ 8.

387. See Martin Kuijter, *The Challenging Relationship Between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession*, 24 INT'L J. HUM. RTS. 998 (2020) (use of judicial dialogue between international courts).

388. See *Sufi v. The United Kingdom*, nos. 8319/07 & 11449/07, ¶¶ 225-26 (Eur. Ct. H.R., Nov. 28, 2011) (ECtHR is persuaded by the CJEU's interpretation of a broader scope of subsidiary protection in Article 3 of the Convention).

389. Sonia Morano-Foadi, *Fundamental Rights In Europe: "Constitutional" Dialogue Between the Court of Justice of the EU and the European Court of Human Rights*, 5 SORTUZ: ONATI J. OF EMERGENT SOCIO-LEGAL STUD. 63, 79 (2013).

SGBs governing the access of EU citizens to national, regional, and international competitions are subject to the rules of the Treaty of Lisbon establishing the Constitution of the European Union.³⁹⁰ This point has recently been³⁹¹ affirmed by the Grand Chamber of the CJEU in three decisions issued on December 21, 2023. The CJEU has been concerned with limiting the imbalance of power in favor of sporting organizations, due to their hegemony, by using horizontal applications of EU law.³⁹² The CJEU has recognized a nuanced application of Community Law in sporting sectors³⁹³ and the conditional autonomy of sporting institutions, acknowledging that SGBs have discretion in the formulation and application of their rules insofar as those rules do not conflict with EU standards.³⁹⁴ This approach allowed for more challenges against SGBs on the basis of EU law, particularly those which argued for the horizontal applicability of the EU's Charter of Fundamental Rights.³⁹⁵ Sports associations' autonomy does not authorize them to limit the exercise of the Treaty individual rights.³⁹⁶ Thus, athletes have rights under EU law that can be effectively enforced by ordinary courts.³⁹⁷ The CJEU Grand Chamber overturned the

390. Case C-22/18, *TopFit eV v. Deutscher Leichtathletikverband eV*, ECLI:EU:C:2019:497, ¶¶ 38–40 (June 13, 2019).

391. Case C-124/21 P, *Int'l Skating Union v. Comm'n*, ECLI:EU:C:2023:1012, ¶ 91 (Dec. 21, 2023) (“the practice of sport is subject to the provisions of EU law applicable to such [economic] activity”); Case C-680/21, *Royal Antwerp Football Club*, ECLI:EU:C:2023:1010, ¶ 103 (Dec. 21, 2023) (SGBs cannot “limit the exercise of the rights and freedoms that EU law confers on individuals”); Case C-333/21, *European Superleague Company SL*, ECLI:EU:C:2023:1011, ¶ 83 (Dec. 21, 2023) (“in so far as it constitutes and economic activity, the practice of sport is subject to the provisions of EU law”).

392. Wojciech Lewandowski, *The Implications of the Recent Jurisprudence of the Court of Justice of the European Union for the Protection of the Fundamental Rights of Athletes and the Regulatory Autonomy of Sporting Federations*, 25 *TILBURG L. REV.* 55, 59 (2020). [Hereinafter, Lewandowski, *Implications*].

393. Antonio Di Marco, *Amateur Sport and Union Citizenship in the Biffi Case: Towards a European Sporting Citizenship*, 27 *MAASTRICHT J. EUR. COMPAR. L.* 598, 602 (2020).

394. *Id.* at 603.

395. See e.g., Duval & Heerdt, *supra* note 25, at 7–8 (discussing challenges brought against FIFA).

396. *TopFit*, Case C-22/18, ¶ 52; *Int'l Skating Union*, Case C-124/21 P, ¶ 196; *Royal Antwerp Football Club*, Case C-680/21, ¶ 53.

397. STEFAAN VAN DEN BOGAERT, *From Bosman to Bernard C-415/93; [1995] ECR I-4921 to C-325/08; [2010] ECR I-2177*, in *LEADING CASES IN SPORTS LAW* 91, 97 (Jack Anderson ed., 2013).

General Court's judgment regarding CAS arbitration.³⁹⁸ The Grand Chamber reaffirmed that the SGBs' legal autonomy to adopt their rules cannot restrict the exercise of the rights conferred by EU law.³⁹⁹ Accordingly, the SGBs rules must be subject to effective judicial review, especially where the arbitration mechanism is imposed by a private actor, the SGB, on another private person such as the athletes.⁴⁰⁰ The requirement of effective judicial review means that the courts reviewing the awards issued by an arbitral tribunal such as CAS with a mandatory and exclusive jurisdiction should be able to determine the compatibility of the SGBs rules with EU public policy including EU competition law and be able to refer a question to the CJEU and obtain a preliminary ruling.⁴⁰¹ As CAS awards are reviewed only by the STF, a court of a non-EU State that cannot obtain a preliminary ruling from the ECJ, and the public policy grounds for such review do not include compliance with EU competition law, the system does not comply with EU law.⁴⁰² For the CJEU, the possibility of claiming damages does not compensate for the lack of a remedy against the infringement.⁴⁰³ Given the potential impacts of its decisions, the CJEU explained that its ruling covered only the final review of CAS awards with the STF but not the CAS arbitration mechanism *per se*.⁴⁰⁴

Remarkably and meaningfully, the CJEU treats SGBs like state legislatures, applying to them the rules on competition law and freedom of movement, even if those regulations were regarded as solely addressing public authorities.⁴⁰⁵ In cases such as *Walrave* and *Bosman*, the ECJ has recognized that freedom of movement provisions have a horizontal as well as vertical direct effect.⁴⁰⁶ In this process, the CJEU has provided important protection to athletes' rights.⁴⁰⁷ The enforcement

398. Int'l Skating Union, Case C-124/21 P, ¶¶ 204, 237.3.

399. *Id.* ¶¶ 192; 196.

400. *Id.* ¶ 193.

401. *Id.* ¶¶ 193; 198.

402. *Id.* ¶¶ 191; 194; 198.

403. *Id.* ¶¶ 200–202.

404. *Id.* ¶¶ 184; 191.

405. Gibraltar Football Ass'n, CAS 2014/A/3776, ¶¶ 239–40.

406. Parrish, Sports Law, *supra* note 5, at 84.

407. Lewandowski, Implications, *supra* note 392, at 55–56.

of fundamental freedoms and the prohibition of discrimination apply to non-State rules, such as those emanating from SGBs.⁴⁰⁸

The CJEU pays close attention to the social dimension of sports, as reflected in many European Union documents.⁴⁰⁹ The CJEU recognized the substantial social significance of sport in the EU and the role of sport as a factor for integration of society.⁴¹⁰ Like its human rights counterpart, the CJEU identified that practicing an amateur sport allows one to create bonds with society.⁴¹¹ The CJEU recognized the “considerable social and educational importance” of sports.⁴¹² Furthermore, it recently upheld the primary role of CAS as adjudicator of sports-related disputes.⁴¹³ The CAS arbitration system cannot and does not compromise the effectiveness of EU competition rules.⁴¹⁴ Citing *Mutu*’s description of CAS as a “single, specialised international arbitral tribunal,” the CJEU found that the specific nature of sports is a legitimate interest to justify the CAS system.⁴¹⁵ The CJEU, however, provided an important caveat and limitation to CAS. While athletes cannot challenge CAS awards before a national court for annulment of decisions which breach European law, athletes may still bring an action for damages before a domestic tribunal.⁴¹⁶ In those situations, national courts are not bound by the CAS ruling, particularly on issues of EU law.⁴¹⁷

408. See *Walrave and Koch*, Case 36/74, at 1418 (“prohibition of ... discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating ... gainful employment”); *Bosman*, Case C-415/93, at 5065-66 (citing *Walrave* ¶ 18); *Bernard*, Case C-325/08, at 2206 (citing *Bosman* ¶ 82).

409. See Parrish, Sports Law, *supra* note 5, at 104.

410. *TopFit*, Case C22/18, ¶ 33.

411. *Id.* ¶ 34.

412. *Royal Antwerp Football Club*, Case C-680/21, ¶ 70; *European Superleague Company SL*, Case C-333/21, ¶ 102.

413. Tilman Kuhn, Jaspers Wauters, & Mathis Rust, *EU General Court delivers ruling on the application of EU competition law to sports authorization rules and upholds the role of the Court of Arbitration for Sport*, WHITE & CASE LLP (Dec. 28, 2020), <https://www.whitecase.com/insight-alert/eu-general-court-delivers-ruling-application-eu-competition-law-sports-authorization>.

414. Case T-93/18, *Int’l Skating Union v. Comm’n*, ECLI:EU:T:2020:610, ¶ 161 (Dec. 16, 2020).

415. *Id.* ¶ 156.

416. *Id.* ¶ 159.

417. *Id.*

The case law of the CJEU demonstrates the horizontal applicability of the European Community's fundamental rights to sporting activity.⁴¹⁸ This approach is consistent with the ECtHR's decisions in cases such as *Mutu* or *Platini*. CAS should move in this direction by increasing the protection of athletes rights and recognizing a more limited SGB autonomy. It is contradictory that CAS recognizes the direct applicability of EU law to SGBs but not the European Convention, since the Convention is the only one binding on Switzerland, where CAS and most of the SGBs are located.⁴¹⁹

VII. INADEQUATE USE OF EUROPEAN HUMAN RIGHTS LAW BY CAS

In the next several sections, the Article will present some of the ways that CAS has understood the (non)applicability and use of international human rights law standards in deciding sports disputes. The paper concentrates on the decisions of CAS that make explicit references to human rights law. It does not discuss the substantive protection (or lack thereof) of athletes' rights by CAS.⁴²⁰ The analysis will be necessarily incomplete as CAS does not publish most of its awards given its discretionary publication practice.⁴²¹ As it was noted, this is highly problematic given that CAS decisions directly affecting clubs and athletes with some severe consequences "cannot in practice be read, reviewed, considered, evaluated, or criticised."⁴²²

A. *Applicable substantive law*

CAS arbitration applies the substantive law chosen by the parties.⁴²³ The law could be the SGB rules or national laws.⁴²⁴ If the parties do not choose, the Ordinary Division applies

418. Lewandowski, Implications, *supra* note 392, at 65.

419. CORNU, *supra* note 14, at 44.

420. For a positive overview of CAS protection of substantive rights of athletes, see Rochefoucauld, *supra* note 116, at 34.

421. Duval, *supra* note 8, at 12-14.

422. LINDHOLM, *supra* note 10, at 113.

423. *Code of Sports-Related Arbitration*, *supra* note 70, at R45, R58.

424. See Int'l Tennis Fed'n (ITF) v. K., CAS 99/A/223 (Ct. Arb. for Sport, Aug. 31, 1999), as reprinted in DIGEST OF CAS AWARDS II 1998-2000, 345 (Mattieu Reeb ed., 2002) (applying the parties' choice of English law).

