HUMAN RIGHTS PROTECTION IN EUROPE IN THE CONTEXT OF SPORTS ORGANISATIONS' DISCIPLINARY AND ARBITRATION PROCEDURES

Good practice handbook No. 5

Enlarged Partial Agreement on Sport
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Accord partiel élargi sur le sport

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HUMAN RIGHTS PROTECTION IN EUROPE IN THE CONTEXT OF SPORTS ORGANISATIONS' DISCIPLINARY AND ARBITRATION PROCEDURES

Good practice handbook for the sports movement

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Foreword

Promoting sports justice that respects human rights.

The "sports justice" decisions taken by disciplinary bodies and arbitration tribunals are based on statutes, regulations and contracts drawn up by sports organisations. Their role is important for ensuring consistent and fair application at the international level of rules, the regulation of tournaments and the operation of sports associations. These organisations enjoy a certain amount of autonomy in the context of freedom of association but without being exempt from positive law. A growing number of issues are arising involving the overlapping of responsibilities between government bodies and the sports movement: the organisation of events, the fight against doping, safety and security management in sport and at sports events, the encouragement of sporting activities, the regulation of the betting market, combating the manipulation of competitions, and visa rights, for example.

The organisation and characteristics of this "sports justice" are described in handbook No. 6 published by EPAS in 2017 especially for the attention of courts and judicial staff who may be required to deal with cases involving the organisation of the sports movement.

Areas of tension between state law and disciplinary and arbitration rulings based on the self-regulation of the sports movement have come to light in such areas as labour law, competition law and, more recently, human rights. This can be seen, especially on human rights issues, in the growing number of actions brought to public national and international courts by members of the sports movement alleging breaches of their fundamental rights.

Even though there is no requirement for the disciplinary and arbitration bodies of the sports movement to apply the provisions directly, it must be possible, according to the case law of the European Court of Human Rights, for an appeal to be lodged against their decisions before a court with jurisdiction to rule on their compliance with fundamental rights.

In this connection, it is important for those responsible for sports governing bodies and members of the sports movement's disciplinary and arbitration bodies to be made more aware, at the very least, of the need to protect human rights and of the principles that could conflict with their regulations or decisions.

This handbook reviews the human rights provisions that may be threatened by practices or decisions of the sports movement. References are provided in each instance for those provisions whose application in the sports context has already been the subject of legal debate or court judgments.

As a body of the Council of Europe, for which the defence of human rights is a core task, and as a platform for co-operation on sports policies, EPAS wants to contribute to the debate on this emerging issue of fundamental rights in sport and also wishes to disseminate useful information on the defence of human rights in sport.

Stanislas Frossard
Executive Secretary of the Enlarged Partial Agreement on Sport (EPAS)

1. General introduction

Issues related to the practice of sport are becoming ever more important. For athletes, the opportunity to take part in the Olympic Games and the results that they may achieve there can change every aspect of their personal circumstances, particularly their economic prosperity and their social status. For a professional football club, whether or not it obtains a licence to take part in the following season's championship will determine whether a large number of people can be kept in work. For non-amateur athletes, temporary suspension from competition can lead to considerable losses resulting from non-payment of appearance fees and prize money or the possible withdrawal of some or all of their sponsors.

For sports federations, maintaining a degree of discipline among their ranks and ensuring that competitions are run fairly and consistently are essential preconditions for preserving the appeal of the sport in question, the very reason why athletes, the public, sponsors and broadcasters make their respective contributions to that sport.

There can of course be conflicts between the interests of federations and sports participants, so it is not surprising that sport-related legal disputes are on the rise. Such disputes have to be settled and, as we shall see, the desire of federations to protect their autonomy has prompted them to devise instruments to settle most conflicts internally by means of ever more extensive and detailed regulations and special subordinate bodies tasked with deciding on disputes, particularly in disciplinary matters. To avoid – as far as possible – having to resort to the ordinary courts, which are considered too slow and not sufficiently familiar with the realities of sport, the sports movement also tends to prefer to invite the persons concerned before arbitration bodies, which generally specialise in the sport concerned, if they are not satisfied with decisions taken by their association.

