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## Redressing the Eurocentric Approach of the Court of Arbitration for Sports to Human Rights Law

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# REDRESSING THE EUROCENTRIC APPROACH OF THE COURT OF ARBITRATION FOR SPORTS TO HUMAN RIGHTS LAW

ARIEL DULITZKY\*

## INTRODUCTION

*Guillermo “Willy” Cañas*, an Argentine professional tennis player who retired in 2010,<sup>1</sup> lived in Buenos Aires, Argentina while being an active player.<sup>2</sup> In 2005, he participated in the *Abierto Mexicano de Tenis* in Acapulco, Mexico.<sup>3</sup> The tournament was organized by the ATP Tour, a private corporation incorporated in Delaware, USA, which provides that the Delaware laws apply.<sup>4</sup> During the tournament in Mexico, Cañas provided a urine sample that was

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<sup>1</sup> *Guillermo Canas Player Overview*, ATP TOUR, <https://www.atptour.com/en/players/guillermo-canas/c433/bio> (last visited Feb. 19, 2024); *Guillermo Canas Player Ranking*, ATP TOUR, <https://www.atptour.com/en/players/guillermo-canas/c433/rankings-history?year=all> (last visited Feb. 19, 2024).

<sup>2</sup> *Cañas v. ATP Tour*, Federal Tribunal 4P.172/2006, at A.a (Mar. 22, 2007).

<sup>3</sup> *Cañas v. ATP Tour*, CAS 2005/A/951, at 6, revised award (May 23, 2007).

<sup>4</sup> *Id.* at 7.

tested in a laboratory in Montreal, Canada.<sup>5</sup> After testing positive for the prohibited substance and being sanctioned, Cañas appealed to an ATP Appeal Tribunal that heard the case in New York.<sup>6</sup> The player challenged the ruling in front of the Court of Arbitration for Sports (CAS). The CAS hearing took place in New York, USA.<sup>7</sup> Cañas contested the award in front of the Swiss Federal Tribunal (TF) that declared the CAS award null and remanded for a new decision.<sup>8</sup> Not satisfied with the ruling, Cañas’ lawyers filed a complaint with the European Commission alleging the infringement of European competition rules. In rejecting the application, the Commission considered that the facts of the case did not have sufficient “community interest.”<sup>9</sup> The dispute would be finally decided by the European Court of Justice.<sup>10</sup> Despite that all the relevant sports-related actions took place in the Americas, a legal fiction (the seat of CAS in Lausanne, Switzerland) meant that the case came under the jurisdiction of Swiss law and made European human rights law relevant.<sup>11</sup> It also opened the possibility of accessing the European Court of Human Rights (the European Court or the Court) to question the rulings of the Swiss Tribunal and indirectly the procedure and reasoning of CAS.<sup>12</sup> Similarly, the attempt to stretch the reach of the European competition rules meant that European competition rules became relevant as well.

The *Cañas* “long and tortuous legal path . . .” represents a clear example of the impact of the transnational regime governing international sports that

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<sup>5</sup> *Id.* at 6.

<sup>6</sup> Appeal of Guillermo Cañas, The ATP Tour Anti-Doping Tribunal, (Aug. 7, 2005), [https://www.doping.nl/media/kb/974/ITF%202005%20Guillermo%20Ca%C3%B1as%20-%20Appeal%20\(S\).pdf](https://www.doping.nl/media/kb/974/ITF%202005%20Guillermo%20Ca%C3%B1as%20-%20Appeal%20(S).pdf). Interestingly, the Decision was signed in Ontario, Canada; Rio Piedras, Puerto Rico; and Elst, the Netherlands. *Id.* at 34-36.

<sup>7</sup> *Cañas*, CAS 2005/A/951, at 9.

<sup>8</sup> *Id.*

<sup>9</sup> Commission Européenne, *Affaire COMP/39471*, ¶ 2 (Oct. 12, 2009).

<sup>10</sup> Case C-269/12 P, Judgment of the Court (Fourth Chamber) — *Cañas v Eur. Comm’n*, 2013 O.J. (C 225) 59.

<sup>11</sup> *Cañas v. ATP Tour*, Federal Tribunal 4P.172/2006, at 4.3.2.2 (Mar. 22, 2007) (referring to the European Convention).

<sup>12</sup> In *Cañas*, CAS applied the strict liability standard (substantively and procedurally) to establish the player’s responsibility. The panel, having established that a banned substance was present in the player’s specimen, shifted the burden to Cañas. The panel confirmed that the Tournament doctor prescribed a specific medication delivered to him by a Tournament staffer. However, Cañas was at fault or acted negligently because he could have suspected (not just that he knew or ought to know) that there was a mistake in the medication handed down to him. *Cañas v. ATP Tour*, Federal Tribunal 4P.172/2006, at B (Mar. 22, 2007). All these elements are highly problematic in terms of the due process guarantees in disciplinary procedures even if, for the sake of the argument, the criminal standards are not applicable. See Mukesh Rawat & Soumya Rajsingh, *Athletes’ Right to a Fair Trial in ‘Non-analytical Positive Doping Cases’: An Analysis*, 13 INT’L J. OF SPORT POL’Y & POL. 379, 380, 384, 388 (2021); see also BART VAN DER SLOOT ET AL., *ATHLETES’ HUMAN RIGHTS AND THE FIGHT AGAINST DOPING: A STUDY OF THE EUROPEAN LEGAL FRAMEWORK 189-243* (2020).

requires an “uprooting” from the local context in order to have a unified and coherent system.<sup>13</sup> My interest in this paper is on a particular aspect of this transnational process, the Eurocentric approach to deciding disputes at the intersection of sports and human rights. On one hand, when and if CAS uses international human rights law, it primarily and almost exclusively applies the European Convention on Human Rights (European Convention or ECHR) and the case law of the European Court.<sup>14</sup> The legal fiction<sup>15</sup> mentioned in the

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<sup>13</sup> *The European Court of Justice Rejects the Appeal by the Former Tennis Player Guillermo Cañas*, The Eur. Olympic Comms., EU Office: Monthly Rep., July-Aug. 2013, at 6; Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva*, ASSER INST. CENTRE FOR INT’L & EUR. L., Sep. 2020, 06 at 19.

<sup>14</sup> The European Court has decided cases directly involving CAS. There are cases, in which CAS intervened, the European Court ruled against a different State rather than Switzerland given that the proceedings did not involve the procedure or merits of CAS award. *Ali Riza v. Turk.*, App. No. 30226/10, ¶¶ 21-24 (Jan. 28, 2020), <https://hudoc.echr.coe.int/eng?i=001-200548>; *Case of Croatian Golf Fed’n v. Croat.*, App. No. 66994/14, ¶¶ 38-39, (Dec. 17, 2020), <https://hudoc.echr.coe.int/eng-press?i=003-6889538-9244693>. In another case, CAS confirmed the sanctions against Croatian footballer Šimunić for racist gestures at the end of an international game. At the same time, the Croatian authorities investigated the racist actions and imposed a fine on him. In his case to the European Court (known as *Šimunić*), the player challenged the Croatian sanctions. Despite that the Tribunal ruled also against Šimunić, it did not even mention the CAS arbitral award. *Simunic v. Fédération Internationale de Football Ass’n (FIFA)*, CAS 2014/A/3562, ¶¶ 5, 9.4, 11, 15, 122-23 (award of July 29, 2014, operative part of May 12, 2014). The most important case decided by the European Court on CAS (and the Swiss TF) is *Semenya v. Switzerland*, where the European Court held, by a majority (4 votes to 3), that there had been a violation of the prohibition of discrimination taken together with the right to respect for private life and a violation of the right to an effective remedy. The Court ruled that the limited supervision exercised by TF over the CAS award was insufficient to fulfill the positive obligations under the Convention to protect individuals within its jurisdiction from discrimination. *Semenya v. Switz.*, App. No. 10934/21, 52 (July 11, 2023), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-225768%22%5D%7D>. Another important case related to CAS decided by the European Court is *Mutu v. Switzerland*. This case concerned the lawfulness of CAS proceedings brought by Adrian Mutu, a professional footballer, and Claudia Pechstein, a professional speed skater. They argued that there was no free acceptance of the arbitration clauses; and that CAS could not be regarded as an independent and impartial tribunal. Pechstein also complained that she did not have a public hearing. *Mutu v. Switz.*, App. Nos. 40575/10 & 67474/10, ¶¶ 12, 16, 22, 23.4 (Oct. 2, 2018), <https://hudoc.echr.coe.int/?i=001-186828>. In *Platini*, the European Court reiterated Switzerland’s international responsibility under the ECHR and its jurisdiction *ratione personae* (this time for alleged substantive rights breaches of Articles 7 and 8), for the same reasons developed in *Mutu*. *Platini v. Switz.*, App. No. 526/18, ¶¶ 36-38 (Feb. 11, 2018), <https://hudoc.echr.coe.int/eng?i=001-201734>. Crucially, The European Tribunal explicitly established in *Platini* that SGB (in this case FIFA and UEFA) are private associations and as such, not directly subject to the European Convention. However, States may be required to adopt measures aimed at respecting the right to privacy even in the relationships of individuals with each other. In rejecting the application of Dutch cyclist Erwin Bakker ban for a doping offense the European Court considered that the restriction on the right of access to a tribunal (CAS and the TF) was neither arbitrary nor disproportionate. *Bakker v. Switz.*, App. No. 7198/07, ¶¶ 27-30 (Sept. 3, 2019), <https://hudoc.echr.coe.int/eng-press?i=003-7459735-10223766>. Finally, in *Riza*, the Court expressed certain doubts as to whether the applicant could avail himself of a right of access to a court vis-à-vis Switzerland, as the dispute had only a very tenuous link with Switzerland given that the dispute was almost entirely within Turkey and not substantively involving CAS jurisdiction. *Case of Ali Riza v. Switz.*, App. No. 74989/11, ¶ 81 (July 13, 2021).

<sup>15</sup> See Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. L. REV. 1313, 1318 (2003) (describing the seat of arbitration as a “legal fiction”).

previous paragraph leads to the preference of challenging CAS and TF decisions to the European Court rather than other human rights bodies. Finally, CAS arbitrators quite often apply European Union competition rules<sup>16</sup> in cases involving human rights issues,<sup>17</sup> despite that Switzerland is not a European Union State and most of the international sporting governing bodies (SGB)<sup>18</sup> are Swiss corporations.

In situations such as the *Cañas* case,<sup>19</sup> a more proper protection of the rights of athletes calls not only for the consistent use of human rights law by CAS and the TF but also for the use and application of United Nations and/or regional human rights institutions and standards. In *Cañas*, Argentina, Mexico, the USA, and Canada are not bound by European law but rather by the norms of the UN and/or the Organization of American States (OAS). A more global approach calls for the recognition of a common core of basic human rights standards universally applicable. Additionally, international human rights law tends to integrate all the regional and universal systems and shows a need to complement regional with universal human rights mechanisms.

CAS “the beating judicial heart of a transnational regime governing international sports[,]”<sup>20</sup> sits at the apex of the complex pyramid of sports arbitration. CAS fulfilled the dream of former IOC president Juan Antonio Samaranch of having a “supreme court of world sport,”<sup>21</sup> a “kind of Hague

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<sup>16</sup> See Agreement Between the European Union and the Swiss Confederation Concerning Cooperation on the Application of their Competition Laws, art. 1, 2014 O.J. (L 347) 3.; Margareta Baddeley, *The Application of Antitrust Legislation by Swiss Courts in Cases Involving International Sports Governing Bodies*, in EU ANTITRUST LAW AND SPORT GOVERNANCE: THE NEXT FRONTIER? 71-84 (Jacob Kornbeck ed., 2023).

<sup>17</sup> See RFC Seraing v. Fédération Internationale de Football Ass’n (FIFA), TAS 2016/A/4490, ¶ 99 (Mar. 9, 2017) (taking into consideration of European Union law as applicable law and the legality of FIFA’s regulations on status and transfers of players with regard to freedom of movement and competition law; see also SCS Fotbal Club CFR 1907 Cluj SA v. Rom. Football Fed’n (FRF), CAS 2012/A/2852, ¶ 77 (June 28, 2013) (on the principle of non-discrimination and freedom of movement); see also Galatasaray v. UEFA, CAS 2016/A/4492, Court of Arbitration for Sport, ¶ 42-45 (Oct. 3, 2016) (on the mandatory nature of European Competition Law and EU fundamental rights).

<sup>18</sup> 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.

<sup>19</sup> For a CAS case that expressly referred to the European Court of Human Rights despite that all the relevant facts took place in Africa and all the actors were Africans, see Al Hilal Club v. Confédération Africaine de Football (CAF), CAS 2020/A/6920, ¶ 67 (Dec. 15, 2020) (dispute between a Sudanese professional football team and the Confederation Africaine du Football headquartered in Egypt. The dispute involved the incidents that took place in a match played in Sudan between the Sudanese team and an Egyptian team). *Id.*

<sup>20</sup> See Antoine Duval, *Time to Go Public? The Need for Transparency at the Court of Arbitration for Sport*, ASSER INST. CENTRE FOR INT’L & EUR. L., Sep. 7, 2020, at 1.

<sup>21</sup> 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).