Swiss law,⁴²⁵ and the Appellate Division the national law of the domicile of the SGB.⁴²⁶ Appellate panels can apply any law they deem necessary.⁴²⁷ Usually, there are areas in which supplementary law is applied: (1) procedural standards; (2) due process requirements; and (3) the meaning of SGB regulations.⁴²⁸

CAS Code does not provide for the direct application of international human rights law. In fact, based on the CAS Code, CAS asserted that human rights norms should be excluded when not explicitly chosen by the parties.⁴²⁹

B. *Recognition of human rights by CAS*

A search of the published CAS awards demonstrates that explicit references to human rights are present in hundreds of decisions.⁴³⁰ CAS has acknowledged several fundamental procedural and substantive rights, such as the right of defense and the principle of legal certainty,⁴³¹ due process,⁴³² the principle of non-retroactivity,⁴³³ *nulla crimen, nulla poena sine lege*,⁴³⁴ the

425. See *S. v. Fédération internationale de natation (FINA)*, CAS 2000/A/274 (Ct. Arb. for Sport, Oct. 19, 2000), as reprinted in *DIGEST OF CAS AWARDS II 1998-2000*, 396 (Mattieu Reeb ed., 2002) (supplementing with Swiss domestic law).

426. *Id.*

427. *Code of Sports-Related Arbitration*, *supra* note 70, at R58.

428. Michael Straubel, *Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better*, 36 *LOY. U. CHI. L. J.* 1203, 1251-52 (2005) [hereinafter, Straubel, *Enhancing the Performance*].

429. See *Midtjylland A/S*, CAS 2008/A/1485, ¶ 28 (noting that the parties' choice of Swiss law and FIFA regulations directly excluded non mandatory provisions of EC Law, including human rights norms).

430. See *infra* note 500.

431. See *Oliveira v. FIFA*, CAS 2015/A/4184, ¶¶ 200, 202 (Ct. Arb. for Sport, Apr. 25, 2016) (acknowledging the right of defense and fundamental principle of *ne bis in idem*).

432. See *FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC Braga*, CAS 2013/A/3309, ¶ 87 (Ct. Arb. for Sport, Jan. 22, 2015) (CAS acknowledging due process).

433. See *Blatter v. FIFA*, CAS 2016/A/4501, ¶ 95 (Ct. Arb. for Sport, Dec. 5, 2016) (CAS acknowledging the principle of non-retroactivity); *Union Cycliste Internationale v. Fédération Française de Cyclisme*, CAS 2000/A/289, ¶ 7 (Ct. Arb. for Sport, Jan. 12, 2001) (referencing the general principle of non-retroactivity).

434. *Tsagaev v. Int'l Weightlifting Fed'n*, CAS (O.G. Sydney) 00/010, ¶ 22 (Ct. Arb. for Sport, Sept. 25, 2000) (clarifying that suspension requires unambiguous legal basis).

prohibition on double jeopardy,⁴³⁵ privilege against self-incrimination⁴³⁶ and equal treatment.⁴³⁷ Sometimes, CAS has preferred to refer to “unwritten principles of sports law” rather than to the European Convention in alluding to the fair trial applicable to SGBs.⁴³⁸ The right of access to the courts is not violated if the time limitation to file an appeal is reasonable.⁴³⁹ To respect the right to be heard, CAS has admitted anonymous witnesses under strict conditions.⁴⁴⁰ CAS has understood that the right to equality of arms is not violated when it rejects a witness if the deadline to present witnesses has elapsed.⁴⁴¹ CAS has established that:

[its] jurisdiction cannot be imposed to the detriment of an athlete’s fundamental rights. . . . [An] athlete basically cannot be precluded from obtaining in CAS arbitration at least the same level of protection of his/her substantive rights that he or she could obtain before a State court. [A]rbitration may be accepted, in the eyes of the European Convention [...], as a valid alternative to access to State courts, only if arbitration proceedings constitute a true equivalent of State court proceedings. [The] imposition [of] mandatory arbitration could be seen as unsatisfactory if it prevents the athlete from obtaining at least the minimum standard of review provided by State court proceedings.⁴⁴²

435. *See* Prusis v. Int’l Olympic Comm., CAS (O.G. Salt Lake City) 02/001, ¶¶ 15, 17, 18 (Ct. Arb. for Sport, Feb. 5, 2002) (Acknowledging the prohibition on double jeopardy).

436. *See* Valcke v. FIFA, CAS 2017/A/5003, ¶¶ 260–272 (Ct. Arb. for Sport, July 27, 2018) (Acknowledging privilege against self-incrimination).

437. *See* Nabokov, CAS 2001/A/357, ¶¶ 24–27 (recognizing that this case is not an example of unequal treatment).

438. *See* AEK Athens, CAS 98/200, ¶¶ 156, 158 (acknowledging that sports law has developed through a set of unwritten legal principles).

439. *See* Grasshopper v. Alianza Lima, CAS 2008/A/1705, ¶ 23 (Ct. Arb. for Sport, June 18, 2009) (holding that the time limitation is not disproportionate).

440. *See* FK Probeda v. UEFA, CAS 2009/A/1920, ¶ 13 (Ct. Arb. for Sport, Apr. 15, 2010) (holding that “when facts are based on anonymous witness statements, the right to be heard which is guaranteed by article 6 of the European Convention of Human Rights”).

441. *See* Aris FC v. Campora, CAS 2011/A/2463, ¶ 12–13 (Ct. Arb. for Sport, Mar. 8, 2012) (holding that respondent had a reasonable opportunity to present its case).

442. *Katusha Mgmt. SA v. Union Cycliste Internationale*, CAS 2012/A/3031, ¶ 68 (Ct. Arb. for Sport, May 2, 2013) (operative part of 15 February 2013).

In an Advisory Opinion, CAS concluded that “any action taken against a competitor in doping matters must respect the principles of international and national law, as well as the laws governing the protection of [...] human rights.”⁴⁴³

C. *Limited and inconsistent use of the European Convention and ECtHR case law*

On occasions, CAS has accepted the applicability of the European Convention in arbitration if the conventional rights are applicable to civil law (and not criminal law) procedures.⁴⁴⁴ Yet, CAS has been inconsistent on the use, applicability, and value of international human rights law. The OHCHR has referred to “the limited and inconsistent application of international human rights norms and standards to disputes” by CAS.⁴⁴⁵ Thus, CAS needs to respect those procedural guarantees.

CAS recognizes that some civil law proceeding guarantees are indirectly applicable in disciplinary matters.⁴⁴⁶ As a State party to the ECHR, Switzerland must ensure that parties to an arbitration enjoy “a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal.”⁴⁴⁷ Sometimes the procedural rights acknowledged by CAS have not been applied following the case law or analyzed using the practice of human rights bodies. For instance, the recognition of the principle of *nulla poena sine lege*⁴⁴⁸ has not led to a discussion on whether the principle is violated by the concept of strict liability.⁴⁴⁹ Sometimes, even if CAS decides on human rights issues, it does so in a limited and unreasoned way. For instance, in a

443. French Triathlon Fed’n v. Int’l Triathlon Union, CAS 93/109, 5 (Ct. Arb. for Sport, Aug. 31, 1994) (translated by author).

444. Fenerbahçe SK v. Union des Associations Europeennes de Football (UEFA), CAS 2013/A/3139, ¶¶ 88, 91 (Ct. Arb. for Sport, Dec. 5, 2013).

445. OHCHR Race and Gender, *supra* note 81, ¶ 46.

446. Fusimalohi v. FIFA, CAS 2011/A/2425, ¶ 70 (Ct. Arb. for Sport, Mar. 8, 2012).

447. *Id.*

448. See Eur. Ct. H.R., *Guide on Article 7 of the European Convention on Human Rights*, at 6, (Aug. 31, 2022), https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf (defining “*nullum crimen, nulla poena sine lege*” as a principle that only the law can define a crime and prescribe a penalty).

449. Kulübü v. Union of European Football Association (UEFA), CAS 2014/A/3628, ¶ 72 (Ct. Arb. for Sport, Sept. 2, 2014) (operative part of July 7, 2014).

case challenging the strict liability standard for doping violations based on the European Convention, CAS simply held that “even if it were applicable, there is no violation of the European Convention.” It added that the WADA Code and the IAAF Rules “protect the athlete against any violation.”⁴⁵⁰ According to a 1994 CAS decision, the “objectives and practical necessities of the fight against doping amply justify the application of a strict liability principle.”⁴⁵¹ CAS added in another decision that the strict liability principle “is not objectionable under Swiss law as long as the athlete has the right to adduce counter evidence as to his/her fault or negligence.”⁴⁵²

Showing a complete misunderstanding of human rights requirements in one of the cases challenging the strict liability principle, CAS noted “that the Appellant agreed at the end of this hearing that procedurally, his rights were heard.”⁴⁵³ For CAS, there was no need to provide more explanation on this point despite the strong objections about the compatibility of the strict liability with the presumption of innocence and the principle of legality.⁴⁵⁴ CAS also confused the right to be heard with the protection of substantive rights. Additionally, CAS uses the “comfortable satisfaction” standard of proof to rule in doping cases.⁴⁵⁵ CAS treats penalties for doping offences as criminal in nature. However, the application of the strict liability principle deprives athletes of required basic criminal procedural protections, such as the presumption of innocence.⁴⁵⁶

CAS has also ruled on substantive human rights, many times based on EU law rather than on the ECHR. It has recognized economic freedom and the right to private property as

450. *Tysse v. Norwegian Athletics Fed'n*, CAS 2011/A/2353, ¶ 39 (Ct. Arb. for Sport, Aug. 29, 2011).

451. *USA Shooting v. Int'l Shooting Union*, CAS 94/129, ¶ 16 (Ct. Arb. for Sport, May 23, 1995).

452. *See P. v. IJHF*, CAS 2005/A/990, (Ct. Arb. for Sport, Aug. 24, 2006).

453. *Tysse*, CAS 2011/A/2353, ¶ 40.

454. *See generally* JANWILLEM SOEK, *THE STRICT LIABILITY PRINCIPLE AND THE HUMAN RIGHTS OF ATHLETES IN DOPING CASES*, at 316, 328 (2007) (providing that CAS has held that the principle of legality prevents the imposition of a penalty and that the presumption of innocence is greatly important in a strict liability environment).

455. *Traves Smikle v. Jamaica Anti-Doping Comm'n (JADCO)*, CAS 2015/A/3925, ¶¶ 69, 73, 128 (Ct. Arb. for Sport, Aug. 10, 2015) (operative part of 22 June 2015).

456. *Straubel, Enhancing the Performance*, *supra* note 428, at 1259–1260.

“applicable international standards of human rights.”⁴⁵⁷ Based on EU law, CAS has applied the right to work, freedom to provide services, and freedom of movement.⁴⁵⁸ Freedom of expression⁴⁵⁹ and the right to privacy⁴⁶⁰ are two rights recognized by CAS.⁴⁶¹ Freedom of association is discussed in thorough detail in CAS cases.⁴⁶² Panels have also recognized, mainly based on Swiss law, the athlete’s right of personality.⁴⁶³

In many cases, even if CAS understands that the European Convention does not apply directly, it uses the case law of the ECtHR to interpret certain procedural guarantees.⁴⁶⁴ In *Yerolimpos*, a CAS panel considered that the Court’s case law “is indicative, and, in jurisdictions to which it applies, compulsive.”⁴⁶⁵

The well-known case dealing with the suspension of the Russian Olympic Committee and the banning of Russian athletes is a good example of CAS’ limited knowledge and misunderstanding of human rights standards. The panel stated that, with respect to the question of punishment of Russian athletes, the ECHR does not specifically prohibit collective punishment as it is mostly a principle of international humanitarian or criminal law.⁴⁶⁶ This statement is problematic in several ways. In the first place, while it is correct that generally human rights law

457. *Viorel v. Romanian Football Federation (RFF)*, CAS 2017/A/4947, ¶ 111 (Ct. Arb. for Sport, Oct. 6, 2017).

