



Physical and sexual abuse against young athletes in sport in light of article 8 of the European Convention on Human Rights (ECHR)

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Abstract

Numerous young athletes have suffered from physical and sexual abuse at the hands of their coaches. Despite this, the European Court of Human Rights (ECtHR) has never dealt with a violation of child rights under the European Convention on Human Rights (ECHR) in the case of physical and sexual abuse in sport. In this situation, a question that may arise is how young athletes can argue a violation of their substantive rights under the Convention before the ECtHR in the case of such abuses? In this regard, the right to physical and mental integrity under Articles 10 (2) and 27 (2) of the Swiss Federal Constitution (SFC) as well as the prohibition of an excessive limitation of personal freedom under Article 27 (2) of the Swiss Civil Code (SCC) may play an essential role to build a bridge between the Convention rights and the fundamental human rights under national law in light of the SFT's precedents within the meaning of *substantive public policy* under Article 190 (2) (e) of the Swiss Private International Law Act (PILA). Although the International Federations (IFs) have not recognised a legal standing of young athletes suffering from physical and sexual abuse, state parties to the ECHR must implement positive obligations under Article 8 (1) of the ECHR to take necessary measures to protect young athletes against such abuses by non-state actors and may require sports governing bodies within the jurisdiction to comply with Article 8 (1)'s obligations. Accordingly, this article might serve to clarify a duty of sports governing bodies to protect young athletes against such abuses through a lens of the ECHR.

Keywords Child rights · European Convention on Human Rights (ECHR) · Physical and sexual abuse · The right to physical and mental integrity · Substantive public policy · Young athletes

1 Introduction

Numerous young athletes have suffered from physical and sexual abuse at the hands of their coaches.¹ The European Court of Human Rights (ECtHR) has already treated some complaints of a violation of the European Convention on Human Rights (hereinafter, the ECHR or the Convention) in sports society.² However, the ECtHR has not dealt with the violation of child rights in the case of physical and sexual abuse in sport.

In this situation, how can young athletes may claim a violation of the Convention rights before the ECtHR? Generally speaking, there are two ways to reach the ECtHR: (1) appeal to ordinary national courts under national criminal law³; and (2) appeal to dispute resolution system in sport (i.e. from internal dispute resolutions bodies in sporting federations, the Court of Arbitration for Sport (CAS) and then the Swiss Federal Tribunal. (SFT)).⁴ On this basis, this article will focus on analysing the latter option because young athletes must follow an exclusive arbitral clause (exclusively

¹ UNICEF 2010, pp. 7-15.

² See ECtHR, *Fact Sheet on Sport and the European Convention on Human Rights, May 2021*, Press Unit of ECtHR. https://www.echr.coe.int/Documents/FS_Sport_ENG.pdf. Accessed 8 July 2021.

³ If victims of physical and sexual abuse in sport want to rely on Article 3 of the Convention, it is necessary to follow this process. The dispute resolution system in sport does not constitute a criminal proceeding and has a purely private nature. For instance, doping sanction has been considered as private sanction and thus it does not constitute double jeopardy. Therefore, this article will not consider Article 3 of the ECHR, but it will be taken into consideration in future article.

⁴ For instance, see *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, Judgment of 2 October 2018, ECtHR.

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referring to the CAS) or a waiver clause (renouncing the right to make a new claim before national courts), or both, in their sporting regulations.⁵ Based on these clauses, in principle, the athletes are not capable of making a new claim before ordinary national courts.⁶

Under these circumstances, can young athletes submit their complaints of a violation of human rights to the ECtHR after a hearing of the dispute resolution system in sport?⁷ In this regard, they must fulfil admissibility criteria under Article 35 of the Convention through examining (1) whether the ECtHR lacks the jurisdiction *ratione personae* over their application (Articles 1 and 35 (3) (a) of the ECHR)⁸; and (2) whether they have exhausted all domestic remedies before submitting it to the ECtHR (Article 35 (1) of the ECHR). On that basis, as of now, young athletes can claim a violation of *procedural rights* under Article 6 of the Convention in light of *Mutu and Pechstein v. Switzerland*.⁹

However, there is no discussion about how young athletes may claim a violation of their *substantive rights* under the Convention before the ECtHR in sports-related disputes? In this regard, the right to physical and mental integrity under Articles 10 (2) and 27 (2) of the Swiss Federal Constitution

(SFC) as well as the prohibition of an excessive limitation of personal freedom under Article 27 (2) of the Swiss Civil Code (SCC) may play an essential role to build a bridge between the Convention rights and the fundamental human rights under Swiss national law in light of the SFT's precedents within the meaning of *substantive public policy* under Article 190 (2) (e) of the Swiss Private International Law Act (PILA).

However, the International Federations (IFs) have not recognised a legal standing of young athletes suffering from physical and sexual abuse, and therefore, they cannot become parties before the internal dispute resolution bodies and the CAS in the case of physical and sexual abuse in sport.¹⁰ But, if the ECtHR finds a violation of Article 8 of the Convention due to such abuses, state parties to the ECHR must implement positive obligations under Article 8 (1) of the ECHR to take necessary measures to protect young athletes against such abuses by non-state actors. More importantly, they may require sports governing bodies within the jurisdiction to comply with Article 8 (1)'s obligations.¹¹ Accordingly, this article might serve to clarify a duty of sports governing bodies to protect young athletes against such abuses through a lens of the ECHR.

In light of the foregoing, the purpose of this article is to consider how young athletes may argue a breach of their substantive human rights under Article 8 of the Convention. In order to achieve this purpose, this article will be divided into the following sections: After this introduction, it will skim through child rights under the ECHR in the case of physical and sexual abuse against young athletes. Furthermore, it will analyse how young athletes may claim a violation of substantive human rights before the ECtHR after a hearing of the dispute resolution system in sport in light of Article 8 of the Convention.

⁵ For instance, Article 59 (2) of the FIFA Statutes (2019) concerns an obligation relating to dispute resolution, which prohibits claimants from having access to the ordinary national courts. Also, Rule 61 of the Olympic Charter (2019) prescribes that “[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration”. The waiver clause is permissible under Article 192 (1) Swiss PILA.

