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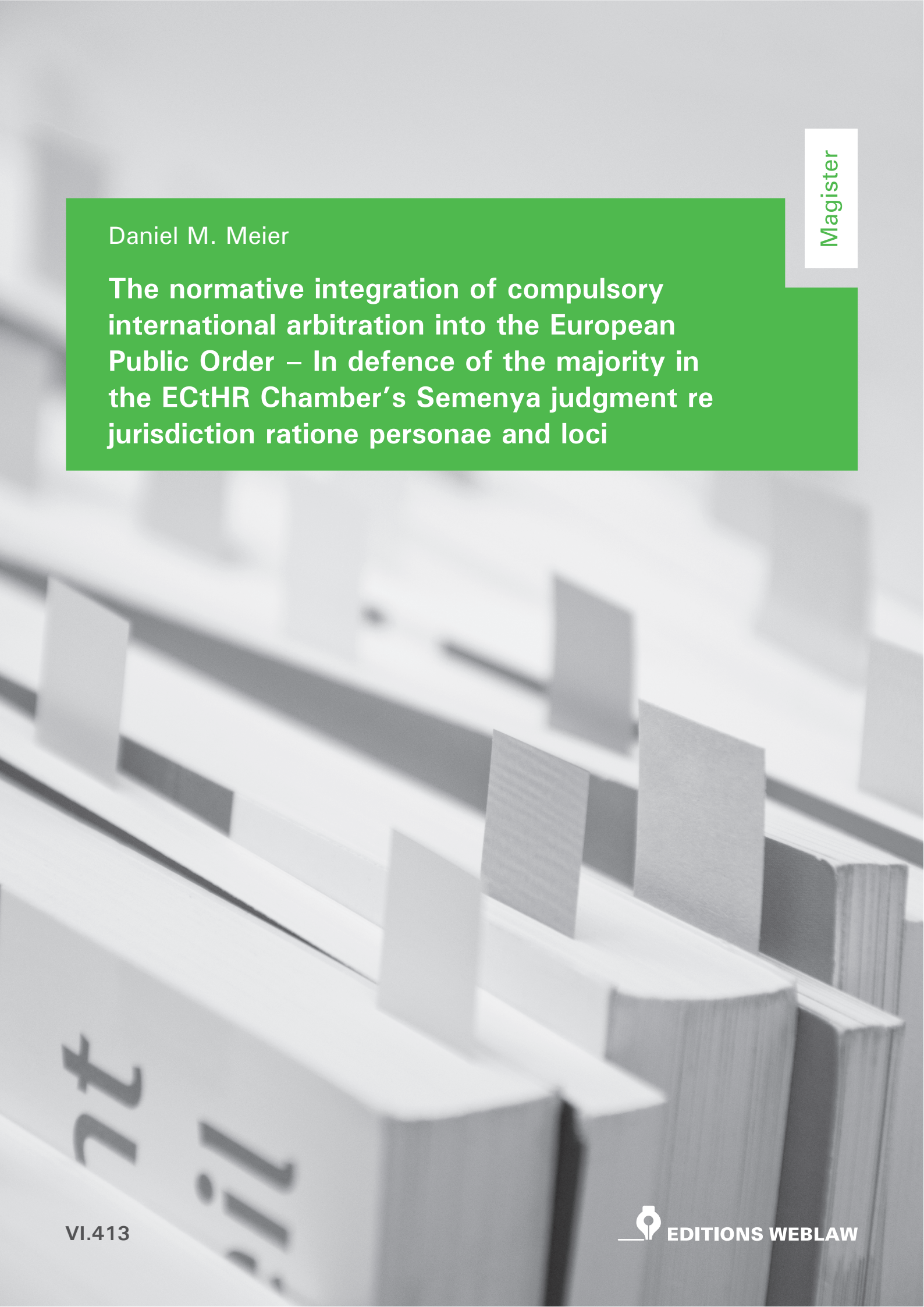
The normative integration of compulsory international arbitration into the European Public Order – In defence of the majority in the ECtHR Chamber's Semenya judgment re jurisdiction ratione personae and loci



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Master's Thesis

The normative integration of compulsory international arbitration into the European Public Order – In defence of the majority in the ECtHR Chamber's Semenya judgment re jurisdiction ratione personae and loci

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Abstract

Compulsory international arbitral proceedings categorically take place independently of national legal orders and thereby create distinct deterritorialised legal spaces. This poses a potential threat to the integrity of the supreme normative order created by the ECHR and its minimum standards. The *Semenya* case raises the question of whether such proceedings need to be normatively integrated into said order regarding the observance of substantive Convention rights (just as art 6(1) ECHR already applies to such arbitral panels). The joint dissenting opinion in the Chamber judgment which denied jurisdiction is inconsistent with the requirements of the concept of the European Public Order regarding primarily (a) the jurisdiction-shaping character and mission of the ECHR to safeguard state observance and (b) the ECtHR's role as the guarantor of the rule of law in default of other equivalent protection.

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List of abbreviations

art(s)	article(s)
App	Application
CAS	Court of Arbitration for Sport
CO	(Swiss) Code of Obligations (SC 220)
CoE	Council of Europe
cons	consideration(s)
CH	Switzerland
CJEU	Court of Justice of the European Union
CPC	(Swiss) Civil Procedure Code (SC 272)
Cst (CH)	Federal Constitution of the Swiss Confederation (SC 101)
Cst (NL)	Constitution of the Kingdom of the Netherlands
DFSC	Decision of the Federal Supreme Court (Switzerland)
DSD	Disorder of sexual development
para(s)	paragraph(s)
ECHR	European Convention on Human Rights and Fundamental Freedoms (SC 0.101)
ECLI	European Case Law Identifier
EComHR	European Commission of Human Rights
ECR	European Court Reports
ECtHR	European Court of Human Rights
ed(s)	editor(s)
edn	edition
eg	exempli gratia
EHRR	European Human Rights Reports
EU	European Union
FCA	(Swiss) Federal Court Act (SC 173.110)
FSC	Federal Supreme Court (Switzerland)
HIV	Human Immunodeficiency Virus
IAAF	International Association of Athletics Federations
ibid	ibidem
ICC	International Criminal Court
ILO	International Labour Organisation

LugC	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention (SC 0.275.12))
n	(foot)note
NATO	North Atlantic Treaty Organisation
NL	The Netherlands
no(s)	number(s)
p	protocol
PILA	(Swiss) Private International Law Act (SC 291)
re	regarding
s	section
SC	Systematic Compilation of Federal Legislation (Switzerland)
TEU	Treaty on European Union
UN	United Nations
UNCh	Charter of the United Nations (SC 0.120)
UNSC	United Nations Security Council
v	versus

1. Introduction

On 11 June 2023, the ECtHR issued its Chamber judgment in the *Semenya*[1] case: it found that the Swiss state violated the South African athlete's right to non-discrimination under art 14 in conjunction with art 8 ECHR and her right to an according effective remedy under art 13 ECHR in relation to those articles – by failing to conduct a thorough legal review of the foregoing arbitral decision of the CAS concerning (allegedly) discriminatory federation regulations. It sent shockwaves: never before has a host state of an international arbitral tribunal been held accountable for the lack of recourse to a human rights-based review of international arbitral decisions.

A dissenting minority of judges however argued that the court lacks jurisdiction *ratione personae* and *loci* – with the consequence that there would not be an according state duty to provide judicial redress for individuals affected by international arbitral decisions. The related issues of legal deterritorialisation and pluralism raise the question of how the autonomous transnational legal order in the realm of international sports relates to the European Public Order and whether the latter's integrity requires the former's normative integration therein.

Accordingly, this paper's research question is whether the dissenting opinion re jurisdiction *ratione personae* and *loci* in Semenya v Switzerland is consistent with the concept of the European Public Order resulting in a lack of a state obligation to foresee an effective remedy to challenge alleged violations of art 14 in conjunction with art 8 ECHR in the context of compulsory international arbitral proceedings.

This question is of current relevance given that, in today's globalised world, economic actors increasingly seek to overcome logistical and financial obstacles posed by jurisdictional differences by relying on international arbitral panels which are independent of national laws.[2] This is especially true for domains which are by their nature international and therefore depend on a single specialised legal space distinct from national jurisdictions like the domain of international sports in which the Court of Arbitration for Sport in Lausanne has risen to the primary adjudicator.[3]

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[1] Semenya v Switzerland (Chamber judgment) App no 10934/21 (ECtHR, 10 July 2023)

[2] Kimberley Chen Nobles, 'Emerging Issues and Trends in International Arbitration' [2012] 43(1) California Western International Law Journal 77

[3] See also Horia Ciurtin, 'A Quest for Deterritorialisation: The "New" Lex Mercatoria in International Arbitration' [2019] 85(2) The International Journal of Arbitration, Mediation and Dispute Management 126

Prima facie, this deterritorialisation of justice poses the risk of human rights vacuums, given that the conventional duty-holders under international human rights instruments are states. To bridge this gap, international human rights law needs to exert a horizontal effect on compulsory international arbitral panels with the effect that states need to provide according effective remedies to challenge – and ensure rights-based reviews of – arbitral decisions. The concept of the European Public Order is *in casu* particularly relevant considering that the majority of the judges in the Chamber judgment themselves referenced it – as it has been used to determine the EC(t)HR's jurisdiction before.[4] The research question is not least of current interest due to the circumstance that the Semenya case was referred to the Grand Chamber which held a hearing on 15 May 2024 and is due to deliver its judgment in the near future.

The thesis is structured as follows: firstly, Sudre's concept of the European Public Order[5] [6] will be introduced.

Secondly, the context in which the Caster Semenya case takes place will be explored by broadly outlining the previous relationship between the EC(t)HR and international arbitration, more concretely the phenomenon as such and how the Convention's art 6(1) exerts a horizontal effect on compulsory international arbitral proceedings through the Swiss *lex arbitri*.

Thirdly, the development of the Caster Semenya case up until the ECtHR's Chamber judgment will be described, including an outline of the points raised in the dissenting opinion of judges Grozev, Roosma and Ktistakis concerning jurisdiction ratione personae and loci.