458. *FC Sportul Studentesc SA v. FC Petrolul Ploiesti SA*, CAS 2015/A/3957, ¶ 83 (Ct. Arb. for Sport, Nov. 30, 2015).

459. *Yerolimpos v. World Karate Foundation (WKF)*, CAS 2014/A/3516, ¶ 116 (Ct. Arb. for Sport, Oct. 6, 2014).

460. *Oliveira*, CAS 2015/A/4184, ¶ 196.

461. *Yerolimpos*, CAS 2014/A/3516, ¶ 116.

462. *Football Ass’n of Serbia v. Union des Associations Europeennes de Football (UEFA)*, CAS 2016/A/4602, ¶¶ 134, 136 (Ct. Arb. for Sport, Jan. 24, 2017).

463. *A. v. Fédération Internationale de Luttes Associées (FILA)*, CAS 2001/A/317, ¶¶ 25, 27 (Ct. Arb. for Sport, July 9, 2001).

464. *See, e.g., Andrianova v. All Russ. Athletic Fed’n*, CAS 2015/A/4304, ¶¶ 48–49 (Ct. Arb. or Sport, Apr. 14, 2016) (on statutes of limitations and the principle of non-retroactivity in disciplinary procedures); *Asif v. Int’l Cricket Council*, CAS 2011/A/2362 ¶ 41 (Ct. Arb. for Sport, Apr. 17, 2013) (on the judicial review of an administrative decision of a competition authority); *see also Keramuddin v. Fédération Internationale de Football Association*, CAS 2019/A/6388, ¶¶ 120–128 (Ct. Arb. for Sport, July 14, 2020) (on the use of protected or anonymous witnesses).

465. *Yerolimpos*, CAS 2014/A/3516, ¶ 116.

466. *World Anti-Doping Agency v. Russ. Anti-Doping Agency*, CAS 2020/O/6689, ¶ 811 (Ct. Arb. for Sport, Dec. 17, 2020).

does not explicitly prohibit “collective punishment,” that silence does not mean that such collective action would not amount to a violation of multiple rights, such as liberty, security of person, and fair trial. Even though the ECtHR has not decided any case on collective punishment, there are references to “collective punishment” in fourteen judgments, three dozen decisions, and three communicated cases,⁴⁶⁷ none of which CAS mentioned, much less analyzed. In its General Comment on states of emergency, the UN Human Rights Committee specified that, “States parties may in no circumstances” invoke a state of emergency “as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance... by imposing collective punishments.”⁴⁶⁸ Other human rights norms include prohibitions of collective sanctions (which are different from punishment).⁴⁶⁹ None of these arguments were discussed by CAS.

Another example is *Deleanu*, a case involving defamatory expressions by an athlete.⁴⁷⁰ CAS simply declared that as the right to freedom of expression is not absolute, a person could be found liable for making defamatory statements.⁴⁷¹ CAS did not refer at all to the extensive case law of the ECtHR on the permissible restrictions to freedom of expressions, including the conditions for the imposition of a sanction for supposedly defamatory expressions.⁴⁷² In *Rajub*, another freedom of expression case related to the President of the Palestinian Football Federation’s call to burn t-shirts and pictures of Lionel Messi, CAS simply referred to the ECtHR’s jurisprudence without citing a single case nor explaining in any detail the content of

467. CORNELIA KLOCKER, *COLLECTIVE PUNISHMENT AND HUMAN RIGHTS LAW. ADDRESSING GAPS IN INTERNATIONAL LAW* 87 (Routledge, 1st ed. 2020).

468. Int’l Covenant on Civ. and Pol. Rts., General Comment No. 29 States of Emergency (Article 4), ¶ 11, U.N. Doc CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2021).

469. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, U.N. Doc. A/RES/45/113 (Dec. 14, 1990), art. 67.

470. *Deleanu v. Fed’n Internationale de Gymnastique*, CAS 2012/A/3041, ¶ 48 (Ct. Arb. for Sport, June 12, 2013).

471. *Id.* ¶ 49.

472. See generally, Eur. Ct. H.R., *Guide on Article 10 of the European Convention on Human Rights* (Aug. 31, 2022), https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf (extensively discussing criteria for liability for defamatory statements).

such case-law and standards.⁴⁷³ Nor did CAS mention any of the freedom of expression cases decided by the ECtHR in the context of sports such as *Šimunić*, *Hachette Filipacchi*, *Ressiot*, *Mosley*, or *Dogan*.

CAS has stated that there is not a special anti-doping regime for children, except considering the “young age of an athlete” to determine their fault.⁴⁷⁴ CAS referred to the best interest of the child as stated in the Convention on the Rights of the Child (CRC) and to “the rights of a child alleged, accused or found of having infringed penal law.”⁴⁷⁵ CAS did not include any analysis whatsoever regarding the meaning of the best interest of the child as developed by the Committee on the Rights of the Child.⁴⁷⁶ In a case deciding the meaning of *non-bis in idem* principle, CAS used “one handbook on Swiss criminal law” and “one leading handbook” on Swiss civil law.⁴⁷⁷ No references were made to the case law of the ECtHR⁴⁷⁸ or of any other international human rights body on double jeopardy.⁴⁷⁹

D. *Indirect applicability of European human rights law by CAS: SGBs and CAS are not directly bound by the European Convention*

Most CAS decisions consider that “[w]hether and to what extent sports associations are bound by the ECHR in the context

473. *Rajoub v. Fédération Internationale de Football Ass’n*, CAS 2018/A/6007, ¶ 96 (Ct. Arb. for Sport, July 18, 2019) (Court stating that Mr. Rajoub “cannot rely on the jurisprudence of the ECtHR according to which the burning of t-shirts falls under the freedom of speech”).

474. *Stichting Anti-Doping Autoriteit Nederland v. W.*, CAS 2010/A/2311 & 2312, ¶ 7 (Ct. Arb. for Sport, Aug. 22, 2011).

475. *Id.* at ¶ 66.

476. See, e.g., Convention on the Rts. of the Child, General Comment No. 8 The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia), ¶ 26, U.N. Doc CRC/C/GC/8 (Mar. 2, 2007).

477. *World Anti-Doping Agency and Union Cycliste Internationale v. Valverde*, CAS 2007/A/1396 & 1402, ¶¶ 119, 124 (Ct. Arb. for Sport, May 31, 2010).

478. See generally, Eur. Ct. Hum. Rts., *Guide on Article 4 of Protocol No. 7 to the European Convention on Human Rights*, (Dec. 31, 2021), https://www.echr.coe.int/Documents/Guide_Art_4_Protocol_7_ENG.pdf.

479. For an up-to-date analysis see, AMAL CLOONEY & PHILIPPA WEBB, *Right not to be Subject to Double Jeopardy*, in *THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW* (Oxford Univ. Press 2020).

of their disciplinary jurisdiction is not clear.”⁴⁸⁰ Generally, CAS arbitrators raise “serious doubts” about the applicability of the ECHR because “only State authority, not private third parties, are bound to observe the rights under the Convention.”⁴⁸¹ CAS has explained that:

[F]undamental rights find application in the vertical relationship between the State and the individual... [I]nternational human rights treaties are not intended to apply directly in private relationships between individuals and therefore not applicable in disciplinary cases tried by private associations.⁴⁸²

For CAS, the Convention protects individual rights against violations by the State. The ECHR is not intended to regulate the legal relationships between private entities such as SGBs.⁴⁸³ SGBs are not an organ of the State, notwithstanding the fundamental importance of their role in the organization of sports.⁴⁸⁴

CAS tends to apply the ECHR in an indirect way and mainly as required by Swiss public law, considering that it is “not bound directly by the provisions of the ECHR” but should take it into consideration “within the framework of procedural public policy.”⁴⁸⁵ If there are gaps in the rules of a SGB, the Code allows the use of domestic law and, in some cases, any appropriate rule of law. This situation could allow CAS to apply human rights indirectly⁴⁸⁶ by using, for example, Swiss law, which offers at least equivalent protections as those embedded in the European Convention.⁴⁸⁷ From time to time, CAS

480. Hoch v. Fédération Internationale de Ski., CAS 2008/A/1513, ¶ 9 (Ct. Arb. for Sport, Jan. 29, 2009).

481. *Id.*

482. Bordeaux v. Fédération Internationale de Football Ass’n, TAS 2012/A/2862, ¶¶ 105–06 (Ct. Arb. for Sport, Jan. 11, 2013) (translation by the author, internal references omitted) (citing Diakite v. Fédération Internationale de Football Ass’n, TAS 2011/A/2433, p. 25 ¶ 23 (Ct. Arb. for Sport, Mar. 8, 2012)).

483. Eder v. Ski Austria, CAS 2006/A/1102 & TAS 2006/A/1146, ¶ 45 (Ct. Arb. for Sport, Nov. 13, 2006).

484. Bordeaux, TAS 2012/A/2862, ¶¶ 105–07.

485. Union Cycliste Internationale, CAS 2011/A/2384 & 2386, ¶¶ 21–23.

486. Club Raja Casablanca, CAS 2019/A/6345, ¶ 35.

487. *Id.*

recognizes that “there are more and more authorities in legal literature advocating that the ECHR also applies directly to sports associations.”⁴⁸⁸

E. *Non-use of non-European human rights sources and its negative consequences*

CAS has used almost exclusively the European Convention to interpret or apply human rights in the context of sports. The process of borrowing from the European human rights system is not unique to CAS. Several judicial and human rights bodies have relied on or “imported” the case law and analytical method of the European Court.⁴⁸⁹

In very few opportunities, CAS has referred to other human rights instruments such as CRC⁴⁹⁰ or the International Covenant on Civil and Political Rights.⁴⁹¹ Besides the problems identified in the text regarding CAS’s inconsistent, restrictive understanding with regards to the European Convention, there are other problems associated with this limited approach. First, the aspiration of CAS to become a global sports court is limited by its use of a regional human rights treaty. CAS fails to pay attention to the treaties and norms with global reach such as those adopted under the auspices of the United Nations⁴⁹² or by other regional organizations such as those in the Inter-American or African human rights systems. The OHCHR explained it such: “the global sport system extends far beyond Europe, which again points to the risk of inconsistencies among jurisdictions in terms of protection and remediation for human rights violations in sport.”⁴⁹³

488. Hoch, CAS 2008/A/1513, ¶ 9.

489. See generally MARIA-LOUIZA DEFTOU, *EXPORTING THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (Bloomsbury Publishing 2022) (discussing how domestic courts and international organizations directly apply the case law of the European Court); Gerald L. Neuman, *Import, export, and regional consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT’L L. 101, 113 (2008).

490. Stichting Anti-Doping Autoriteit Nederland, CAS 2010/A/2311 & 2312, ¶¶ 65–66.

491. Valverde, CAS 2007/A/1396 & 1402, ¶ 116.

492. For a critique of this same problem with the CJEU, see De Búrca, *After the EU Charter*, *supra* note 381, at 173–74 (noting the CJEU’s dismissive attitude toward the Human Rights Committee).