⁶ Ms. Pechstein attempted to submit her complaints to the ordinary national courts in Germany after her litigations from the CAS to the SFT. On 7 June 2016, the *Bundesgerichtshof* (BGH) rejected her claims as inadmissible on the ground that the arbitration agreement between her and the ISU is valid and binding. Ehle and Guaia 2016, pp. 418-419; Maisonneuve 2015, pp. 335-347; Favre-Bulle 2015, pp. 320-330; Rombach 2016a, pp. 268-276 at para. 54; The proceeding is still pending before the *Bundesverfassungsgericht*. See Rombach 2016b, p. 279; Frankfurter Allgemeine Zeitung, *Klagen über Klagen: Pechstein klagt weiter*, 12 July 2016. <https://www.faz.net/aktuell/sport/mehr-sport/sport-kompakt/sport-kompakt-klagen-ueber-klagen-14336748.html>. Accessed 8 July 2021.

⁷ This article will not consider physical and sexual abuse case before the internal dispute resolution body and the CAS because, at this moment, sporting regulations allow young athletes to bring physical and sexual abuse case before the dispute resolution bodies in sport.

⁸ *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, Judgment of 2 October 2018, ECtHR, para. 65, and 92-96.

⁹ TF 4A_248/2019, consid. 3.2; *Bramelid and Malmström v. Suède* (dec.), nos 8588/79 et 8589/79, Reports of Commission of 12 October 1989, para. 30; *R. c. la Suisse* (déc.), requête no 10881/84, le 4 mars 1987, CommissionEDH ; *Tabbane c. la Suisse* (déc.), no. 41069/12, le 1er mars 2016, CourEDH, para. 26-29; Jarrosson 1989, pp. 576-578 and pp. 589-590; see also Thomassen 2015, pp. 31-38.

¹⁰ Recently, a French professional female racing cyclist has appealed to the CAS over the UCI's lack of transparency in the two highly publicised harassment and abuse cases on 21 January 2021. See Kirsten Frattinis, “Marion Sicot appeals to CAS over UCI's lack of transparency in abuse cases”, available at <https://www.cyclingnews.com/news/marion-sicot-appeals-to-cas-over-ucis-lack-of-transparency-in-abuse-cases/>. Accessed 8 July 2021.

¹¹ D. Rietiker considered indirect horizontal effect of the ECHR on sports governing bodies, in particular, the FIFA's duty under the ECHR in application of the ECtHR's judgments concerning the obligation of international organisation. See Rietiker 2020, pp. 76-79.

2 Child rights in sport under the ECHR in the case of physical and sexual abuse against young athletes

In sports society, numerous young athletes have suffered from physical and sexual abuse at the hands of their coaches around the world.¹² Such abuses may cause them a serious adverse effect on their physical and mental conditions.¹³

The IOC Toolkit for IFs and NOCs (2017) clarifies the definitions of *physical abuse* and *sexual abuse* in sport. *Physical abuse* in sport means “any deliberate and unwelcome act—such as for example punching, beating, kicking, biting and burning—that causes physical trauma or injury. Such acts can also consist of forced or inappropriate physical activity (e.g. age, or physique inappropriate training loads; when injured or in pain), forced alcohol consumption or forced doping practices”.¹⁴ Moreover, *sexual abuse* in sport defines as “any conduct of a sexual nature, whether non-contact, contact or penetrative, where consent is coerced/manipulated or has not or cannot be given”.¹⁵

Based on the definitions, this section will analyse (1) physical abuse and (2) sexual abuse against young athletes under Article 8 of the Convention in light of the ECtHR’s precedents.

2.1 Physical abuse

Young athletes have suffered physical abuse at the hands of their coaches¹⁶ and due to excessive training

programmes.¹⁷ Moreover, their caregivers’ prejudice against competitive sports that young athletes should be exposed to *minimum pains* for enhancing their competitive performance.¹⁸

A state concerned is reluctant to intervene with the internal matters of sports governing bodies because they (mostly located in Switzerland) can enjoy freedom of association (*specificity of sport*)¹⁹ under Article 60 *et seq.* of the SCC.²⁰ Precisely, the Swiss government permits them to enjoy an extraordinary autonomy under Swiss private law.²¹ Thus, the state authorities were faced with a complex issue of whether it should intervene in the internal matters of sporting federations to deal with a violation of human rights in sport in terms of the extraordinary autonomy under Swiss private law.²²

Under such circumstances, can young athletes argue a violation of the right to physical and mental integrity under Article 8 of the Convention due to physical abuse by their coaches?

Article 8 of the Convention stipulates that:

“[e]veryone has the right to respect for his private and family life, his home and his correspondence”.

The concept of *private life* covers the right to physical and mental integrity of an individual and extends to the relationships between individuals. *Private life* is a broad term, “encompassing, inter alia, aspects of an individual’s physical and social identity, including the right to personal autonomy, personal development and to establish and

¹² Corneliu and Singh 2011, p. 296; see also UNICEF 2010, pp. 7-15.

¹³ Sérgio Pinheiro 2006, pp. 13-17 and pp. 63-66.

¹⁴ IOC Toolkit for IFs and NOCs 2017, p. 36; IOC launched a mission for safeguarding young athletes in the light of *Recommendation 18 of the Olympic Agenda 2020* at the Youth Olympic Games. In this context, the IOC published some official documents in 2018 (Buenos Aires) and 2020 (Lausanne), explaining “how incidents of harassment and abuse in sport may be reported during the Youth Olympic Games, and the subsequent procedures to safeguard athletes”. However, the IOC did not clearly mention the protection of child rights in these documents. See <https://www.olympic.org/safesport/olympic-and-youth-olympic-games-time>. Accessed 8 July 2021; The IOC also created the *IOC Toolkit for IFs and NOCs (2017)* and the *IOC Guidelines for IFs and NOCs (2016)* for creating and implementing policies and procedures to safeguard athletes from harassment and abuse in sport. See <https://www.olympic.org/safesport/assistance-for-olympic-movement-stakeholders>. Accessed 8 July 2021.