These arrangements – disciplinary proceedings followed, where appropriate, by arbitration – keep a large majority of sports disputes away from the ordinary courts, although arbitration decisions are generally subject, as we shall also see, to a usually very restricted review (with exceptions linked to specific national characteristics). Decisions given by sports federations, reviewed in some cases by arbitration bodies, have serious consequences for the persons concerned. We therefore need to look closely at the guarantees that the system offers to persons whom federations accuse of disciplinary offences. On the one hand, it is generally best for federations for procedures to be carried out very quickly so as to remove those bringing the sport into disrepute and preserve their reputation, and this sometimes entails some procedural corner-cutting. On the other, it is in the interest of the persons concerned for their case to be heard fairly, more or less as it would be by the ordinary courts. The difficulty lies in striking a happy medium between these seemingly conflicting goals so as to avoid the accusation of perfunctory and arbitrary procedures, leading ultimately to the development of legislation and case law liable to encroach on the autonomy of sport as a result of the reactions of parliaments and judges, moved by the way in which individuals in the world of sport are being treated; fair treatment of the persons affected by disciplinary procedures in sport may also considerably reduce their inclination to contest the decisions through formal proceedings, thereby contributing to a degree of serenity in the functioning of the sports organisations concerned.

In this happy medium referred to above, human rights inevitably play a crucial role, even if – and this will be explained later on – compliance with them is not an obvious and exhaustive formal requirement in the context of sports associations, as the main parties addressed by the texts in which such rights are enshrined are states, not the private persons formed by sports organisations. During their proceedings, such organisations and the arbitration bodies ruling on sports disputes simply cannot overlook principles as universal as, for example, the right to be heard or, more generally, the right to a fair trial.

The aim of this handbook is to determine whether, and, if so, to what extent, respect for human rights – particularly those enshrined in international conventions – is a requirement for sports organisations and arbitration tribunals when they are dealing with disciplinary matters (Chapter 2), how such human rights are actually implemented in sports proceedings and how they could be applied more effectively without preventing such proceedings from being relatively simple and swift (Chapter 3).

2. Sports justice and human rights

2.1. Introduction

Sports issues are now inextricably tied up with the need to respect human rights, and there are two main reasons for this.

First, the sports movement is a domain in which certain fundamental rights are attained. This is the case for example with the freedom to engage in the occupation of one's choice, freedom of association, the right to equality or the right not to be discriminated against on the ground of one's sex, race, religion, political opinions or national or social origin. Admittedly, the right to practise the sport of one's choice has not been enshrined as a fundamental right by positive law. While it is recognised for example by the International Charter for Sport and Physical Education, adopted by UNESCO on 21 November 1978, this is only a declaratory instrument. Nonetheless, many commentators, including certain human rights specialists, no longer have any hesitation in calling for fuller recognition. This clearly shows that, as a social activity, sport is seen as an ideal means of personal fulfilment.

Second, the sports movement is a locus of power, in which the persons who wield authority – the sports organisations – may act in a manner which encroaches on their members' freedoms, for example by laying down rules of conduct or adopting disciplinary sanctions. It is essential therefore for the way in which sports organisations exercise their powers to be regulated and made subject to respect for athletes' fundamental rights.

Protecting human rights has become a key concern when consolidating the instruments and mechanisms designed to regulate sport, from the viewpoint of both sports organisations and states.

Regarding the former, it is not rare, although far from a general trend, for sports organisations to incorporate human rights-related provisions into their articles of association, disciplinary regulations or other standard-setting instruments, particularly in connection with the exercise of disciplinary powers. This attitude stems from a desire to legitimise their actions. However, on a more fundamental level, compliance by sports organisations with athletes' fundamental rights can also be a question of the legality of their actions.

Many states are becoming more and more demanding vis-à-vis sports organisations. They may strongly encourage them for instance to adopt good governance policies, a key component of which is respect for human rights. Furthermore, the main joint initiatives by states concerning the regulation of sport most often establish a clear link with human rights protection. For instance, UNESCO's International Convention against Doping in Sport (19 October 2005) refers in its preamble to "existing international instruments relating to human rights". Likewise, the Council of Europe Convention on the Manipulation of Sports Competitions (CETS No. 215), which was opened for signature on 18 September 2014, refers to human rights as one of the essential components of concerted action by the authorities and sports organisations in the fight against this abusive action which threatens sport.

Nonetheless, it does not always go without saying that sports organisations will be required to respect human rights as we would traditionally define them, and as enshrined in a very large number of national or international legal instruments, namely as "rights and powers securing human freedom and dignity, covered by institutional safeguards" (Sudre 2012: 12). Human rights are primarily prerogatives granted to people to enable them to protect themselves against interference by the authorities – the state and its emanations – in their sphere of individual freedoms. Yet, the aim here is to impose respect for human rights on sports organisations, which are private bodies. Furthermore, these organisations demand enhanced autonomy, which is often interpreted as placing them outside the scope of the ordinary law. Their autonomy is also particularly wide when they are exercising their disciplinary powers and settling disputes with members.