Court in the sports world.”<sup>22</sup> A tribunal with aspirations of being the global court for sports disputes should have a global mind. If not, CAS risks going back to its days as a “kangaroo court.”<sup>23</sup>

In a growing number of CAS awards there are references either directly to rights guaranteed by the European Convention on Human Rights<sup>24</sup> or indirectly by referring to human rights or substantive public policy which includes human rights in general. When and if CAS applies human rights standards,<sup>25</sup> it uses almost exclusively European standards. Additionally, by reviewing the decisions of CAS in a very limited way, the TF applies, under limited and strict circumstances, almost exclusively (and only indirectly) the European Convention to determine if the CAS awards are compatible with Swiss public policy and thus valid decisions.<sup>26</sup> Finally, the European Court could review the TF’s decisions and thus, exercise an indirect control and apply European human rights standards over the procedures and merit decisions of CAS. Similarly, the European Court of Justice of the European Union (ECJEU) could review, as it did in the *Cañas* case, the compatibility of SBS actions with European

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<sup>22</sup> *Speech Delivered by Mr. Juan Antonio Samaranch IOC President*, 181 OLYMPIC REV., Nov. 1982, 314, 317,

[https://library.olympics.com/Default/search.aspx?SC=OLYMPIC\\_REVIEW&QUERY=SelectionCriteria\\_id\\_exact%3a%22208727%22&QUERY\\_LABEL=Recherche+sur+Olympic+Review+%3a+Revue+Olympique#/Detail/\(query:\(Id:'246\\_OFFSET\\_0',Index:247,NBResults:483,PageRange:3,SearchQuery:\(FacetFilter:'%7B%22\\_390%22:%22English%22,%22\\_387%22:%22Journal%20issue%22%7D',ForceSearch:!t,InitialSearch:!f,Page:24,PageRange:3,QueryGuid:f63d15f5-724a-4673-921b-84c6d97abaea,QueryString:'SelectionCriteria\\_id\\_exact:%22208727%22',ResultSize:10,ScenarioCode:OLYMPIC\\_REVIEW,ScenarioDisplayMode:display-standard,SearchGridFieldsShownOnResultsDTO:!\(,SearchLabel:-'Recherche%20sur%20Olympic%20Review%20:%20Revue%20Olympique',SearchTerms:'SelectionCriteria\\_id\\_exact%20208727',SortField:YearOfPublication\\_sort,SortOrder:0,TemplateParams:\(Scenario:",Scope:Default,Size:!,n,Source:",Support:",UseCompact:!,f\),UseSpellChecking:!,n\)\)\)](https://library.olympics.com/Default/search.aspx?SC=OLYMPIC_REVIEW&QUERY=SelectionCriteria_id_exact%3a%22208727%22&QUERY_LABEL=Recherche+sur+Olympic+Review+%3a+Revue+Olympique#/Detail/(query:(Id:'246_OFFSET_0',Index:247,NBResults:483,PageRange:3,SearchQuery:(FacetFilter:'%7B%22_390%22:%22English%22,%22_387%22:%22Journal%20issue%22%7D',ForceSearch:!t,InitialSearch:!f,Page:24,PageRange:3,QueryGuid:f63d15f5-724a-4673-921b-84c6d97abaea,QueryString:'SelectionCriteria_id_exact:%22208727%22',ResultSize:10,ScenarioCode:OLYMPIC_REVIEW,ScenarioDisplayMode:display-standard,SearchGridFieldsShownOnResultsDTO:!(,SearchLabel:-'Recherche%20sur%20Olympic%20Review%20:%20Revue%20Olympique',SearchTerms:'SelectionCriteria_id_exact%20208727',SortField:YearOfPublication_sort,SortOrder:0,TemplateParams:(Scenario:)

<sup>23</sup> Steffi Jose, Comment, *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).

<sup>24</sup> See Pierre Cornu et al., *Human Rights Protection in Europe in the Context of Sports Organisations' Disciplinary and Arbitration Procedures*, COUNCIL EUR., GOOD PRACTICE HANDBOOK NO. 5, at 14 (2018).

<sup>25</sup> Throughout the article I refer, for brevity reasons, to CAS rather than CAS panels that could be more appropriate. As one CAS panel observed: "In CAS jurisprudence there is no principle of binding precedent, or stare decisis. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel." Int'l Assn. of Athletics Fed'n v. USA Track & Field, CAS 2004/A/628, ¶ 73 (June 28, 2004). As CAS panels are not bound by the decisions of prior panels, there is not a coherent or single CAS, but a multiplicity of positions expressed by different CAS panels. Nevertheless, CAS panels follow past awards even if they do not regard precedent as binding. See Annie Bersagel, *Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport - An Analysis of Published Awards for Anti-Doping Disputes in Track and Field*, 12 PEPP. DISP. RESOL. L.J. 189, 201 (2012); see also Gregory Ioannidis, *The Influence of Common Law Traditions on the Practice and Procedure Before the Court of Arbitration for Sport (CAS)*, in A YEARBOOK OF INTERNATIONAL SPORTS ARBITRATION 2015 (Duval, A., Rigozzi ed. 2016).

<sup>26</sup> Cornu, *supra* note 24, at 41 n.20 (citing *Xavier v. UEFA*, CAS 2000/A/290 (Feb. 2, 2001); ATF III 429, ASA Bulletin 2001, at 566; TFS, Lu Na Wang, CAS Digest II, at 767 (Mar. 31, 1999)).

competition law and crucially with the fundamental rights recognized by the European Union.<sup>27</sup> I call this phenomenon “exporting European human rights law” to the realm of sports or a “Eurocentric bias” of sport dispute adjudication.<sup>28</sup>

Probably no data shows the Eurocentric bias more than the list of CAS arbitrators. According to CAS, there are currently 422 arbitrators.<sup>29</sup> 28 of those arbitrators are African nationals, 25 from Oceania, 60 from Asia, 95 from the Americas and 216 from Europe.<sup>30</sup> In other words, 51.2% of the CAS arbitrators are Europeans. This imbalance is even more pronounced if disaggregating the European arbitrators by nationality. Fifty-nine percent of the European arbitrators come from six countries (Great Britain with thirty, Switzerland twenty-seven, France twenty-six, Italy twelve, Spain twenty, and Germany thirteen).<sup>31</sup> Similar data revealed that the imbalance is present in the appointments to a specific panel. Of the 2,194 arbitrator appointments for specific panels, more than seventy-seven percent went to European based arbitrators.<sup>32</sup> In the context of those arbitrators with “specific expertise in human rights,” fifty-five percent are Europeans.<sup>33</sup> Interestingly, in *Cañas* two of the three arbitrators were from the USA and one from Canada.<sup>34</sup> No arbitrator was from Mexico, the place of the competition nor from Argentina the country of nationality of the player.

The current situation, described as a “phantom regime” has among others one key flaw that undermines its effectiveness: the inadequacy of the applicable law.<sup>35</sup> Highly problematic is the inability of CAS to truly protect the full panoply of the athletes’ human rights in sports. This article concentrates particularly on

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<sup>27</sup> 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).

<sup>28</sup> The fact that the European Court has been ruling increasingly on issues touching directly or indirectly on sports could explain in part this Eurocentric approach. In particular, the Court has decided cases dealing with arbitration in sports and on disciplinary actions in the context of sports. It is a phenomenon that I call “sporting European Human Rights Law.”

<sup>29</sup> CAS, *List of Arbitrators (general list)*, TAS-CAS, <https://www.tas-cas.org/en/arbitration/liste-des-arbitres-liste-generale.html?GenSlct=2&nmIpt=&ContinentSelected%5B%5D=2> (last visited Feb. 21, 2024).

<sup>30</sup> There is a discrepancy in the CAS list. While it cites a total of 444 arbitrators, the CAS’s .pdf file results in 422 arbitrators. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> JOHN LINDHOLM, COURT OF ARBITRATION FOR SPORT AND ITS JURISPRUDENCE (2019).

<sup>33</sup> See 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, 2023), <https://voelkerrechtsblog.org/who-is-responsible-for-ensuring-human-rights-in-global-sport/>.

<sup>34</sup> *Cañas*, CAS 2005/A/95.

<sup>35</sup> Daniel West, *Revitalising a Phantom Regime: The Adjudication of Human Rights Complaints in Sport*, 19 INT’L SPORTS L.J. 2, 3 (2019).

CAS and TF's inconsistent use of European human rights law. At its core, the paper explores CAS' capacity to manage human rights arguments with a less Eurocentric approach.<sup>36</sup> The aim of this article is to highlight the paradoxical approach of the CAS regarding international human rights law. Despite its universal jurisdiction, CAS only applies European human rights standards.<sup>37</sup> The first part of the article analyzes the substantive law applicable to CAS proceedings. Then, the article delves into showing the inconsistent use of human rights (exclusively European) by CAS. The next section demonstrates how the Swiss federal tribunal repeats the same Eurocentric approach. The second part of the paper proposes ways that could strengthen the CAS capacities to apply universal human rights standards in a less Eurocentric manner. The paper explores changes in the interpretation by CAS, the TF and the European Court of human rights, sporting and jurisdictional norms, procedural reforms to the CAS Code and the Swiss Private International Law Act (PILA), modification of litigation strategies by athletes' advocates and finally, development in the institutional structure of CAS and the UN.

#### THE SUBSTANTIVE LAW APPLIED BY THE COURT OF ARBITRATION FOR SPORTS

Arbitration is the main form of settling sports disputes<sup>38</sup> and the CAS is its key institution. Professional athletes must accept not only all the regulations of

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<sup>36</sup> See Antoine Duval & Daniela Heerdt, *FIFA and Human Rights – a Research Agenda*, 25 TILBURG L. REV. 1, 8 (2020).

<sup>37</sup> One of the potential explanations for the Eurocentric approach of CAS and the TF is the fact that there is a growing number of cases dealing with sports-related matters in the European Court's docket. The cases range from disputes where the sport matter is the central or most relevant issue to other legal controversies that took place in the context of sports or by persons related to sports, but where the sporting activity was not the main discussion. The Tribunal has dealt with a multiplicity of stakeholders relevant to sports from professional to amateur athletes and former professional sportspersons, from referees to managers and athletes' representatives, from journalists to fans, from students involved in physical activities to property owners affected by hunting activities or the constructions of Olympic Games venues. The Court has acknowledged the standing, in addition to individual athletes, of football teams and federations, associations of fans, sports-related workers, and sporting media. The issues dealt by the Court include fans' safety, hooliganism, discrimination, freedom of religion, association, expression, privacy, property rights, sexual violence, doping, sports arbitration, and due process in the decision of sports disputes and corruption 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. See Ariel Dulitzky, *Sporting and Exporting European Human Rights Law*, 56 N.Y. UNIV. J. INT'L L. & POL. (forthcoming) (on file with author).

<sup>38</sup> See, e.g., Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220529(a) (2020) (providing that an aggrieved party "may obtain review by [an] arbitration and mediation provider"); see also Basketball Arbitral Tribunal [BAT], <https://www.fiba.basketball/bat> (set up by the world governing body for basketball [FIBA]) (last visited Feb. 21, 2024); see also Tribunale Nazionale di Arbitrato per lo Sport (National Arbitration Tribunal for Sports), Comitato Olimpico Nazionale Italiano, <https://www.coni.it/en/institutional->



international federations but also submit their disputes for arbitration to CAS.<sup>39</sup> For instance, Rule 61 of the Olympic Charter defines CAS' jurisdiction, stating that any Olympic Games-related dispute "shall be submitted exclusively to the Court of Arbitration for Sport in accordance with the Code of Sports Related Arbitration."<sup>40</sup> In anti-doping matters, "[e]ach government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human and fundamental rights and applicable national law."<sup>41</sup> The TF 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."<sup>42</sup> Today almost all sports federations and all national Olympic committees recognize CAS.<sup>43</sup>

In the next sections, the article will present ways that CAS has understood the (non)applicability and use of international human rights law standards in deciding sports disputes. The article concentrates on the decisions of CAS making explicit references to human rights law. It discusses the CAS' substantive protection (or lack thereof) of athletes' rights. Our analysis will be necessarily incomplete as CAS does not publish a large share of its awards given its discretionary publication practice.<sup>44</sup>

The Code of Sports-related Arbitration and Mediation Rules (the CAS Code) regulates all aspects of CAS' institutional and procedural functioning. In the Ordinary Procedure, the Parties may choose the substantive law to govern their dispute. If no choice is made, Swiss law applies. The parties may give authorization to CAS to decide *ex aequo et bono*.<sup>45</sup> In the Appeals Arbitration Procedure, the panel shall use the applicable regulations and "subsidiarily, to the rules of law chosen by the parties." In the absence of a choice, the Panel

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activities/national-court-of-arbitration/establishment.html (arbitration set up by the Italian Olympic Committee) (last visited Feb. 21, 2024); *see also* Chambre Arbitrale du Sport (the Arbitral Chamber for Sport) <https://cnosf.franceolympique.com/cnosf/cat/4/394.php> (the French National Olympic Committee) (last visited Feb. 21, 2024).

<sup>39</sup> LLOYD FREEBURN, REGULATING INTERNATIONAL SPORT. POWER, AUTHORITY AND LEGIMACY, 122, 146 (2018).