Fourthly, the aforementioned positions will be critically appraised in light of the concept of the European Public Order by contrasting the points with the requirements of the concept in the context of a deterritorialised legal space and international legal pluralism, concretely with the supra-constitutional primacy of the ECHR and the European Public Order's broad normative content. Of particular use is Altwicker's contribution on the application of international human

[4] Semenya (n 1), para 111

[5] Frédéric Sudre, 'Existe-t-il un ordre public européen ?' in Paul Tavernier (ed), Quelle Europe pour les droits de l'homme ? (Bruylant 1996)

[6] Frédéric Sudre, 'L'ordre public européen' in Marie Joëlle Redor (ed), L'ordre public : Ordre public ou ordres publics ? Ordre public et droits fondamentaux (Bruylant 2001)

rights law in cross-border contexts with the definition of the 'effective control over the situation' criterion[7] and Burchardt's topological approach to legal spaces.[8] A conclusion follows.

In literature, the concept of the European Public Order has so far not been connected with the phenomenon of (compulsory) international arbitration at all and while it is settled case-law that art 6(1) ECHR applies to compulsory international arbitral panels, there has not been any research on the application of the substantive guarantees under art 14 in conjunction with art 8 ECHR. The author's contribution will therefore be the application of the concept of the European Public Order to the phenomenon of international arbitration with the aid of existing case-law and primarily the aforementioned literature so as to ascertain whether the concept requires a holistic normative integration of such proceedings.

2. The European Public Order

2.1. Term

The notion of public order is multi-faceted: in the realm of Private International Law, public order (also commonly referred to as "public policy" in American and "ordre public" in most of Continental European literature) is a defence which hinders the recognition and enforcement of foreign laws or judgments in another country.[9] In (European) Human Rights Law, the notion is mostly known as a legitimate interest whose protection is a ground for limitations of rights.[10]

The European Public Order as a normative concept on the other hand was mainly influenced by Sudre. It refers to an overarching value order over the "European legal sphere"[11] which the ECHR established upon ratification by CoE member states.[12]

In the ECtHR's jurisprudence, the term gained traction with the *Loizidou* judgment in which the court held that it "[…] must bear in mind the special character of the Convention as an

[7] Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' [2018] 29(2) European Journal of International Law

[8] Dana Burchardt, 'The concept of legal space: A topological approach to addressing multiple legalities [2022] 11(3) Global Constitutionalism

[9] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' [1981] 11(3) Georgia Journal of International and Comparative Law 591-595; as eg in art 34(1) LugC

[10] As eg in art 9(2) ECHR

[11] Referring to the Council of Europe

[12] Sudre (n 5) 40/41

instrument of [the] European [P]ublic [O]rder […] for the protection of individual human beings […]."[13]

As for what said value order entails, the court remarked in 1978 on the nature of the ECHR and the rights enshrined therein: "[u]nlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the [p]reamble, benefit from a 'collective enforcement'."[14]

That aforementioned "network" of objective obligations forms a normative body which engulfs and binds all member states, tasking them individually and collectively to enforce their duties owed to individuals under the Convention within their jurisdiction in order to uphold the fundamental values which underpin it [the Convention].[15]

The European Public Order's function is therefore to safeguard the Convention rights of persons in the multi-layered European legal sphere by radiating into all layers of statehood within and exerting on them the direct effect of the ECHR as well as its primacy over other legal rules and regimes.[16]

2.2. Content

There has been lively discourse on the normative content of the European Public Order; while Colombi Ciacchi and Grynchak et al argue that the notion contains the whole ECHR[17], Dzehtsiarou rightfully notes that such an understanding would merely encompass the convention rights themselves and therefore defeat the purpose of formulating a distinct concept.[18] To put it differently: if the ECHR were to be interpreted in order to give effect to (and in turn shape) the

[13] Loizidou v Turkey (Preliminary Objections) (1995) 20 EHRR 99, para 93

[14] Ireland v The United Kingdom (1979-80) 2 EHRR 25, para 239

[15] Sudre (n 6) 111

[16] Sudre (n 6) 111/112; Aurelia Colombi Ciacchi, 'Internationales Privatrecht, ordre public européen und Europäische Grundrechte' [2008] 2008 ZERP-Diskussionspapiere 6

[17] Colombi Ciacchi (n 16) 4; Alla A. Grynchak and Others, 'Convention for the Protection of Human Rights and Fundamental Freedoms as a Constitutional Instrument of European Public Order' [2023] 23(2) Public Organization Review 833

[18] Kanstantsin Dzehtsiarou, Can the European Court of Human Rights Shape European Public Order? (Cambridge University Press 2021) 86

European Public Order, the latter needs to have its own meaning, otherwise the interpretative arguments would be circular.

Sudre defined principles which the Convention is based on and therefore embody the concept of the overarching objective legal order. He noted that member states, by submitting themselves to the duties under the ECHR, entrusted themselves with upholding fundamental values which are characteristic for – and essential to the functioning of – a democratic society.[19]

According to him, those are essentially the principles of respect for human dignity, the rule of law, pluralism and non-discrimination.[20]

The principle of respect for human dignity is enshrined in art 3 ECHR which prohibits torture and inhuman or degrading treatment and is a guiding norm which informs all other rights and freedoms contained in the Convention.[21] It binds contracting states not merely in their undertakings within but also towards other countries. For instance, a person may not be extradited to a country if there is "[…] a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."[22] An extraditing country has a duty to assess whether "[…] conditions awaiting [the person concerned] in the country of destination are in full accord with each of the safeguards of the Convention […]" and bears responsibility for foreseeable violations of art 3 ECHR in the receiving country.[23] This was eg exemplified in *Al-Saadoon and Mufdhi*, in which the United Kingdom was required to undertake "all possible steps to obtain an assurance from the Iraqi authorities" that the applicants – who had previously been transferred to Iraqi judicial control – will not face the prospect of execution.[24] The issue of jurisdiction and extraterritoriality will be further elaborated on in the following and particularly in Chapter 5.1.2.1.

The principle of the rule of law – which will be further elaborated on in Chapter 5.1.3.2. – requires that any restriction of the enjoyment of human rights must be based on law which is

[19] Sudre (n 5) 51/52; Sudre (n 6) 113/114

[20] Sudre (n 5) 54-57; Sudre (n 6) 117-119

[21] Sudre (n 5) 54/55

[22] Soering v The United Kingdom (1989) 11 EHRR 439, para 91

[23] Ibid, para 86

[24] Al-Saadoon and Mufdhi v The United Kingdom (2010) 51 EHRR 9, para 171

accessible to an individual and sufficiently precise so as to ensure a degree of foreseeability and democratic legitimisation of state conduct.[25]

The principle of pluralism represents an important factor in ascertaining the scope of rights and freedoms (in that the Convention seeks to foster a pluralist society) and is strongly (though not exclusively) linked to the freedom of expression pursuant to art 10 ECHR and the freedom of assembly and association pursuant to art 11 ECHR which *inter alia* enable civic participation in political discourse while including counter-majoritarian elements as limitations of majority rule.[26]

The principle of non-discrimination is enshrined in art 14 ECHR[27] which prohibits discrimination of individuals based on protected characteristics. Measures resulting in unequal treatment of equals must have an objective and reasonable justification.[28] Art 14 ECHR furthermore serves as a tool for distributive justice in society by encompassing the phenomena of indirect and passive discrimination.[29]

2.3. The effects of supra-constitutionality

2.3.1. Primacy over national law: from formal subsidiarity to material constitutionalisation

The ECtHR has exercised its function and authority as the 'guardian of the European Public Order'[30] in declaring state conduct and omissions unlawful (in respect to the Convention) as a court of last instance.[31]

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[25] Sudre (n 5) 55; Caroline Picheral, L'ordre public européen : Droit communautaire et droit européen des droits de l'homme (La Documentation Française 2001) 99-101

[26] Sudre (n 5) 56/57; Aernout Nieuwenhuis, 'The Concept of Pluralism in the case law of the ECtHR' [2007] 3(3) European Constitutional Law Review 368; Gündüz v Turkey (2003) 41 EHRR 5, para 40

[27] As well as in art 1 p 12 which – contrary to art 14 – provides an autonomous guarantee

[28] Sudre (n 6) 119/120; Picheral (n 25) 117

[29] Tilmann Altwicker, Menschenrechtlicher Gleichheitsschutz (Springer 2011) 478-485; the phenomenon of passive discrimination will be further addressed in Chapter 3.3.

[30] Paraphrasing Loizidou (n 13), para 93

[31] Sudre (n 5) X; Picheral (n 25) 327; Javier García Roca, 'The Preamble, The Convention's Hermeneutic Context: A Constitutional Instrument of European Public Order' in Javier García Roca and Pablo Santolaya (eds), Europe of Rights: A Compendium on the European Convention of Human Rights (Brill | Nijhoff 2012) 5/6

Just as the Convention itself[32], the ECtHR's judgments are binding upon the signatory states per art 46(1) ECHR and thereby – in case of violations – create a duty to execute them and achieve as far as possible *restitutio in integrum* under the supervision of the Committee of Ministers.[33]

While formally, the Convention is an instrument of subsidiary human rights protection[34], its legal force legally binds the signatory states to act in conformity thereof. In his dissenting opinion in *Hutchinson*, judge Pinto de Albuquerque went as far as to assign the Convention a constitutional function: "[…] domestic authorities, courts included, must act in a way that coheres with the principle of pacta sunt servanda and therefore comply with the letter and abide by the principles underlying the Court's judgments and decisions, including those delivered against other Contracting Parties. As administrators of first resort of the Convention, the domestic authorities must therefore be deferential to the final say of the Court, which is entrusted with the uniform upholding of the 'constitutional instrument of [the] European [P]ublic [O]rder' […]."[35]

Indeed, the concept of the European Public Order as an overarching, unified, supreme normative order necessitates the material constitutionalisation of the ECHR.[36]

In practice, the rights enshrined in the Convention have been implemented into national legal orders and assigned constitutional value by most signatory states which is especially relevant in national legal orders which do not foresee the possibility of effective constitutional review of federal acts like the Netherlands[37] and Switzerland[38].[39] The ECHR insofar fills voids in national models of constitutionalism by submitting the legislatives to a supreme law when some

[32] Grynchak and Others (n 17) 832

[33] Ilgar Mammadov v Azerbaijan App no 15172/13 (ECtHR, 29 May 2019), para 150

[34] Martin Nettesheim, 'Einleitung' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), Europäische Menschenrechtskonvention, Handkommentar (5th edn, Nomos 2023), n 28; Kudła v Poland (2002) 35 EHRR 11, para 152

[35] Hutchinson v The United Kingdom App no 57592/08 (ECtHR, 17 January 2017), dissenting opinion of judge Pinto de Albuquerque, para 45

[36] Sudre (n 5) 43; Picheral (n 25) 196; Grynchak and Others (n 17) 835; García Roca (n 31) 7

[37] Art 120 Cst (NL)

[38] Art 190 Cst (CH)

[39] Alec Stone Sweet, On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court (Yale Law School Legal Scholarship Repository 2009) 8; García Roca (n 31) 8; Grynchak and Others (n 17) 829

national constitutions do not exert that effect.[40] Normatively, the Convention thus creates a minimum standard of constitutional guarantees in terms of human rights protection.[41]

Stone Sweet furthermore stressed that the ECtHR fulfils the material elements of a constitutional court by embodying the competence of authoritative interpretation, a consistent caseload and the ability to build a precedent-based jurisprudence.[42]

2.3.2. Primacy over other international law

In relation to other international law and bodies, the ECtHR has utilised the concept of the European Public Order to maintain its judicial autonomy and the Convention's standing as well as its protective function of persons within its jurisdiction *ratione loci*.[43]

The perhaps most notable example thereof is *Al-Dulimi* in which the Iraqi national Khalaf M. Al-Dulimi complained of Swiss authorities' strict enforcement of UNSC Resolution 1483 which left him without any ability to access a court to challenge his listing as a sanctioned person.[44] The majority held that the court has jurisdiction and that Switzerland violated the applicant's right to a fair trial according to art 6(1) ECHR.