These two features do not necessarily prevent human rights from being applied to sports organisations. However, it is not a question of subjecting sports federations entirely to the same constraints which apply to the authorities. In

particular, the unqualified transposition of the conditions inherent in a form of justice which shows due respect for human rights to the context of disciplinary proceedings in sport or even to sport arbitration cases is neither justified nor desirable as the "sports justice" system (for some clarification about this expression, see 2.3.1 below) cannot and must not be equated with the state justice system. Accordingly, to deal with the question of the requirement for sports organisations to respect human rights, we need to adopt a somewhat adjusted definition of human rights, accepting that not all of them have to be imposed as a totally inflexible restriction on sports organisations' actions and that when some of these rights can be applied to these organisations (see 2.2), it is sometimes at the cost of certain adjustments needed to take account of the specific characteristics of the sport concerned (see 2.3).

2.2. The scope of human rights: legal value and enforceability

We shall first identify the sources and mechanisms for the protection of human rights (see 2.2.1), and then consider the question of their enforceability against private persons (see 2.2.2).

2.2.1. The sources and mechanisms of human rights protection

The recognition of specific rights (section 2.2.1.3) by formal sources (section 2.2.1.1) would have no effect if there were no mechanisms through which they could be claimed (section 2.2.1.2).

2.2.1.1. Formal sources of human rights protection

Whether at national, regional or international level, the body of law establishing human rights is very diverse. It is made up of some instruments which are purely declaratory in nature and others which have binding legal force. Nonetheless, however disparate they are, these instruments do have certain common features. First, they all recognise or declare

rights rather than create them, which highlights the fact that the prerogatives they establish are inherent in all individuals and their human condition. Second, these instruments also establish a broad core of shared values and principles, thereby upholding the universal dimension of human rights.

It is not our aim here to provide an exhaustive list of these instruments. A simple overview of the main human rights instruments will be sufficient to establish their overriding value in the hierarchy of norms.

Human rights first emerged at the national level. Certain historic instruments have provided the foundation for the entire theory of human rights: the Magna Carta of 1215, the Petition of Right of 1628 and the Bill of Rights of 1689 in England; the Declaration of Independence of 1776 and the Constitution of 1787 in the United States of America; and the Declaration of the Rights of Man and of the Citizen of 1789 in France.

Today, at national level, human rights are most frequently enshrined in instruments of a constitutional rank, which assigns them the highest place in the hierarchy of norms and implies that all norms with a lower rank must comply with them. The establishment of human rights has, moreover, become one of the essential components of any constitutional instrument, forming an essential precondition for the establishment of any state governed by the rule of law.

There are exceptions, however. In the United Kingdom, for example, human rights are established through legislation (such as the Human Rights Act of 1998, which transposed the Convention for the Protection of Human Rights and Fundamental Freedoms into domestic law) and through custom, with their content deriving, in substance, from the historical texts referred to above and from case law.

In addition, even in cases where human rights are expressly laid down at constitutional level, nothing prevents instruments of a different nature and value from also contributing to their implementation. For instance, in Switzerland, Article 28 of the Civil Code transposes the obligation to respect personality rights, which include certain fundamental rights such as the rights to privacy and freedom of movement, into the sphere of private relations. This is an important provision because it is not uncommon for the Court of Arbitration for Sport (CAS, described in detail below in sections 2.3.2.1 and 2.3.2.2.2), whose awards may be subject to an appeal in the Swiss Federal Supreme Court, to refer to it in

the context of appeals against sports federations' disciplinary decisions.[1] In common-law countries, the principles of natural justice such as the *Audi alteram partem* rule, according to which everyone has the right for his or her case to be heard, or the *Nemo judex in causa sua debet esse* principle, according to which nobody may judge a case in which he or she is a party, both of which are closely related to the requirements of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the right to a fair trial, also play an essential role in the effective implementation of fundamental rights. It is interesting to note, moreover, that the rules of procedure of some arbitration bodies specialising in sports disputes have adopted these principles as basic standards, which must govern procedure. This is the case for example with the New Zealand Sports Disputes Tribunal, which is required, under Rule 17 of its own rules, to observe "in all matters" "the principles of natural justice". It is also the case with the UK body, Sport Resolutions,[2] whose arbitration rules do not expressly mention the principles of natural justice but do provide that

> [a]ny decision of the Tribunal in relation to the conduct of the proceedings shall be consistent with its duties at all times to act fairly and impartially, to allow the parties reasonable opportunity to put their respective cases and to deal with that of their opponent and to avoid unnecessary delay or expense, so as to provide a fair and efficient means for resolving the dispute (Rule 8.1).