493. OHCHR Race and Gender, *supra* note 81, ¶ 49.

A quantitative search of the CAS database shows an explicit reference to human rights in hundreds of decisions. A simple search of the phrase “human rights” in the CAS database returned 246 results.⁴⁹⁴ Out of those results, CAS referred to the European Convention on 108 occasions and to the European Court on 123 results.⁴⁹⁵ For the United Nations human rights treaties, CAS database returns only 10 results: 4 to the International Covenant on Civil and Political Rights (ICCPR),⁴⁹⁶ 2 to the Convention on the Rights of Persons with Disabilities (CRPD),⁴⁹⁷ 2 to the Convention on the Rights of the Child (CRC),⁴⁹⁸ one to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁴⁹⁹ and one to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁵⁰⁰ There are no references to any of the United Nations treaty bodies, such as the Human Rights Committee. In fact, in an almost insulting manner, in the *Caster Semenya* case, the CAS panel said that the opinion of UN human rights experts was not “particularly useful.”⁵⁰¹ This Eurocentric approach contrasts with the fact that Switzerland has ratified almost all the core United Nations human rights treaties except the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁵⁰² There are also no CAS awards mentioning the Inter-American and African regional human rights systems or treaties. Additionally, when using the European Convention,

494. CAS database, [https://jurisprudence.tas-cas.org/Search/results.aspx#k=\(%22human%20rights%22\)](https://jurisprudence.tas-cas.org/Search/results.aspx#k=(%22human%20rights%22)) (last visited August 4, 2023).

495. *Id.* It is important to note that we include 30 citations of the European Convention of human rights, 66 mentions of the European Convention on Human Rights and 12 references to the European Convention for the Protection of Fundamental Rights.

496. *See e.g.*, Valverde, CAS 2007/A/1396 & 1402, ¶ 116 (citing Art. 14.7 of the ICCPR).

497. *See e.g.*, Leeper, CAS 2020/A/6807, ¶ 320–21 (citing the CRPD).

498. *See e.g.*, Stichting Anti-Doping Autoriteit Nederland, CAS 2010/A/2311 & 2312, ¶ 66 (citing the CRC).

499. *See e.g.*, Feyenoord Rotterdam N.V v. UEFA, CAS 2015/A/4256, ¶ 48 (Ct. Arb. for Sport, June 14, 2016) (citing the ICERD).

500. *Semenya*, CAS 2018/O/5794 & 2018/O/5798, ¶¶ 219, 281 and 544.

501. *Id.* ¶ 554.

502. *See Ratification Status for Switzerland*, OHCHR, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN (listing the treaties ratified by Switzerland) (last visited May 7, 2024).

CAS tends to refer to the interpretations given by the ECtHR.⁵⁰³ In the limited instances that it referred to UN treaties, it has not mentioned the understanding of the UN monitoring bodies.

A problem of limiting the references to the European Convention and the ECtHR is that the European treaty is largely limited to civil and political rights.⁵⁰⁴ Therefore, a wide range of economic, social, and cultural rights, particularly relevant in the context of sports, such as the right to work⁵⁰⁵ or to health,⁵⁰⁶ are not fully applied by CAS.

The Eurocentric approach of CAS has a negative impact on equity and legitimacy as well as the quality of CAS reasoning.⁵⁰⁷ For instance, the Inter-American human rights system has a much more expansive interpretation of questions such

503. *Id.*

504. For similar problems with the European Court of Justice, see UN OHCHR, *THE EUROPEAN UNION AND INTERNATIONAL HUMAN RIGHTS LAW* 11 (2011), https://europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf.

505. See e.g. International Labour Organization, *Global Dialogue Forum on Decent Work in the World of Sport, Points of Consensus*, GDFWS/2020/7 (Jan. 2020), https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—sector/documents/meetingdocument/wcms_735388.pdf. In Case 2481, the ILO Committee on Freedom of Association considered that professional football players are workers. Case No. 2481 (Colombia) *The Colombian Association of Professional Football Players (ACOLFUTPRO)*, Report No. 344 (Int'l Lab. Org. 2007).

506. See e.g., WORLD HEALTH ORGANIZATION, *GLOBAL ACTION PLAN ON PHYSICAL ACTIVITY 2018-2030*, <https://apps.who.int/iris/bitstream/handle/10665/272722/9789241514187-eng.pdf>; G.A. Res. 67/17, *Sport as a means to promote education, health, development, and peace* ¶ 1, U.N. Doc A/RES/67/17 (Nov. 28, 2012); HRC *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: sport and healthy lifestyles as contributing factors* (2014) Office of the High Commissioner for Human Rights, Report on the Twenty-Sixth Session, HRC, 26th Sess., A/HRC/26/L.29; Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Human Rights Council, Report on the Twenty-Ninth Session, HRC, 29th Sess., U.N. Doc. A/HRC/29/33 at ¶ 13 (2015).

507. See similarly, Stewart Manley et. al., *The (Non-) Use of African Law by the International Criminal Court*, 34 *EUR. J. INT'L L.* 555, 558 (2023) (arguing that the ICC's failure to consider African law to resolve interpretational issues in cases considering African defendants undermines the legitimacy of the ICC).

as reparations,⁵⁰⁸ interim measures⁵⁰⁹, protection of groups in situations of vulnerability.⁵¹⁰ Particularly important is that the Inter-American Court had consistently said that the minimum due process guarantees related to criminal matters are applicable *mutatis mutandi* to disciplinary or administrative procedures where rights can be adjudicated or sanctions imposed.⁵¹¹ Contrary, the European Court's position is that disciplinary proceedings are not, as such, "criminal" in nature, and thus the criminal procedure guarantees do not apply directly.⁵¹² Key to this Article, the American Convention on Human Rights specifically recognized the right of association for "sports" purposes.⁵¹³ As the whole sports system is based on the premise of the autonomy of sports associations, the particular interpretation of the Inter-American Court on the permissible limitation of the right of association,⁵¹⁴ including for purposes of protecting the "rights

508. See generally CLARA SANDOVAL, *Two steps forward, one step back: Reflections on the jurisprudential turn of the Inter-American Court of Human Rights on domestic reparation programmes*, in *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM*, 82 (Routledge 2020) (describing the court's victim sensitive approach to reparations that includes a flexible concept of victim, and a similarly flexible approach to the standard of burden of proof).

509. CLARA BURBANO HERRERA & YVES HAECK, *The Impact of Precautionary Measures on Persons Deprived of Liberty in the Americas*, in *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: IMPACT BEYOND COMPLIANCE* 89, 91-93 (Par Engström ed., 2019) (discussing the Inter-American commissions' use of provisional measures to prevent irreparable damage, despite lacking an explicit formal mandate to do so).

510. Mary Beloff & Laura Clérico, *Derecho a condiciones de existencia digna y situación de vulnerabilidad en la jurisprudencia de la Corte Interamericana*, 14 ESTUDIOS CONSTITUCIONALES, no. 2016, at 139-178 (discussing the inter-American Court's broad interpretation of protection of vulnerable groups when ensuring the conditions of a dignified existence).

511. Baena Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 72, ¶¶ 125-127. (Feb. 2, 2001); Vélez Lóor v. Panama, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 142 (Nov. 23, 2010); Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter Am. Ct. H.R. (ser. C) No. 251, ¶ 157 (Oct. 24, 2012).

512. Peleki v. Greece, no. 69291, ¶¶ 35-36 (Eur. Ct. H.R., Mar. 5, 2020).

513. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 16.1.

514. See generally, CORTE IDH, CUADERNILLO DE JURISPRUDENCIA N° 26: RESTRICCIÓN Y SUSPENSIÓN DE DERECHOS HUMANOS 87-94 (2022), <https://biblioteca.corteidh.or.cr/adjunto/38988>, (discussing limits on the freedom of association necessary in a democratic society to protect, among other things, public order or morals).

and freedoms of others”⁵¹⁵ and to protect a non-discriminatory approach to the right of association,⁵¹⁶ is extremely relevant.

The Eurocentric approach taken by CAS is more problematic, as many interpret that CAS is the creator of a sort of “*lex sportiva*”: the foundational legal principles regulating sports.⁵¹⁷ As long as CAS continues with this Eurocentric bias, the whole “*lex sportiva*” will be impregnated by the same bias. The choice of European law over other plausible legal arguments rather than on legally ill-founded theories is evidence of this bias.⁵¹⁸ This is another twist in the Eurocentric character of international law and the legal favoritism for the Global North.⁵¹⁹ Or as Martti Koskeniemi puts it, it is evidence that CAS, like most international institutions, has a “structural bias”⁵²⁰ or “deeply embedded preferences”⁵²¹ that make it opt for certain normative outcomes or distributive choices over others. While different national normative systems, general legal principles, doctrinal models, and philosophical approaches influence the CAS, the

515. American Convention, art. 16.2.

516. See Rights to freedom to organize, collective bargaining, and strike, and their relation to other rights, with a gender perspective, Advisory Opinion OC-27/21, Inter-Am. Ct. H.R. (ser. A) No. 27 (May 5, 2021) (discussing the right of women to be free of discrimination and violence in exercise of right to association, right to collective bargaining, and right to strike).

517. See e.g., Casini, *supra* note 40 (examining the structure and functions of the Court of Arbitration for Sport); Foster at 2 (discussing the jurisprudence of the Court of Arbitration for Sport and developing the legal principles of the Court); James Nafziger, *The principle of fairness in the lex sportiva of CAS awards and beyond*, INT’L SPORTS L.J., July-Oct. 2010, at 3 (discussing the development of *lex sportiva* and its implications); Antoine Duval, *Seamstress of Transnational Law: How the Court of Arbitration for Sport Weaves the Lex Sportiva*, in ENTANGLED LEGALITIES BEYOND THE STATE 260-288 (Nico Krisch ed., 2021) (discussing how the Court of Arbitration for Sport serves as the institutional centre for *lex sportiva* and how the Court’s judicial practice is best described by assemblage and hybridity).

518. See Andrea Bianchi, *Choice and (the Awareness of) its Consequences: The ICJ’s “Structural Bias” Strikes Again in the Marshall Islands Case*, 111 AJIL UNBOUND 81, 83–84 (2017) (discussing how judges “make choices” based on legally plausible claims, not legally (ill-)founded ones, resulting in bias).

519. See Arnout Geeraert et al., *Good Governance in International Sport Organizations: an Analysis of the 35 Olympic Sport Governing Bodies*, 6 INT’L J. OF SPORT POL’Y & POL. 281, 281-306 (2014) (describing structural issues with the self-governance of the Olympic sport governing bodies).

520. Martti Koskeniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT’L L. 7, 11 (2009).

521. MARTTI KOSKENIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 607 (2005).

arbitrators are the ones that choose “between different standards of fundamental rights and by declaring specific fundamental rights as binding for a particular regime”.⁵²² Choices such as insistence on the autonomy of sports, complete private nature of SGBs, direct applicability of commercial rules and European competition law than international human rights law, and attribution of a civil rather quasi-criminal nature to disciplinary procedures are some of the examples of these choices. The transplant or imposition of Global North concepts to Global South such as the idea of the autonomy of sports could be limited by the lack of proper acknowledgement of the local realities and contexts as well as the different type of models applied in different national settings.⁵²³ By solely relying on the ECtHR, CAS brings some of the interpretative tools used by the European Court including the use of the “practice of European States reflecting their common values”⁵²⁴ and the “European consensus.”⁵²⁵ The ECtHR has recognized that it is “influenced by the developments and commonly accepted standards [...] of the member States of the Council of Europe.”⁵²⁶

The European case-law in fact supplies elements that could lead CAS to use global human rights norms. The ECtHR stated that in interpreting the European Convention “[it] can and must take into account elements of international law other than the Convention.”⁵²⁷ The “tenuous link” standard referred to by the ECtHR in *Riza* should encourage CAS to apply other human rights standards than the European Convention when there is only a “tenuous link” between the European space and the sport dispute. As the ECtHR has asserted, as a multi-lateral treaty, the Convention operates essentially in a “regional context and notably in the legal space (*espace juridique*)” of the European

522. Bützler and Schöddert, *supra* note 237, at 47.

523. See Borja García & Henk Erik Meier, *The “autonomy” of developing countries in the Olympic Movement: Assessing the fate of sports governance transplants in the Global South*, 4 FRONT. SPORTS ACT. LIVING 1 (2022) (discussing governance transplants through the notion of autonomy by the International Olympic Committee).