¹⁵ *Ibid.*, p. 36; FIFA also clarified the definitions of physical and sexual abuse in its publication. See FIFA, Child Safeguarding Toolkit for Member Associations, 30 June 2019. <https://resources.fifa.com/image/upload/toolkit-fifa-guardians.pdf?cloudid=nz1lyz3ykaioy7gwfms>. Accessed 8 July 2021.

¹⁶ UNICEF 2010, p. 8.

¹⁷ According to Paulo David, “[c]ompetitive sports can expose young athletes to at least four types of physical abuse and violence: excessive intensive training; peer violence; physical violence by adults, including corporal punishment; and violence due to participating in competitions”. David 2005, pp. 64-79.

¹⁸ This understanding causes negative consequences for young athletes who cannot say “no” against them, such as excessive training, forced diet, corporal punishment, violence by their parents as educational chastisement. See David 2005, pp. 64-79.

¹⁹ Valloni and Pachmann 2014, p. 21.

²⁰ Baddeley 2020, section. 2.1-2.2.

²¹ *Ibid.*, section. 2.3. and 4; Swiss Confederation, “Sport justice and state justice in Switzerland”, in *Enlarged Partial Agreement on Sport (EPAS)*, EPAS (2013) 30, 23 May 2013, Strasbourg. <https://rm.coe.int/report-of-the-seminar-on-sports-judiciary-and-human-rights-strasbourg-168073786b>. Accessed 8 July 2021.

²² But Switzerland would interfere with their internal matters only if acts or omissions of sporting federations are incompatible with *public order* under Swiss law. The concept of *public order* plays an important role to protect legal order in that state, especially the fundamental legal principle. Valloni and Pachmann 2014, pp. 24-25.

develop relationships with other human beings and the outside world”.²³ The violation of his or her physical integrity constitutes an interference with *private life*.²⁴

The purpose of Article 8 of the Convention is to protect the individual against arbitrary interference by public authorities and to “compel the State to abstain from such interference” (negative obligation).²⁵ Also, it contains “positive obligations inherent in an effective respect for private or family life”.²⁶ These “obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.²⁷ Therefore, the state concerned is held responsible for implementing a negative and positive obligation under Article 8 of the Convention to protect young athletes from physical abuse by their coaches.²⁸ Based on the positive obligation, in particular, it must provide an adequate legal framework to protect the athletes against a violation of their rights to physical and mental integrity by their coaches.²⁹

But, the state concerned can still justify its interference with the rights to physical and mental integrity under Article 8 (2) of the Convention. The interference will be compatible with Article 8 (2) only if “it is “in accordance with the law”, has an aim or aims that is or are legitimate under that paragraph and is “necessary in a democratic society” for the aforesaid aim or aims”.³⁰ In *Glass v. the United Kingdom*, the applicants argued that there were violations of Article 8 due to no effective respect for their rights to physical and mental integrity within the meaning of *private life* because the administration of diamorphine was contrary to the applicant’s will.³¹ The Court observed that the doctors’ medical care to the applicants was recognised as an intervention with their rights to physical and mental integrity.³² However, it held that the state’s intervention was unjustified under Article 8 (2).³³ It concluded that there was a violation of the right to physical and mental integrity under Article 8 of the Convention. By the same token, if the state concerned intervened to the right to physical and mental integrity due to physical abuse against young athletes, the ECtHR may decide

whether the state successfully justifies such an intervention under Article 8 (2) of the Convention.

However, it is important to note that, in sports society, there is no arbitrary intervention by state authority, but by non-state actors. Thus, a question that arises is whether the state parties may justify such intervention under Article 8 (2) of the ECHR. In this regard, there is no clear answer to this question by the Court and legal scholars so that it should be considered that the exceptions prescribed in Article 8 (2) of the ECHR might not play a role in positive obligations. However, the state parties may argue that their national law affords a sufficient protection to avoid being held responsible for the intervention by non-state actors.³⁴ If not, the ECtHR may find a violation of positive obligations under Article 8 (1) of the ECHR to take a necessary measure to protect young athletes against physical abuse by their coaches and to prevent such violation.³⁵

To sum up, it follows that young athletes can argue a violation of their right to physical and mental integrity under Article 8 (1) of the Convention due to physical abuse by their coaches. Although the state concerned can justify the state intervention to their rights under Article 8 (2) of the Convention, in the case of physical abuse in sports, exceptions set forth in Article 8 (2) do not play a role in positive obligations. On this basis, the state parties are held responsible for implementing positive obligations under Article 8(1) of the Convention to prevent the violations by the non-state actors when they fail to show that their national law provides a sufficient protection for young athletes against the physical abuse. In this sense, young athletes may claim a violation of their substantive rights guaranteed by Article 8 (1) of the Convention due to the lack of adequate legal frameworks for protecting young athletes against physical abuse by their coaches and the state parties may require sports governing bodies within the jurisdiction to comply with Article 8 (1)’s obligations.

2.2 Child sexual abuse

Child sexual abuse at the hands of coaches has occurred in sports society. It should be noted that there is a crucial difference between *sexual harassment* and *sexual abuse*.³⁶ On

²³ *Tysiac v. Poland*, no. 5410/03, Judgment of 20 March 2007, ECtHR, para. 107.

²⁴ *Đurđević v. Croatia*, para. 105;

²⁵ *Ibid.*, para 106.

²⁶ *Ibid.*, para 106.

²⁷ *Ibid.*, para 106.

²⁸ *Ibid.*, para. 96 *et seq.*

²⁹ *Ibid.*, para 107.

³⁰ *Glass v. the United Kingdom*, no. 61827/00, Judgment of 9 March 2004, ECtHR, para. 73.

³¹ *Ibid.*, para. 61.

³² *Ibid.*, para. 70.

³³ *Ibid.*, para. 73-83.

³⁴ ECtHR, Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence, Updated on 31 December 2020, para. 11.

³⁵ Harris et al. 2018, pp. 511-513.