<sup>40</sup> International Olympic Committee (IOC), *Olympic Charter*, Rule 61(2) (Oct. 15, 2023) [hereinafter *Olympic Charter*]. More broadly, it also provides that any disputes regarding the IOC decisions or its application or interpretation of the Olympic Charter are to be submitted to the CAS for resolution. *Id.* at Rule 61(1).

<sup>41</sup> World Anti-Doping Agency [WADA], *Revised World Anti-Doping Code 2021*, art. 22.6.

<sup>42</sup> *A v. World Anti-Doping Agency (WADA)*, 4A\_428/2011, ¶ 3.2.3 (Swiss Fed. Trib.) (Feb. 13, 2012).

<sup>43</sup> The U.S. professional leagues, Formula 1, and the English Football are the main SGBs that have not accepted CAS as the final arbitration mechanism.

<sup>44</sup> Duval, *supra* note 20, at 13. In Cañas the only available decision is the 2007 revised award issued after the FT annulled the original one of 2006 which is not public.

<sup>45</sup> *Code of Sports-related Arbitration*, CAS / TAS at R45 (Feb. 1, 2023), [https://www.tas-cas.org/fileadmin/user\\_upload/CAS\\_Code\\_2023\\_\\_EN\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2023__EN_.pdf).

applies the domestic law of the domicile of the SGB or the rules of law the Panel deems appropriate.<sup>46</sup>

In the latter case, the Panel shall give reasons for its decision. As far as the country of domicile had ratified any human rights treaty and the treaty is part of the domestic law of such country, CAS could apply those treaties in case of no election by the parties.<sup>47</sup> However, in most cases, CAS interpretation leads to the applicability of Swiss law rather than the laws of the domicile. In general, CAS does not pay attention to the pertinent applicable human rights standards. For instance, in the *Al Hilal* case, a dispute between a professional football club from Omdurman, Sudan and the Confédération Africaine de Football with its headquarters in Egypt, the CAS referred to a European Court case that is inapplicable to the Sudanese team or the African Federation.<sup>48</sup> Similarly, in *Kuže*, a controversy between the state of a coach and a Chinese football team, CAS referred to a commentary of the European Convention.<sup>49</sup>

The CAS Code does not provide for the direct application of international human rights law. In fact, based on the CAS Code, in the past, CAS asserted that human rights norms should be excluded when not explicitly chosen by the parties.<sup>50</sup> According to the Code and its case law, and to the extent that there are gaps in SGB statutes, CAS could use Swiss law that reflects European human rights standards to fill the regulatory gaps.<sup>51</sup>

The Code makes the relevant sports regulations the primary default rules applied in appeals.<sup>52</sup> CAS and the TF have recognized the autonomy of SGB or their freedom to establish their own provisions. CAS endorses this autonomy imposing mainly governance limits.<sup>53</sup> The SGBs are limited by their higher ranking provisions, in particular the association's statutes, when adopting new rules and regulations.<sup>54</sup> The sports regulations apply over domestic law unless

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<sup>46</sup> *Id.* at R58.

<sup>47</sup> Krech, *supra* note 33; see *Adams v. Canadian Centre for Ethics in Sport (CCES)* (where CAS applied the Ontario Human Rights Code), CAS 2007/A/1312, ¶ 14 (May 16, 2008).

<sup>48</sup> *Al Hilal Club v. Confédération Africaine de Football (CAF)*, CAS 2020/A/6920, ¶ 67 (Dec. 15, 2020).

<sup>49</sup> *Kuže v. Tianjin TEDA FC*, CAS 2015/A/3910, ¶ 158 (Nov. 20, 2015).

<sup>50</sup> *FC Midtjylland A/S v. Fédération Internationale de Football Ass'n (FIFA)*, CAS 2008/A/1485, ¶ 28 (Mar. 6, 2009).

<sup>51</sup> *Club Raja Casablanca v. Fédération Internationale de Football Ass'n (FIFA)*, CAS 2019/A/6345, ¶ 35 (Dec. 16, 2019).

<sup>52</sup> U.N. High Commissioner for Human Rights, *Intersection of Race and Gender Discrimination in Sport*, ¶ 44, U.N. Doc. A/HRC/44/26 (June 15, 2020) [hereinafter OHCHR Race and Gender].

<sup>53</sup> *Football Fed'n Islamic Republic of Iran (IRIFF) v. Fédération Internationale de Football Ass'n (FIFA)*, CAS 2008/A/1708, ¶ 24 (Nov. 4, 2009).

<sup>54</sup> *Id.*

that legislation is part of the public order.<sup>55</sup> If there is a contradiction with domestic law, the provisions of the SGB are still applicable.<sup>56</sup> In *Semenya*, the CAS noted that the SGB regulations could be unenforceable in or contrary to the domestic law of different national jurisdictions. However, it would be for the domestic courts to make such determinations rather than CAS.<sup>57</sup> In sum, as long as the SGB rules do not contradict public policy in the limited understanding of the TF and follow the SGB's statutes, the CAS will not further review their substance but will rely on the autonomy of the association.<sup>58</sup> In this sense, autonomy is used to avoid State intervention in sports human rights cases.<sup>59</sup>

The effect of the CAS Code, as the United Nations Office of the High Commissioner for Human Rights (OHCHR) explained, is that CAS applies primarily to the relevant sport regulations. Given the very few specific references to human rights by the SGB's documents, recourse to human rights norms is quite narrow.<sup>60</sup>

In the *Semenya* case the CAS considered it unnecessary to examine "detailed principles" of "international human rights law" including the International Convention on the Elimination of all forms of Discrimination against Women. CAS determined the irrelevancy of those human rights instruments even if they are part of the domestic legislation of the country where the SGB's headquarters are located or the legal systems of the members of the SGB or where the SGB carries out competitions.<sup>61</sup> This lack of proper human rights analysis was the main reason for the European Court to rule against Switzerland in this case. CAS does not apply a human rights analysis to the cases even if it refers to similar principles. As the European Court has established in the *Semenya* case, even if CAS conducted a detailed examination of the allegation of discrimination and applied a criterion quite similar to the Court's considerations, CAS failed to apply the relevant provisions of the

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<sup>55</sup> *Grasshopper v. Alianza Lima*, CAS 2008/A/1705, ¶¶ 22-23 (Jun. 18, 2009).

<sup>56</sup> *Id.* ¶ 22.

<sup>57</sup> *Semenya v. Int'l Ass'n of Athletics Fed'n (IAAF)*, CAS 2018/O/5794, ¶ 555 (Apr. 30, 2019); *Athletics S. Afr. v. Int'l Ass'n of Athletics Fed'n (IAAF)*, CAS 2018/O/5798, ¶¶ 469, 553, 555 (Apr. 30, 2019).

<sup>58</sup> Despina Mavromati, *Autonomy and Good Governance in Sports Associations in Light of the CAS Case Law*, PAPERS.SSRN.COM, Jun. 1, 2014, at 17, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2573303](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2573303); see also Peter Donnelly et al., *Contesting the Autonomy of Sport to Realize the Right to Safe Sport: A Canadian Case Study*, 22 INT'L SPORTS L. J. 165 (2022).

<sup>59</sup> Daniela Heerdts & William Rook, *Remedy and Redress for Sport-related Human Rights Abuses*, 22 INT'L SPORTS L. J. 85, 89 (2022).

<sup>60</sup> OHCHR Race and Gender, *supra* note 52, ¶¶ 44-45. However, see below section XXX

<sup>61</sup> *Semenya v. Int'l Ass'n of Athletics Fed'ns*, CAS 2018/O/5794, ¶ 544 (Apr. 30, 2019); *Athletics S. Afr. v. IAAF*, CAS 2018/O/5798, ¶ 544 (Apr. 30, 2019).

Convention or the Court's case-law.<sup>62</sup> More insultingly, in the *Semenya* case, the CAS panel said that the opinion of the UN human rights experts was not “particularly useful.”<sup>63</sup>

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 CAS database returned 255 results.<sup>64</sup> Out of those results, CAS referred to the European Convention on 108 occasions and to the European Court in 123 results.<sup>65</sup> For the United Nations human rights treaties, CAS database returns only nine results (four to the International Covenant on Civil and Political Rights, two to the Convention on the Rights of Persons with Disabilities, two to the Convention on the Rights of the Child, and one to the Convention on the Elimination of All Forms of Racial Discrimination).<sup>66</sup> There are no references to any of the United Nations treaty bodies, such as the Human Rights Committee. There are also no awards mentioning the Inter-American and African regional human rights systems or treaties.

CAS, in recent years, has expanded its recourse to European human rights law.<sup>67</sup> It has established that CAS arbitration has to provide at least the same level of protection of their rights that they could obtain before a state court. CAS arbitration may be accepted under the European Convention as a valid alternative to access to State courts, only if CAS provides a true equivalent of State court proceedings.<sup>68</sup>

Most CAS decisions consider that is unclear whether and to what extent the European Convention bind sports associations.<sup>69</sup> Generally, CAS arbitrators doubt the applicability of the ECHR given that “only state authority, not private third parties, are bound to observe the rights under the Convention.”<sup>70</sup> “[F]undamental rights find application in the vertical relationship between the State and the individual . . . [and] are not intended to apply directly in private

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<sup>62</sup> *Semenya v. Swiss*, App. No. 10934/21 ¶¶ 174, 200 (July 11, 2023).

<sup>63</sup> *Semenya*, CAS 2018/O/5794 & 5798, ¶ 554.

<sup>64</sup> *Jurisprudence*, JURISPRUDENCE.TAS-CAS.ORG (last visited Feb. 23, 2024), [https://jurisprudence.tas-cas.org/Search/results.aspx#k=\(%22human%20rights%22\)](https://jurisprudence.tas-cas.org/Search/results.aspx#k=(%22human%20rights%22)).

<sup>65</sup> *Id.* It is important to note that we include thirty citations of the European Convention *of* human rights, sixty-six mentions of the European Convention *on* Human Rights and twelve references to the European Convention for the Protection of Fundamental Rights.

<sup>66</sup> *Id.*

<sup>67</sup> For an excellent analysis of CAS' use of European Human Rights Law, see Antoine Duval, *Lost in Translation? The European Convention on Human Rights at the Court of Arbitration for Sport*, 22 INT'L SPORTS L. J. 132 (2022).

<sup>68</sup> *Katusha Mgmt. SA v. Union Cycliste Internationale (UCI)*, CAS 2012/A/3031, ¶ 68 (May 2, 2013) (operative part of Feb. 15, 2013).

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*

relationships between individuals and therefore not applicable in disciplinary cases tried by private associations.”<sup>71</sup> The Convention is “not applicable to legal relationships between private entities such as associations and its members.”<sup>72</sup> SGBs are not an organ of the State, notwithstanding the fundamental importance of its role in the organization of sports.<sup>73</sup>

On occasions, CAS applied the ECHR to the extent that its provisions are pertinent to civil rather than criminal proceedings.<sup>74</sup> CAS had recognized that increasingly legal academics advocate for the direct application of the ECHR to sports associations.<sup>75</sup> However, CAS has been inconsistent on the use, applicability, and value of international human rights law.<sup>76</sup>

CAS has recognized substantive human rights many times based on EU law (despite the fact that Switzerland is not an EU member State) rather than on the ECHR. Economic freedom and the right to private property have been acknowledged as “applicable international standards of human rights.”<sup>77</sup> The right to work, freedom to provide services, and freedom of movement have been recognized as applicable European law.<sup>78</sup> Freedom of speech<sup>79</sup> and the right to privacy<sup>80</sup> have been identified as well. Freedom of association is discussed in thorough detail in CAS cases.<sup>81</sup> Panels have also recognized, mainly based on Swiss law, the athlete’s right of personality.<sup>82</sup>

Similarly, CAS has admitted several fundamental procedural rights. The list includes the recognition of the right of defense,<sup>83</sup> due process,<sup>84</sup> right of access

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<sup>71</sup> *Bordeaux v. Fédération Internationale de Football Ass’n*, TAS 2012/A/2862, ¶¶ 105-07 (Jan. 11, 2013) (translation by the author, internal references omitted).

<sup>72</sup> *Eder v. Ski Austria*, CAS 2006/A/1102, TAS 2006/A/1146, ¶ 45 (2006).

<sup>73</sup> *Bordeaux*, TAS 2012/A/2862, ¶ 107.

<sup>74</sup> *Fenerbahçe SK v. Union des Ass’n Européennes de Football (UEFA)*, CAS 2013/A/3139, ¶¶ 88, 92 (Dec. 5, 2013).

<sup>75</sup> *Hoch v. Fédération Internationale de Ski*, CAS 2008/A/1513, ¶ 9 (Jan. 29, 2009).

<sup>76</sup> OHCHR *Race and Gender*, *supra* note 52, ¶ 46.

<sup>77</sup> *Viorel v. Romanian Football Fed’n (RFF)*, CAS 2017/A/4947, ¶ 111 (Oct. 6, 2017).

<sup>78</sup> *FC Sportul Studentesc SA v. FC Petrolul Ploiesti SA*, CAS 2015/A/3957, ¶ 83 (Nov. 30, 2015).

<sup>79</sup> *Yerolimpos v. World Karate Fed’n (WKF)*, CAS 2014/A/3516, ¶ 116 (Oct. 6, 2014).

<sup>80</sup> *Oliveira v. Fed’n Internationale de Football Ass’n (FIFA)*, CAS 2015/A/4184, ¶ 196 (Apr. 25, 2016).