The internationalisation of human rights came much later but there are now a very large number of international instruments. Many are only declaratory in nature. This is the case with the many declarations by the United Nations General Assembly on the rights of the child (20 November 1959), on the elimination of all forms of racial discrimination (20 November 1963) or on the elimination of discrimination against women (7 November 1967), which have nonetheless often been the prelude to the adoption of a full binding international convention. A special mention must be made of the Universal Declaration of Human Rights of 10 December 1948, which was the first time that human rights had been laid down in an international instrument. Although, officially, it serves only as a recommendation, its content can be

1. See, for example, CAS 2006/A/1025, Puerta v. ITF, §11.7.17.
2. Described as "the independent, not-for-profit, dispute resolution service for sport in the United Kingdom", see www.sportresolutions.co.uk/ (accessed 13 November 2017).

interpreted as having binding customary force given how much it contributed subsequently to the consolidation of human rights in positive international law.

Binding instruments are, however, no less abundant. Some are intended to bind all the countries of the world. These are mostly sectoral conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), the Convention on the Political Rights of Women (31 March 1953), the Convention on the Rights of the Child (20 November 1989), or conventions adopted at the instigation of the International Labour Organization such as the Freedom of Association and Protection of the Right to Organise Convention (9 July 1948). Here again, one instrument deserves a special mention, namely the International Convention against Apartheid in Sports (10 December 1985), which is specifically intended to combat certain serious abuses in sport infringing the fundamental right to non-discrimination on the ground of race. In addition to these sectoral instruments, there are the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, both of which were adopted on 16 December 1966 and have a much more general scope.

Some other instruments have a regional scope. Of these, the most well known outside the European context are the American Convention on Human Rights, adopted by the Organization of American States on 22 November 1969 (the San José Pact), the African Charter on Human and Peoples' Rights adopted by the Organisation of African Unity on 28 June 1981 and the Arab Charter on Human Rights of 14 September 1994.

In the European setting, the most important instrument is the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), also known as the European Convention on Human Rights (hereinafter "the Convention"), which was adopted by the Council of Europe on 4 November 1950 (and has been supplemented and amended by several protocols). The European Social Charter (ETS No. 35) of 18 October 1961 complements the Convention by establishing social rights such as the right to work and trade union rights, whereas the Convention establishes civil and political rights (such as the right to life, the prohibition of torture, the right to a fair trial and the right to respect for one's private life). European Union law also comprises a substantial mechanism for the protection of fundamental rights. The Court of Justice of the European Union (the CJEU, which was called the Court of Justice of the European

Communities before the entry into force of the Lisbon Treaty) was the first body to work for the recognition of human rights in the Community legal system. Drawing initially on national legal traditions and then on the Convention and the case law of the European Court of Human Rights, the CJEU established fundamental rights as "general principles of Community law",[3] placing them on the same footing as the founding treaties. More generally speaking, the other main source of international human rights law is general legal principles, in their form as unwritten norms. The CAS frequently refers to these and applies them in particular when incorporating certain fundamental rights, particularly procedural rights, into the legal system for sport (see 2.3 below). Since 1 December 2009, the Charter of Fundamental Rights of the European Union of 7 December 2000 has also had binding force (whereas prior to this it was only declaratory). In essence, it reiterates the rights enshrined in the Convention, but it also adds certain economic rights such as freedom of enterprise, reflecting the main economic freedoms enshrined in the treaty establishing the European Economic Community (Treaty of Rome, 1957).

2.2.1.2. Human rights protection mechanisms

Despite the existence of a large number of human rights instruments, individuals will still be only virtual beneficiaries as long as there is no mechanism enabling them to demand effective compliance.

At the domestic level, it is mainly the courts which perform the role of protecting fundamental rights and freedoms. The effectiveness of human rights is therefore primarily dependent on the right of access to the courts, which is in itself a fundamental right.

At the international level, there are many human rights protection procedures. Their main aim is to protect individuals against interference by the authorities in the sphere of their fundamental freedoms. Some of these procedures are non-judicial, such as those of the Human Rights Committee, which produces regular reports monitoring compliance

3. See the Rutili judgment of 28 October 1975.

by states with the UN Covenant on Civil and Political Rights. Others are judicial mechanisms, such as the system set up by the Convention which enables private persons to apply directly to the European Court of Human Rights (hereinafter "the Court") to challenge states' decisions once domestic remedies have been exhausted.

2.2.1.3. The rights in question

It is usual to divide human rights into three distinct categories or generations.