³⁶ According to the CRC, the term ‘sexual abuse’ signifies that “the involvement of a child in a sexual activity against his or her free will, or where the child, due to his or her level of development, is unable to provide genuine consent to involvement in such activities”. In contrast, the ‘sexual exploitation’ involves “a nexus between the sexual abuse of a child and an exchange, whether direct or indirect, financial or in some other form, for the benefit of another person or persons”. Tobin 2019, pp. 1314-1330.

the one hand, a coach touches a girl's body for teaching techniques of sports with sexual intention (*sexual harassment*).³⁷ On the other hand, the coach forced them to engage in sexual intercourse using his or her superior status to young athletes (*sexual abuse*).³⁸ However, the athletes, mostly female athletes, may often confront with alienation from the sports community³⁹ when they refuse to accept unwanted sexual advances by their coaches.⁴⁰

Under such circumstances, they had accused their coaches of being a sexual abuser under national criminal law before national criminal courts. For instance, the UK Courts held that a former football coach, Bob Higgins, was jailed for 24 years and three months for abusing young players under British Criminal Code.⁴¹ Also, A French young athlete accused her coach of sexual abuse before the French Court.⁴² Thus, child sexual abuse in sport has been gradually recognised as a criminal offence under national criminal law.⁴³

In this context, how can young athletes claim a violation of the Convention rights due to child sexual abuse? In this regard, this subsection will analyse the ECtHR's precedents regarding sexual abuse under Article 8 of the Convention.

In *X. and Y. v. The Netherlands*, a young girl, who was mentally handicapped, experienced forced sexual abuse by a family member when she was 16 years old, and this experience caused her traumatic consequences.⁴⁴ The applicant lodged a complaint of violating her right to physical integrity under Articles 3 and 8 of the Convention. The Court observed that Dutch national law was not sufficient to protect

the applicant's right⁴⁵ so that it is incompatible with Article 8 (2) of the Convention.⁴⁶ Therefore, the Court decided that there was a violation of Article 8 of the Convention due to the sexual abuse against the victim,⁴⁷ and the Dutch government must implement a positive obligation to enact an adequate legal system to protect the victim under Article 8 of the Convention.⁴⁸

Another example is that, in *M.C v. Bulgaria*, a 14-year-old girl was raped by two individuals and the domestic authorities had dismissed it.⁴⁹ The Court observed that "[i]n accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim".⁵⁰ In this case, the Court held that the state concerned violated its positive obligation under Articles 3 and 8 of the Convention⁵¹ because the Bulgarian authorities did not conduct such an investigation and dismissed her allegation to having been raped by two individuals under Bulgarian criminal law lacking an effective punishing system on sexual abuse.⁵²

In light of the precedents, a question may arise as to whether young athletes may argue a violation of the right to physical and mental integrity due to sexual abuse by their coaches under Article 8 (1) of the Convention. In this regard, sexual abuse is recognised as an intervention in their physical and mental integrity. Moreover, the state must be held responsible for the relationship between private actors within its territory under positive obligation of Article 8(1) of the Convention.⁵³ In this context, young athletes may argue a violation of their rights to physical and mental integrity due to sexual abuse by their coaches.

Nevertheless, the state concerned can justify a state conduct under Article 8 (2) of the Convention that the state

³⁷ Touching the body has both positive and negative aspects in sport. Concerning positive touch, see Kerr et al. 2015, pp. 56-68.

³⁸ David 2005, p. 94; Cornelius and Singh 2011, pp. 330-302.

³⁹ David 2005, p. 94.

⁴⁰ UNICEF 2010, p. 14.

⁴¹ Steven Morris, "Bob Higgins jailed for 24 years for abusing young footballers", The Guardian, published on 12 June 2019. <https://www.theguardian.com/society/2019/jun/12/bob-higgins-jailed-for-24-years-for-abusing-young-footballers>. Accessed 8 July 2021; Patrick Sadd, The legal remedies for victims of child abuse in English football, LawInSport, published on 6 December 2016. <https://www.lawinsport.com/topics/item/the-legal-remedies-for-victims-of-child-abuse-in-english-football>. Accessed 8 July 2021.

⁴² Lionel Pittet, "Dans le sport, les victimes d'abus sexuels brisent le silence", LeTemps, publié jeudi 30 janvier 2020. <https://www.letemps.ch/sport/sport-victimes-dabus-sexuels-brisent-silence>. Accessed 8 July 2021.

⁴³ However, child victims are reluctant to disclose their horrible experiences. So, child sexual abuse is uneasy to be proved during judicial proceedings. Guðbrandsson 2010, p. 87.

⁴⁴ *X. and Y. v. The Netherlands*, no. 8978/80, Judgment of 26 March 1985, ECtHR, para. 8.

⁴⁵ *Ibid.*, para. 27.

⁴⁶ *Ibid.*, para. 30.

⁴⁷ *Ibid.*

⁴⁸ According to Harris et al., "[t]he Court's approach ... tends to suggest that it often views the sphere of protection under Articles 3 and 8 to be conterminous". On this basis, Harris et al. also noted that the Court found no violation of Article 3 of the ECHR in the case of domestic violence, but instead examined whether there is a violation of positive obligations under Article 8(1) of the Convention because Article 3 may apply in the most serious case. See Harris et al. 2018, p. 520.

⁴⁹ *M.C. v. Bulgaria*, no. 39272/98, Judgment of 4 December 2003, ECtHR, para. 9-71.

⁵⁰ *Ibid.*, para. 153 and 166.

⁵¹ *Ibid.*, para. 187.

⁵² *Ibid.*, para. 185.

⁵³ Harris et al. 2018, pp. 511-513.

concerned did not take any necessary measure to protect young athletes from the intervention in their rights. If not, it is incompatible with Article 8 (2) of the Convention and, therefore, there is a violation of Article 8 (1) of the Convention. However, as had been described above, the exceptions under Article 8 (2) might not apply in the case of positive obligations under Article 8 (1) of the Convention. When the national law does not grant a sufficient protection for young athletes against sexual abuse in sport by their coaches, the state parties would infringe positive obligations under Article 8 (1) of the ECHR. Therefore, they must provide a sufficient legal and administrative framework to protect young athletes against sexual abuse by their coaches under the positive obligations of Article 8 (1) of the Convention and prevent such violations. More importantly, they may also require sports governing bodies within the jurisdiction to comply with Article 8 (1)'s obligations.