524. *Demir and Baykara v. Turkey*, no. 34503/97, ¶ 85 (Eur. Ct. H.R., Nov. 12, 2008).

525. *Evans v. United Kingdom*, no. 6339/05, ¶¶ 90-92 (Eur. Ct. H.R., Apr. 10, 2007).

526. *Tyrer v. United Kingdom*, no. 5856/72, ¶ 31 (Eur. Ct. H.R., Apr. 25, 1978).

527. *Demir*, no. 34503/97, at ¶ 85.

states.⁵²⁸ As the Bankovic Court explains, “[T]he Convention was not designed to be applied throughout the world, even in respect of the conduct” of contracting States.⁵²⁹ The dissenting judges Grozev, Roosma and Ktistakis warned in the *Semenya* case on widening the scope of the Convention and the Court’s jurisdiction to cover “the whole world of sports...[T]his ... extends the reach of the Convention worldwide, which neither follows from the case-law of the court, nor was it ever the intention” of the Convention.⁵³⁰ The dissenting judges that “Nothing in the convention suggests that it should provide universal protection of the rights laid down by it.”⁵³¹

Relevant factors to be taken into account by CAS in order to apply human rights standards other than the European ones should be the place of the actual dispute, game, competition and/or violation; the place of the actual, real and not fictional, seat of the arbitration body and; the place where the regulations were adopted.⁵³²

F. *The impact of ECtHR rulings on CAS*

It appears that CAS takes seriously the rulings of the ECtHR dealing specifically with CAS, albeit interpreting those decisions in the most restrictive and favorable way. After *Mutu*, CAS “noted the ruling” of the Court. In particular, it highlighted that “the ECHR judgment is another confirmation, this time at a continental level, that CAS is a genuine arbitration tribunal and that such sports jurisdiction is necessary for uniformity in sport.”⁵³³ Additionally, CAS referred to the changes introduced to “strengthen the independence and the efficiency of the

528. *Bankovic v. Belgium and others*, No. 52207/99, ¶ 80 (Eur. Ct. H.R., Dec. 12, 2001).

529. *Id.*

530. *Semenya*, no. 10934/21, Joint Dissenting Opinion of Judges Grozev, Roosma and Ktistakis.

531. *Id.*

532. For similar arguments in the determination of which State should be responsible for human rights violations in the sports field, see Shinohara, *supra* note 319 (discussing state attribution under sports-related disputes).

533. Media Release, Court of Arbitration for Sport, Statement on the Decision Made by the European Court of Rights (ECHR) in the Case Between Claudia Pechstein / Adrian Mutu and Switzerland (Oct. 2, 2018), https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf.

CAS” and “the possibility of having public hearings.”⁵³⁴ In particular, the R57 provision regarding the public nature of CAS hearings was revised and put into effect on Jan. 1, 2019.⁵³⁵ The first public hearing took place in the *Sun Yang* case.⁵³⁶ Some have argued that the reforms are limited and in compliance with the requirements laid out by the Court.⁵³⁷

In *Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi A.S.*, a case initiated under the previous CAS Code rules but decided after Mutu, the Panel decided not to hold a public hearing following the CAS Code version then in force.⁵³⁸ However, “given the recent Mutu and Pechstein judgment,” the Panel went on to “conside[r] the question under the aspect of Art. 6 ECHR.”⁵³⁹ CAS analyzed the *Pechstein* decision and the ECtHR case law to finally rule that a private hearing was compatible with Article 6 of the European Convention.⁵⁴⁰

G. *Some CAS arguments that could lead to more systematic use of human rights law*

CAS arbitrators have used several principles of international law. The application of the same international law rules present in other awards could lead CAS to a better use of human rights law.

CAS, when interpreting and applying the sporting rules regulating nationality (the sport nationality rules), considers

534. *Id.*

535. *Code of Sports-Related Arbitration*, *supra* note 70, ¶ R57. The Committee of Ministers of the Council of Europe—which supervises the execution of the judgements of the ECtHR—decided to close its supervision in the *Mutu* case given that the new CAS rules allow public hearings in disciplinary and/or ethics matters at the request of the athlete. Comm. of Ministers, *Execution of the judgment of the European Court of Human Rights, Mutu and Pechstein against Switzerland*, Res. CM/ResDH(2020)91 (June 4, 2020).

536. Media Release, Court of Arbitration for Sport, *The Hearing in the CAS Arbitration Procedure between WADA, Sun Yang and FINA to be Held in Public* (Aug. 20, 2019), https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_Public_Hearing.pdf.

537. Duval, *supra* note 8, at 4.

538. *Yatirim v. Turkish Football Fed’n*, CAS 2018/A/5746, ¶¶ 93-106 (Ct. Arb. for Sport, July 30, 2019).

539. *Id.* ¶ 100.

540. *Id.* ¶¶ 101-05.

international law.⁵⁴¹ It has correctly emphasized that in nationality cases there are two different concepts: one is related to the citizenship of one or more States, and the second is the sport-specific concept, defining the rules for qualifying players. These are two different legal systems, one under public law, the other under private law, which do not overlap and do not conflict.⁵⁴² CAS highlighted the difference between country, nation, and independent State under sports regulations and international law.⁵⁴³ However, when there are “established principles of international public law”, it is “far easier” to use international law as the “starting point” than to “creat[e] and defin[e] a specific sporting term and understanding.”⁵⁴⁴

The same reasoning—that is, using international human rights law as the “starting point”—should be applied by CAS. At a minimum, international law in general should serve as basis for CAS to use sports-specific conventions that establish a clear link between sports and human rights protection. For instance, the references to human rights in the Preamble of the UNESCO’s International Convention against Doping in Sport⁵⁴⁵ should bring human rights as the “starting point” of all doping matters before CAS. Equally, the Council of Europe Convention on the Manipulation of Sports Competitions mentions human rights twice in its Preamble and in detail

541. *See, e.g.*, U.S. Olympic Comm. (USOC) v. Int’l Olympic Comm. (IOC) (Perez I), CAS (O.G. Sydney) 00/001, ¶¶ 13, 21, 24 (Ct. Arb. for Sport, Sept. 13, 2000) (noting there are no grounds to conclude athlete acquired U.S. nationality before September 1997 even though he was not naturalized until 1999 under “the Olympic Charter, or under international law, or indeed under U.S. law”); Perez v. Int’l Olympic Comm. (IOC) (Perez II), CAS (O.G. Sydney) 00/005, ¶ 21 (Ct. Arb. for Sport, Sept. 19, 2000) (athlete became “stateless” under international law in 1993 and changed from Cuban to U.S. nationality in the same year, making him eligible to compete in 2000 Olympics for U.S.).

542. B. v. Fédération Internationale de Basketball (FIBA), TAS 92/80, ¶ 13 (Ct. Arb. for Sport, Mar. 25, 1993).

543. Gibraltar Football Ass’n v. Union des Associations Européennes de Football (UEFA), CAS 2002/O/410, ¶ 23 (Ct. Arb. for Sport, Oct. 7, 2003); *see also* Football Ass’n of Serbia v. Union des Associations Européennes de Football (UEFA), CAS 2016/A/4602, ¶¶ 123–24 (Ct. Arb. for Sport, Jan. 24, 2017) (explaining the differences in meanings of the terms under international law).

544. Football Ass’n of Serbia, CAS 2016/A/4602, ¶ 123.

545. Int’l Convention Against Doping in Sport, *supra* note 183, at preamble.

in its Article 34 on the implementation of the Convention.⁵⁴⁶ Additionally, CAS could use human rights instruments that include explicit references to sports, such as the Convention on the Elimination of All Forms of Discrimination against Women,⁵⁴⁷ the Convention on the Rights of Persons with Disabilities,⁵⁴⁸ the Inter-American Convention on Protecting the Human Rights of Older Persons,⁵⁴⁹ and the Ibero-American Convention on the Rights of Youth⁵⁵⁰ as the starting point of its analysis rather than “creating and defining specific sporting terms and understandings.”⁵⁵¹

Other standards used by CAS could serve as the basis for a more consistent application of international human rights law. While CAS acknowledges the autonomy of international governing bodies to depart from even from mandatory national provisions, such autonomy is limited by a transnational public order.⁵⁵² In particular, the limitation to autonomy comes when the SGBs actions could be assimilated to State-like activities. CAS, for instance, has recognized that FIFA acts “in a manner analogous to that of a state legislator” treats its “own regulations much like laws, promulgating them as binding on national . . . associations, clubs, players.” Given these special powers and its status as a private entity, FIFA “must respect general principles that also constrain legislators and governmental administrations.”⁵⁵³ This correct reasoning should lead CAS to limit the SGBs autonomy by respecting human rights standards in the same way those rights limit the power of public authorities.

The regulatory status, functionally equivalent to state legislators and the special responsibilities that accompany them, should require that international governing organizations

546. Council of Europe Convention on the Manipulation of Sports Competitions, C.E.T.S. No. 215, preamble, art. 34 (2014).

547. G.A. Res. 34/180, *supra* note 177, at arts. 10(g), 13(c).

548. G.A. Res. A/RES/61/106, *supra* note 177, at art. 30.

549. Inter-American Treaties A-70, Inter-American Convention on Protecting the Human Rights of Older Persons, art. 22, June 15, 2015.

550. Ibero-American Convention on Rights of Youth, art. 33.

551. Football Ass’n of Serbia, CAS 2016/A/4602, ¶ 123.

552. See Bützler and Schöddert, *supra* note 237, at 47 (noting that while international governing bodies have the autonomy to deviate from mandatory provisions of substantive national laws, such autonomy is limited by a transnational *ordre public*).

553. Gibraltar Football Ass’n, CAS 2014/A/3776, ¶¶ 237–40.

follow standards even if they “were conceived as applicable to the conduct of public authorities.”⁵⁵⁴ CAS has emphasized the parallel between States and sports federations—SGBs adopt their rules and reach their decisions by a process similar to those used by public authorities and those actions have an analogous effect on those concerned.⁵⁵⁵ Again, this approach should extend the applicability of human rights law to SGBs even if they “were conceived as applicable” to public authorities.

The CAS has also referred to “fundamental principle[s] of any democratic regime” in order to find support to the applicability of *lex mitior*, which recognizes the retroactivity of the most favorable criminal law.⁵⁵⁶ The same concept should move CAS to apply human rights standards more consistently. There is a consensus that human rights, democracy, and the rule of law are interdependent and mutually reinforcing.⁵⁵⁷

554. *Id.* ¶ 240.

555. *Brit. Equestrian Fed’n v. Fédération Equestre Internationale*, CAS 2010/A/2058, ¶¶ 14–16 (Ct. Arb. for Sport, July 13, 2010).