While the same majority circumvented a clear answer to the question of hierarchy of norms[45], the concurring opinion by judge Pinto de Albuquerque (joined by judges Hajiyev, Pejchal and Dedov) emphasises the role of the court as the ultimate arbiter within the European legal sphere in the field of human rights and the Convention's primacy therein, thereby upholding its above-mentioned authority as the 'guardian of the European Public Order'[46]:

"[t]he Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the

[40] Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' [2009] 16(2) Indiana Journal of Global Legal Studies 630/631; García Roca (n 31) 8

[41] See also Tilmann Altwicker, 'Convention Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights' in Armin von Bogdandy and Pál Sonnevend (eds), Constitutional Crisis in the European Constitutional Area (Nomos 2015) 338/339

[42] Stone Sweet (n 39) 3/4

[43] Sudre (n 6) 125/126; Picheral (n 25) 311/312

[44] Al-Dulimi and Montana Management Inc. v Switzerland App no 5809/08 (ECtHR, 21 June 2016), paras 14-26

[45] Ibid, para 149

[46] See n 30

maintenance and further realisation of human rights and fundamental freedoms (Article 1, paragraph b, of the 1949 Statute of the Council of Europe). With more than 217 treaties, the legal order of this international organisation has at its top an international treaty, the European Convention on Human Rights, that has direct, supra-constitutional effect on the domestic legal orders of the member States of the Council of Europe. Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations for States Parties towards all individuals and private entities within their jurisdiction. With its transformational role emphatically proclaimed in the preamble as an instrument for building a closer union of European States and developing human rights on a pan-European basis, the Convention is subordinated neither to domestic constitutional rules, nor to allegedly higher rules of international law, since it is the supreme law of the European continent. In the Council of Europe's own internal hierarchy of norms, United Nations law is equal to any other international agreement and subordinated to the primacy of the Convention as a constitutional instrument of [the] European [P]ublic [O]rder."[47]

2.3.3. Shaping territorial jurisdiction

The concept of the European Public Order has been utilised by the ECtHR to determine the extent to which states are obliged to uphold the ECHR's guarantees in the exercise of their power and thereby to shape the notion of territorial jurisdiction.[48]

This is best exemplified in the aforementioned case of *Loizidou* which is one of the leading cases on the ECHR's extraterritorial application – which will be further detailed in Chapter 5.1.2.1. The case involved the Turkish army's refusal to allow the applicant to access her property after its invasion of Northern Cyprus in 1974.[49] The applicant argued that – even though the acts took place outside Turkish territory – Turkey exercised effective control over Northern Cyprus, thus rendering it responsible.[50] The court found that the alleged conduct indeed fell under Turkish jurisdiction in the sense of art 1 ECHR and that a conclusion to the contrary would significantly limit the ECHR's application and effectiveness to a degree which would undermine the Convention's character as an "instrument of [the] European [P]ublic [O]rder […]

[47] Al-Dulimi (n 44), concurring opinion of judge Pinto de Albuquerque, para 59

[48] Sudre (n 5) 47/48; Sudre (n 6) 122; Dzehtsiarou (n 18) 28

[49] Loizidou (n 13), paras 11-13

[50] Ibid, para 57

for the protection of individual human beings and its mission, as set out in Article 19 […] 'to ensure the observance of the engagements undertaken by the High Contracting Parties'."[51]

3. International arbitration and the EC(t)HR in general

3.1. The phenomenon and its significance

In cross-border disputes, parties likely face the prospect of jurisdictional hurdles which are associated and accompanied with logistical, often linguistical and – not least – financial inconveniences and may impede innovation in developing economic (sub)sectors like for instance cross-border digital services.[52]

International arbitration on the other hand is a form of alternative dispute resolution in which parties who reside in different countries agree to settle a dispute before an independent arbitration panel which both/all parties appoint. This is generally cheaper than traditional litigation as it does not necessarily involve lawyers and thereby helps parties save legal fees. Proceedings are confidential and relatively time-saving as some national court systems are notoriously overburdened leading to lengthy proceedings.[53] The procedural flexibility gives the parties the freedom to select a panel of experts whose fields of interests are close to the subject matter of the dispute which potentially makes decisions more expedient. Eventually, decisions are binding upon the parties and final without a possibility of appeal as arbitration agreements normally contain a waiver of any right to recourse.[54]

The phenomenon has attracted the attention of economic actors worldwide and is a growing trend.[55] This is especially true for domains which are by their nature inter- or rather transnational

[51] Ibid, para 93; see also Cyprus v Turkey (2002) 35 EHRR 731, para 78

[52] Craig R. Tractenberg, 'Nuts and Bolts of International Arbitration' [2019] 38(3) Franchise Law Journal 452

[53] See eg in the case of the United Kingdom: The Law Society, 'County Court users face growing delays and crumbling buildings' (The Law Society, 14 December 2023) <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/county-court-users-face-growing-delays-and-crumbling-buildings> accessed 25 March 2024

[54] Paris Mayfield, 'The Benefits of International Arbitration' (Lexology, 4 April 2023) <https://www.lexology.com/library/detail.aspx?g=d17c7981-7b01-4666-8e4a-ef5f75519af3> accessed 27 March 2024

[55] See n 2; also, for instance, in 2020, the International Court of Arbitration registered a rise in caseload of 15.79% compared to 2015. (International Chamber of Commerce, 'ICC Dispute Resolution 2020 Statistics' (DR S895 ENG, International Chamber of Commerce 2021 <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/#anchor-download> accessed 20 April 2024) 9)

and depend upon unhindered economic relations throughout national boundaries like international sports.

3.2. The effect of deterritorialisation

In traditional litigation, legal procedures are embedded in the national legal order with the full procedural and substantial guarantees afforded by a country's constitutional law which national courts are required to follow. International arbitration on the other hand is usually undertaken by a panel in the name of the institution providing arbitration which is a judicial person under the host country's private law – yet not a court.[56]

Accordingly, in the case of international arbitration, the forum is not bound by the host country's laws at large which is also apparent in the way arbitral jurisdiction may be formed. Particularly in the domain of international sports, the CAS is a convenient example as it constitutes its jurisdiction not by virtue of (one of) the parties' residence or relationship of the subject matter to the territory[57] but of the subject matter itself and consent of the parties. In the case of Caster Semenya at hand (which will be outlined in Chapter 4), it was irrelevant that she and her national sports federation were resident in South Africa and the respondent in the case, the then-IAAF was domiciled in Monaco, the case was submitted and heard at the CAS on Swiss soil – however under its own internal material and procedural framework rather than the Swiss CO or CPC respectively.

This underlines that the normative corpus in this domain is categorically autonomous and distinct from spatial legal territory and transnational in that it encompasses multiple (if not all) countries and regions throughout the world and is insofar deterritorialised – reminiscent of the *lex mercatoria*.[58] In the realm of sports law, the jurisprudence of the CAS constitutes and shapes a distinct normative order, the *lex sportiva*.[59]

[56] Ciurtin (n 3) 126

[57] As eg for rights *in rem* in art 22(1) LugC

[58] Ciurtin (n 3) 125-127

[59] Antoine Duval, 'Transnational Sports Law: The Living Lex Sportiva' in Peer Zumbansen (ed), The Oxford Handbook of Transnational Law (Oxford University Press 2021) 494/495

While this form of deterritorialisation of justice may be a tool for legal innovation, it carries a risk: the traditional addressees of international human rights instruments are states[60] and in a (seemingly) legal vacuum, there could not be a way to compel arbitral panels to enforce human rights obligations as state courts do. To bridge this gap, international human rights law, in particular the ECHR as the focus of this thesis, would need to exert an indirect horizontal effect[61] on international arbitral panels in their exercise of a quasi-adjudicative function.

3.3. Positive state obligations

Modern human rights doctrine categorises state obligations into three dimensions: the negative duty to respect, the positive duty to protect and the positive duty to fulfil.[62]

In the context of art 14 ECHR, prohibiting discrimination of subjects, state entities must not actively engage in discriminatory conduct themselves either due to a person's protected characteristic (direct discrimination) or with the effect that a measure disproportionally targets persons with a certain protected characteristic (indirect passive discrimination).[63] Furthermore, a state may engage in passive discrimination if it remains passive despite an existing (positive) duty to act.[64]

More concretely, according to Altwicker, who transformed the general formula of elements of discrimination pursuant to art 14 ECHR to capture the concept: passive discrimination occurs in case of lack of treatment of a person in comparison to similarly situated persons, whereby the non-treatment (by the state) violates a positive duty leading to a disadvantage which can't be justified.[65]

These positive duties are aimed at the protection against instances of third-party discriminatory conduct, equal access to certain goods and services and the effective investigation of cases of

[60] Art 1 ECHR reads "The High Contracting Parties shall secure […] the rights and freedoms defined in Section I of this Convention." Also, art 34 ECHR only allows individual complaints about violations by contracting states.

[61] See Eric Engle, 'Third Party Effect of Fundamental Rights (Drittwirkung)' [2009] 5(2) Hanse Law Review 166

[62] Ida Elisabeth Koch, 'Dichotomies, Trichotomies or Waves of Duties?' [2005] 5(1) Human Rights Law Review 82

[63] Altwicker (n 29) 477-479

[64] Ibid, 392

[65] Ibid, 314

discriminatory violence.[66] For the purpose of this thesis, the former is of particular interest as it tasks the judiciary to perform a corrective function if claims of third-party discriminatory conduct are put forward.