<sup>81</sup> *Football Ass’n of Serb. v. Union des Ass’n Européennes de Football (UEFA)*, CAS 2016/A/4602, ¶¶ 134, 136 (Jan. 24, 2017).

<sup>82</sup> *A. v. Fédération Internationale de Luttes Associées (FILA)*, CAS 2001/A/317, ¶¶ 25, 27 (July 9, 2001).

<sup>83</sup> *Oliveira*, CAS 2015/A/4184, ¶ 200.

<sup>84</sup> *FC Dynamo Kyiv v. Gerson Alencar de Lima Júnior & SC Braga*, CAS 2013/A/3309, ¶ 87 (Jan. 22, 2015).

to the courts,<sup>85</sup> and the right to be heard,<sup>86</sup> the principle of non-retroactivity,<sup>87</sup> *nulla crimen, nulla poena sine lege*,<sup>88</sup> the prohibition of double jeopardy,<sup>89</sup> privilege against self-incrimination,<sup>90</sup> equal treatment,<sup>91</sup> and equality of arms.<sup>92</sup> Sometimes, CAS has referred to natural justice or “unwritten principles of sports law . . .” rather than to the European Convention to allude to due process guarantees.<sup>93</sup> Switzerland is required by the European Convention to ensure that parties to an arbitration enjoy a fair proceeding within a reasonable time by an independent and impartial arbitral tribunal, including CAS.<sup>94</sup>

Even if CAS is not bound directly by the ECHR, it should nevertheless take it into account as a requirement of Swiss public policy.<sup>95</sup> In many cases, even if CAS understands that the European Convention does not apply directly, it uses the case law of the European Court to interpret certain procedural guarantees.<sup>96</sup> In *Yerolimpos*, a CAS panel considered that the European Court’s jurisprudence is “indicative” in general and “compulsive” “in jurisdictions to which it applies.”<sup>97</sup> However, many times, 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, there is no discussion on whether the concept of strict liability<sup>98</sup> violates the principle of *nulla poena sine lege*.<sup>99</sup> Sometimes,

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<sup>85</sup> Grasshopper v. Alianza Lima, CAS 2008/A/1705, ¶ 23 (June 18, 2009).

<sup>86</sup> FK Probeda v. UEFA, CAS 2009/A/1920, ¶ 13 (Apr. 15, 2010).

<sup>87</sup> Blatter v. Fédération Internationale de Football Ass’n (FIFA), CAS 2016/A/4501, ¶ 95 (Dec. 5, 2016).

<sup>88</sup> See, e.g., Tsagaev v. Int’l Weightlifting Fed’n, CAS (O.G. Sydney) 00/010, ¶ 22 (Sept. 25, 2000).

<sup>89</sup> Prusis v. Int’l Olympic Comm., CAS (O.G. Salt Lake City) 02/001, ¶¶ 15, 17, 18 (Feb. 5, 2002).

<sup>90</sup> See generally Valcke v. Fédération Internationale de Football Ass’n (FIFA), CAS 2017/A/5003, ¶¶ 260-72 (July 27, 2018).

<sup>91</sup> Nabokov v. Int’l Ice Hockey Fed’n, CAS 2001/A/357, ¶¶ 24-26 (Jan. 31, 2002).

<sup>92</sup> Aris FC v. Campora, CAS 2011/A/2463, ¶ 12 (Mar. 8, 2012).

<sup>93</sup> AEK Athens v. Union Eur. Football Ass’n, CAS 98/200, ¶¶ 156, 158 (Aug. 20, 1999).

<sup>94</sup> Fusimalohi v. Fédération Internationale de Football Ass’n (FIFA), CAS 2011/A/2425, ¶ 70 (Mar. 8, 2012).

<sup>95</sup> Union Cycliste Internationale v. Velasco, CAS 2011/A/2384 & 2386, ¶¶ 21-23 (Feb. 6, 2012).

<sup>96</sup> See, e.g., Andrianova v. All Russia Athletic Fed’n, CAS 2015/A/4304, ¶ 48 (Apr. 14, 2016) (on statutes of limitations and the principle of non-retroactivity in disciplinary procedures).

<sup>97</sup> Yerolimpos v. World Karate Fed’n (WKF), CAS 2014/A/3516, ¶ 116 (Oct. 6, 2014).

<sup>98</sup> Kulübü v. Union des Ass’n Européennes de Football (UEFA), CAS 2014/A/3628, ¶ 72 (Sept. 2, 2014).

<sup>99</sup> The European Court understands that the “penalty” and “punishment” rationale and the “guilty” concept and the corresponding notion of “*personne coupable*” (in the French version) support an interpretation of Article 7 as requiring, in order to implement punishment, a finding of liability by the national courts enabling the offence to be attributed to and the penalty to be imposed on its perpetrator (see, e.g., *Varvara v. It.*, § 71; *Sud Fondi SRL v. It.*, § 116 (regarding the requirement of mens rea in the perpetrator of the offence); *G.I.E.M. S.R.L. v. It. (merits)* [GC], §§ 241-42 and 246), cited by *Guide on Article 7 of the European Convention on Human Rights No Punishment Without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty*, ¶ 3 (last updated Dec. 2021), [https://www.echr.coe.int/Documents/Guide\\_Art\\_7\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_7_ENG.pdf).)

even if CAS decides on human rights issues, it does so in a limited and unreasoned way. In a case challenging the strict liability standard for doping violations based on the European Convention, CAS simply said that “even if it were applicable, there is no violation of the European Convention . . . .”<sup>100</sup>

CAS pays attention to the rulings of the European Court dealing specifically with CAS. After the European Court in *Mutu* required a public hearing before CAS, CAS “noted the ruling . . .” of the Court<sup>101</sup> and referred to the changes introduced to “strengthen the independence and the efficiency of the CAS . . .” and “the possibility of having public hearings . . . .”<sup>102</sup> In particular, the R57 provision regarding the public nature of CAS hearings was revised and put into effect on Jan. 1, 2019.<sup>103</sup> In *Trabzonspor Sportif Yatirim ve Futbol Isletmeciligi A.S.*,<sup>104</sup> a case initiated under the old CAS rules but decided after the *Mutu* decision, the Panel first held, in accordance with the Sports Code version then in force, not to hold the hearing in public. However, “given the recent *Mutu* and *Pechstein* [j]udgment,” the Panel went on to “conside[r] the question under the aspect of Art. 6 ECHR.”<sup>105</sup> CAS analyzed the *Pechstein* decision and the European Court case law to finally rule that a private hearing was compatible with Article 6 of the European Convention.<sup>106</sup>

The previous paragraphs demonstrate that CAS has almost exclusively used the European Convention to interpret or apply human rights in the context of sports. As such, we see that this is another twist in the Eurocentric character of international law and the legal favoritism for the Global North.<sup>107</sup> In very few occasions CAS has referred to other human rights instruments such as the Convention on the Rights of Persons with Disabilities,<sup>108</sup> the Convention on the Rights of the Child,<sup>109</sup> the Convention on the Elimination of all Forms of

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<sup>100</sup> *Tysse v. Norwegian Athletics Fed'n*, CAS 2011/A/2353, ¶ 8.28 (Aug. 29, 2011).

<sup>101</sup> Media Release, Ct. Arb. for Sport, Statement of the Court of Arbitration for Sport (CAS) on the Decision Made by the European Court of Human 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](https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Mutu_Pechstein_ECHR.pdf).

<sup>102</sup> *Id.*

<sup>103</sup> *Code of Sports-Related Arbitration*, CT. ARB. FOR SPORT (Jan. 1, 2019), <https://bit.ly/2RaK8OM>.

<sup>104</sup> *Yatirim v. Turkish Football Fed'n*, CAS 2018/A/5746, ¶¶ 93-99 (July 30, 2019).

<sup>105</sup> *Id.* ¶ 100.

<sup>106</sup> *Id.* ¶¶ 101-105.

<sup>107</sup> Arnout Geeraert et al., *Good Governance in International Sport Organizations: An Analysis of the 35 Olympic Sport Governing Bodies*, 6 INT'L J. SPORT POL'Y & POL. 3, 282, 286, 296-97 (2013).

<sup>108</sup> See, e.g., *Leeper v. Int'l Ass'n of Athletics Fed'ns*, CAS 2020/A/6807, ¶ 108 (Oct. 23, 2020).

<sup>109</sup> See, e.g., *Stichting Anti-Doping Autoriteit Nederland v. W.*, CAS 2010/A/2311 & 2312, ¶ 66 (Aug. 22, 2011).

Discrimination against Women,<sup>110</sup> or the International Covenant on Civil and Political Rights.<sup>111</sup> CAS fails to pay attention to the treaties and norms with global reach such as those adopted under the auspices of the United Nations or by other regional organizations such as those in the Inter-American or African human rights systems. In the limited instances that it referred to UN treaties, it has not referred to the understanding of the UN monitoring bodies.

The suspension of the Russian Olympic Committee and the banning of Russian athletes due to systemic State sponsored doping<sup>112</sup> is a good example of CAS' problematic use of global and even regional human rights standards. The panel stated with respect to the question of the banning of Russian athletes, that collective punishment is a principle of international humanitarian or criminal law, and CAS added that there is no specific prohibition on collective punishment in the ECHR without references to other UN human rights norms.<sup>113</sup> This statement is problematic. Collective punishment constitutes a violation of specific human rights, such as the right to liberty and security of person, the principle of legality, the right to private life, and the right to a fair trial, even if there is not a specific reference to collective punishment. Despite that the European Court has not decided any case on collective punishment, references to the term "collective punishment" can be found in multiple judgments and decisions,<sup>114</sup> none of which CAS mentioned, much less analyzed. CAS entirely overlooked the United Nations' standards on collective punishments. The UN Human Rights Committee specified that States' parties may "in no circumstances" invoke a state of emergency "as justification for . . . imposing collective punishments."<sup>115</sup> Other UN human rights norms include prohibitions of collective sanctions (which are different from punishment).<sup>116</sup> CAS did not discuss any of these arguments.

#### THE JUDICIAL REVIEW BY THE FEDERAL SWISS TRIBUNAL AND THE EUROPEAN COURT OF JUSTICE AS CONTRIBUTING FACTORS TO THE EUROCENTRIC

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<sup>110</sup> See, e.g., Semenya v. Int'l Ass'n of Athletics Fed'n (IAAF), CAS 2018/O/5794, ¶¶ 219, 277, 281, 544 (Apr. 30, 2019); Athletics S. Afr. v. IAAF, CAS 2018/O/5798, ¶¶ 219, 277, 281, 544 (Apr. 30, 2019).

<sup>111</sup> See, e.g., World Anti-Doping Agency v. Valverde, CAS 2007/A/1396 & 1402, ¶ 116 (May 31, 2010).

<sup>112</sup> Press Release, Int'l Olympic Comm. Exec. Bd., IOC Suspends Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeonChang 2018 Under the Olympic Flag (Dec. 5, 2017), <https://olympics.com/ioc/news/ioc-suspends-russian-noc-and-creates-a-path-for-clean-individual-athletes-to-compete-in-pyeongchang-2018-under-the-olympic-flag>.

<sup>113</sup> World Anti-Doping Agency v. Russian Anti-Doping Agency, CAS 2020/O/6689, ¶ 811 (Dec. 17, 2020).

<sup>114</sup> CORNELIA KLOCKER, COLLECTIVE PUNISHMENT AND HUMAN RIGHTS LAW: ADDRESSING GAPS IN INTERNATIONAL LAW 87 (2020).

<sup>115</sup> Office of the High Commissioner for Human Rights, *General Comment No. 29*, CCPR/C/21/Rev.1/Add.11, art. 4, ¶ 11 (Aug. 31, 2001).

<sup>116</sup> See G.A. Res. 40/33, The Beijing Rules, UN Doc. A/RES/40/33, art. 9 (Nov. 29, 1985).



## APPROACH

The Swiss Federal Tribunal (TF) plays an important role in sports as the *de facto* appeal tribunal to CAS.<sup>117</sup> The TF is limited to determine the substantial and procedural compatibility of CAS proceedings and decisions with Swiss public policy.<sup>118</sup> In those limited circumstances, the TF tends to repeat the same restrictive arguments developed by CAS applying exclusively European human rights law, despite the fact that Switzerland has ratified almost all the core United Nations human rights treaties with the exception of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>119</sup>

Sadly, for human rights, Switzerland is a legal paradise for SGB and for CAS.<sup>120</sup> Given the TF's "benevolence," "generosity," and "liberalism" approach to CAS<sup>121</sup> and the high bar to challenge CAS awards,<sup>122</sup> SGB and CAS enjoy a strong immunity in general and in particular a great deal of freedom of action regarding human rights. Additionally, the TF recognizes and grants an important degree of autonomy to SGBs.<sup>123</sup> The Swiss Tribunal rarely overturns decisions made by CAS.

The recourse to the TF to challenge a CAS arbitration award is "very limited" and available only for "certain well-founded reasons" affecting public policy.<sup>124</sup> Public policy is contradicted only if there is a violation of a fundamental and generally recognized principles leading to an unbearable contradiction with the sense of justice and incompatible with the Rule of Law. An erroneous application, even an obvious one, of domestic law or a manifestly erroneous finding of fact is not sufficient to assert a violation of public order.<sup>125</sup>

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<sup>117</sup> West, *supra* note 35, at 6.