3 Dispute resolution system in sport and the implementation of child rights under the ECHR

After the hearing of the SFT, young athletes can refer to Article 6 of the Convention on the grounds that the CAS did not guarantee the right to “a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.⁵⁴ According to *Mutu and Pechstein v. Switzerland*, the applicants claimed a violation of Article 6 of the Convention due to the arbitral tribunal lacking impartiality and independence from sporting federations⁵⁵ and that it did not guarantee the right to a public hearing during the CAS proceedings.⁵⁶ The ECtHR held that there was no violation of the right to a fair trial, but the right to a public hearing was violated because the CAS held its hearing on camera.⁵⁷

However, it is still unclear whether young athletes can refer to substantive human rights before any dispute resolution bodies. In this context, a question that may arise is how they can claim a violation of their substantive rights due to physical and sexual abuse by their coaches under

the Convention before the ECtHR. However, as had been described above, the internal dispute resolution body and the CAS have not allowed young athletes to be parties in the case of physical and sexual abuse. In this situation, this section will consider whether young athletes can claim a violation of human rights guaranteed by Article 8 of the Convention within the meaning of *substantive public policy* under Article 190 (2) (e) PILA so as to identify an indirect horizontal effect on sports governing bodies under the positive obligations of Article 8 (1) of the Convention.

In doing so, it will be divided into two parts: (1) admissibility criteria before the ECtHR under Article 35 of the Convention; and (2) complaint of a violation of fundamental human rights under Article 190 (2) (e) PILA in light of Article 8 of the Convention.

3.1 Admissibility criteria before the ECtHR

3.1.1 Jurisdiction *ratione personae* (Articles 1 and 35 (3) (a) of the ECHR)

This part will firstly consider the ECtHR's jurisdiction *ratione personae* because the “[c]ompatibility *ratione personae* requires the alleged violation of the Convention to have been committed by a Contracting State or to be in some way attributable to it”.⁵⁸ In fact, the CAS is a *private court* established by SCC. Therefore, a question that arises is why the ECtHR necessarily hears a case of the CAS.⁵⁹

In the *Mutu and Pechstein* case, the Court considered that “Swiss law confers jurisdiction on the Federal Court to examine the validity of CAS awards” and “that supreme court dismissed the appeals ..., thereby giving the relevant awards force of law in the Swiss legal order”.⁶⁰ Therefore, the Court held that “[t]he impugned acts or omissions are thus capable of engaging the responsibility of the respondent state under the Convention”. Accordingly, “the Court has jurisdiction *ratione personae* to examine the applicants' complaints as to the acts and omissions of the CAS that were validated by the Federal Court”.⁶¹ In *Michel Platini c. Suisse*, the Court reaffirmed that “[i]t also follows that the Court has jurisdiction *ratione personae* for hearing the Appellant's complaints regarding the acts and omissions of the CAS, endorsed by the Swiss Federal Tribunal”.⁶² So, it follows that the ECtHR is competent to hear a case of CAS

⁵⁴ See Besson 2006, pp. 395-416; Knigge and Ribbers 2017, pp. 779-794.

⁵⁵ *Mutu and Pechstein v. Switzerland*, para. 124-168; Hirsch L (2019), pp. 1-17 at pp. 10-13; Dos Santos 2019, pp. 122-123.

⁵⁶ *Mutu and Pechstein v. Switzerland*, para. 169-188; Hirsch 2019, pp. 13-14; Dos Santos 2019, pp. 123-124.

⁵⁷ Additionally, the ECtHR made a new judgment, *Ali Rıza and Others v. Turkey* on 28 January 2020, that clarified the guidance of establishing independent and impartial tribunals. See *Ali Rıza and Others v. Turkey*, nos. 30226/10 and 4 others, Judgment of 28 January 2020, ECtHR, para. 194-200; See also Gemalmaz 2019, pp. 38-58.

⁵⁸ ECtHR, *Practical Guide on Admissibility Criteria*, Council of Europe/European Court of Human Rights, 2019, para. 191.

⁵⁹ *Mutu and Pechstein v. Switzerland*, para. 65.

⁶⁰ *Ibid.*, para. 66.

⁶¹ *Ibid.*, para. 67.

⁶² *Michel Platini c. Suisse* (déc.), requête n° 526/18, le 11 février 2020, CourEDH, para. 38.

because the CAS constitutes as a part of the Swiss legal order endorsed by the SFT under the PILA regime.⁶³

However, why should a state concerned be held responsible for a *private act* before the ECtHR? In general, the Convention does not impose any direct obligations on private actors,⁶⁴ but Contracting States are also responsible for a violation of the Convention's rights of *private actors* within their territory.⁶⁵ In this regard, in *Costello Roberts v. the United Kingdom*, concerning corporal punishment against children in a private school, the ECtHR estimated that a school's disciplinary system falls within the ambit of Articles 3, 8 and 13 of the Convention and Article 2 of Protocol No. 1.⁶⁶ Also, it observed that "the state cannot absolve itself from responsibility to delegating its obligations to private bodies or individuals".⁶⁷ This approach may apply *mutatis mutandis* to other cases at Strasbourg.⁶⁸ Therefore, it follows that the state concerned must also implement "*indirect obligations*" to protect the rights of *private actors* under the Convention.

3.1.2 Exhaustion of all domestic remedies (Article 35 (1) of the ECHR)

It is also necessary to consider whether young athletes had exhausted all domestic remedies under Article 35 (1) of the Convention.