The ECtHR has held states accountable for failing to fulfil that role in regard to art 14 in conjunction with art 8 ECHR notably in two instances: in the realm of labour relations, the court held in the case of *I.B.* that the Greek state failed to protect the applicant, a HIV-positive man who was dismissed from his workplace due to his diagnosis given that the highest instance court did not weigh up the competing interests carefully enough to the degree that it did not even rebut the (applicant's former colleagues') "manifestly inaccurate premise" that HIV was contagious.[67]

In the realm of family law, the ECtHR held in *Pla and Puncernau* that the Andorran state violated the applicants' right to non-discrimination by failing to interpret their grandmother's will from 1939 – which *prima facie* excluded the inheritance of her estate to any non-biological grandchildren, thus leaving the applicants without any right to the property – in light of existing case-law (according to which the justification for differential treatment between biological and adopted children must be particularly weighty)[68].[69]

Prima facie, this also applies to the field of international arbitration which would therefore mandate the regulation of international arbitral procedures resulting in an obligation on the part of arbitral panels to observe the ECHR and ECtHR case-law in the exercise of their quasi-adjudicative function so as to prevent that they – by remaining passive regarding discriminatory conduct raised in a procedure – appropriate a party's discriminatory conduct and engage in passive discrimination to the detriment of the other.[70]

Indeed, the phenomenon of international arbitration is not entirely new to the Strasbourg court; in the context of international arbitration, it has (primarily) been faced with challenges relating to the civil limb of the right to a fair trial pursuant to art 6(1) ECHR.

[66] Ibid, 316/356/372

[67] I.B. v Greece App no 552/10 (ECtHR, 3 October 2013), para 88

[68] Mazurek v France (2006) 42 EHRR 9, para 33

[69] Pla and Puncernau v Andorra (2006) 42 EHRR 25, para 62

[70] See also Altwicker (n 29) 329

3.4. The notion of compulsiveness

While the literature generally welcomes this normative integration in the realm of procedural rights,[71] others argue that the applicability of art 6(1) ECHR *prima facie* poses a contradiction to the abovementioned procedural flexibilities afforded by arbitration.[72]

The ECtHR has been faced with this dilemma: on the one hand, a strict burden to observe the parties' procedural rights under art 6(1) ECHR with unlimited state obligations to provide a possibility of review could potentially render the possibilities and advantages of arbitration nugatory in that parties would not be able to exercise their private autonomy and contractual freedom to choose the modalities of arbitration *in toto*. As a consequence, CoE member states could lose their competitive standing as potential seats of arbitral panels as their administration is then categorically more costly and less expedient (as the possibility of judicial review looms).[73]

On the other hand, absolute deference could potentially lead to one private actor nudging another one into an arrangement containing an arbitration clause with a waiver of rights and exert undue influence on the panel to decide in their favour. Procedurally unjust arbitral decisions would be given *de facto res judicata* effect without any possibility of review. Long-established standards could thereby be hollowed out.

The EComHR and later the ECtHR struck a balance between the parties' contractual freedom and procedural guarantees by first establishing in *Bramelid and Malmström* and later reinforcing in *Suda* that the procedural guarantees under art 6(1) ECHR must in any case be observed if the arbitral procedure is compulsory – as opposed to voluntary. Generally, compulsiveness is assumed if the procedure is mandated by law and parties to a dispute had no choice other than to undergo an arbitral procedure.[74] [75]

In contrario, in default of an imposition by law, voluntariness is assumed.[76] However, the assumption that the conclusion of an arbitration clause would always be truly voluntary falls short

[71] See eg Ilka Hanna Beimel, Independence and Impartiality in International Commercial Arbitration: An Analysis with Comparative References to English, French, German, Swiss, and United States Law (Eleven International Publishing 2021) 26

[72] See eg Gary Born, International Commercial Arbitration (Wolters Kluwer Law International 2021) 1792

[73] See also Tabbane v Switzerland App no 41069/12 (ECtHR, 1 March 2016), para 33

[74] Bramelid and Malmström v Sweden (1983) 5 EHRR 249, para 29

[75] Suda v The Czech Republic App no 1643/06 (ECtHR, 28 October 2010), para 49

[76] Tabbane v Switzerland App no 41069/12 (ECtHR, 1 March 2016), para 26

of reality as it overlooks potential economic inequalities between private parties to contractual relationships, especially in the context of labour relations.[77]

Indeed, in *Mutu and Pechstein*, the court took a more nuanced approach and specified that arbitration can only be considered voluntary if consent to the agreement was given "free[ly], lawful[ly] and unequivocal[ly]".[78] In this particular instance, German speed skater Claudia Pechstein had – in practice – no choice other than to agree to the waiver as the refusal would have entailed a ban from participating in the respective competitions.[79] Thus, the circumstances leading to the entering of the agreement were tantamount to an imposition by law and the arbitral procedure (before the CAS) was deemed compulsory nevertheless.

This significantly narrowed understanding of the notion of voluntariness enables a greater influence of the Convention on arbitral panels in that it forces CoE member states to provide recourse to challenge potential violations of the guarantees enshrined in art 6(1) ECHR and will in the future potentially lead to relatively large number of challenges to decisions as the question of whether an arrangement is compulsory or voluntary is contingent on material circumstances surrounding the conclusion of arbitration clauses which are prone to exegesis. Furthermore, it is not unlikely that arbitral panels may precautionarily ensure compliance with art 6(1) ECHR as – in case of a violation of a procedural guarantee – a state court could potentially regard an arbitration clause as compulsory leading to the setting-aside of a decision. Thereby, the ECHR does in principle exert a horizontal effect on compulsory international arbitral panels through national procedural frameworks.

3.5. The Swiss lex arbitri

A country's legal framework governing arbitral proceedings is referred to as its *lex arbitri* – in the case of Switzerland, it is codified in Chapter 12 of the PILA. It is divided into 12 short subchapters of which the majority regulate basic requirements for members of international arbitral panels and their conduct in default of according rules agreed upon by the parties or internal rules of arbitral institutions.

[77] See also Marte Knigge and Pauline Ribbers, 'Waiver of the Right to Set-Aside Proceedings in Light of Article 6 ECHR: Party-Autonomy on Top?' [2017] 34(5) Journal of International Arbitration 781/782

[78] Mutu and Pechstein v Switzerland App nos 40575/10 and 67474/10 (ECtHR, 2 October 2018), para 103

[79] Ibid, paras 112-114

Of particular interest herein is art 190(2) PILA which foresees the grounds for a setting-aside action against an arbitral decision. While arts 190(2)(a)-(d) PILA concern violations of fair trial guarantees, (e) concerns the sole substantial issue: an arbitral decision may be set aside if it is incompatible with public order.

As mentioned above, the notion of public order is a frequently-used instrument in private international law. Its scope is elusive: the Federal Supreme Court defined a formula according to which a decision may be set aside if "[…] its content misconceives fundamental legal principles and is therefore incompatible with the essential, widely recognized system of values, which, according to the prevailing view in Switzerland, should form the basis of every legal system."[80]

Given the dynamic nature of values, it is impossible to formulate an exhaustive list of contents, however, the court has repeatedly referred to the elements of the "principle of pacta sunt servanda, the prohibition of the abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the principle of non-discrimination and the protection of incapacitated persons […]".[81]

The court intends to interpret the notion of public order as a whole restrictively[82] and insofar assigned the notion of non-discrimination a scope which only includes a negative obligation binding a public authority which is party to a dispute but not a private one and is insofar narrower than that of art 14 ECHR.[83]

Accordingly, the court has avoided the question on in how far the ECHR is directly applicable to arbitral proceedings altogether.[84] It is however clear that the public order ground presents a possible procedural avenue to indirectly regulate arbitral proceedings by way of setting aside decisions.

[80] DFSC 144 III 120 cons 5.1

[81] DFSC 128 III 191 cons 6b; DFSC 132 III 389 cons 2.2.1; DFSC 138 III 322 cons 4.1

[82] DFSC 132 III 389 cons 2.1; DFSC 142 III 360 cons 4.1.2

[83] DFSC 147 III 49 cons 9.4

[84] Stefan Leimgruber and Benjamin Gottlieb, 'Art. 190 IPRG / III. Anfechtung (Art. 190 Abs. 2 IPRG)' in Regina Elisabeth Aebi-Müller and Christoph Müller (eds), Bundesgesetz über das Internationale Privatrecht (IPRG) – Internationale Schiedsgerichtsbarkeit, Art. 176-194 IPRG sowie Art. 7 und 196 IPRG (Stämpfli 2023), n 65

4. The Caster Semenya case so far

4.1. Factual background

Mokgadi Caster Semenya, born 1991, is a female South African middle-distance runner who was born with a medical condition called *5α-reductase 2 deficiency* – a type of DSD[85] – which causes her to have XY chromosomes and to naturally produce relatively high levels of testosterone. Her achievements have caused controversy for a while as some commentators argued that her condition would give her a competitive advantage compared to other female athletes.[86]

On 23 April 2018, the International Association of Athletics Federations (IAAF), now called World Athletics, which is based in Monaco and governs matters in the realm of the sport of athletics (which includes competitive running), published the binding *Eligibility Regulations for the Female Classification (DSD Regulations)*.[87] The regulations "[…] address the eligibility of athletes with differences of sex development to compete in the female category of competition in certain track events."[88] Concretely, legally recognised female or intersex athletes with a DSD are only eligible to compete in the female category if they undergo hormonal treatment.[89]

Given that World Athletics is affiliated with 214 national sporting federations around the world, among them Athletics South Africa, and has the power to adopt legally binding rules and regulations through its Council (as a legislative organ) for its member federations, the DSD Regulations have a direct effect on athletes' eligibilities to compete.

Thus, Semenya (whose engagement is captured by the scope of application of the regulations) has been barred from further participating in tournaments unless she undergoes hormonal treatment pursuant to s 2.3 (b) and (c) of the regulations.