556. *Advisory Opinion, Union Cycliste Internationale et Comité National Olympique Italien*, TAS 94/128, ¶ 33 (Ct. Arb. for Sport, Jan. 5, 1995). The principle is recognized in human rights treaties, e.g., Organization of American States, American Convention on Human Rights art. 9, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 15.1 (Dec. 16, 1966). Even though Article 7 § 1 of the European Convention does not expressly mention the retroactivity of the lighter penalty, the European Court has accepted and applied such principle as implicitly recognized by the Convention.; *see, e.g., Scoppola v. Italy (No. 2)*, no. 10249/03, ¶ 109 (Eur. Ct. H.R., Sept. 17, 2009) (Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law).

557. *See, e.g., Human Rights Council Res. 28/14*, U.N. Doc. A/HRC/RES/28/14, preamble (Apr. 9, 2015) (“Stressing that human rights, democracy and the rule of law are interdependent and mutually reinforcing . . .”); *Inter-American Democratic Charter*, preamble, Sept. 11, 2001, 40 I.L.M. 1289 (“Reaffirming that the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy”).

VIII. JUDICIAL REVIEW BY THE FEDERAL SWISS TRIBUNAL AND THE
INDIRECT APPLICATION OF HUMAN RIGHTS STANDARDS

The STF plays a unique role in the global governance of sports as the *de facto* appellate court for CAS.⁵⁵⁸ The STF should apply a human rights review over CAS awards as the ECtHR determined in *Semenya*. However, this review is extremely limited.⁵⁵⁹ Nevertheless, the existence of a potential for review by STF, as shown by cases such as *Gundel*, produces very real effects on CAS operations and on its jurisprudence.⁵⁶⁰

Sadly, for human rights, Swiss law is a legal paradise for SGBs and for CAS.⁵⁶¹ As most SGBs are seated in Switzerland, it is possible to bring claims against them before Swiss courts for their violations of human rights. However, Swiss courts appear to be reluctant to hold SGBs accountable for harms that are not directly linked to their activities. The STF confirmed that its tasks in examining CAS awards is not to rule with full power of review and it does not act as a court of appeal.⁵⁶² The combination of the extraordinary autonomy that SGBs enjoy in Switzerland, in addition to the consistent “benevolence”, “generosity” and “liberalism” of the STF in assessing CAS’ arbitration clause,⁵⁶³ and the high bar to challenge CAS awards, provide strong immunity to SGBs and CAS. The STF rarely overturns decisions made by CAS.⁵⁶⁴

Thus, in practice CAS enjoys “an almost absolute freedom” as the STF’s authority is “virtually non-existent.”⁵⁶⁵ While the STF might appear suitable to hold SGB and CAS accountable

558. West, *supra* note 22, at 6.

559. See Rigozzi, Challenging Awards, *supra* note 77, at 263–64 (discussing how in practice STF revision is “an extraordinary legal remedy, to be used only in exceptional circumstances”).

560. LINDHOLM, *supra* note 10, at 65–66 (discussing the consequences and legacy of the *Gundel* case).

561. Di Marco, *supra* note 168, at 624 n. 27 (citing FRÉDÉRIC BUYET AL., DROIT DU SPORT 44 (2015) and noting the tax and property privileges granted by Swiss law).

562. See Tribunal fédéral [TF] Jan. 27, 2021, 4A_600/2020, at 4.1.

563. Antoine Duval & Ben Van Rompuy, *Protecting Athletes’ Right to a Fair Trial Through EU Competition Law: The Pechstein Case*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW: PUBLIC AND PRIVATE LAW PERSPECTIVES 255 (Christophe Paulussen et al. eds., 2016).

564. Weston, *supra* note 179, at 103.

565. Rigozzi, Challenging Awards, *supra* note 77, at 254.

for their human rights compliance, it is extremely difficult to access for complainants and the Swiss court is exceedingly lenient in their review of CAS awards. However, this by no means indicates that the STF cannot and will not be more attuned to human rights in the future, especially if the ECtHR continues to find Switzerland responsible for CAS proceedings and decisions and the limited review by the STF as it did in *Semenya*.

In *Bakker*, the ECtHR described the recourse to the STF to challenge a CAS arbitration award as “very limited” and available only for “certain well-founded reasons” affecting public policy.⁵⁶⁶ Only the narrowly constructed concept of Swiss public policy serves as the basis to challenging CAS award. The public policy defense is a universal rather than national concept.⁵⁶⁷ An international arbitration award cannot be set aside by simply demonstrating the manifestly wrong application of a legal norm or an obviously incorrect factual determination.⁵⁶⁸ The STF does not review whether CAS rightly applied the law.⁵⁶⁹ In *Gundel*, the STF explained that the public policy standard is “more restrictive and narrower than the argument of arbitrariness.”⁵⁷⁰ In *Biolley*, the STF provided a detailed explanation of when an award is inconsistent with public policy.⁵⁷¹ Only an award that no longer can be considered consistent with the Swiss legal order and system of values could be set aside.⁵⁷² The violations of fundamental principles such as discriminatory measures, and the protection of certain persons are considered specific reasons to nullify.⁵⁷³ In one of the earliest cases reviewing CAS awards, the STF set a high bar by requiring that for nullifying an arbitration award the decision must “constitute an attack on personal rights which was extremely

566. Bakker, no. 7198/07, ¶ 37.

567. Tribunal fédéral [TF] Mar. 31, 1999, 5P.83/1999 (Switz.), as reprinted in DIGEST OF CAS AWARDS II 1998-2000, 779 (Mattieu Reeb ed., 2002).

568. *Id.* at 779.

569. Bundesgericht [BGer] Jan. 22, 2009, 4A_424/2008, at 7 (Switz.).

570. Matthew J. Mitten, *Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations*, 10 PEPP. DISP. RESOL. L.J. 51, 59 (2010) (quoting *Gundel* opinion).

571. Tribunal fédéral [TF] Mar. 20, 2008, 4A_506/2007, at 4.1 (Switz.) (involving a challenge to a CAS award on a soccer related contractual dispute).

572. *Id.*

573. *Id.*

serious and totally disproportionate.”⁵⁷⁴ In the *Semenya* case, the STF required the plaintiff to demonstrate that the CAS award is “manifestly untenable, seriously disregards a clear and undisputed legal standard or principle, or shockingly offends the sense of justice and fairness.”⁵⁷⁵ An award is not contrary to public policy even if another solution appears conceivable, preferable, or if the evidence was poorly assessed.⁵⁷⁶

In *Matuzalem*, the STF asserted that a CAS award “violates public policy only when it disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order.”⁵⁷⁷ The STF ruled that CAS award violated Francelino Matuzalem da Silva’s right to economic freedom.⁵⁷⁸ To the extent that FIFA disciplinary sanction curtailing the athlete’s economic freedom jeopardizes his economic existence, it constitutes “an obvious and grave violation” of the civil code, which is “contrary to public policy.”⁵⁷⁹ To date, *Matuzalem* remains an exception to the STF vacating a CAS award on substantive grounds.⁵⁸⁰

The STF provides for indirect application of the ECHR on sports arbitration in proceedings where an arbitral award is challenged before the STF.⁵⁸¹ According to the STF, the European Convention is not directly applicable to arbitration. The violation of the ECHR is not one of the exhaustive grounds included in list in Article 190(2) of the Swiss Private International Law Act (PILA).⁵⁸² The STF has confirmed that

574. Tribunal fédéral [TF] Mar. 31, 1999, 5P.83/1999, ¶ 3(b) (Switz.), as reprinted in DIGEST OF CAS AWARDS II 1998-2000, 780 (Mattieu Reeb ed., 2002).

575. Tribunal fédéral [TF] Aug. 25, 2020, 4A_248/2019 & 4A_398/2019, ¶ 9.1 (Switz.).

576. See Geistlinger & Gappmaier, *supra* note 15, at 309 (providing that a violation of public policy occurs when there is a violation of a fundamental principle of law according to the Swiss Federal Tribunal).

577. Tribunal Fédéral [TF] Mar. 27, 2012, 4A_558/2011, ¶ 4.1 (Switz.).

578. *Id.* ¶ 4.3.5.

579. *Id.* ¶ 14.3.2.

580. Baddeley, *supra* note 146, at 15.

581. Geistlinger & Gappmaier, *supra* note 15, at 309.

582. Tribunal fédéral [TF] Feb. 21, 2008, 4A_370/2007, ¶ 2.4, 5.3.2 (Switz.).

in disciplinary actions taken by SGB, the criminal due process guarantees of the ECHR do not apply.⁵⁸³

The STF implicitly recognized that forced arbitration to CAS reduces the level protection to athletes' rights as provided by State law. In *Nagel*, the STF required a clear "waiving [of] the legal protection provided by the state."⁵⁸⁴ In *Cañas*, the STF considered that the waiver of appeal added to the forced arbitration appeared to be contrary to the European Convention.⁵⁸⁵ However, it annulled the CAS award on a procedural public policy ground given the lack of response by CAS to Guillermo Cañas arguments.⁵⁸⁶ CAS is required to indicate, "at the very least, why they considered that the rules referred to by the appellant were not applicable," given that those rules were "State laws" and "inter-State laws."⁵⁸⁷ It appears that this case invites the parties who appear in front of CAS to make a human rights argument so as to force the arbitral tribunal to rule on such arguments explicitly.

In *Urquijo Goitia v. Da Silva Muñiz*,⁵⁸⁸ the STF annulled a CAS award based on the idea that the "right to be heard" (due process) requires that the arbitral tribunal invites the parties "to express their position if the court or the arbitral tribunal considers basing its decision on a provision or legal consideration, which has not been discussed during the proceedings and which the parties could not have suspected relevant."⁵⁸⁹

The STF invariably requires that applicants who rely on the European Convention's guarantees must establish an infringement of the Convention which amounts to a violation of one of the grounds for annulment under Article 190(2). The ECHR is not a standalone ground to set aside an arbitral award.⁵⁹⁰ On a recent decision, the STF confirmed that

583. *See, e.g.*, Tribunal fédéral [TF] Mar. 27, 2014, 4A_362/2013, ¶ 3.1 (Switz.) (stating that the applicable rules are not assessed from the perspective of criminal law concepts or guarantees arising from the ECHR).

584. Tribunal fédéral [TF] Oct. 31, 1996, 4C_44/1996, ¶ 2 (Switz.).

585. Tribunal fédéral [TF] Mar. 22, 2007, 4P.172/2006, ¶ 4.3.2.2 (Switz.).

586. *Id.* ¶ 5.2.

587. *Id.* ¶ 5.3.

588. Tribunal fédéral [TF] Feb. 9, 2009, 4A_400/2008 (Switz.).

589. *Id.* ¶ 3.1.