Article 35 (1) of the ECHR stipulates that:

"[t]he Court may only deal with the matter after all domestic remedies have been exhausted in the light of the generally recognised rules of international law (...)".⁶⁹

Under this provision, if the applicants had exhausted all domestic remedies (including the internal dispute resolution,

CAS and SFT) before submitting their applications to the ECtHR, the Court may declare them admissible.⁷⁰

According to *Ali Rıza and Others v. Turkey*, the Court considered that "an application to reopen the proceedings is an extraordinary remedy which the applicant need not exhaust", if sporting rules or CAS Code⁷¹ states that the decision "was final and that there were no circumstances warranting the reopening of the proceeding".⁷² The domestic remedies in this case "was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success".⁷³ However, "the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress".⁷⁴ When satisfying these conditions under Article 35 (1) of the Convention, the applications would not be manifestly ill-founded within the meaning of Article 35 (3) (a) of the Convention, but the Court must therefore declare this application admissible.

In *Michel Platini c. Suisse*, the Court observed that "Article 35 of the Convention compels to bring the complaints, which are subsequently to be submitted to the ECtHR, before the appropriate, at least in substance, domestic body and within the time-limits prescribed by domestic law".⁷⁵ Also, the Court considered that "that complaints under Article 6 have not been raised before the SFT, not even in substance".⁷⁶ Accordingly, it held that "the complaints must be rejected because of non-exhaustion of domestic legal remedies under Article 35 (1) and (4) of the Convention".⁷⁷ In this sense, if the athletes did not bring the complaints of a violation of their human rights before the SFT, the ECtHR must refuse them due to the non-exhaustion of domestic legal remedies under Article 35 (1) and (4) of the Convention.

In light of the foregoing, young athletes must fulfil the requirement of exhaustion of all domestic remedies before submitting their applications to the ECtHR. In doing so, they must claim a violation of human rights under national

⁶³ Dos Santos 2019, p. 120.

⁶⁴ Łukomski 2013, pp. 67-69.

⁶⁵ As Harris *et al.* put it, "it would be consistent with this reasoning for the state in all cases to be directly responsible under the Convention for the acts of private companies and other persons to whom powers that are traditionally state powers have been transferred by privatization, as in the case of private prisons". Harris *et al.* 2018, p. 27.

⁶⁶ *Costello-Roberts v. The United Kingdom*, no. 13134/87, Judgment of 25 March 1993, ECtHR, para. 27.

⁶⁷ *Ibid.*, para. 27.

⁶⁸ *Woś v. Poland*, no. 22860/02, Judgment of 8 June 2006, ECtHR, para. 72-73; *Kotov v. Russia* [GC], no. 54522/00, Judgment of 3 April 2012, ECtHR, para. 92.

⁶⁹ Concerning the general understanding of this provision, see Harris *et al.* 2018, pp. 49-62; Rietiker indicated this issue in the context of sport. Rietiker 2013, pp. 267-268.

⁷⁰ Schabas 2015, pp. 764-769; *Mutu and Pechstein v. Switzerland*, para. 72.

⁷¹ R46, paragraph 3 of the CAS Code: "The award, notified by the CAS Court Office, shall be final and binding upon the parties subject to recourse available in certain circumstances pursuant to Swiss Law within 30 days from the notification of the award by mail or courier."

⁷² *Ali Rıza and Others v. Turkey*, para. 164.

⁷³ *Ibid.*, para. 165; *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17135/11 *et al.*, Judgment of 25 March 2014, para. 74.

⁷⁴ *Vučković and Others v. Serbia* (preliminary objection) [GC], para. 74.

⁷⁵ *Michel Platini c. Suisse*, para. 40.

⁷⁶ *Ibid.*, para. 41.

⁷⁷ *Ibid.*, para. 42.

law corresponding to one of the Convention rights at the domestic level.

3.2 A complaint of a violation of fundamental human rights under Article 190 (2) (e) PILA in light of Article 8 of the ECHR

However, how can they claim a violation of another Convention rights apart from Article 6 of the Convention before the ECtHR, even if the athletes cannot claim a violation of their substantive human rights before national courts?

The dispute resolution system in sport is composed of three steps: (1) internal dispute resolution body in sporting federations; (2) the CAS; and (3) the SFT. The athletes must obey to the exclusive arbitral clause referring to the CAS⁷⁸, and then, they can appeal before the SFT under Article 190 (2) PILA. This provision provides for five conditions:

lack of the independence and impartiality of arbitrators or/and arbitral tribunal itself;
wrong acceptance or denial of the jurisdiction;
ultra petita (ruled beyond the claims) or *infra petita* (failed to decide one of the claims);
violation of the principle of equal treatment of the parties or their right to a public hearing; and
incompatibility with the public order.⁷⁹

When satisfying one of the conditions, the athletes can claim the annulment of the CAS awards before the SFT.⁸⁰ After the three steps, the athletes are entitled to bring the complaints of a violation of the Convention rights before the ECtHR.

However, there were no CAS awards concerning physical and sexual abuse in the context of *human rights* corresponding to Article 8 of the Convention. Hence, this article will focus on analysing how young athletes may claim a violation of their rights guaranteed by Article 8 before the ECtHR in

light of the SFT's jurisprudence. In doing so, this subsection will analyse the question of how the SFT permits the athletes to allege a breach of their substantive rights under the ECHR and Article 190 (2) (e) PILA?

In this regard, the concept of *public policy* under Article 190 (2) (e) PILA constitutes *substantive* and *procedural public policy*.⁸¹ In particular, the *substantive public policy* includes fundamental principles of substantive law, such as “contractual fidelity, respect for the rules of good faith, prohibition of abuse of law, prohibition of discriminatory or confiscatory measures, and protection of persons lacking civil capacity”.⁸² Among them, young athletes may claim the infringement of personality rights under Articles 10 (2)⁸³ and 27 (2)⁸⁴ of the SFC.⁸⁵

In this regard, Article 10 (2) of the SFC stipulates that:

Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.

Furthermore, Article 27 (2) of the SFC provides that:

Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.

However, Article 27 (2) of the SCC prescribes the prohibition of an excessive limitation of personal freedom, which reads as follows:

No person may surrender his or her freedom or restrict the use of it to a degree which violates the law or public morals.