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[85] Disorder of sexual development

[86] Jeré Longman, 'Understanding the Controversy Over Caster Semenya' (The New York Times, 18 August 2016) <https://www.nytimes.com/2016/08/20/sports/caster-semenya-800-meters.html> accessed 25 March 2024

[87] International Association of Athletics Federations, 'Eligibility Regulations for the Female Classification' (iaaf.org, 23 April 2018) <https://www.iaaf.org/download/download?filename=0c7ef23c-10e1-4025-bd0c-e9f3b8f9b158.pdf&urlslug=IAAF%20Eligibility%20Regulations%20for%20the%20Female%20Classification%20%5BAthletes%20with%20Differences%20of%20Sex%20Development%5D%20in%20force%20as%20from%201st%20November%202018> accessed 24 March 2024

[88] S 1.1 DSD Regulations

[89] S 2.3 (a)-(c) DSD Regulations

4.2. The CAS arbitral decision

S 5.2 of the DSD Regulations submits any challenges to decisions based thereon to the exclusive jurisdiction of the CAS. Consequently, Semenya and Athletics South Africa filed a claim before it against the then-IAAF, seeking – inter alia – a declaration of the DSD Regulations' unlawfulness on the ground that the eligibility requirements are discriminatory.[90]

Semenya's representants brought particularly forward that the requirements solely restrict athletes' eligibility based on a natural or genetic trait, only address the female competitive category and the participation in specific events (400 meters to 1 mile distance running) and target athletes' physical appearances (as female athletes conforming to stereotypically female physical characteristics are unlikely to be considered as potentially having a DSD).[91] They argued that the difference in treatment is unnecessary to maintain fair competition as success stems from both genetic and environmental factors and given the variety of genes associated with sporting performance, sport is inherently unfair (given that generally, genetic anomalies, like in the case of Usain Bolt, do not give rise to differential treatment).[92] Also, Semenya has not consistently outperformed her fellow competitors so as to reasonably allow for a conclusion in favour of differential treatment.[93]

The then-IAAF on the other hand maintained that 5α-reductase 2 deficiency constitutes a substantial genetic difference reflected in the evidence-backed assumption that – beyond the size of genitalia – athletes with XY chromosomes, male gonads and average biologically male levels of circulating testosterone show all biological advantages biological males have over biological females in competitive sport – regardless of gender identity.[94] Therefore, the differential treatment furthers the legitimate interest of maintaining competitive fairness in sport in a reasonable way.[95]

In its decision, the panel reasoned that the expert evidence submitted by the IAAF is sufficient to conclude that Semenya's genetic condition constitutes – if untreated – a competitive advantage which goes beyond general genetic differences between athletes of the same biological

[90] CAS 2018/O/5794 Mokgadi Caster Semenya v International Association of Athletics Federations (30 April 2019), para 296

[91] Ibid, para 51

[92] Ibid, para 52

[93] Ibid, para 56

[94] Ibid, paras 288-290

[95] Ibid, para 295

sex and thereby renders the differentiation reasonable.[96] Also, Ms Semenya's burden of being faced with the choice of either consistently lowering her testosterone levels or not competing in the relevant events do not outweigh the legitimate interest in maintaining fair and equal competitive opportunities.[97] Furthermore, the selectively narrow scope of application serves as a factor which minimises the regulation's effects to the least necessary possible.[98] Consequently, the CAS upheld the DSD Regulations and rejected Semenya's claim for declaratory relief.[99]

4.3. The Swiss Federal Supreme Court judgment

Relying on art 190(2)(e) PILA in conjunction with art 77(1)(a) FCA, Semenya filed a setting-aside action with the Swiss Federal Supreme Court on the ground that the CAS decision was contrary to public order which includes the principle of non-discrimination that the arbitral decision violated.[100]

Her representatives argued that even though the court has previously held that the principle of non-discrimination as part of Swiss public order does not capture discriminatory conduct from private parties, the notion of non-discrimination must be interpreted in light of the respective right pursuant to art 14 ECHR which entails positive obligations and insofar exerts an indirect horizontal effect on private actors. Furthermore, the relationship between a sports federation and an athlete at hand is not dissimilar to that between a state and private part given the hierarchical structure and lack of participatory opportunities in the policy-making of federations.[101]

In its judgment, the court first underlined that the scope of public order is – given its primary nature as a tool in civil litigation and arbitration as opposed to public law – to be construed narrowly and that there is accordingly no obligation emanating from the ECHR to interpret related components of national public order in light of the corresponding Convention rights.[102] Regarding the scope of the concept of non-discrimination as part of national public order, it took note of the argument that the relationship between the then-IAAF and Semenya was – as

[96] Ibid, para 620

[97] Ibid, para 621

[98] Ibid, para 609

[99] Ibid, para 626

[100] FSC judgment 4A_248/2019 of 29 July 2019, cons 9

[101] Ibid, cons 5.2.4/9.4

[102] Ibid, cons 9.2

usual in the context of international sports – hierarchical, yet considered that it was not tantamount to that between a state and an individual and accordingly refused to depart from its position that the concept of non-discrimination does not exert a horizontal effect on private parties.[103] Given the consequent lack of applicability of art 190(2)(e) PILA, it found the complaint manifestly unfounded.[104]

Paradoxically, it nevertheless proceeded with an assessment on whether the DSD Regulations could *in abstracto* constitute discrimination to the detriment of Semenya for the purpose of the national constitutional principle of non-discrimination pursuant to art 8(2) Cst[105]: it maintained that the DSD Regulations treat athletes with a DSD differently[106] in pursuance of a legitimate aim[107] reasonably and proportionally[108]. Followingly, it held that even if the then-IAAF had been under a justiciable duty not to discriminate against athletes (and the CAS to prevent discriminatory effects from manifesting) under Swiss national public order, neither the DSD Regulations nor the CAS arbitral decision materially violated art 8(2) Cst.[109]

4.4. The ECtHR Chamber's judgment re jurisdiction

On 18 February 2021, Semenya's representative lodged a complaint against the Swiss state at the ECtHR which issued its Chamber judgment in writing on 11 July 2023.[110]

Her representatives complained – inter alia – that Switzerland had failed to provide an effective remedy to challenge the abovementioned discrimination by the then-IAAF (manifested through the DSD Regulations and reinforced by the CAS) and thereby violated her rights under art 14 in conjunction with art 8 ECHR and additionally art 13 ECHR in relation to those articles.

The Swiss government raised a preliminary objection that the court would lack jurisdiction *ratione personae* and *loci*: it argued principally that since all parties of the CAS dispute (except for the CAS itself) were not resident in Switzerland, there was no connection to Switzerland in

[103] See Chapter 3.5. above

[104] Ibid, cons 9.4

[105] Ibid, cons 9.5

[106] Ibid, cons 9.6.2

[107] Ibid, cons 9.8.3.3/9.8.3.4

[108] Ibid, cons 9.8.3.5

[109] Ibid, cons 9.8.3.6

[110] Semenya (n 1), principal facts

the matter.[111] Therefore, the Swiss government had no ability to influence the parties, above all the then-IAAF (a private entity under Monegasque law), which resided abroad.[112]

Also, according to the government, in cases in the context of compulsory international arbitration, the jurisdictional link to a country alleged to have violated Convention rights has only been considered given in relation to art 6(1) ECHR, thus to the procedures of the arbitral panel which a country hosts.[113] If however Switzerland had to undertake full substantial reviews of arbitral decisions, thus applying the ECHR *in toto*, a special appellate court would be necessary which would contradict the PILA and the very nature of arbitration.[114] As a consequence, the contracting parties would likely lose their attractiveness as host countries.[115]

Semenya's representatives on the other hand argued that the objection was contradictory as Switzerland chose to promote itself as an attractive host country for arbitral panels which is apparent in the fact that Swiss law gives effect to arbitral decisions and the Federal Supreme Court has the full ability under art 190(2) PILA to set them aside.[116] Thereby, Switzerland integrated international arbitral panels into its legal system.[117]

Thus, according to her representatives, it is irrelevant that Semenya is resident in South Africa as Switzerland exercised *de jure* and *de facto* control in that the Federal Supreme court omitted to set aside the discriminatory CAS decision (even if the event giving rise to the challenge occurred abroad).[118] There was therefore no extraterritoriality at all.[119]

In its Chamber judgment, the court first recalled that jurisdiction is primarily territorial and that the notion of territoriality must be interpreted to fulfil the object and purpose of the Convention.[120]

It further outlined that – for the purpose of art 6(1) ECHR as held in *Markovic* – the submission of a case within a country's legal system is sufficient to establish a jurisdictional link and that

[111] Ibid, paras 81/82

[112] Ibid, para 85

[113] Ibid, para 89

[114] Ibid, para 86

[115] Ibid, para 87

[116] Ibid, para 90

[117] Ibid, para 95

[118] Ibid, para 94

[119] Ibid, para 97

[120] Ibid, paras 101/102

the Federal Supreme Court gives arbitral decisions *res judicata* effect in the Swiss legal order, thereby reinforcing third-party violations of procedural rights (originating eg in CAS procedures).[121] The court further reiterated that the same was the case in terms of art 8 ECHR in *Platini* and that there was therefore no reason to limit the abovementioned approach to procedural guarantees.[122]

It furthermore clarified that not the DSD Regulations or otherwise conduct of the Monegasque then-IAAF as such but the proceedings at the CAS and Federal Supreme Court – which gave effect to the allegedly discriminatory regulation – are at the centre of the assessment and that the latter's decision is subject to the ECtHR's consideration under art 14 ECHR given that the Federal Supreme Court itself applied a form of the principle of non-discrimination.[123]

In view of the transnational nature of international arbitration, it drew distinctions between the supervision of the CAS by the Federal Supreme Court and the case of *Drozd and Janousek,* in which neither France nor Spain were accountable for procedural shortcomings in the Monegasque court system in default of judicial control by the respondent states.[124] Also, even though it held in *Galić* as well as *Blagojević*, that the mere seat of an international judicial body in a contracting state (*in casu* the ICC in The Hague) does not by itself trigger a state's positive obligations, this can't apply to the CAS as it is an entity under Swiss private law and not part of an intergovernmental organisation.[125]

At last, the Chamber noted that the applicant had no other legal avenue available than to refer the dispute to the CAS and afterwards the Federal Supreme Court and that if it "[…] were to find that it did not have jurisdiction to examine this type of application, it would risk barring access to the Court for an entire category of individuals, that of professional female athletes, which would not be in keeping with the spirit, object and purpose of the Convention. Such a conclusion would hardly be compatible with the idea of the Convention as a constitutional

[121] Ibid, paras 104/105; see also Markovic and Others v Italy (2007) 44 EHRR 52, paras 49-55 and Mutu and Pechstein (n 78), para 64

[122] Ibid, para 106; see also Platini v Switzerland App no 526/18 (ECtHR, 11 February 2020), paras 37/38

[123] Ibid, paras 107/108

[124] Ibid, para 109; see also Drozd and Janousek v France and Spain (1992) 14 EHRR 745