The first generation of human rights incorporates those rights which were the first to be established, namely civil and political rights such as the right to life, the right to personal dignity and safety, the right to freedom of thought, conscience, religion and expression, the right to freedom of assembly and association, the right to equality before the law, the right to a fair trial and the right to private property.

The second encompasses economic, social and cultural rights, such as the right to work and to fair working conditions, the right to education, the right to physical and mental health and the right to rest and recreation.

Lastly, the third generation of rights is one that is not relevant to this handbook, namely the rights of people, such as the right to peace and a healthy environment.

With very few exceptions, such as the right to life or the right not to be subjected to physical duress (though in both cases, particularly the second, the matter is still debated), human rights never have absolute status. This is the case with second-generation rights which are not directly enforceable but should be regarded more as aims guiding the authorities' actions. The same also applies to first-generation rights, to which exceptions may be made to satisfy an overriding aim. For example, despite the right to free expression and assembly, the authorities may prohibit an event such as a sports meeting when it may give rise to public disorder. Likewise, wearing religious symbols may be banned or restricted in certain circumstances in order to uphold the principle of secularity.

Human rights protection instruments sometimes spell out the conditions under which a fundamental right may be infringed. This is the case in particular with Article 8.2 of the Convention. This provision establishes the right to respect for private life and provides that interference may be tolerated only if it is: (1) prescribed by law; (2) justified in the interests of national security, public safety or the economic well-being of the country, or for the prevention of disorder, the protection of health or morals or the protection of the rights and freedoms of others; and (3) necessary for the pursuit of these aims. When no express provision is made by the applicable instruments, courts are generally guided by a proportionality test, which helps them to check that the infringement is not excessive. The Court, more particularly, makes use of a composite proportionality test, enabling it to check that: (1) the restrictive measure is appropriate to the aim pursued (for example, will banning the event considered to be dangerous make it possible to prevent the trouble feared?); (2) the restrictive measure is necessary to achieve the aim pursued (for example, would the deployment of extra law-enforcement bodies around the disputed event not be sufficient to reduce the risks of public disorder?); (3) the measure does not entail a disproportionate burden in comparison with the benefits to which it gives rise (the proportionality test in its strictest sense). On the whole, this proportionality test serves merely as a guideline for the implementation of human rights and they still cannot be applied in any absolute or intangible way.

With regard more specifically to the sports movement, there are many human rights liable to be infringed by sports organisations.

These may be substantive rights such as the right to respect for private life or the right to freedom. The regulations implemented under the fight against doping are a perfect example (for more details, see section 3.3.1. below). Under the World Anti-Doping Code and under the supervision of the World Anti-Doping Agency (WADA), as well as the authorities responsible for anti-doping measures at national level, athletes are subject to strict supervisory obligations through a geolocation system (Whereabouts Monitoring and the ADAMS system): they agree to an obligation to be locatable for one hour per day, every day, between 6 a.m. and 11 p.m. and must update the information on their location for each forthcoming quarter. This can be seen as an infringement of their freedom of movement. It can also be regarded as an infringement of the right to protection of private life as the athletes subject to these obligations must abandon any kind of spontaneity in their lifestyles because they must notify the relevant authorities of all their movements,

whether for professional or private purposes (see Lapouble 2011: 901-912; Verbiest, Hadef and Joly 2008: 63 et seq.). These aspects and others relating to the compatibility of the World Anti-Doping Code with certain fundamental rights are considered in more detail under section 3.3.1.1.4.1 below.

They may also be procedural rights, such as those which every individual should be able to enjoy when he or she appears before an authority passing judgment. It is the very purpose of this handbook to identify those fundamental rights which may be infringed when disciplinary proceedings are initiated in sport and arbitration is used to try to settle disputes between sports organisations and their members. The third part of this handbook outlines what the relevant procedural rights are in this specific context.

Even though one of these rights may be enforceable against sports organisations – that is to say that the legality of their acts can be assessed in the light of their compliance with this right – it is not absolutely binding on them. Organisations may limit the enjoyment of such rights provided that they are acting with a legitimate purpose. Here, of course, it is the specific aims of the sports movement which must be taken into account: the desire to uphold sports ethics, to protect the political neutrality of sports organisations or to improve athletes' safety may justify measures which restrict freedoms. However, in this case, the infringement made must not be excessive. Here again, the principle of proportionality must serve as the yardstick by which the legality of restrictions on athletes' fundamental rights will be gauged.

2.2.2. Enforceability vis-à-vis private persons

Over time, human rights have been shaped and consolidated to protect individuals against oppressive authorities. More specifically, the recognition and effective protection of human rights enables persons to guard against interferences with their freedoms by the authorities – the state and its satellites. According to the traditional view of human rights therefore, only states can be required to meet the obligation of respecting individuals' fundamental rights.