Based on these provisions, what are personality rights under Articles 10 (2) and 27 (2) of the SFC? In TF 4A_558/2011 of 27 March 2012 (ATF 138 III 322), the appellant, a professional football player, argued that a prohibition of working as a football player worldwide and forever imposed by the FIFA Disciplinary Committee constituted “a grave violation of the freedom of profession guaranteed at Art. 27 (2) of the [SFC] and in international treaties, as well as an excessive limitation of personal freedom as substantiated in Art. 27 of the [SCC]”.⁸⁶ In this case, the SFT observed that:

⁸¹ Dutoit 2016, p. 868, para. 32; Rigozzi 2010, pp. 253.

⁸² TF 4A_260/2017, consid. 5.1; Kaufmann-Kohler and Rigozzi 2010, para. 847 g, p. 535.

⁸³ Article 10, para. 2 of the SFC: “[e]very person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement”.

⁸⁴ Article 27, paragraph 2 of the SFC: “[e]conomic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity”.

⁸⁵ In this regard, see Dutoit 2016, p. 873, para. 37.

⁸⁶ TF 4A_558/2011, consid. 4.2.

⁷⁸ For instance, Article 59 (2) of the FIFA Statutes (2019) concerns an obligation relating to dispute resolution, which prohibits claimants from having access to the ordinary national courts. Also, Rule 61 of the Olympic Charter (2019) prescribes that “[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration”. The waiver clause is permissible under Article 192 (1) Swiss PILA. So, the athletes must consent to such clauses as a prerequisite condition to participate in the sports competitions. Rigozzi 2010, pp. 226-227; Kaufmann-Kohler and Rigozzi 2010, pp. 476-477, para. 766-767; See also 4P.172/2006, arrêt du 22 mars 2007, *X. c. ATP Tour*, consid. 4.3.2.2.

⁷⁹ Article 190, paragraph 2 (a) to (e) Swiss PILA; Shinohara 2019a, pp. 124-141.

⁸⁰ *X. c. ATP Tour* case was the first case to set aside the CAS awards before the SFT. See 4P.172/2006, *X. c. ATP Tour*, consid. 6; Shinohara 2019b, pp. 228-231.

As a fundamental legal value, the personality of the human being requires the protection of the legal order. In Switzerland, it is protected constitutionally through the guarantee of the right to personal freedom (Art. 10 (2) [SFC]), which entails all liberties constituting the elementary manifestations of the unfolding of personality, in addition to the right to physical and mental integrity or to freedom of movement (...). The free unfolding of personality is also guaranteed among others by the constitution right to economic freedom, which contains in particular the right to choose a profession freely and to access and exercise an occupational activity freely (Art. 27 (2) [SFC]).⁸⁷

Furthermore, it noted that the personality right “is not protected merely against infringement by the state but also by private persons (Art. 27 (2) [SCC])”.⁸⁸ Accordingly, the Court held that “[t]he threat of an unlimited occupation ban (...) constitutes an obvious and grave encroachment in the Appellant’s privacy rights and disregards the fundamental limits of legal commitments as embodied in Art. 27 (2) [SCC]”. As a result, the CAS award in this case “contains an obvious and grave violation of privacy and is contrary to public policy (Art. 190 (2) (e) PILA)”.⁸⁹

In TF 4A_304/2013 of 3 March 2014, the SFT reaffirmed that “a violation of a player’s personality rights may be contrary to substantive public policy”, and that “a worker may have legitimate interest to carry out his profession effectively in order to avoid losing his value on the employment market and jeopardizing his professional future; this is particularly true for professional football players”. In other words, the SFT confirmed that the athletes could argue a violation of personal freedom (Article 10 (2) SFC and Art. 27 (2) SCC) in the context of economic freedom (Article 27 (2) SFC).⁹⁰

Thus it follows that the athletes may claim a violation of substantive public policy under Article 190 (2) (e) PILA in the context of Articles 10 (2) and 27 (2) of the SFC as well as Article 27 (2) SCC concerning the freedom of movement and economic freedom. In other words, young athletes may have access to the SFT due to a violation of the personal freedom derived from private individuals (Article 27 (2) SCC)⁹¹ in the context of freedom of movement (Article 10 (2) SFC)⁹² and economic freedom (Article 27 (2) SFC)⁹³.

⁸⁷ TF 4A_558/2011, consid. 4.3; see also Bucher and Bonomi 2013, p. 392.

⁸⁸ TF 4A_558/2011, consid. 4.3; see also Auer et al. 2013, pp. 147-148.

⁸⁹ TF 4A_558/2011, consid. 4.3.5.

⁹⁰ TF 4A_304/2013, consid. 5.2.2.

⁹¹ See ATF 113 Ia 257 S. 262, consid. 4 b).

⁹² Auer et al. 2013, pp. 149-152 and pp. 156-159; Mistic and Töpperwien 2018, para. 579, p. 213.

⁹³ Auer et al. 2013, pp. 415-466; Mistic and Töpperwien 2018, pp. 234-240.

On that basis, it appears to me that this situation may lead to another issue that the athletes might claim a violation of the freedom of the exercise of professional and business activities under Article 8 of the Convention.⁹⁴

The SFT specified that Article 10 (2) SFC “entails all liberties constituting the elementary manifestations of the unfolding of personality, in addition to the right to physical and mental integrity”⁹⁵ and “[t]he free unfolding of personality is not protected merely against infringement by the state but also by private persons” under Article 27 (2) SCC.⁹⁶ The violation of their personal freedom under Article 10 (2) SFC arises out of all interventions in human bodies.⁹⁷ In this context, the athletes might claim a violation of the right to physical and mental integrity under Article 10 (2) SFC and Article 27 (2) SCC before the SFT.