<sup>118</sup> Antonio Rigozzi, *Challenging Awards of the Court of Arbitration for Sport*, 1 J. INT'L DISP. SETTLEMENT 217, 219 (2010).

<sup>119</sup> See United Nations Human Rights Treaty Bodies: UN Treaty Body Database, *Ratification Status for Switzerland*, OFF. UNITED NATIONS HIGH COMM'R FOR HUM. RTS., [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN) (last visited Feb. 25, 2024).

<sup>120</sup> Antonio Di Marco, *Athletes' Freedom of Expression: The Relative Political Neutrality of Sport*, 21 HUM. RTS. L. REV., 620, 624 (2021) (citing Buy et al, LAW OF SPORT, at 44 (2015)).

<sup>121</sup> See 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 245, 255 (Christophe Paulussen et al., eds. 2016).

<sup>122</sup> 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, 103 (2009).

<sup>123</sup> Margareta Baddeley, *The Extraordinary Autonomy of Sports Bodies Under Swiss Law: Lessons to be Drawn*, 20 INT'L SPORTS L. J. 3, 5 (2020).

<sup>124</sup> Bakker v. Switz., App. No. 7198/07, ¶ 37 (Sept. 3, 2021), <https://hudoc.echr.coe.int/eng?i=001-196440>.

<sup>125</sup> Tribunal Fédérale [TF] Case 4A\_424/2008, ¶ 3.3 (Switz.) (Jan. 22, 2009).

In the *Semenya* case, the European Court considered that this restrictive approach of the TF precluded the possibility of responding to the serious concerns related to discrimination as required by the European Convention.<sup>126</sup>

In this narrow approach, the TF provides only for the indirect application of the ECHR on sports arbitration.<sup>127</sup> According to the TF, the European Convention does not apply directly to arbitration, since the Convention's violation is not one of the specific grounds listed in Article 190(2) of the Swiss Private International Law Act (PILA).<sup>128</sup> In disciplinary actions taken by SGB the criminal limb of article 6 of the ECHR does not apply.<sup>129</sup> The European Convention, according to the TF, only protects persons vis-à-vis the State. As the disciplinary proceedings are conducted by private entities, such as SGB, the Convention is, in principle, unapplicable. Similarly, the Convention does not cover athletes in those proceedings, as they are not the subject to a State measure.<sup>130</sup>

The TF and the litigants that appear in front of the tribunal only use the European Convention. UN human rights treaties rarely if ever appear mentioned in the case law of the TF in reviewing CAS awards. Even in this restrictive Eurocentric approach, the TF requires applicants who rely on the European Convention's guarantees to establish that the alleged infringement of the Convention amounts to a violation of one of the grounds mentioned in Article 190(2). The ECHR does not serve as standalone ground to set aside an arbitral award.<sup>131</sup> In particular, the appellant must show how the alleged violation of the ECHR would constitute a violation of procedural public policy.<sup>132</sup> Recently, the TF asserted that alleging a violation of Article 14 of the ECHR (equality and non-discrimination) cannot serve as the sole basis for challenging a CAS award.<sup>133</sup> The ECHR can be used concretize the grounds referred in Art. 190 para. 2 PILA.<sup>134</sup> The fundamental principles resulting from ECHR may be helpful to substantiate the guarantees contained in Art. 190(2) PILA, but it must

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<sup>126</sup> *Semenya v. Int'l Ass'n of Athletics Fed'ns*, CAS 2018/O/5794, ¶ 200 (Apr. 30, 2019); *Athletics S. Afr. v. Int'l Ass'n of Athletics Fed'ns*, Arbitration CAS 2018/O/5798 ¶200 (Apr. 30, 2019).

<sup>127</sup> 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).

<sup>128</sup> Tribunal Fédérale [TF] Case 4A\_370/2007, ¶ 5.3.2 (Switz.) (Feb. 21, 2008).

<sup>129</sup> *See* Tribunal Fédérale [TF] Case 4A\_362/2013, ¶ 3.3 (Switz.) (Mar. 27, 2014).

<sup>130</sup> Swiss Federal Judgement of 11 June 2001, *Abel Xavier v. UEFA*, consid. 2 d, reproduced in Bull. ASA, 2001, p. 566 (partially published in ATF 127 III 429).

<sup>131</sup> *See* Tribunal Fédérale [TF] Case 4A\_320/2009, ¶ 1.5.3 (Switz.) (June 2, 2010).

<sup>132</sup> Tribunal Fédérale [TF] Case 4A\_486/2019, ¶ 4.1 (Switz.) (Aug. 17, 2020).

<sup>133</sup> Tribunal Fédérale [TF] Case 4A 618/2020, ¶ 5.2 (Switz.) (June 2, 2021).

<sup>134</sup> Tribunal Fédérale [TF] Case 4A\_486/2019 (Switz.) (Aug. 17, 2020).

be shown how one of the grounds for appeal in the PILA is met.<sup>135</sup> No reference to UN treaties is made in these precedents.

The TF contributes and consolidates the Eurocentric approach in sports law by mainly applying, in a very restrictive and indirect manner, the European Convention and no other United Nations human rights treaties when reviewing CAS awards.

Similarly to the TF, the CJEU could exercise control over The Grand Chamber of the CAS and the SGBs with regard to their compliance with European Union legislation, particularly competition rules. The CJEU in three decisions issued on December 21, 2023 confirmed that SGBs governing access of EU citizens to national, regional, and international competitions are subject to the rules of the European Union Treaty of Lisbon.<sup>136</sup> For the CJEU SGBs' autonomy does not authorize them to limit the exercise of the Treaty individual rights.<sup>137</sup> Thus, athletes have rights under EU law that can be effectively enforced by ordinary courts and apply horizontally vis a vis SGBs.<sup>138</sup> The Grand Chamber reaffirmed that the SGBs' legal autonomy to adopt their rules cannot restrict the exercise of the rights conferred by EU law.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> For the CJEU the possibility of claiming damages does not compensate for the lack of a remedy

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<sup>135</sup> Tribunal Fédérale [TF] Case 4A\_178/2014, ¶ 2.4 (Switz.) (June 11, 2014).

<sup>136</sup> Case C-124/21 P, *International Skating Union v Commission* ¶ 91 (December 21, 2023); Case C-680/21 *Royal Antwerp Football Club* ¶ 103 (December 21, 2023); and Case C-333/21 *European Superleague Company SL* ¶ 83 (December 21, 2023).

<sup>137</sup> *International Skating Union v Commission* ¶ 196 and C-680/21 *Royal Antwerp Football Club* ¶ 53 (December 21, 2023).

<sup>138</sup> Case C-124/21 P, *International Skating Union v Commission* ¶¶ 204 and 237.3 (December 21, 2023).

<sup>139</sup> *Id.* ¶¶ 192 and 196.

<sup>140</sup> *Id.* ¶ 193.

<sup>141</sup> *Id.* ¶¶ 193 and 198.

<sup>142</sup> *Id.* ¶¶ 191, 194 and 198.

against the infringement as such.<sup>143</sup> 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.<sup>144</sup>

#### DEVELOPMENTS ON A UNIVERSAL HUMAN RIGHTS APPROACH TO SPORTS

There are no reasons to limit CAS' human rights standards to European human rights law given the United Nations' increased attention to human rights in sports. Despite that the UN has approached the intersection of sports and human rights in a very ad hoc, incoherent, intermittent, and patchwork manner, there are some positive developments demonstrating the universal concerns by UN human rights bodies to secure full respect of human rights in the sports field. Some more limited trends appear in regional human rights systems.

There are treaties related to sports that refer to human rights and some human rights treaties that mention sports. For instance, UNESCO's International Convention against Doping in Sport recalls in its preamble the "existing international instruments relating to human rights."<sup>145</sup> Conventions such as the Convention on the Elimination of All Forms of Discrimination against Women<sup>146</sup> and the Convention on the Rights of Persons with Disabilities<sup>147</sup> include explicit references to sports. Finally, the International Convention against Apartheid in Sports could be relevant. The current interpretation considers that the concept of apartheid covers broader situations than the system that prevailed in South Africa.<sup>148</sup> More timid efforts appear in the Inter-American context with the Inter-American Convention on Protecting the Human Rights of Older Persons,<sup>149</sup> and the Ibero-American Convention on the Rights of Youth.<sup>150</sup>

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<sup>143</sup> *Id.* ¶¶ 200-202.

<sup>144</sup> *Id.* ¶¶ 184 and 191.

<sup>145</sup> UNESCO, International Convention Against Doping in Sports, *opened for signature* Oct. 19, 2005, 2419 U.N.T.S. 201 (entered into force Feb. 1, 2007).

<sup>146</sup> G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, arts. 10(g), 13(c) (Dec. 18, 1979).

<sup>147</sup> G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, art. 30 (Dec. 13, 2006).

<sup>148</sup> *See* Comm. on the Elimination of Racial Discrimination, G. Rec. 19/3, The Prevention, Prohibition and Eradication of Racial Segregation and Apartheid, U.N. Doc. A/50/18, 140 (1995); *see also* International Convention Against Apartheid in Sports, U.N. Doc. A/40/53, annex VII(1) (Dec. 10, 1985).

<sup>149</sup> Inter-American Convention on Protecting the Human Rights of Older Persons, art. 22, June 15, 2015, Inter-American Treaties A-70.

<sup>150</sup> Ibero-American Convention on Rights of Youth, art. 33, Mar. 1, 2008. Technically this is not an Inter-American Convention as it was adopted in the context of the Ibero-American Conference on Youth.

Similarly, the UN in its general activities (as opposed to those specific on human rights) have dealt with the intersection between sports and human rights. UN sponsored world conferences,<sup>151</sup> the General Assembly,<sup>152</sup> UNICEF,<sup>153</sup> UNESCO,<sup>154</sup> ILO,<sup>155</sup> WHO,<sup>156</sup> and UNODC,<sup>157</sup> to mention a few, have all made references to the importance of human rights in the context of sports. Specifically, the UN human rights machinery has dealt with sports in multiple occasions. The Human Rights Council,<sup>158</sup> the Advisory Committee,<sup>159</sup> the

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<sup>151</sup> See Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20, ¶¶ 107(f), 183, 280(d) (Sept. 15, 1995); see also World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action*, U.N. Doc. A/CONF.189/12, ¶ 218 (Aug. 31, 2001).

<sup>152</sup> G.A. Res. 67/17, Sport as a Means to Promote Education, Health, Development, and Peace, 1 (Nov. 28, 2012); Human Rights Council Res. 27/8, Promoting Human Rights through Sport and the Olympic Ideal, U.N. Doc. A/HRC/RES/27/8 (Oct. 3, 2014); G.A. Res. 70/4, Building a Peaceful and Better World Through Sport and the Olympic Ideal (Nov. 13, 2015); G.A. Res. 74/16, Building a Peaceful and Better World Through Sport and the Olympic Ideal (Dec. 13, 2019).

<sup>153</sup> Ryoko Akamatsu (Chairperson) & Andrés Franco (Deputy Director), United Nations Int'l Child's Emergency Fund (UNICEF), *Children's Rights in Sport Principles* (2nd ed. Dec. 2018), [https://childinsport.jp/assets/downloads/Children's\\_Rights\\_in\\_Sport\\_Principles\\_English.pdf](https://childinsport.jp/assets/downloads/Children's_Rights_in_Sport_Principles_English.pdf).

<sup>154</sup> U.N. Educ., Sci. and Cultural Org. (UNESCO), *Kazan Action Plan: Six Int'l Conf. of Ministers and Senior Off. Responsible for Physical Educ. and Sport*, ¶ 2 (July 15, 2017).

<sup>155</sup> Int'l Lab. Org., *Global Dialogue Forum on Decent Work in the World of Sport*, Points of Consensus, GDFWS/2020/7, ¶ 1 (Jan. 22, 2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/meetingdocument/wcms\\_735388.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_735388.pdf).

<sup>156</sup> World Health Org. (WHO), *Glob. Action Plan on Physical Activity 2018-2030: More Active People for a Healthier World*, 12 (2018) (including a guiding principle on Human Rights Approach).

<sup>157</sup> United Nations Off. on Drugs and Crime (UNODC), *Global Report on Corruption in Sport*, 97-98, 170, 197, 200, 214 (2021), [https://www.unodc.org/res/safeguardingsport/grcs/22-03221\\_SPORTS\\_CORRUPTION\\_2021\\_Full\\_report.pdf](https://www.unodc.org/res/safeguardingsport/grcs/22-03221_SPORTS_CORRUPTION_2021_Full_report.pdf) (making references that corruption in sports could lead to human rights abuses).