It should be noted, moreover, that in the field of sport, the authorities shoulder the main responsibility for ensuring that sports practices do not give rise to unjustified infringements of individuals' fundamental rights. This applies with regard

to both the implementation by states of their regulations on sport (such as anti-doping measures) and the freedom that states grant to sports organisations for the purposes of their self-regulation (see sections 2.3.2 and 2.3.3 below). In the latter case, if the state leaves too much discretion to these organisations and is not able to supervise properly the decisions they adopt, any resulting infringements of human rights may be attributed to the state's shortcomings (in which case we talk of negative interference or passive interference by the state; for a more detailed analysis of this question, see the report by the joint programme of the Sorbonne and the International Centre for Sport Security on ethics and sport security – ICSS 2014, part 2: 456 et seq.).

There have, however, been major changes in the scope of application of human rights, and it is acknowledged today, despite some reluctance deriving from the traditional concept of human rights, that private persons can also be required to respect human rights and fundamental freedoms. This change has emerged gradually as a response to the true nature of relationships between private persons, as some private persons are in a position to exercise restrictive authority over others which is comparable, in certain aspects, to that of the state.

This principle was clearly established by the CJEU in relation to fundamental economic freedoms in the Walrave and Koch judgment of 12 December 1974. The aim was to determine if the rule adopted by the Union cycliste internationale (UCI) under which, to take part in certain competitions, cyclists and trainers had to be of the same nationality was compatible with the prohibition on discrimination.

In its judgment, the CJEU found that:

> the abolition, as between member states, of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3 (c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.[4]

4. Case 36/74, judgment of 12 December 1974.

Outside the EU law context, some courts are now quick to hold private persons responsible for respecting the fundamental rights enshrined in the states' constitution (the German courts were groundbreakers in this area). Case law on the horizontal effect (i.e. the effect on relations between private persons) of international conventions, particularly the Convention, is rarer. It is not non-existent, however, as is shown for example by certain decisions by the French courts pursuant to Article 8 on the right to respect for private life and Article 9 on religious freedom in the context of relations between employers and employees or landlords and tenants.[5]

Most certainly, not all fundamental rights can be applied to relations between private persons in this way. It is also clear that the extent to which this concept of the application of human rights may be exercised depends on the nature of the relationships between the persons concerned. However, the most important issue is the degree to which a private person may encroach on the freedoms of another. Clearly, the extent of the powers which sports organisations may exercise over their members is such as to warrant, in principle, the enforceability of the obligation to respect human rights on such organisations, particularly when they are exercising disciplinary powers.

2.3. The organisation of sports justice

We shall first clarify the concept of sports justice (2.3.1) and then focus on the need for the sports movement to regulate itself (2.3.2) and the limits of self-regulation (2.3.3).

5. See for example, Court of Cassation, Social Affairs Division, judgment of 17 October 1973, *Bulletin Civil,* No. 484, p. 144; Court of Cassation, Social Affairs Division, *Spileers v. SARL Owni Paw,* judgment of 12 January 1999, *D.* 1999, p. 6451; Court of Cassation, *Nikon,* judgment of 2 October 2001, *D.,* 2001, jur. 3148; Court of Cassation, 3rd Civil Division (Cass. Civ. 3rd), *Mel Yedei v. OPAC Ville de Paris,* judgment of 6 March 1996, *Bulletin Civil* III, No. 60; Cour de Cassation, 3rd Civil Division, *SMHLM,* judgment of 22 March 2006, *RDC,* 2006, p. 1149.

2.3.1. Concept of sports justice

Any sports organisation, whether it is international, national or local in scope, will have its own system of supervision through which it can ensure proper compliance by its members with its rules, particularly its disciplinary rules (from here on in, we will refer mainly to disciplinary matters). Depending on the resources deployed by each sports institution, the disciplinary arrangements may be of varying degrees of detail and be managed by one or more bodies, in the course of a procedure which sometimes comprises several levels of supervision (see Cornu, Cuendet and Vidal 2017).

This is not dissimilar to a justice system and it is not unusual for people to use the expression "sports justice" to designate all the control mechanisms set up by sports organisations to ensure that their members comply with their disciplinary rules, whether they are officials, athletes, referees or other persons involved in competitions. Some sports federations have themselves adopted terminology from the world of justice to designate their disciplinary bodies. This is the case with FIFA for example, whose Disciplinary Code uses the expression "judicial bodies" for the Disciplinary Committee, before which cases are brought initially, the Appeal Committee and the Ethics Committee (Article 73 of the Disciplinary Code), or the Fédération internationale de l'automobile (FIA), whose Judicial and Disciplinary Rules designate the first-instance disciplinary body by the expression "International Tribunal".