[125] Ibid, para 110; see also Galić v the Netherlands App no 22617/07 (ECtHR, 9 June 2009), para 46 and Blagojević v The Netherlands App no 49032/07 (ECtHR, 9 June 2009), para 46

instrument of [the] European [P]ublic [O]rder, of which the States Parties are required to guarantee at least the foundations to all the individuals under their jurisdiction […]".[126]

Consequently, the court concluded that "[…] to the extent that the findings of the CAS were reviewed by the Federal Supreme Court […]", the case falls within the jurisdiction of Switzerland and rejected – by a majority of 4 out of 7 – the government's preliminary objection that the court lacks jurisdiction *ratione personae* and *loci* and furthermore found a violation of art 14 in conjunction with art 8 ECHR as well as art 13 ECHR in relation to them.[127]

4.5. The joint dissenting opinion re jurisdiction

Judges Grozev, Roosma and Ktistakis issued a joint dissenting opinion on the majority's findings.[128]

They argued that, for the purpose of determining the jurisdictional link of art 14 in conjunction with art 8 ECHR, analogously applying *Markovic* to substantial rights would broaden the court's jurisdiction to cover all potential disputes in "the entire world of sports" for which there is no legal basis in the Convention. Furthermore, the majority errs on its logic: an obligation to provide a fair trial is different from an obligation to provide a forum for a hearing on a claim's merits.[129]

The national law providing a potential jurisdictional link is the Swiss PILA enshrining national public order which is – according to them – for Swiss courts to interpret, not the ECtHR as a body with subsidiary function, neither as to the material content, nor its jurisdiction. In its findings, the majority would therefore infringe upon a country's judicial independence which is inconsistent with the court's nature as a judicial body of subsidiary human rights protection.[130]

However, they continued, even if the national notion of public order was amenable to interpretation by the ECtHR, it is clear that the concept of public order stemming from the Convention would solely cover non-derogable rights like the right to life pursuant to art 2 ECHR and the prohibition of torture pursuant to art 3 ECHR which is reflected in consistent case law on

[126] Ibid, para 111

[127] Ibid, paras 112/113

[128] Ibid, joint dissenting opinion by judges Grozev, Roosma and Ktistakis

[129] Ibid

[130] Ibid

positive state obligations in extraterritorial contexts. Neither art 14 nor art 8 ECHR entail non-derogable rights and enlarging the scope of public order to capture them would thereby render the hierarchy of Convention rights nugatory.[131]

Consequently, the jointly dissenting judges concluded that there was no basis to establish a jurisdictional link and accordingly that the court lacked jurisdiction *ratione personae* and *loci* to decide the case.[132]

5. The joint dissenting opinion in light of the European Public Order

In the following, the points raised in the joint dissenting opinion will be critically appraised in light of the concept of the European Public Order outlined in Chapter 2.

5.1. Supra-constitutional primacy

5.1.1. The hierarchy of public orders

The jointly dissenting judges argued that the national courts' interpretation of public order clauses is not amenable to review by the ECtHR as this would be inconsistent with the subsidiary nature of the Convention and thereby infringe upon the contracting parties' national sovereignty.[133]

As noted in Chapter 2.3.1., the ECHR as an instrument of European Public Order embodies a common normative framework providing minimum constitutional safeguards for the countries within the multi-layered European legal sphere, the aim of which is a great degree of convergence of public orders.[134] The maintenance of the European Public Order's integrity necessitates its primacy over national public orders as otherwise, materially deficient ones would counteract its standards and thereby render its function nugatory.

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[131] Ibid, on the extraterritoriality of art 2 ECHR see eg Jaloud v The Netherlands (2015) 60 EHRR 29, para 152 and of art 3 ECHR see eg Al-Saadoon and Mufdhi (n 24), para 171

[132] Ibid

[133] See also Altwicker (n 41) 346 and Marisa Iglesias Vila, 'Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights' [2017] 15(2) International Journal of Constitutional Law 394

[134] See also Altwicker (n 41) 339, Dzehtsiarou (n 18) 88 and Sudre (n 5) 50

To give effect to the European Public Order's primacy, it is for the ECtHR as its guardian to enforce the ECHR over subordinated national public orders and insofar exercise its supreme adjudicative authority. This necessarily entails a review of the scope of national public orders in regards to that of the European Public Order.

5.1.2. Determining jurisdiction in a deterritorialised legal space

As noted above, the judges differ on the question where a jurisdictional anchor point arises: can a state appropriate third-party discriminatory conduct (by failing to prevent its effect from manifesting) if the original act took place outside its spatial territory, thus without any reasonably available possibility of the state to influence the particular private party proactively in the first place? While the jointly dissenting judges imply that discriminatory conduct taking place outside of a state's territory can't engage a state's substantive positive obligations under art 14 in conjunction with art 8 ECHR in legal proceedings, the majority's analogous application of *Markovic* insinuates that it can.

In the following, it will be broadly outlined how the ECtHR has adapted its jurisprudence on jurisdiction in the wake of growing international cooperation and how this can be applied to the phenomenon of compulsive international arbitration so as to justify the analogous application of *Markovic*.

5.1.2.1. Extraterritorial jurisdiction of the ECtHR

Transnationalisation and cross-border conduct of a state may affect the enjoyment of human rights in another one.[135]

In order to capture such developments, the ECtHR has adapted its interpretation of the notion of jurisdiction pursuant to art 1 ECHR: while jurisdiction is primarily territorial, "[…] the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention."[136] Principally, such constellations arise in cases of *effective control* by one country over an area or persons outside national territory, be it "as a

[135] Altwicker (n 7) 585/586

[136] Banković and Others v Belgium and Others (2007) 44 EHRR SE5, para 67

consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, [through which it] exercises all or some of the public powers normally to be exercised by that Government."[137]

In terms of possible effective control established by military occupation, the court had to determine in *Banković* – wherein relatives of victims of a NATO air strike on a Belgradian radio station claimed violations of various rights by ECHR signatories involved in NATO – whether the concerning states exercised effective control over the area through the military activities.[138] *In casu*, the court found that although NATO exercised control over the airspace, it fell short of being capable of providing *all* Convention rights to the inhabitants of that area (contrary to the situation in *Loizidou*)[139], thus the respondent states did not exercise effective control and the court consequently had no jurisdiction.[140]

In the context of the *War on Terror*, the ECtHR has increasingly turned away from this "all or nothing" approach: in *Al-Skeini*, it first held that any exercise or authority over an individual renders the respondent state responsible to secure the Convention rights which are "relevant to the situation of that individual" – insofar, Convention rights may indeed insofar be "divided and tailored".[141] Ultimately, it clarified in *Hanan* – which involved a German airstrike on an Afghani village – that airstrikes indeed constitute exercises of effective control and thus establish a jurisdictional link as well as ultimately trigger a respondent state's positive obligation under art 2 ECHR to conduct an effective investigation into allegations of deadly war crimes.[142]

In the context of cross-border policing, the court held in *Öcalan* – which concerned the applicant's apprehension on Kenyan soil and subsequent forcible transfer to Turkey by Turkish agents – that it was irrelevant whether the actions in question took place under the approval of Kenyan authorities or – *in contrario* – violated Kenyan national sovereignty. In either way, Turkey exercised effective control over the applicant and thereby exercised jurisdiction.[143]

In the context of Private International Law, the case of *K* involved the lack of enforcement of a Polish judgment by Italian authorities who were obliged to implement it due to an according

[137] Ibid, para 71

[138] Ibid, paras 9-11

[139] Loizidou (n 13), para 93

[140] Banković (n 136), para 75

[141] Al-Skeini v The United Kingdom (2011) 53 EHRR 18, para 137

[142] Hanan v Germany App no 4871/16 (ECtHR, 16 February 2021), paras 136-145

[143] Öcalan v Turkey (2005) 41 EHRR 985, paras 91-98

mutual treaty obligation. This was therefore a case of effective control by virtue of consensual transfer of executory competences from Poland to Italy.[144]

Altwicker has furthermore highlighted constellations of extraterritoriality which entail the manifestations of harmful activities in another country in the absence of effective control in the traditional sense; rather, states in which such activities originate have effective control *over the source* or *over the situation* which is particularly apparent in the contexts of transboundary environmental harm and cross-border bulk interception of data.[145]

5.1.2.2. From a spatial to a topological approach

In the *Semenya* case at hand, owing to the contractual arrangements of the parties involved, the discriminatory act (in the form of the DSD Regulations) towards Semenya took primarily place within the realm of the *lex sportiva*, instead of the traditional state jurisdiction of Monaco. *Ipso facto*, the CAS, which is not a (Swiss) national court as such, heard the challenge outlined in Chapter 4. The usual constellation of extraterritoriality is therefore not applicable *in casu*.

A model which is however capable of addressing the interactions between multiple legalities in an age of legal deterritorialisation is Burchardt's concept of legal space: her model involves sets and subsets of legal norms which constitute legal spaces which may or may not be linked to a territory.[146] To establish a space, legal elements (such as norms, values or customs which constitute subordinated sets and subsets) must be interrelated to create a necessarily dense network which as a whole can be considered as one distinct space.[147]

To assess whether spaces constitute fully autonomous entities or are intertwined, she takes an approach which is inspired by the mathematical concept of topology which measures a sphere's qualitative faculties instead of physical dimensions. Accordingly, spaces may overlap, thus sharing those elements and making them hybrid. This happens if normative influence(s) lead(s) to elements being functionally similar or even identical. Increasing normative convergence

[144] K v Italy (2006) 43 EHRR 50, para 21

[145] Altwicker (n 7) 593/594, in terms of cross-border bulk interception of data see also Holly Huxtable, 'ET Phoned Home… They Know: The Extraterritorial Application of Human Rights Treaties in the Context of Foreign Surveillance' [2018] 28(1-4) Security and Human Rights 103 and Big Brother Watch and Others v The United Kingdom (2022) 74 EHRR 17, para 497

[146] Burchardt (n 8) 526

[147] Ibid, 535

accordingly leads to an ever-growing number of such hybrid elements – the most extreme form of which is integration of a space into another one – making the former a subset of the latter.[148]

This however leaves the physical properties of the space which the subset is integrated in unaffected, even if the integrated subset's scope of application is open and reaches beyond the outer boundaries of the space. This is due to the notion of homeomorphism in topology: "[e]ven if an object is transformed by being stretched or bent, but without being ruptured or cut, it maintains its properties."[149]

To apply this concept to the relationship between the *lex sportiva* and the general Swiss (territory-based) legal space: Switzerland offers – through its private (international) law – a specialised forum for the *lex sportiva* in the form of the CAS, formally exercising authority over its practice through the recognition and validation of its decisions as well as the power to set those aside. Normatively, Switzerland has submitted the CAS's jurisprudence to Swiss public order and thereby values nationally considered essential.