<sup>158</sup> Human Rights Council Res. 13/27, A World of Sports Free from Racism, Racial Discrimination, Xenophobia and Related Intolerance, U.N. Doc. A/HRC/RES/13/27, 1 (Apr. 15, 2010); Human Rights Council Res. 18/... Promoting Awareness, Understanding and Application of the Universal Declaration of Human Rights through Sport and the Olympic Ideal, U.N. Doc. A/HRC/L.18/Rev.1, 1 (Sept. 28, 2011); Human Rights Council Res. 24/1 Promoting Human Rights through Sport and the Olympic Ideal, U.N. Doc. A/HRC/RES/24/L.1, 1 (Oct. 8, 2013); Human Rights Council Res. 26/18, The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Sport and Healthy Lifestyles as Contributing Factors, U.N. Doc. A/HRC/Res/26/18, 1 (July 14, 2014); Human Rights Council Res. 37/18, Promoting Human Rights Through Sport and the Olympic Ideal, U.N. Doc. A/HRC/RES/37/18, 1 (Mar. 23, 2018); Human Rights Council Res. 40/5, Elimination of Discrimination Against Women and Girls in Sport, U.N. Doc. A/HRC/RES 40/5, 1 (Apr. 4, 2019); Human Rights Council Res. 43/18, Promoting Human Rights Through Sport and the Olympic Ideal, U.N. Doc. A/HRC/RES/43/18, 1 (June 22, 2020).

<sup>159</sup> Human Rights Council Res. 39/50, Final Report of the Human Rights Council Advisory Committee on the Possibilities of Using Sport and the Olympic Ideal to Promote Human Rights for All and to Strengthen Universal Respect for Them, U.N. Doc. A/HRC/30/50, ¶ 1 (Aug. 17, 2015).

Office of the High Commissioner for Human Rights,<sup>160</sup> human rights treaty bodies,<sup>161</sup> and UN special procedures<sup>162</sup> have all addressed issues related to sports and human rights. However, other than these case-by-case instances, the United Nations currently has no single institution nor a document that focuses on the intersection between sports and human rights holistically. Some of those documents take a limited approach by referring to the promotion of human rights through sports<sup>163</sup> rather than the protection of human rights in sports.

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<sup>160</sup> OHCHR Race and Gender, *supra* note 52; U.N. Hum. Rts. Council, High Comm'r for Hum. Rts., Rep. on Physical Activity and Sport Under Art. 30 of the Convention on the Rts. of Persons with Disabilities, U.N. Doc. A/HRC/46/49, ¶ 1 (Jan. 25, 2021).

<sup>161</sup> Comm. on the Rts. of the Child, Gen. Comment No. 17, U.N. Doc. CRC/C/GC/17, ¶ 6 (Apr. 17, 2013); 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 Rep. of Kaz., U.N. Doc. CEDAW/C/KAZ/CO/5, ¶ 41(e) (Nov. 12, 2019); Comm. on the Elimination Against Women, Concluding Observations on the Fourth Periodic Rep. of Bots., U.N. Doc. CEDAW/C/BWA/CO/4, ¶ 39 (Mar. 14, 2019); Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Seventh Periodic Rep. of It., U.N. Doc. CEDAW/C/ITA/CO/7, ¶ 44(d) (July 24, 2017); Comm. on the Rts. Of Pers. with Disabilities, Concluding Observations on the Initial Rep. of Fr., U.N. Doc. CRPD/C/FRA/CO/1, ¶¶ 60, 61(b) (Oct. 4, 2021); Comm. on the Elimination of Racial Discrimination, Consideration of Repts. Submitted by State Parties Under Art. 9 of the Convention, U.N. Doc. CERD/C/ISR/CO/13, ¶ 7 (June 14, 2007); Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Twentieth and Twenty-First Periodic Repts. of Alg., U.N. Doc. CERD/C/DZA/CO/20-21, ¶ 11 (Dec. 17, 2017); Comm. on the Elimination of Racial Discrimination, Comm'n No. 26/2002, U.N. Doc. CERD/C/62/D/26/2002, ¶¶ 2.4, 4.2, 4.13 (Apr. 14, 2003); Comm. Econ., Soc. and Cultural Rts., Comm'n No. 3/2014, ¶ 2.3 (Aug. 8, 2016); Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 21, Rt. of Everyone to Take Part in Cultural Life (Art. 15, ¶ 1(a), of the Int'l Covenant on Econ., Soc. and Cultural Rts.) E/C.12/GC/21, ¶ 13 (Dec. 21, 2009).

<sup>162</sup> G.A. Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. A/HRC/29/33, ¶ 13 (Apr. 2, 2015); Combating Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Comprehensive Implementation of the Follow-Up to the Durban Declaration and Programme of Action, U.N. Doc. A/69/340, ¶ 3 (Aug. 22, 2014); (e.g., Alexandra Xanthaki & E. Tenadyi Achiume (Special Rapporteur)), Special Rapporteur in the Field of Cultural Rights and the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, AL OTH 90/2022 (Sept. 14, 2022); (e.g. James Anaya (Special Rapporteur)), Mandate of the Special Rapporteur on the Rights of Indigenous Peoples, , OL Indigenous (2001-8) OTH 3/2014, (Apr. 10, 2014); (e.g., Dainius Puras, ET AL., (Special Rapporteur)), Mandates of the Special Rapporteur on Right of Everyone to the Highest and Attainable Standard of Physical and Mental Health; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Working Group on the Issue of Discrimination Against Women in law and in Practice, OL OTH 62/2018 (Sept. 18, 2018); Special Rapporteur on the Sale and Sexual Exploitation of Children, Including Child Prostitution, Child Pornography and Other Child Sexual Abuse Material, U.N. Doc. A/HRC/40/51 (Dec. 27, 2018); UN Special Procedures Written Submission to the Court of Arbitration for Sport (CAS) on Cases, CAS 2018/O/5794 & CAS 2018/O/5798, ¶ 30 (pursuant to rule 41.4 of the Procedural Rules), Semenya v. Switz., App. No. 10934/21, ¶2 (Oct. 8, 2021), <https://www.ohchr.org/sites/default/files/documents/issues/health/AC-Caster-Semenya-vs-Switzerland.pdf>.

<sup>163</sup> Ibero-American Convention on Rights of Youth, *supra* note 150, at art. 33.

Additionally, some of these documents refer positively to sport autonomy<sup>164</sup> that tends to serve as a shield against stronger human rights protections.<sup>165</sup> A human rights approach to sports requires a different understanding of autonomy. International human rights law recognizes that autonomy of associations constitutes an important aspect of their freedom of association.<sup>166</sup> However, such autonomy does not preclude States from imposing restrictions in order, among others to protect the rights and freedom of others.<sup>167</sup> As the Inter-American Court of Human Rights has said, with regards to women, but equally applicable to all persons, “autonomy cannot be claimed as an excuse for measures that could limit women’s exercise of trade union rights in unions, but instead requires the states to adopt measures that would allow women to enjoy formal and material equality in the workplace and in the union.”<sup>168</sup> The American Convention on Human Rights is the only treaty that recognizes the right to association for “sports” purposes. Section 2 of Article 16 of the American Convention allows the restriction of such right for the “protection of the rights of others”.<sup>169</sup> In fact, appeals to sports autonomy cannot serve as a shield to the inclusion of human rights in the sports fields. Autonomy, similarly, to the concept of State sovereignty that used to be the excuse to exclude international human rights supervision, needs to be deconstructed, “strip it of its myth, identify its essentials, retain only its valuable values.”<sup>170</sup> Otherwise “[t]hose who yearn for ‘the good old days’ and continue to trumpet terms like ‘sovereignty’ without relating them to the human rights conditions within the states under discussion do more than commit an anachronism. They undermine human rights.”<sup>171</sup> The same could be said of sports autonomy.

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<sup>164</sup> See e.g., G.A. Res. 75/18, Sports as an Enabler of Sustainable Development, ¶ 15 (Dec. 1, 2020); Resol. 8/4 Conf. of the States Parties to the U.N. Convention, CAC/COSP/2019/17 (Dec. 2019) (recognizing that sports organizations within the Olympic movement have the rights and obligations of autonomy); Human Rights Council Res. 43/. . . , Promoting Human Rights through Sports and the Olympic Ideal, U.N. Doc. A/HRC/43/L.24/Rev.1 (June 17, 2020) (acknowledging the need to support the independence and autonomy of sport).

<sup>165</sup> See G.A. Res. 34/180, *supra* note 147.

<sup>166</sup> *Lovrić v. Croat.*, App. No. 38458/15, ¶ 71 (Apr. 7, 2017) <https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-172471&filename=CASE%20OF%20LOVRI%C4%86%20v.%20CROATIA.pdf&logEvent=False>.

<sup>167</sup> Int’l Covenant on Civ. & Pol. Rts. art. 22.2, Dec. 16, 1966, 49 U.N.T.S.

<sup>168</sup> Right to Freedom of Association, Right to Collective Bargaining and Right to 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, ¶ 193 (May 5, 2021).

<sup>169</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>170</sup> Louis Henkin, *Human Rights and State Sovereignty*, 25 GA. J. INT’L & COMP. L. 31, 31-32 (1995).

<sup>171</sup> W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L., 866, 876 (1990).

Several SGBs include human rights references in their constitutions, charters, policies, and/or regulations. Human rights policies of SGBs endorsed the universal approach of human rights without restricting it to the European system. In fact, the human rights references in the constitutive documents of the SGB or in their policies do not make an explicit reference to the European Convention. For instance, the 2017 FIFA Human Rights Policy expresses its commitment “to respecting human rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs)” and:

embraces all internationally recognised human rights, including those contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.<sup>172</sup>

The Olympic Charter provides that “the practice of sport is a human right” and 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 discrimination.”<sup>173</sup> The IOC adopted the Athletes’ Rights and Responsibilities Declaration (the Declaration) in October 2018.<sup>174</sup> The IOC includes in Article 1.4 of its Code of Ethics “[r]espect for international conventions on protecting human rights insofar as they apply to the Olympic Games’ activities.”<sup>175</sup> Other SGBs have also incorporated human rights references to their documents, such as the International Fencing Federation (FIE) (“respect for human rights”),<sup>176</sup> the International Golf Federation (IGF) (“respect for international conventions on protecting human rights” and “adherence to internationally agreed standards, including the UN Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work and the UN Guiding Principles on Business and Human Rights”),<sup>177</sup> the Fédération Internationale de Gymnastique (FIG) (“the

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<sup>172</sup> Federation Internationale de Football Ass’n (FIFA), *FIFA’s Human Rights Policy*, ¶¶ 1-2 (May 2017).

<sup>173</sup> International Olympic Committee, *supra* note 40, at 8-9.

<sup>174</sup> Int’l Olympic Comm. (IOC), *Athletes’ Declaration*, IOC, <https://olympics.com/athlete365/who-we-are/athletes-declaration/> (last visited Nov. 22, 2023).

<sup>175</sup> Int’l Olympic Comm. (IOC), *IOC Code of Ethics*, art. 1.4, IOC (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>.

<sup>176</sup> Int’l Fencing Fed’n Statutes § XII.VI(1) (Dec. 2021), <https://static.fie.org/uploads/26/131723-FIE%20Statutes%20ang.pdf>.

<sup>177</sup> Int’l Golf Fed’n, *Policies & Charters*, 95 (Dec. 2021) <https://sites.brightspotcdn.com/34/7b/105862124564bbed7cc378fea769/igf-policies-charters-version-december-2021.pdf>.



Federation “does not permit any violation of human rights”),<sup>178</sup> the International Powerlifting Federation (“observing human rights principles”),<sup>179</sup> the International Table Tennis Federation and the Fédération Internationale de Volleyball (FIVB) (“respect for international conventions on protecting human rights”),<sup>180</sup> the Federation Internationale de l'Automobile (FIA) (“promote the protection of human rights”),<sup>181</sup> and Formula 1 (“respecting internationally recognised human rights in its operations globally”).<sup>182</sup> National Olympic Committees<sup>183</sup> and regional sporting organizations<sup>184</sup> have also included references to human rights in their constitutive documents.

None of these references to human rights are limited to the European Convention. In fact, we could not find any SGB document referring to the ECHR. The introduction of human rights commitments in the statutes, regulations and/or policies of the different international organizations<sup>185</sup> necessarily should affect how CAS settles sport-related disputes. Indeed, Article 58 of the Sports Code requires that the Panel decide the dispute according to “the applicable regulations” of the SGB; this means that “human rights [should] no longer just apply subsidiarily (if at all), but directly.”<sup>186</sup> As the CAS said in 2009 if the Constitutional Rules and Regulations of an SGB include rights based

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<sup>178</sup> Fédération Internationale de Gymnastique Statutes § 1 art. 2.2 (Jan. 1, 2023), [https://www.gymnastics.sport/publicdir/rules/files/en\\_Statutes%20Edition%202023.pdf](https://www.gymnastics.sport/publicdir/rules/files/en_Statutes%20Edition%202023.pdf).

<sup>179</sup> Int'l Powerlifting Fed'n, *Constitution Of The International Powerlifting Federation*, art. 1.2.15, [https://www.powerlifting.sport/fileadmin/ipf/data/about-ipf/constitution-by-laws/IPF\\_Con\\_By-Laws\\_2019\\_update.pdf](https://www.powerlifting.sport/fileadmin/ipf/data/about-ipf/constitution-by-laws/IPF_Con_By-Laws_2019_update.pdf) (last updated Nov. 6, 2019).

<sup>180</sup> Int'l Table Tennis Fed'n, Handbook, art. 6.1.4 (2021), [https://documents.ittf.sport/sites/default/files/public/2021-08/2021ITTFHandbook\\_v2\\_clean\\_version\\_1.pdf](https://documents.ittf.sport/sites/default/files/public/2021-08/2021ITTFHandbook_v2_clean_version_1.pdf); Fédération Internationale de Volleyball, *Code Of Ethics*, art. 9.2.4 (Mar. 21, 2022), [https://www.fivb.com/en/thefivb/legal\\_](https://www.fivb.com/en/thefivb/legal_).