590. *See e.g.*, Tribunal fédéral [TF] June 2, 2010, 4A_320/2009, ¶ 1.5.3 (Switz.) (providing that an appeal against an international arbitral award may only be based on the ground set forth in Art. 190 (2) PILA and not directly on an alleged violation of the ECHR).

violations of the European Convention need to be connected to the grounds for appeal listed in PILA.⁵⁹¹ However the European Convention can be used, where appropriate, to interpret the grounds included in Art. 190 para. 2 PILA. The violation of the European Convention does not *per se* constitute a breach of public policy within the meaning of PILA.⁵⁹² The plaintiff must demonstrate that the breach of the ECHR constitutes a breach of Swiss public policy.⁵⁹³ The fundamental principles resulting from ECHR may be helpful to substantiate the guarantees contained in Art. 190(2) PILA, but it must be shown in what way one of the grounds for appeal in the PILA is met.⁵⁹⁴ In particular, the applicant has the burden to demonstrate that an alleged violation of the ECHR constitutes an infringement of procedural public policy.⁵⁹⁵ Similar to CAS, the STF ruled that the European Convention protects individuals' human rights vis-à-vis State authorities and, in principle, is inapplicable in disciplinary procedures conducted by private entities such as SGBs. The European Convention is not applicable as athletes are not the subject of a measure taken by the State.⁵⁹⁶

In the *Semenya* case, the Swiss Tribunal noted that according to Swiss constitutional law the prohibition of discrimination applies to the State and does not, in principle, affect relations between private persons.⁵⁹⁷ Thus, if the discrimination originates in actions or omissions of a subject of private law, it is not part of public policy exception to challenge an arbitral award. The similarities between the relations of an athlete and a SGB to with those between an individual and the State are not sufficient to argue that the public order is implicated.⁵⁹⁸ The ECtHR criticized the STF for not having conducted its own independent

591. Tribunal fédéral [TF] Aug. 17, 2020, 4A_486/2019, ¶ 4.1 (Switz.).

592. Tribunal fédéral [TF] June 2, 2021, 4A_618/2020, ¶ 5.1 (Switz.).

593. *Id.* ¶ 5.1.

594. Tribunal fédéral [TF] June 11, 2015, 4A_178/2014, ¶ 2.4 (Switz.).

595. Tribunal fédéral [TF] Aug. 17, 2020, 4A_486/2019, ¶ 4.1 (Switz.).

596. *See* Tribunal fédéral [TF] June 11, 2001, 4P.64/2001, ¶ 2, (Switz.), reproduced in 19 ASA BULLETIN 470, 566 (2001) (explaining that the appellant has the burden of showing which provisions of Art. 190 para. 2 LDIP were triggered and, and must demonstrate in a circumstantial manner what a violation of the relevant principle would consist of).

597. Tribunal fédéral [TF] Aug. 25, 2020, 4A_248/2019 & 4A_398/2019, ¶ 9.4 (Switz.).

598. *Id.* ¶ 9.4.

review using the European Convention as interpreted by the Court.

In *Gundel*, the STF decided that CAS is a true independent arbitral tribunal. It held that because CAS was not an internal organ of the SGB (in this case, the International Equestrian Federation, it did not receive commands from FEI and preserved sufficient autonomy from it.⁵⁹⁹ However, the STF highlighted the abundant ties between CAS and the IOC: the almost exclusive financial support of the IOC to CAS, and the power of the IOC to modify CAS Statute and to appoint the CAS arbitrators.⁶⁰⁰ Those links were to call into question CAS independence in cases where the IOC was a party to the proceedings. *Gundel* led to major reforms of the CAS. The IOC and other SGBs adopted the Agreement related to the Constitution of the International Council of Arbitration for Sport (the “Paris Agreement”).⁶⁰¹ The Paris Agreement created the International Council of Arbitration for Sport (ICAS), the entity responsible for the functioning and funding of CAS.⁶⁰² The IOC remained the main funding source of CAS, but its proportion was reduced to only a third of its former funding.⁶⁰³ Since these reforms, all Olympic International Federations and many National Olympic Committees have recognized CAS jurisdiction and adopted an arbitration clause referring disputes to the CAS.⁶⁰⁴

In *Lazutina*,⁶⁰⁵ the STF reaffirmed the independence of CAS, this time in a dispute between an athlete and the IOC.⁶⁰⁶ More importantly, for our purposes, the STF ruled that CAS’ decisions could “be considered true awards, equivalent to the judgments of State courts.”⁶⁰⁷ The STF added that CAS, “as a body which reviews the facts and the law with full powers of investigation and complete freedom to issue a new decision in

599. Tribunal fédéral [TF] Mar. 15 1993, 119 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE (RECUEIL OFFICIEL) II 271, reproduced in DIGEST OF CAS AWARDS I 1986–1998, 561, 568–69 (Matthieu Reeb, ed. 2001)

600. *Id.* at 570.

601. Agreement related to the Constitution of the International Council of Arbitration for Sport (June 22, 1994), https://arbitrationlaw.com/sites/default/files/free_pdfs/ICAS%20Agreement.pdf [hereinafter ICAS].

602. *History of the CAS*, *supra* note 32.

603. ICAS, *supra* note 601.

604. *History of the CAS*, *supra* note 32.

605. Tribunal fédéral [TF] May 27, 2003, 4P.267-270/2002 (Switz.).

606. *Id.* ¶ 3.3.4.

607. *Id.*

place of the body that gave the previous ruling, the CAS is more akin to a judicial authority independent of the parties.”⁶⁰⁸ The logical consequence of the fact that CAS awards are equivalent to “judgments of State courts” and that CAS is “akin to a judicial authority,” should be that all the obligations of any judicial authorities are equally applicable to CAS, including the strict application of international human rights law.

In a post-*Mutu* case, the STF confirmed the validity of CAS’ compulsory arbitration clause.⁶⁰⁹ The STF relied in part on the *Mutu*, *Riza*, and *Platini* cases to confirm the compatibility of compulsory arbitration clauses with the European Convention and that CAS must and does meet due process requirements.⁶¹⁰

IX. OTHER DOMESTIC COURTS AND POTENTIAL INDIRECT CONTROL OVER CAS

There is a limited possibility that other domestic courts other than Swiss courts could control CAS. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)⁶¹¹ regulates the judicial recognition and enforcement of foreign arbitration awards for the 169 States party to such Convention. Because CAS’s seat is in Switzerland, all CAS awards are to be considered foreign arbitration except in Switzerland. Thus, national courts should provide judicial recognition to CAS awards to be legally enforceable outside Switzerland.⁶¹² The New York Convention establishes that State parties shall recognize and enforce arbitral awards.⁶¹³ Article V(2)(b) of the New York Convention, allows a national court to refuse such recognition and enforcement of an arbitration award (including CAS ones) if doing so

608. *Id.* ¶ 3.3.3.2.

609. Tribunal fédéral [TF] Jan. 27, 2021, 4A_600/2020 (Switz.).

610. *Id.* ¶ 5.5.2.

611. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. [Hereinafter, New York Convention].

612. See Matthew J. Mitten & Hayden Opie, “Sports Law”: *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 301 (2010). [Hereinafter, Mitten & Opie, Sports Law] (describing how the “seat” of all CAS arbitration is tied to Switzerland, rendering all decisions as foreign except within Switzerland).

613. New York Convention, *supra* note 611, art. III.

“would be contrary to the public policy of that country.”⁶¹⁴ So, if national law provides greater substantive legal protection to the rights of athletes, CAS awards may be displaced if those protections are considered part of domestic public policy.⁶¹⁵

In practice, however, the use of the New York Convention in such a way rarely happens.⁶¹⁶ Because sports’ international federations have a monopoly position in their sport, they may impose disciplinary enforcement mechanisms to facilitate, “spontaneously and voluntarily,” compliance with the respective CAS award.⁶¹⁷ This is known as self-enforcing CAS awards that do not require using the New York Convention in most instances.⁶¹⁸ Even if a national court decides to annul a CAS award, that ruling does not necessarily “bind courts in other countries where an athlete may seek to compete nor on non-parties and governing bodies that have power to insist terms of the CAS award be upheld.”⁶¹⁹ As the OHCHR explained, even if domestic courts provide remedies, national governing sport bodies are in an untenable position. Those national sporting entities confront “two seemingly intractable forces, . . . the order of a domestic court and the directive of an international federation.”⁶²⁰ If the national bodies comply with the domestic courts’ rulings, they could jeopardize the ability of national athletes to participate in international competitions.⁶²¹

Additionally, the judicial review allowed by the New York Convention to CAS awards is extremely limited. *Gatlin*

614. *Id.*, at art. V(2)B.

615. Mitten & Opie, Sports Law, *supra* note 612, at 302.

616. See e.g., Audrey Cech & Carlos Schneider, *Chamber for Contentious Administrative Proceedings of the Audiencia Nacional, Sixth Section, Marta Dominguez v. Minister for Education, Culture and Sport, 21 June 2017*, 2017 Y.B. INT’L SPORTS ARB 133. (discussing the *Marta Dominguez* case and the importance of recognition of international arbitral awards to produce effects under national law).

617. MARCO VAN DER HARST, *The Enforcement of CAS Arbitral Awards by National Courts and the Effective Protection of EU Law*, in FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW: PUBLIC AND PRIVATE LAW PERSPECTIVES 282 (Christophe Paulussen et al., eds., 2016).

618. See generally Kepa Larumbe Beain, *CAS Awards and Enforcement Issues*, in ARBITRATING DISPUTES IN A MODERN SPORTS WORLD 5TH CONFERENCE CAS & FSA/SAV LAUSANNE 2014, 73-91 (Michele Bernasconi ed., 2016) (discussing the manner in which FIFA and UEFA ensure compliance with CAS awards through regulations and disciplinary sanctions).

619. Weston, *Dress Rehearsal*, *supra* note 179, at 118.

620. See OHCHR Race and Gender, *supra* note 81, ¶ 42.

621. *Id.*

illustrates this problem. In *Gatlin*, a federal district court ruled that an “arbitrary and capricious” CAS arbitration award breached the Americans with Disabilities Act.⁶²² For the court, this breach was not enough to constitute a violation of the New York Convention’s public policy exception as to justify a refusal to enforce the arbitral decision.⁶²³ This determination was troubling to the judge because it meant that U.S. courts had no authority to remedy the wrong committed against Justin Gatlin.⁶²⁴ Nonetheless, the District Court ultimately found that Gatlin’s remaining avenue for relief lies with the STF, which, as was explained, would elect to review the case in its discretion and in very limited circumstances.⁶²⁵ This acceptance of the CAS to determine the fate of American athletes is intriguing given the United States’ overall hostility and skepticism towards international adjudication.⁶²⁶

In Germany, the so-called “*Pechstein saga*” shows the potential and limitations of challenging CAS awards domestically. Claudia Pechstein, after losing at CAS, challenged the ban in her home country, Germany.⁶²⁷ The various courts ruled in diverse ways. The Munich Regional Court found the CAS arbitration clause in the International Skating Union regulations invalid because it was not signed voluntarily.⁶²⁸ Nevertheless, as Pechstein recognized CAS and did not challenge its jurisdiction in the arbitral proceeding, the Munich Regional Court determined that the CAS award was valid.⁶²⁹ Conversely, on appeal, the Munich Higher Regional Court held that the CAS arbitration clause violated provisions of German competition law.⁶³⁰ As

622. *Gatlin*, 2008 WL 2567657, at *1.

623. *Id.*

624. *Id.* at *2 (describing the how the United States Courts have “no power to right the wrong perpetrated upon one of its citizens”).

625. *Id.* at *1.

626. See Abbas Ravjani, *The Court of Arbitration for Sport: A Subtle Form of International Delegation*, 2 J. INT’L MEDIA & ENT. L. 241, 244 (2009) (discussing the United States’ acceptance of the CAS compared with its position towards international adjudication more broadly).