It is also undeniable that many sports organisations' disciplinary procedures are tending to become increasingly judicial in nature, taking state structures as their model (for example, in some federations, the prosecuting body is separate from the trial body and there are different levels of proceedings). This "judicialisation" is prompted by increasing recognition of fundamental procedural rights such as the right to a fair trial.

Sports organisations' disciplinary systems cannot, however, be equated with actual courts. A supervisory body can be regarded as a court only if it is independent and impartial and if it adopts decisions with the status of final judgment. Yet, despite the efforts of various sports organisations to ensure that their disciplinary bodies are independent and impartial, it has to be said that they do not have the same attributes as true courts. Furthermore, appeals against their decisions may always be brought before a court, which may be a state court but is more likely to be a court of

arbitration specially set up to hear sport-related matters. Accordingly, although the expression "sports justice" is used in this handbook because it is commonly used in studies relating to sport law, the reader should not be misled because there is no question of regarding sports disciplinary bodies as courts on the same footing as state courts or courts of arbitration (and this is not what sports federations expect anyway). This clarification is all the more important because it also explains why some of the requirements that apply to true courts, relating to respect for fundamental procedural rights – such as a clear separation between the authorities in charge of investigating complaints and those passing judgment – cannot necessarily be transposed as such to the disciplinary bodies of sports organisations.

2.3.2. Need for self-regulation

2.3.2.1. The principle of the autonomy of the sports movement

Apart from a few exceptions, such as France, which considers sports organisations perform a public-service task, most states rarely intervene in the regulation of sports activities. The sports movement operates on the basis of a highly integrated institutional set-up based on a pyramid structure, with the international federations at the summit having monopoly rights in relation to their particular discipline (with a few exceptions, particularly as regards the North American major professional leagues, which are not under the authority of the international federations corresponding to their sport). This accounts for the fact that the sports movement has very substantial autonomy vis-à-vis the authorities.

This principle of the autonomy of the sports movement is central to the whole system for the regulation of sport (see Chappelet 2010). It is very widely recognised by states. At the European level, the EU institutions regard it as a prerequisite for any initiative to regulate the commercial or societal aspects of sport. It is referred to for example in the European Commission's "White Paper On Sport" (2007), in the Declaration by the European Council in Nice on the specific characteristics of sport (2000) – which pointed to the Council's support for "the independence of sports organisations and their right to organise themselves through appropriate associative structures" – and in the Resolution of the Council and of the Representatives of the Governments of the Member States of 1 June 2011 on a European Union

Work Plan for Sport for 2011-2014 (Resolution 2011/C 162/01). The principle of autonomy is also central to the Council of Europe's work on sport. A resolution of the Parliamentary Assembly adopted in 2008 states, for example, that "the independent nature of sport and sports bodies must be supported and protected, and their autonomy to organise the sport for which they are responsible should be recognised" (Resolution 1602 (2008)). The Committee of Ministers' Recommendation to the member states of 2 February 2011 (Recommendation CM/Rec(2011)3) on the principle of autonomy in sport defines the principle as follows:

> the autonomy of sport is, within the framework of national, European and international law, the possibility for non-governmental non-profit-making sports organisations to:
>
> – establish, amend and interpret the "rules of the game" appropriate to their sport freely, without undue political or economic influence;
> – choose their leaders democratically, without interference by states or third parties;
> – obtain adequate funds from public or other sources, without disproportionate obligations;
> – use these funds to achieve objectives and carry out activities chosen without severe external constraints;
> – co-operate with public authorities to clarify the interpretation of the applicable legal framework in order to prevent legal uncertainty and contribute, in consultation with public authorities, to the preparation of sports rules, such as competition rules or club rules of sports NGOs, which are legitimate and proportionate to the achievement of these objectives.

Even more recently, the Council of Europe Convention on the Manipulation of Sports Competitions (CETS No. 215), opened for signature on 18 September 2014, acknowledges that, "in accordance with the principle of the autonomy of sport, sports organisations are responsible for sport and have self-regulatory and disciplinary responsibilities in the fight against manipulation of sports competitions".

Sports organisations themselves take the view that their autonomy is essential to their existence and protects them from excessive intervention by public authorities in the organisation of sports competitions.

From a legal viewpoint, the autonomy of the sports movement basically implies two things.