<sup>181</sup> Fed'n Internationale de L'Automobile, *FIA Statutes*, art. 1.2 (June 23, 2023), <https://www.fia.com/fia-statutes-and-internal-regulations>.

<sup>182</sup> *Statement of Commitment to Respect for Human Rights*, FORMULA 1, <https://www.formula1.com/en/toolbar/statement-of-commitment-to-respect-for-human-rights.html> (last visited Feb. 26, 2024).

<sup>183</sup> 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>.

<sup>184</sup> Confederación Sudamericana de Fútbol (South-American Confederation of Football), *Estatutos (Statutes)*, art. 4.1.b (June 4, 2019), <https://cdn.conmebol.com/wp-content/uploads/2018/12/Estatutos-Conmebol-2020-esp.pdf>; Olympic Council of Asia, *Constitution and Rules*, art. 24.17.b (2019), [https://ocasia.org/media/oca\\_files/OCA\\_CONSTITUTION\\_AND\\_RULES\\_\\_19052022\\_new\\_gTkELZw\\_UF20vN2\\_yDjwveH\\_tan6oWe.pdf](https://ocasia.org/media/oca_files/OCA_CONSTITUTION_AND_RULES__19052022_new_gTkELZw_UF20vN2_yDjwveH_tan6oWe.pdf).

<sup>185</sup> For some critiques of these policies, see Hans Erik Næss, *In Pursuit of Clarity: A Critique of Sports Governing Bodies' Conceptual Inconsistency in Human Rights Work*, 38 NORDIC J. HUM. RTS. 205, 205, 207 (2020).

<sup>186</sup> Bodo P. Bützler & Lisa Schöddert, *Constitutionalizing FIFA: Promises and Challenges*, 25 TILBURG L. REV. 40, 46 (2020).

on the ECHR or if they refer to the ECHR as applicable to its disciplinary proceedings then the Convention is applicable based on that SGB's own Rules and Regulations.<sup>187</sup> However, when the CAS uses human rights standards based on the SGBs norms, it should apply all internationally recognized rights and not just the European Convention.

#### ADDRESSING THE EUROCENTRIC APPROACH OF THE CAS.

In the next sections I will discuss measures that could encourage the CAS to use a more universal human rights approach and to broaden the attention of universal and human rights institutions to sports issues. There are relevant factors the CAS should consider when applying human rights standards other than the European ones. Additionally, there are procedural or institutional measures that the International Council of Arbitration for Sport (ICAS), the United Nations, and civil society could adopt that might help to universalize the phenomenon of righting sports law.

Any decision (interpretative, procedural, or institutional) should aim to improve the protection of human rights in the realm of sports. The CAS and any other tribunal or procedure dealing with sports disputes must expand the protection of athletes' rights (and the rights of other individuals of course). The proposed changes should serve to strengthen the functioning areas, fill the existing gaps, and change, replace, or complement the dysfunctional aspects of the sports remedial system.

Arbitration alone falls short of meeting the requirements of an effective and efficient dispute resolution system. A comprehensive approach requires a diverse array of institutions and resources. Nonetheless, CAS holds particular relevance for addressing human rights issues in sports. Firstly, arbitration in general, and CAS in particular, are deeply entrenched in the of sports ecosystem, woven into its institutions, culture, and practices. Despite the existing limitations within the sports dispute resolution framework, arbitration has proven to be a valuable and indispensable tool in resolving a broad spectrum of sports-related matters.<sup>188</sup>

European human rights and competition law and the European Courts of Human Rights and Justice together with the FT currently constitute the primary checks on the rules and decisions stemming from SGBs. Those judicial

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<sup>187</sup> *Fédération Française de Natation (FFN) v. Ligue Européenne de Natation (LEN)*, CAS 2009/A/1957, ¶ 20 (July 5, 2010).

<sup>188</sup> See similarly, Zachary R. Calo, *Mega-sporting events and human rights arbitration*, in *THE ROUTLEDGE HANDBOOK OF MEGA-SPORTING EVENTS AND HUMAN RIGHTS* 125 (William Rook & Daniela Heerd, eds., Taylor & Francis 2023).

mechanisms provide the institutional space where SGBs and CAS can be challenged. So, the paradox of the current situation is that the Eurocentric character of sports law consolidated by CAS at the same time provides the judicial review mechanisms that provide some oversight over CAS.<sup>189</sup>

The proposed changes should be considered holistically to increase but not to deprive access to international human rights protection.<sup>190</sup> The right of individual application provides a clear international remedy constituting a key feature of the effectiveness of the European human rights system.<sup>191</sup> Thus, there needs to be a judicial or quasi-judicial mechanism similar to the provided by the European Convention to examine the complaint and to afford legal redress with the proper institutional and procedural safeguards of independence, impartiality, and adversarial procedure.<sup>192</sup>

The CAS and the TF need to move beyond the sole and inconsistent application of the European Convention. Even the European Court has asserted that the European Convention is a multi-lateral treaty operating in a regional context, notably in the Europe. The Convention was not designed to be applied throughout the world, even regarding the conduct of European States.<sup>193</sup> A more global approach calls for the recognition and protection of a common universal core of basic human rights standards.<sup>194</sup> Additionally, international human rights law tends to integrate the regional and universal systems and shows a need to complement regional with universal human rights mechanisms.<sup>195</sup> In this

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<sup>189</sup> Duval, Antoine, Alexander Krüger, and Johan Lindholm, *Made in Europe: Lex Sportiva as Embedded Transnational Law in Antoine Duval, Alexander Krüger and Johan Lindholm The European Roots of the Lex Sportiva: How Europe Rules Global Sport*. Bloomsbury Academic, 2024.

<sup>190</sup> For other recent proposals for reform of CAS or the sports arbitration system in general to make it more protective of human rights, see Antonio Di Marco, *Human Rights in the Olympic Movement: The Application of International and European Standards to the Lex Sportiva*, 40 NETH. Q. HUM. RTS 244 (2022); Daniela Heerdt & William Rook, *Remedy and Redress for Sport-Related Human Rights Abuses*, 22 INT'L SPORTS L.J. 85, 85 (2022); Helen Jefferson Lenskyj, *Rights, Responsibilities and Power in Sport Anti-Doping: The Court of Arbitration for Sport*, in 16 RESEARCH IN THE SOCIOLOGY OF SPORT, DOPING IN SPORT AND FITNESS 35, 35-51 (April Henning & Jesper Andreasson, Emerald Publishing eds., 2023).

<sup>191</sup> *Mamatkulov v. Turk.*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., ¶¶ 100, 122 (2005); *Loizidou v. Turk.* (Preliminary Objection), App. No. 15318/89, Eur. Ct. H.R., ¶ 70 (1995).

<sup>192</sup> *Selahattin Demirtaş v. Turk.* (No. 2), App. No. 14305/17, Eur. Ct. H.R., ¶¶ 183, 185-86 (2020); *Tunç v. Turk.*, App. Nos. 4133/16 & 31542/16, Eur. Ct. H.R., ¶¶ 65-66 (2019).

<sup>193</sup> *Banković v. Belg.*, App. No. 52207/99, ¶ 78 (2001). Semenya, *supra* note 14, Joint Dissenting Opinion of Judges Grozev, Roosma and Ktistakis (Stating that 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 decision of the majority "considerably broadens the scope of the Court's jurisdiction, so that it covers the entire sporting world. Such an enlargement can only be done on the basis of very solid legal bases; however, it seems to us that these bases are lacking).

<sup>194</sup> "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 40 (Sept. 24, 1982).

<sup>195</sup> *Id.* ¶¶ 41, 43.

integration, CAS should apply what the Inter-American Court calls “the *corpus juris* of international human rights law” a “set of international instruments with different legal content and effects (treaties, conventions, decisions, and declarations).”<sup>196</sup>

### *Changes in interpretation*

The first important change that would reduce the Eurocentric approach and include a more robust universal protection of human rights is a change in the CAS’s and the TF’s interpretations, and to a lesser degree, interpretations from the European Court. In order to determine the proper applicable human rights norms as well as deciding which are the best mechanisms to adjudicate a particular dispute, proper consideration should be given to the other relevant elements such as the place of the actual action, game, competition, and/or violation or the residence and/or nationality of the claimant.<sup>197</sup>

CAS<sup>198</sup>

A better interpretative approach for the CAS would be to follow this succinct methodology:

1. Give full force to the references to human rights in the Statutes, Constitutions, Code of Conduct and policies of the different SGB. As all of those documents make references to human rights in general, and not only to the European Convention, the CAS should also apply the whole *corpus juris* of international human rights law and not only the European one.
2. Consider international human rights law as a general principle of sports law that informs all policies, practices, and decisions.
3. Utilize as the starting point of any analysis the United Nations human rights norms, standards and interpretations. Additionally, use the relevant regional human rights norms depending on the place of the dispute and competitions.

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<sup>196</sup> The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 115 (Oct. 1, 1999).

<sup>197</sup> For similar arguments in the determination of which State should be responsible for human rights violations in the sports field, 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 (2021).

<sup>198</sup> For the capacity of CAS to change its interpretation of human rights norms, see Surbhi Kuwelker, *Evolution of CAS Human Rights Jurisprudence: Observations from Keramuddin Karim v. FIFA*, 22 INT’L SPORTS L. J. 171, 171-72 (2022).

4. Use consistently all human rights instruments and in particular those that include explicit references to sports.
5. Apply the United Nations Guiding Principles on Business and Human Rights as one central framework for the analysis of all decisions and practices of SGB.<sup>199</sup>
6. Consider the interpretations, recommendations, decisions, resolutions, reports, and general comments adopted by the United Nations (including the treaty bodies and special procedures) and those adopted by all the different regional systems.

## TF

The decisions in cases such as *Mutu* and *Semenya* signal that Switzerland will be found responsible for human rights violations due to the CAS procedures and decisions and the minimum review by the TF. A similar trend surely will emerge in front of the UN human rights machinery. Three major changes in the TF interpretation could enhance the protection of human rights in the sports field and expand the limited Eurocentric oversight that the TF exercises over CAS.

1. Expand the concept of public policy to include violations of international human rights treaties ratified by Switzerland as a direct ground to challenge the CAS awards.<sup>200</sup>
2. Consider, in the review of CAS awards, all international treaties ratified by Switzerland.
3. Determine that international human rights norms are directly applicable to CAS and SGB.<sup>201</sup>

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<sup>199</sup> CAS has stated that the UN Guiding Principles are applicable to SGBs and “all sporting organizations within the world of professional sport, including leagues, clubs, national associations, academies, dispute resolution services, regulatory and enforcement agencies.” See Estelle de La Rochefoucauld & Matthieu Reeb, *Sport and Human Rights Overview from A CAS perspective*, CAS, at 8 (June 20, 2022), [https://www.tas-cas.org/fileadmin/user\\_upload/2022.06.20\\_Human\\_Rights\\_in\\_sport\\_20\\_June\\_2022\\_.pdf](https://www.tas-cas.org/fileadmin/user_upload/2022.06.20_Human_Rights_in_sport_20_June_2022_.pdf). In its 2022 Strategic Framework on Human Rights, the IOC refers to the UNGPs as its ‘Standard of Reference.’ See *IOC Strategic Framework on Human Rights*, at 12. <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Strategic-Framework-on-Human-Rights.pdf>.

<sup>200</sup> For a similar proposal, see Antonio Rigozzi, *Sports Arbitration and the European Convention of Human Rights—Pechstein and Beyond*, in *NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL ARBITRATION 77*, 127 (Christoph Müller et al. eds., 2020).

<sup>201</sup> Switzerland included the principle of the horizontal effect of human rights by determining that “the authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons.” Constitution of the Swiss Confederation (English Translation) art. 35.3, (1999 rev. 2014), available at [https://www.constituteproject.org/constitution/Switzerland\\_2014.pdf](https://www.constituteproject.org/constitution/Switzerland_2014.pdf).

## European Court

The European Court should continue exercising its significant role in overseeing the functioning of CAS, of other SGBs, and also in clarifying States' roles in sports. At the same time, the European Court has a double responsibility of encouraging CAS to take a more universal approach to the application of human rights law in sports while providing and maintaining the rights of individuals to lodge applications challenging decisions adopted by CAS and the TF.

The interpretative tools that the European Court must use in order to reduce the Eurocentric bias of sports law in general and CAS "jurisprudence" include:

1. Consistently applying the *Riza* "tenuous link" standard to determine the joint, concurrent, or exclusive responsibility of other European States (in Europe rather than Switzerland) for the actions or omissions of SGB and CAS.<sup>202</sup>
2. The often-disputed concept of legal space (*espace juridique*) of the European Convention<sup>203</sup> should lead the Court to encourage CAS to apply other human rights standards when there is only a "tenuous link" between the European space and the sport dispute.
3. Continue its *Semenya* approach by looking closely to the *corpus juris* developed by the United Nations and other regional bodies in areas intersecting sports and human rights.
4. Establish clearly that CAS has a duty to apply universally accepted human rights norms.