Functionally, the CAS's situation is – apart from the more limited grounds of review as well as the lack of power to render reformatory (as opposed to cassatory) judgments – insofar not indifferent to that of a Swiss civil court of lower instance. This therefore makes the *lex sportiva* (as long as the CAS is agreed to be the arbiter) a subset of the Swiss legal space – and even though it internally expands through the entire world, it does not change the outer boundaries of the space as such (which nevertheless remains confined to the Swiss territory).

5.1.2.3. The need for analogous application of Markovic

In the following, it is worth ascertaining whether the above considerations on the topological approach to legal spaces may be helpful in determining whether the 'effective control over the source' or 'effective control over the situation' criterion is applicable *in casu*.

Generally, the fear that the criteria may lead to unlimited human rights jurisdiction which itself would render jurisdiction obsolete is not only raised by the jointly dissenting judges but also reflected in scholarly opinion.[150] Accordingly, a due limitation is ought to be set.

[148] Ibid, 541/542

[149] Ibid, 530/531

[150] Altwicker (n 7) 590

Altwicker notes that such a distinction lies in the factors of individualisation and concreteness of the normative relationship between a state and an individual, as well as the severity of the impact on the enjoyment of human rights. Aspects which determine the severity of the impact may be the "[…] dangerousness of the effects, impact duration, choice of means and the vulnerability of the targeted or affected individuals, as well as the overall security context in the state where the affected individuals reside […]".[151]

In the *Semenya* case at hand, the factors of individualisation and concreteness are principally inapplicable as the Swiss state did not directly interact with the applicant. However, the phenomenon of deterritorialised legal spaces warrants a consideration of the nexus between a state's creation or fostering thereof and the abstract risk of human rights violations therein.

On the one hand, as noted in the foregoing, Switzerland has – through its private (international) law – allowed for the creation of the CAS and conferred to it quasi-judicial powers as well as a relatively[152] high degree of autonomy. The institutional standing of the CAS is the *conditio sine qua non* for the steady development of the *lex sportiva* as well as the legal relationships and dynamics therein.[153]

On the other hand, the abstract risk of human rights violations within the *lex sportiva* is categorically constantly existent in default of corrective mechanisms. *In casu*, the applicant was faced with the choice of undergoing hormonal treatment and abandoning her career and had no other remedies available to her than to resort to the Swiss legal system. The impact of the discriminatory regulation which resulted out of the *lex sportiva's* autonomy is severe as to its effects and the lack of recourse in terms of human rights adjudication.

Therefore, even if the nexus between the applicant's situation and the functional integration of the CAS and the *lex sportiva* is indirect, the potential impact of legislative and judicial deference on athletes' rights is nevertheless grave enough to conclude that the 'effective control over the situation' criterion is applicable to constellations such as *in casu*.

In light of the above considerations, "the entire world of sports"[154] (as long as the CAS is determined to be the arbiter) is in fact – for the matter of human rights protection – part of Swiss

[151] Ibid, 591/592

[152] Referring to the limited grounds for review in art 190(2) PILA

[153] See also Vladislava Stoyanova, Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries (Oxford University Press 2023) 294

[154] Semenya (n 1), joint dissenting opinion by judges Grozev, Roosma and Ktistakis

law due to its functional and normative integration into the national legal order and regarding the nature of the ECHR as a living instrument[155], it is untenable how the ECtHR could refuse to adapt the notion of jurisdiction pursuant to art 1 ECHR to present-day conditions in which transnational and deterritorialised legal spaces are gaining traction.

Consequently, not extending jurisdiction to that entire *lex sportiva* would *in contrario* create a vacuum in the ECtHR's territorial scope of protection which would violate the integrity of the European Public Order – similar to the situation in *Loizidou* if the court had denied the existence of effective control by Turkey.[156]

Accordingly, the logical solution that would be in keeping with the spirit of the Convention as a "constitutional instrument of [the] European [P]ublic [O]rder"[157] is indeed the analogous application of *Markovic* as the majority undertook – with the effect that a jurisdictional link is established as soon as a claim is submitted in a national court for the purpose of substantial rights protection.

5.1.3. Preserving the ECtHR's authority

5.1.3.1. Competing international legal orders

The emergence of inter- and transnational legal orders has led to a certain degree of competition: which one prevails if there are conflicting norms and whose word is the last? As noted above, Sudre's European Public Order assumes the ECtHR as the supreme arbiter within the European legal sphere in the field of human rights. However, primacy does not preclude harmonisation; jurisdictional overlapping and interactions in the form of judicial dialogue may foster increasing international cooperation and normative alignment and generally, non-intervention and mutual respect between international legal orders may be pivotal for their functioning.[158] Nonetheless, it is important to identify the degree to which another international order's influence would not

[155] Tyrer v The United Kingdom (1979-80) 2 EHRR 1, para 31

[156] See also in the context of cross-border policing Michael Duttwiler and Anna Petrig, 'Neue Aspekte der extraterritorialen Anwendbarkeit der EMRK: Die Strassburger Praxis zu Art. 1 EMRK anlässlich der möglichen Beteiligung der Schweiz an internationalen Polizeieinsätzen' [2009] 2009(10) Aktuelle Juristische Praxis 1259

[157] Loizidou (n 13), para 93

[158] Jost Delbrück, 'Structural Changes in the International System and its Legal Order: International Law in the Era of Globalization' [2001] 2001(1) Swiss Review of International and European Law 18

be reconcilable with the Convention and consequently jeopardise the ECtHR's authority within the European legal sphere in the field of human rights, leading to the erosion of the European Public Order.

In the following, it will be broadly elucidated how the ECtHR has approached the issue of conflicting international state obligations in relation to the EU's and UN's legal orders.

5.1.3.1.1. The relationship to the European Union

Out of the 46 CoE member states which comprise the jurisdiction of the EC(t)HR, 27 are part of the EU. The EU itself has a fully-fledged autonomous legal system with the CJEU as its judicial body.[159] Its legal order has generally recognised the EC(t)HR's authority in the field of human rights; Art 6(2) TEU goes as far as to explicitly foresee the EU's accession to the ECHR. In 2014, the CJEU has however declared a draft agreement on accession to be incompatible with primary law, *inter alia* as it would undermine the court's authority within the EU's legal order and its autonomy vis-à-vis the EC(t)HR.[160]

In practice, the conflict between the two legal regimes has particularly been shown in cases whereby the EU member states relied on the principle of mutual trust according to which they presume fellow EU member states to share the same values and thus provide at least the same standard of human rights protection which is crucial for the functioning of a common market.[161] However, what if such trust is in fact unwarranted and in breach of the concerning states' obligations under the ECHR?

In *Bosphorus*, the ECtHR decided that in applying EU law, Ireland could be presumed to act within its obligations under the ECHR, given that EU law categorically provides *equivalent protection* to what the ECHR requires. Such a presumption may however be "rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient."[162]

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[159] Lando Kirchmair, Rethinking the Relationship between International, EU and National Law (Cambridge University Press 2024) 96

[160] Opinion of the Court 2/13 of 18 December 2014 [2014] ECR, ECLI:EU:C:2014:2454, para 258

[161] Lukáš Boháček, 'Mutual trust in EU law: trust 'in what' and 'between whom'?' [2022] 14(1) European Journal of Legal Studies 110

[162] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland (2006) 42 EHRR 1, para 156

This famous *Bosphorus Presumption* was for the first time rebutted in the case of *Moldovan*, in which the ECtHR held that France violated the applicant's right under art 3 ECHR by failing to duly consider the possibility of ill-treatment posed by inadequate prison conditions in Romania prior to his extradition.[163]

5.1.3.1.2. The relationship to the United Nations

In relation to the legal order of the United Nations, the ECtHR has ruled in *Klausecker* that the administrative tribunal of the ILO enjoyed immunity from EC(t)HR jurisdiction and that the German courts thus did not err in declaring legal challenges against its decision inadmissible given that the applicant had "available reasonable alternative means to effectively protect [his] Convention rights […]."[164]

Regarding the justiciability of the implementation of UNSC Resolutions[165] by the ECtHR, the court held in *Nada* that it had jurisdiction and that Switzerland violated the applicant's right to respect for private and family life under art 8 ECHR by implementing Resolution no 1390 too strictly – leading to his *de facto* entrapment in the enclave of Campione d'Italia without the ability to access vital medical care – without due regard for the applicant's legitimate interest (given that the Resolution itself did not entail any reasonable alternative for the effective protection of that right).[166] *In contrario*, the implementation of UNSC Resolutions must not "have the effect of lowering the minimum level of protection afforded by the ECHR."[167]

This approach was reiterated in *Al-Dulimi* (mentioned in Chapter 2), in which the court utilised the 'equivalent protection' criterion reminiscent of the abovementioned *Bosphorus Presumption*.[168]

Prima facie, this logic cannot be 1:1 transferred to the phenomenon of international arbitration due to the public nature of international organisations while arbitral panels are bodies of private

[163] Moldovan v France App no 12623/17 (ECtHR, 25 March 2021), para 125

[164] Klausecker v Germany (2015) 61 EHRR SE8, para 104

[165] Which are, as per art, 25 UNCh, binding upon the states and supreme over all other state obligations by virtue of art 103 UNCh

[166] Nada v Switzerland (2013) 56 EHRR 593, para 195

[167] Linos-Alexander Sicilianos, 'The European Court of Human Rights facing the Security Council' [2017] 66(4) The International and Comparative Law Quarterly 795

[168] Al-Dulimi (n 44), para 117

law.[169] However, these phenomena are insofar comparable as they concern the internationalisation – and thus deterritorialisation – of justice. Owing to the difference in institutional legitimacy, it is arguable that the 'equivalent protection' criterion's role is even more relevant in the context of international arbitration[170], which in turn would categorically strengthen the ECtHR's supervisory role therein.

5.1.3.2. The risk of arbitrariness and need for a rights-based review

In *Hornsby*, the court raised the significance of the court's (previously addressed) supervisory role in the prevention of arbitrariness.[171]

This was reiterated in *Al-Jedda*[172] and *Al-Dulimi*, with the court – in the latter – explicitly referring to the court's inherent task to uphold the European Public Order and its fundamental principles – one being the rule of law of which arbitrariness is its negation. Concretely, in not implementing UNSC Resolution no 1483 in a manner which would have been reconcilable with the guarantees of art 6(1) ECHR, thus depriving him of the Convention's protection in default of alternative yet equivalent protection, Switzerland acted arbitrarily in contravention of the European Public Order.[173]

In turn, it is to be ascertained whether specifically within the *lex sportiva*, the principle of the rule of law as part of the European Public Order could otherwise be safeguarded in default of the ECtHR's guardianship.