627. Dorothee Goertz, *Recap of the Pechstein Saga: A Hot Potato in the Hands of the Sports Arbitration Community*, KLUWER ARBITRATION BLOG (Feb. 1, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/02/01/recap-of-the-pechstein-saga-a-hot-potato-in-the-hands-of-the-sports-arbitration-community/>.

628. *Id.*

629. *Id.*

630. *Id.*

such, the award could not be enforced because it contradicted German public order.⁶³¹ Finally, the German Federal Tribunal reversed the appeals court's decision because it found that Pechstein entered voluntarily into arbitration. Furthermore, it held that CAS's proceedings granted sufficient protections to athletes' rights, and the Swiss Federal Tribunal could review CAS awards.⁶³² Similarly, in *Raguz*, the Australian Supreme Court refused to review an award by an ad hoc panel division of CAS in Australia after finding that CAS was a foreign and not domestic arbitration court given that CAS' seat is in Switzerland.⁶³³

The challenges of assigning exclusive jurisdiction to CAS to solve disputes is highlighted by recent contradictory decisions by Trinidad and Tobago courts.⁶³⁴ The High Court of Justice was deeply critical of FIFA's conduct in the lawsuit filed by the Trinidad and Tobago Football Association (TTFA) against FIFA challenging the appointment of a normalization committee. In its strongly worded decision, the High Court considered FIFA's pressure to force TTFA to withdraw the lawsuit contempt of court.⁶³⁵ However, the Court of Appeal overturned this decision based on CAS's exclusive jurisdiction under the TTFA Constitution and FIFA Statutes.⁶³⁶ Recently, a French Court maintained that the European Convention binds States and not arbitrators directly. Even so, judges must set aside an arbitral decisions if the arbitral award does not breach due process guarantees of the Convention, especially those not voluntarily waived by the parties.⁶³⁷

The Eurocentric approach taken by CAS and most commentators precludes CAS and scholars from benefiting from a vast case law that exists in other regions, some of which explicitly

631. *Id.*

632. *Id.*

633. *Raguz v Sullivan* [2000] 240 NSWCA (Austl.); see also Damian Sturzaker & Kate Godhard, *The Olympic Legal Legacy*, 2 MELB. J. INT'L L., 241, 241-48 (2001) (providing summary on the case).

634. Jason Haynes, *The death of judicial review of sporting bodies in the commonwealth Caribbean*, INT'L SPORTS L.J. (2021), <https://ssrn.com/abstract=3895264>.

635. *Trin. & Tobago Football Ass'n v. FIFA*, Claim No. CV2020-01208, High Court of Justice (Oct. 13, 2020) (Trin. & Tobago).

636. *FIFA v. Trin. & Tobago Football Ass'n*, Civil Appeal No. P225 of 2020, Court of Appeals (Oct. 23, 2020) (Trin. & Tobago) (Appeal of Claim No. CV 2020-01208).

637. Cour d'appel [CA] Paris, 16 Chambre Commerciale Internationale, June 8, 2021, RG 19/02245, §§ 35, 36 (Fr.)

refer to CAS and support its role. For instance, the Colombian Constitutional Court, in Tutela T-550/16 implicitly recognized that access to CAS could be considered an effective remedy given its role as the final instance to decide sports disputes.⁶³⁸ Nonetheless, the Colombian Court conceded that access to CAS could present obstacles such as additional costs for international travel and lodging and the need to count with international experts.⁶³⁹ Thus, it ordered the Colombian Football Federation to cover those costs.⁶⁴⁰ The Peruvian Constitutional Court recognized that arbitration is the main form of solving sporting disputes and that the autonomy of SGB allows them to impose sanctions to its members as long as they respect due process guarantees and fundamental rights.⁶⁴¹ It also allowed SGBs to use arbitration as the main tool to decide disputes, including giving jurisdiction to CAS.⁶⁴² However, it held that arbitration runs in parallel and does not displace the jurisdiction of regular courts to protect fundamental rights if needed or to intervene in matters—such as criminal cases—that cannot be dealt by arbitration and are not protected by freedom of association.⁶⁴³ Similarly, the Ecuadorian Constitutional Court recognized that the autonomy of sports organizations allows them to establish arbitration mechanisms to enforce their international regulations, and that autonomy does not violate the Constitution.⁶⁴⁴

By contrast, some other tribunals have rejected the idea that arbitration and the impossibility of challenging SGBs in domestic courts are compatible with constitutional protections. For instance, the Chilean Supreme Court found it unconstitutional to prohibit football teams from challenging decisions of

638. Corte Constitucional [C.C.], octubre 11, 2016, Sentencia T-550/16, M.P.: A. Gómez, ¶ 6.8 (Colom.).

639. *Id.* ¶ 7.2.

640. *Id.*

641. Tribunal Constitucional [T.C.] [Constitutional Tribunal], 1 octubre 2007, Exp No. 03574-2007-PA/TC 54 (Peru)

642. *See id.* at 31 (outlining arbitration as the main method of dispute resolution).

643. *See id.* at 41, 61, 63 (explaining instances in which regular courts have concurrent jurisdiction with arbitration).

644. La Corte Constitucional del Ecuador [Constitutional Court of Ecuador], 1 Dec. 2021, Juez ponente: Agustín Grijalva Jiménez, Sentencia [S.] No. 2-13-IN y acumulado/21, ¶ 207 (Ecuador).

the Chilean Federation in ordinary courts and to impose sanctions on the team if they used such courts.⁶⁴⁵

X. CONCLUSION

“[D]espite all of the recent attention to human rights, and despite the human rights achievements in sport . . . human rights are also continually and routinely violated in ways that are directly or indirectly related to sports.”⁶⁴⁶ So the challenge is to improve how the different sports stakeholders enforce and protect human rights.

The Court of Arbitration for Sport has gained legitimacy and international recognition. CAS plays an increasingly key role in deciding important sporting disputes, many of which involve human rights issues. In this context, we are witnessing a triple process of righting sports (introducing human rights standards into the sporting field), sporting European human rights law (the role of the European Courts of Justice and of Human Rights deciding more sports related cases), and exporting and by extension globalizing European Human Rights Law (by CAS using exclusively European human rights law in its awards). As such, we see that this is another twist in the Eurocentric character of international law and the legal favoritism of the Global North.

This Article showed one aspect of the connection between sports and human rights: the use of European standards by CAS. There are many problems with the CAS approach to rights, including the lack of full respect for due process guarantees, and the incorrect application or faulty interpretation of human rights standards. Those problems have been analyzed by other studies. At the same time, it is true that CAS has experience using human rights standards and utilizing other legal regimes like European Union law and international law in general (in the case of nationality) that could provide the basis for a stronger and more consistent approach to human rights.

This Article demonstrate the shortcoming of CAS’s use of human rights law. Despite the fact that there have been

645. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 3 noviembre 2021, “El Torreón S.A./Karmy,” Rol de la causa: 56134-2021, Poder Judicial, <https://juris.pjud.cl/busqueda/u?j92m> (Chile).

646. Donnelly, *supra* note 19, at 381.

challenges to CAS procedures and decisions by the ECtHR, the Swiss Tribunal, and domestic courts in France, Belgium, Germany, the United States, Trinidad and Tobago, Colombia, and by a vast sector of academia, one of the CAS arbitrators simply called the challenges “due process paranoia.”⁶⁴⁷ This dismissive attitude is not helpful to gain trust and legitimacy.

The SGBs and the CAS, as key players in international sports, rule over professional athletes like sovereign States. Their authority, however, is being checked by national, European, and international courts as the ECtHR did in the *Semenya* and *Mutu* cases. This trend moves sports from the private law paradigm and better captures the SGBs’ public function. CAS should not continue to operate and rule as if it is an international commercial arbitration court. Rather, it should act and conduct its proceeding as a state court.⁶⁴⁸ In fact, as the Article explains, CAS has already recognized the enormous power (and responsibilities) of SGBs.

Some commentators have argued that challenging CAS awards in domestic courts would undermine the “single uniform legal regime for Olympic and international sports competition” with “universally accepted legal rules and dispute resolution processes” needed to have a “fair and equitable” system.⁶⁴⁹ Even accepting this idea for the sake of the argument, the consequence should be that CAS needs to apply international human rights law, rather than inconsistently apply the European human rights standard, to secure a “fair and equitable” resolution mechanism for sports disputes.⁶⁵⁰ At the end of the day, the hope for a more consistent human rights approach by CAS comes from the pressure and indirect review of its “jurisprudence” that the European Courts (the Justice and Human Rights ones) could exert.⁶⁵¹

647. See Luigi Fumagalli, *The right to be heard: what does it really mean? Information to heal the ‘due process paranoia’*, COURT OF ARBITRATION FOR SPORT BULLETIN, Budapest Seminar Oct. 2019, at 13, 14 (noting how international jurisprudence is incredibly focused on the right to be heard, but stating “that such ‘paranoia’ is not justified”).

648. Duval, *supra* note 8, at 25.

649. Mitten & Opie, *supra* note 612, at 67.

650. *Id.*

651. See HARTMANN, *supra* note 35, at 41 (making the same point with regard to CAS changes generally).

The sporting of human rights law and the righting of sports mean that CAS (as well as the SGBs) and the ECtHR (as well as other human rights bodies) coexist and will continue to overlap when adjudicating over the same issues and case raising the possibility of continuous conflict in their interactions. Unless CAS and the STF take a stronger stand on bringing the full panoply of human rights protections to the sports field, the ECtHR will continue to challenge and reverse those decisions.

Assigning responsibility to Switzerland in all those instances could be seen as unfair⁶⁵² and unjustifiable⁶⁵³ or lacking enough legal basis.⁶⁵⁴ I partially disagree with this approach. Switzerland has created a legal framework to grant broad autonomy to SGBs and a great level of deference to CAS awards. So, it is only fair that the Swiss state assumes responsibility for the actions or omissions of those private entities (SGBs and CAS) functioning in Switzerland with little to no oversight by the State, particularly by the STF.

The potential for conflict will be minimal if the process of the righting of sports is taken seriously. Ultimately, the ECtHR and other human rights bodies must exercise external scrutiny on the conformity of CAS awards and SGB rules and practices with human rights law. The righting sports process requires that CAS, the STF, and the SGB offer comparable or equivalent substantive and procedural, although not identical, human rights protection.⁶⁵⁵

652. See, e.g., Mark Vinall, *Caster Semenya in Strasbourg: Applying the ECHR to the "entire sporting world"?* SPORT LAW BULLETIN (July 14, 2023), <https://www.sportslawbulletin.org/caster-semenya-in-strasbourg-applying-the-echr-to-the-entire-sporting-world/> ("Furthermore, in a number of ways, the majority appears to set the Swiss government a virtually impossible task").

653. Shinohara, *supra* note 319, at 333 ("However, it should be considered that Switzerland is not be liable for all violations of the ECHR's rights caused by another state party.").

654. See, e.g., *Semenya*, no. 10934/21, Joint Dissenting Opinion of Judges Grozev, Roosma and Ktistakis. There, the joint dissent noted the complaint was brought by a South African athlete residing in South Africa, concerning the measures adopted by a private organization under Monegasque law. As such, "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."

655. See *Şirketi v. Ireland*, no. 45036/98, ¶¶ 155, 165 (Eur. Ct. H.R., June 30, 2005) ((noting that States party to the Convention are in compliance with their legal obligations when the relevant organizations provide "comparable" rights protections to the Convention).