More importantly, in *Michel Platini c. Suisse*, the ECtHR accepted the applicability of Article 8 of the Convention on the grounds that “the claimant is not explicitly referred to the Swiss Federal Tribunal under Article 8, but that he has invoked an infringement of his personal rights (Article 27 SCC) and his economic freedom. The Court therefore considers that [the applicant] has exhausted, in substance, domestic remedies”.⁹⁸ Therefore, young athletes can claim a violation of their right to physical and mental integrity due to the deprivation of professional activities and earnings under Article 8 of the Convention before the ECtHR on the ground that they lost their earnings on account of the decisions by the dispute resolution system in sport. Thereby, it is difficult for young athletes to argue the violation of their rights *due to the physical and sexual abuse by their coaches* in light of *Michel Platini c. Suisse*.

However, the notion of *public order* would be perfectly matched for the evolutive interpretation of the ECHR so that it is necessary to observe the subsequent evolution of the interpretation of this notion.⁹⁹ In this sense, it seems to me that young athletes may complain about a violation of their rights to physical and mental integrity under Article 10

⁹⁴ Schabas 2015, pp. 374-375; Harris et al. 2018, pp. 557-559; In this regard, Valloni and Pachmann indicate this point that “[t]he Swiss Federal Supreme Court is very restrictive in the application of this appeal ground. Even the incorrect application of mandatory laws or the violation of human rights does not per se constitute a breach of *ordre public*”. Valloni and Pachmann 2014, pp. 129-130; BGE 116 II 634 consid. 4; see also Rietiker 2013, pp. 275-276.

⁹⁵ TF 4A_558/2011, consid. 4.3.

⁹⁶ TF 4A_558/2011, consid. 4.3.

⁹⁷ Auer et al. 2013, p. 149.

⁹⁸ *Michel Platini c. Suisse*, para. 51.

⁹⁹ Rietiker indicated that “[I]’avenir montrera s’il s’agit d’un arrêt exceptionnel ou du point de départ d’un développement important vers une prise en compte plus large des garanties de la CEDH à travers la notion de l’ordre public”. Rietiker 2013, pp. 275-276.

(2) SFC and Article 27 (2) SCC due to physical and sexual abuse by their coaches in light of Article 8 of the Convention. This is because there is still a possibility for them to prove that they lost their professional activities and earnings due to physical and sexual abuse by their coaches. Under this logic, they may claim a violation of their rights to physical and mental integrity under Article 10 (2) SFC and Article 27 (2) SCC due to physical and sexual abuse by their coaches in light of Article 8 of the Convention. However, it is necessary to wait until the SFT evolves the interpretation of *substantive public policy* under Article 190 (2) (e) PILA including young athletes' rights to physical and mental integrity in the context of physical and sexual abuse by their coaches.

Furthermore, it should be noted that Switzerland should not be held responsible for a violation of Article 8 of the Convention that occurred in another Contracting State. For example, if sporting clubs in the UK violated the right to physical integrity of young athletes under Article 8 of the Convention due to child sexual abuse, the British government should be responsible for the violation and take a regulatory and preventive measure to protect the athletes. Thus, even if the athletes can theoretically claim a violation of the right of physical and mental integrity under Article 8 of the Convention, Switzerland should be held responsible for the violation of Article 8 only if the violation occurred in its own territory.¹⁰⁰

4 Conclusion

In conclusion, young athletes may claim a violation of their rights guaranteed by Article 8 of the Convention due to the deprivation of their professional activities and earnings. However, it is still unclear whether they may argue the violation of their rights in the context of the physical and sexual abuse against them. In this regard, there is still a possibility to evolve the interpretation of substantive public policy that contains the physical and sexual abuse by private actors within the meaning of Article 190 (2) (e) PILA.

This article discussed how the athletes can claim a violation of Article 8 of the Convention before the ECtHR after the hearing before the dispute resolution system in sport. Regarding this issue, it analysed a question of whether or not the athletes may set aside CAS awards before the SFT due to a violation of public policy under Article 190 (2) (e) PILA. According to the SFT's precedents, young athletes

may claim a violation of their rights to physical and mental integrity in the context of the freedom of movement and economic freedom (Articles 10 (2) SFC, 27 (2) SFC and 27 (2) SCC). However, it is still unclear whether the athletes may claim a violation of the right to physical and mental integrity under Article 10 (2) SFC and Article 27 (2) SCC before the SFT due to physical and sexual abuse by their coaches within the meaning of Article 190 (2) (e) PILA.¹⁰¹ In this regard, it is necessary to observe the subsequent evolution of the interpretation of *substantive public policy* under Article 190 (2) (e) PILA before the SFT.

If they may bring a complaint of their right to physical and mental integrity due to physical and sexual abuse within the framework of Article 190 (2) (e) of the PILA, young athletes may invoke Article 8 (1) of the Convention to allege a violation of their substantive rights before the ECtHR. If so, the state parties must implement positive obligations under Article 8 (1) of the Convention to protect young athletes against physical and sexual abuse by their coaches. More importantly, they may also require sports governing bodies to comply with Article 8 (1)'s obligations. As a consequence, it follows that young athletes would claim a violation of their substantive human rights under the provisions of the ECHR before the ECtHR, and as a result, sports governing bodies would have a duty to protect them against such abuses by their coaches under the positive obligations of Article 8 (1) of the Convention.¹⁰²

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¹⁰¹ Also, young athletes may claim human rights' violations before the SFT under Articles 8 (2) of the SFC (discriminatory measures) relating to Article 14 of the Convention within the framework of Article 190 (2) (e) PILA. See Rietiker 2013, p. 275; Auer et al. 2013, pp. 473-530; TF 4P_12/2000, consid. 5 a) aa); TF 4A_370/2007, consid. 5.4.

¹⁰² However, it is further worth noting that the extraordinary private autonomy of sports governing bodies might be controversial because the state parties may argue that non-intervention with the acts of sports governing bodies can be justified because of the private autonomy guaranteed by Article 60 et seq. of the SCC. This issue will be examined in future research.

¹⁰⁰ See Daniel Rietiker, "The European Court of Human Rights and FIFA: Current Issues and Potential Challenges", *Verfassungsblog*, published on 6 July 2019. <https://verfassungsblog.de/the-european-court-of-human-rights-and-fifa-current-issues-and-potential-challenges/>. Accessed 8 July 2021.

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