As noted in Chapter 2.2., the principle of the rule of law requires the existence of a legal basis for human rights restrictions.[174] Formally, a legal basis must not necessarily take the form of a

[169] See Semenya (n 1), para 110; however, this of course excludes international arbitral procedures of public international law nature

[170] Which is also apparent in the fact that the ECtHR assigns a state's interest of maintaining international relations and cooperation a certain weight (see eg Bosphorus (n 162), para 150)

[171] Hornsby v Greece (1997) 24 EHRR 250, para 40

[172] Al-Jedda v The United Kingdom (2011) 53 EHRR 789, para 146

[173] Al-Dulimi (n 44), para 145

[174] Picheral (n 25) 100

parliamentary act[175], yet it must at any time pass a certain qualitative threshold consisting of the factors of accessibility[176] and precision[177].[178]

Prima facie, those requirements can hardly apply in the constellation of passive discrimination as private individuals are not legislators and therefore cannot by nature base their conduct on law. However, private relations do not take place in legal vacuums either; individuals act within the bounds of discretion afforded to them by the principle of private autonomy in private law.[179]

In *Malone*, the court was faced with a constellation of discretionary conduct: it involved the wiretapping of the applicant by British authorities pursuant to administrative practice devoid of a basis in written law. According to British law, the authorities acted within customarily presumed discretion which may only be limited by legislation. The court held that a legal framework which allows for discretion must – as a safeguard against arbitrariness – indicate the scope and manner of exercise thereof in order to sustain the requirements in terms of qualitative compliance with the principle of the rule of law.[180] As no such legislation existed, the discretion was deemed overbroad and thereby arbitrary.[181]

This situation is insofar comparable to that of an international athlete who faces discriminatory federation regulations as they formally exist within the discretion afforded by contractual freedom as a principle of private law granted by a state's legal order. Within that autonomy however, a party may submit itself to a contractual arrangement entailing unduly broad discretionary power for the other, leading to unforeseeable and potentially unconscionable outcomes, particularly if – due to differential bargaining powers in negotiations or market positions – a party has in practice hardly a choice other than to agree to it.[182]

The case of *Semenya* demonstrates that such a relationship inside the *lex sportiva* is not necessarily materially different to that between a state and an individual; World Athletics comprises

[175] The Sunday Times v The United Kingdom (1979-80) 2 EHRR 245, para 47

[176] Silver and Others v The United Kingdom (1983) 5 EHRR 347, para 87

[177] Ibid, para 88

[178] Picheral (n 25) 99-101

[179] See also Ernest J. Weinrib, The Idea of Private Law (Oxford University Press 2012) 207

[180] Malone v The United Kingdom (1984) 7 EHRR 14, paras 66-68

[181] Ibid, para 79

[182] See also Weinrib (n 179) 78/79

a legislative organ which is tasked with passing regulations which are binding upon athletes in the field without prior negotiation.[183] There is therefore an abstract risk of arbitrariness.

Consequently, it is essential that a state counteracts the risk of arbitrariness in the realm of private (international) law by providing adequate safeguards to prevent the discretionary conduct of a party from abusing the other. In light of the considerations in Chapter 5.1.2.3., it is Switzerland which *in casu* incorporated the *lex sportiva* and is accordingly tasked with providing safeguards against arbitrariness therein.

It follows that the principle of the rule of law requires a rights-based adjudicative review of private conduct so as to prevent arbitrariness which would erode the European Public Order. In view of the foregoing elucidations on the supra-constitutional character of the ECHR according to the European Public Order, this necessarily entails its application and the ECtHR's authority as the supreme guarantor of the rule of law within the European legal sphere.

5.2. A hierarchy of rights?

The last point raised by the dissenting opinion is that an extraterritorial reach could only be assumed in non-derogable rights owing to the hierarchy of rights within the Convention.

In this regard, it is on the one hand to be ascertained whether there is a hierarchy of Convention rights under the European Public Order and on the other hand whether such a hierarchy determines their ability to exert an extraterritorial reach.

Those fundamental principles named in Chapter 2.2. form the basis the ECHR as a whole is based on and to be interpreted in light of. Even though the systematically monumental principle of respect for human dignity is clearly embodied in art 3 ECHR, Sudre denies the existence of a hierarchy of Convention rights.[184] This stance is particularly justified in light of the fact that the principles of the rule of law and pluralism are not by themselves enshrined in the Convention as rights on their own but rather components in the protection of all – including derogable – rights.[185] A conclusion to the contrary would furthermore be curious regarding the instance that art 14 ECHR – which embodies the fundamental principle of non-discrimination – is not

[183] See also the considerations on *de facto* compulsiveness in Chapter 3.4 and Mutu and Pechstein (n 78), para 119

[184] Sudre (n 5) 58

[185] See Chapter 2.2.

autonomously applicable and could thereby *prima facie* be mistakenly assumed to be a second-class guarantee.[186]

Under art 15(1) ECHR, a contracting state may in a time of "war or other public emergency threatening the life of the nation" derogate from its obligations under the Convention, except for – as art 15(2) clarifies – the non-derogable rights, namely those under arts 2, 3, 4(1) and 7 ECHR.

The aim and purpose of human rights derogation is to tailor human rights obligations to extraordinary and thus temporary situations of emergency, not to impede the ordinary administration of human rights protection and adjudication.[187] Also, no interpretation would allow the notion of derogability to be construed to allow for a determination which rights (do not) have an extraterritorial reach as this would significantly interfere with the substantive scope of art 1 ECHR, resulting in a reduction of the Convention's application and thus overall effectiveness of human rights protection.

The assumption is furthermore to be rejected regarding the fact that the right to a fair trial pursuant to art 6(1) ECHR is derogable as well and still applicable regardless of whether the substantive issue in a procedure arose outside of a state's territory or not and also regarding the possible extraterritorial jurisdiction of art 8 ECHR.[188] The opinion is thus inconsistent with existing case-law.

Followingly, the assumption of a hierarchy of rights is not reconcilable with the normative content of the European Public Order, not least along the delineation of derogable and non-derogable rights – the purpose of which is not extraterritoriality.[189]

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[186] See also Luzius Wildhaber, 'Protection against Discrimination under the European Convention on Human Rights—A Second-Class Guarantee?' [2002] 2 Baltic Yearbook of International Law 72

[187] Evan J. Criddle, 'Protecting Human Rights During Emergencies: Delegation, Derogation, and Deference' in Mónika Ambrus and Ramses A. Wessel (eds), Netherlands Yearbook of International Law 2014 (TMC Asser Press 2014) 200

[188] In terms of art 6(1) ECHR see Markovic (n 121), paras 49-55 and Mutu and Pechstein (n 78), para 64 and in terms of art 8 ECHR see Big Brother Watch (n 145) para 497

[189] See also Sudre (n 5) 58

6. Conclusion

The normative concept of the European Public Order serves as a tool for convergence of values and effective protection of human rights within the European legal sphere. In the view of increasing international legal pluralism, its role is more essential than ever: international arbitration is gaining traction and challenges the state-centeredness of international human rights regimes.

The *Semenya* case raises the question whether it is a state's obligation to foresee a remedy to challenge alleged violations of art 14 in conjunction with art 8 ECHR, thus substantive norms, so as to holistically normatively integrate compulsory international arbitral proceedings into the European Public Order – which the majority in the Chamber judgment agreed upon.

The points raised by the jointly dissenting judges re jurisdiction (which are indicative of opposition in the run-up of the forthcoming Grand Chamber judgment) refer to the independence of national public orders, the normative content of the European Public Order and the lack of a Swiss jurisdictional anchor point.

This paper has laid out how the joint dissenting opinion is inconsistent with the requirements of the European Public Order regarding the supra-constitutional value it assigns to the ECHR and its normative content.

More concretely, firstly, it's the ECtHR's task as the 'guardian of the European Public Order' to observe the compliance of state conduct with the ECHR which naturally entails the submission of national public orders to the European Public Order.

Secondly, the notion of jurisdiction pursuant to art 1 ECHR must be interpreted to give effect to the Convention's character as an instrument of the European Public Order and its mission to ensure state observance.[190] The deterritorialised character of compulsory international arbitration requires the deployment of the 'effective control over the situation' criterion in combination with a topological approach to legal space from which follows that the deterritorialised legal spaces created by compulsory international arbitration fall within the jurisdiction of their host states.

Thirdly, within signatory states' territorial jurisdiction, the ECtHR's authority as the ultimate arbiter within the European legal sphere in the field of human rights and the observance of the

[190] See also Loizidou (n 13), para 93

ECHR as the supreme law requires the national deployment of a human rights-based review mechanism for compulsory international arbitral decisions, as the lack of a possibility for review in default of other equivalent protection would result in arbitrariness.[191]

Lastly, the normative content of the European Public Order indirectly includes the whole of the ECHR – not merely its non-derogable rights.

It follows that – in view of the concept of the European Public Order – there is a state obligation to foresee an effective remedy to challenge alleged violations of art 14 in conjunction with art 8 ECHR. This entails that compulsory international arbitral proceedings are to be normatively integrated into the European Public Order not merely regarding procedural, but also substantive rights.

The ECtHR's Grand Chamber is yet to deliver its judgment which will ultimately decide the case and – for now – clarify the question on the application of substantive Convention rights to compulsory international arbitration more generally.

It remains to be seen how the ECtHR and international human rights bodies at large will develop the notion of jurisdiction in the face of likely increasing trends of quasi-judicial deterritorialisation in the future. While the respect for national sovereignty generally plays – not least in the face of rising nationalist sentiment – an essential role in the acceptance and implementation of international human rights law, it is nevertheless essential that the living nature of human rights instruments is observed and realised in order to maintain the effective protection of human rights in changing times, even if that entails forms of material constitutionalisation.

[191] See also Al-Dulimi (n 44), para 145

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Declaration of Authorship

I hereby declare that I have composed the presented written thesis independently and only with the aid of the sources mentioned in the indices or in the footnotes. I also assure that I have not already used this thesis as proof of my performance elsewhere. The thesis may be checked for plagiarism using appropriate software.

Daniel Maria Meier

Zürich, on 30 May 2024