### *Procedural Reforms*<sup>204</sup>

The substantive law applied by CAS is determined by the Sports Code. Additionally, the Swiss Private International Law Code regulates the challenges

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<sup>202</sup> *Riza* involves a dispute between a professional football player and his team decided by Turkish Football Federation and appealed to CAS. The Court was doubtful that Riza could claim a right of access to a Swiss court given that the dispute had only a very "tenuous link" with Switzerland. The Turkish proceedings had no connection with the Swiss courts and no international element. Accordingly, there had been no right of appeal to the CAS or the Swiss TF. Case of Ali Riza v. Switz., App. No. 74989/11, ¶¶ 6, 17 (July 13, 2021).

<sup>203</sup> In *Bankovic*, the European Court described the Convention as a multi-lateral treaty operating in an essentially regional context in the "legal space (*espace juridique*)" of the European states. The Convention was not designed to be applied throughout the world, even in respect of the conduct of European States. *Bankovic v. Certain NATO Member States*, 2001-XII Eur. Ct. H.R. 333, 357-58. The *Bankovic* decision has been vastly criticized for creating a distinction "between what Contracting parties can do 'at home' and what they can do 'abroad.'" Matthew Happold, *Bankovic v. Belgium and the Territorial Scope of the European Convention on Human Rights*, 3 HUM. RTS. L. REV. 1, 88 (2003).

<sup>204</sup> For an early list of proposed changes, see 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, 1223 (2005).

to arbitral awards. A change in both regulations could easily globalize the righting of sports law by encouraging or requiring CAS and the TF to apply universal human rights norms in addition to, and complementing, European law.

### CAS Code<sup>205</sup>

A simple change to the CAS Code could require, encourage, and facilitate in CAS a consistent application of a non-Eurocentric human rights law framework. These are possible changes:

1. Add a generic statement committing ICAS and CAS to uphold internationally accepted human rights in all their activities and particularly in solving international sports disputes.<sup>206</sup>
2. Modify articles 47 and 58 to make it explicit that CAS should apply international human rights law in its ordinary and appeal arbitration processes.
3. Include a clause that requires that all CAS arbitrators should have human rights proficiency and that they make a solemn commitment to uphold human rights law in the arbitration processes in which they participate.

### Swiss Private International Law/Arbitration

A similar change in the uniquely liberal Swiss Private International Law Act (PILA) could facilitate a more consistent use of a non-Eurocentric human rights law framework by CAS and particularly the TF. There are two main changes in PILA could make:

1. Establish that all international arbitration awards must comply with human rights law binding in Switzerland in order to be enforceable.
2. Add a clause clarifying that the non-application of international human rights law constitutes a violation of Swiss public policy.

### *New Litigation Strategies*

A comprehensive approach to the applicability of human rights law in the sports field requires a multi-layer litigation strategy.<sup>207</sup> The CAS and the TF

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<sup>205</sup> See Di Marco, *supra* note 120, ¶ 253.

<sup>206</sup> Nikki Dryden & Shaun Star, *The CAS Ad Hoc Division for the Olympic Games*, in THE ROUTLEDGE HANDBOOK OF MEGA-SPORTING EVENTS AND HUMAN RIGHTS 125, 136. (William Rook & Daniela Heerdt, eds., Taylor & Francis 2023).

<sup>207</sup> Mazzucco, M., Findlay, H., *From Sagen to Henriques: Legal Challenges to Olympic Event Selection Decisions and the Role of the Court of Arbitration for Sport*, LIVERPOOL LAW REV 44, 1–35 (2023).

have failed to properly apply human rights law to sports disputes. However, it is clear that lawyers representing athletes have not consistently used human rights arguments in their presentations to the CAS and the TF and those who have used such arguments almost exclusively referred to the European Convention and Court. In parallel, civil society organizations and private lawyers who frequently use the different human rights systems very rarely bring sports-related disputes to the United Nations or other regional human rights bodies. The TF's decisions can be challenged in front of the European Court or the five United Nations treaty bodies whose jurisdiction to receive individual complaints was accepted by Switzerland.<sup>208</sup> So far, the only challenges to Swiss decisions involving CAS were filed in the European Court, not the UN mechanisms.

To overcome this limitation lawyers and advocates should take a more holistic view and strategy, which includes:

1. Make human rights arguments in a consistent way in front of CAS and the TF.
2. Use the United Nations human rights machinery holistically by:
  - a. Bringing individual sports-related human rights complaints to the treaty bodies.
  - b. Submitting shadow reports to treaty bodies highlighting sports-related human rights abuses in the State under review.
  - c. Making general allegations, urgent actions, and other presentations to Special Procedures on sports-related human rights abuses pertinent to the specific mandates.
  - d. Calling the attention of the Human Rights Council with regard to sports-related human rights abuses during the Universal Periodic Review process.
3. Expanding the use of other Regional Human Rights Systems by bringing more sports-related human rights abuses to the Inter-American<sup>209</sup> and African Human Rights systems.

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<sup>208</sup> The Committees against Torture (CAT), Enforced Disappearances (CED), Discrimination against Women (CEDAW), Racial Discrimination (CERD) and the Rights of the Child (CRC). *See Acceptance of Individual Complaints Procedures by Switzerland*, OHCHR, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=169&Lang=EN) (last visited Nov. 22, 2023).

<sup>209</sup> Ariel E. Dulitzky, *Meza V. Ecuador: The Challenges Of Bringing Human Rights Claims In Sporting Disputes*, LAWINSPOORT (May 5, 2023), <https://www.lawinsport.com/topics/item/meza-v-ecuador-the-challenges-of-bringing-human-rights-claims-in-sporting-disputes>.



*Institutional Developments*<sup>210</sup>

In addition to procedural and interpretative changes, modifications in the institutional design of the CAS and the United Nations regime could strengthen a universal and consistent application of human rights law in the context of sports-related disputes. The World Player has recommended the creation of a new mechanism with the specific mandate of dealing with human rights complaints in the sports field.<sup>211</sup> There are proposals to create a new International Tribunal on Business and Human Rights<sup>212</sup> and to develop Rules on Business and Human Rights Arbitration<sup>213</sup> that could present an alternative to the CAS as far as it considers sports as part of a business affair. This proposal could enhance the idea that sports are mainly a business enterprise. Additional ideas could facilitate the universal applicability of human rights law to sports.

## CAS

ICAS could make changes in its structure to have a more specialized and regionally balanced body of arbitrators or to facilitate that the CAS panels are well-informed on human rights issues.

1. Create a list of “Human Rights Arbitrators” like the “Football list.” ICAS could appoint the arbitrators forming the “Human Rights List” from proposals submitted by the Office of the United Nations High Commissioner for Human Rights.
2. Create a specialized division on Human rights disputes.<sup>214</sup>

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<sup>210</sup> For recommendations on how the IOC could improve the “remedy ecosystem in sports,” see PRINCE ZEID RA’AD AL HUSSEIN & RACHEL DAVIS, INDEPENDENT EXPERT REPORT: RECOMMENDATIONS FOR AN IOC HUMAN RIGHTS STRATEGY BY INDEPENDENT EXPERT REPORT 38-40 (2020), at <https://uniglobalunion.org/wp-content/uploads/WPA-SHR-DRM-FAQ-tool.pdf>.

<sup>211</sup> World Players Association, ‘Sport and Human Rights Dispute Resolution Mechanism’ (2021). See also, West, D. 2019. Revitalising a phantom regime: the adjudication of human rights complaints in sport. *International Sports Law Journal*, 19, 2–17.

<sup>212</sup> Claes Cronstedt & Robert C. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights*, 57 HARV. INT’L L. J. 67, 67-68 (2016).

<sup>213</sup> *The Hague Rules on Business and Human Rights Arbitration*, CTR. FOR INT’L LEGAL COOPERATION, <https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/> (last visited Feb. 25, 2024).

<sup>214</sup> Calo, *supra* note 188, at 126. Following the EUCJ decision in ISU, Duval and Van Rompuy proposed to establish a CAS chamber specifically tasked with handling EU (competition) law. Duval, A. and Van Rompuy, B.: “Taking EU (Competition) Law outside of the Court of Arbitration for Sport (Case C-124/21 P *International Skating Union v Commission*)”, EU Law Live, 12/02/2024, <https://eulawlive.com/competition-corner/taking-eu-competition-law-outside-of-the-court-of-arbitration-for-sport-case-c-124-21-p-international-skating-union-v-commission-by-antoine-duval-and-ben-van-rompuy/>.

3. Introduce a Human Rights Advocate General (HRAG) (like the Advocate-General of the CJEU) to assist panels by writing impartial and independent opinions on the cases that the HRAG considers relevant to the development of human rights law in the sports field.
4. Add a requirement that the list of arbitrators should respect a regional balance.<sup>215</sup>

UN<sup>216</sup>

There are three measures that the United Nations could adopt to facilitate the applicability of a universal human rights law framework to the sports field:

1. Establish a Special Rapporteur on Sports and Human Rights with the mandate to report and advise on human rights in the sports field, undertake country visits and engagement with SGB, act on individual cases and on general issues by sending communications to States and SGB, promote and support the development of international human rights standards in the sports field, and engage in raising public awareness and advising the UN system, States, and particularly SGBs.
2. Elaborate on an international legally binding instrument on Sports and Human Rights that considers the development of international law, the case-law of the European Court and other international human rights bodies, the UN Guiding Principles on Business and Human Rights, the human rights policies adopted by SGBs, and experience on the application of treaties such as the International Convention against Apartheid in Sports and the other human rights treaties with specific references to sports.<sup>217</sup>

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<sup>215</sup> Even Goh, who considers that CAS substantially follows the standards and practices of other international arbitral tribunals, criticizes the egregious regional imbalance of CAS' list of arbitrators. Chui Ling Goh & Jack Anderson, *The Credibility of the Court of Arbitration for Sport*, 13 HARV. J. SPORTS & ENT. L. 233, 264 (2022).

<sup>216</sup> C.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, 154 (2022).

<sup>217</sup> PACE has recommended Council of Europe to draft a convention on good governance in sport, building on a set of harmonized good governance criteria. *Towards a Framework for Modern Sports Governance*, PARLIAMENTARY ASSEMBLY PACE (Jan. 24, 2018), <https://pace.coe.int/en/files/24443/html>. For a call on an international treaty to regulate international sports, see L. FREEBURN, REGULATING INTERNATIONAL SPORT—POWER, AUTHORITY AND LEGITIMACY- (2018) Jean-Loup Chappelet, *Beyond Governance: The Need to Improve the Regulation of International Sport*, 21 SPORT IN SOCIETY 724 (2018).

3. The Human Rights Council, the Office of the High Commissioner of Human Rights, the treaty bodies, and special procedures should pay more attention to the protection of human rights in sports and human rights in the discharge of their respective mandates and reframe the concept of sports autonomy in light a human rights framework.

#### CONCLUSION

The Court of Arbitration for Sports has gained legitimacy and international recognition. CAS plays an increasingly vital role in deciding important sporting disputes, many of which involve human rights issues. As human rights violations continue to happen in the sport field, CAS's role will continue to increase in this area. As more SGBs include references to human rights in their regulations, CAS will inevitably deal with more human rights cases in the future.

Despite its universal jurisdiction, CAS only applies (inconsistently and in a limited manner) European human rights standards. The Swiss federal tribunal repeats the same Eurocentric and limited human rights approach when reviewing CAS awards. However, there is no reason to keep this Eurocentric direction, and in fact, there are strong justifications for the sports adjudicatory system to apply universal human rights standards more consistently. The article presents specific proposals to address CAS's limited approach to becoming a true and legitimate world sports supreme court.

This Eurocentric approach of using a regional human rights treaty applicable only in Europe limits CAS's aspiration to become a global sports court. The OHCHR explained that the sport ecosystem is a global one that extends far beyond Europe. A Eurocentric approach by CAS creates "the risk of inconsistencies among jurisdictions in terms of protection and remediation for human rights violations in sport."<sup>218</sup>

Some of the changes proposed in this article are probably not going to be adopted by CAS anytime soon. CAS's limited and inconsistent use of European human rights not only reflects its Eurocentric approach to sports law. It is a poor attempt to keep human rights' influence in sports at the bare minimum, reflecting a misguided understanding of the principle of sports autonomy. A more proactive approach by the United Nations, the regional human rights systems, athletes, and all those concerned with a sport world respectful of human rights is in place to ensure that CAS move in the right direction and in a speedier way.

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<sup>218</sup> OHCHR Race and Gender, *supra* note 52, ¶ 49.

This process could be accelerated by the recent European Court decision in *Semenya*. While the Court did not directly decide on the compatibility of the World Athletic regulations with the European Convention, it made clear that the TF and CAS failed to conduct a rigorous legal scrutiny and a thorough examination of how those regulations affected Semenya's rights. The ECtHR insisted that the Federal and Arbitral tribunals must take greater responsibility for ensuring human rights in sport.<sup>219</sup> The *ISU* case decided by the European Court of Justice, similarly, places limits on CAS and SGBs requiring them to apply European Union law, including the protection of individual rights in a horizontal manner. Despite its potential positive impact, the *Semenya* and *ISU* rulings do confirm the Eurocentric approach to sports, and it could deepen it. Time will tell.

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<sup>219</sup> Krech, *supra* note 33.