First, they have self-regulatory capacity, meaning that they themselves produce the standards which apply to them and their members. This occurs in particular in the disciplinary field, where sports organisations issue their own standards of conduct and, where necessary, decide to harmonise the applicable rules at international level (see Cornu, Cuendet and Vidal 2017). In this area, governments cannot force sports organisations to incorporate certain principles or measures into their sports regulations. The adoption in the French Sports Code of standard disciplinary regulations, which all French sports federations must apply, is an exception. It should also be said that, even in France, international federations are not expected to perform a public-service task and are free to determine their own statutes and internal organisation.

The ultimate manifestation of this self-regulatory capacity is the emergence of a true *lex sportiva*, which can be defined as all the rules of international scope drawn up by sports organisations themselves to regulate the conduct of sports competitions. Furthermore, because of the pyramid structure and the highly integrated nature of the sports movement, the effectiveness of sports rules is ensured through arrangements which are also specific to the sports movement and do not require any intervention from the authorities. A decision by a national federation to suspend an athlete, for example, can be systematically recognised by other national federations for competitions within their remit or if the international federation demands that this be the case. In other words, most sports rules are self-executing.

Therefore, sports organisations are instrumental in the construction of a genuine sports legal system, which is distinct from state legal systems, although inevitably linked to them. The CAS, which can be regarded as the sports movement's supreme judicial authority in that it has extremely broad powers as a result of the fact that a very large number of sports federations have placed themselves under its jurisdiction, also works very actively to consolidate this legal system. It does so in particular by fleshing out the rules of sports law – such as those deriving from the regulatory instruments adopted by sports organisations – and many general principles of law, some of which are drawn from national legal systems or international law and are related to the recognition of individuals' fundamental rights.

Second, sports organisations also have a capacity to supervise themselves, which they exercise in particular through their disciplinary authority. However, their need for autonomy vis-à-vis the authorities is such that the sports movement

has also opted to prefer the use of arbitration procedures to escape the control of national courts. These are the two most pronounced illustrations of the principle of autonomy.

2.3.2.2. The autonomy of sports justice

2.3.2.2.1. The autonomy of disciplinary law

In the disciplinary field, the autonomy of sports organisations is very extensive. The prevailing principle here is that sports organisations are free both to adopt the substantive disciplinary standards by which their members must abide and to organise their own enforcement system.

The body of disciplinary standards encompasses rules:

- defining the behaviour expected of, or prohibited for, members of the organisation; anyone in breach of the rules is committing a disciplinary offence;
- establishing the disciplinary procedure;
- determining how one or more disciplinary bodies will operate;
- determining the sanctions applicable to anyone found guilty of a disciplinary offence.

The instruments in which these rules are laid down take an extremely wide variety of forms. Most commonly, they are found in sports organisations' disciplinary rules, and more occasionally in their articles of association. However, sports organisations may also adopt other texts, such as codes of ethics, complementing these regulations.

It should also be said that the CAS arbitration panels have done a great deal of work to enrich the body of internationally applicable disciplinary standards by identifying certain rules of conduct that apply to all the members of the sports movement as general principles of law. This is the case for example with the principle of the integrity of sports competitions or the principle of fair play (see ICSS 2014, part 2: 457 et seq.).

The freedom of sports organisations to draft their own disciplinary rules may be limited by, or subject to, certain efforts to harmonise the applicable law out of a concern to take efficient measures against deviant conduct. This is for example the case with the fight against doping, as the adoption of the World Anti-Doping Code by the WADA is intended precisely to unify the rules on anti-doping measures in all sports. However, so far this has been the only example of harmonisation.

With regard to the organisation of supervisory systems, sports organisations again have complete freedom to organise their disciplinary procedures as they wish. This partly explains the extreme variety of existing models.

There is a notable exception to the principle of the autonomy of sports organisations' disciplinary power in states like France which have adopted a system whereby responsibility for a public sport service is delegated to sports federations. Such systems are based on the principle that sports federations, which hold a monopoly over the organisation of competitions within their sports, are given a public-service role in their sphere of activity. In this context, sports federations have broad ordinary law powers, particularly when they adopt disciplinary sanctions. In other words, they act on behalf of the state. As a result, the autonomy they enjoy is closely regulated by the legislature or the regulatory authority. In the disciplinary sphere, the authorities may therefore lay down the rules and define the procedures to be followed by sports organisations. In France, as already stated, the Sports Code provides for a standard set of disciplinary regulations to be adopted by the executive authority of the state, which must be complied with by all the sports federations to which a public sport service task has been delegated.

The exercise of disciplinary authority by sports organisations must be divided between national and international federations, whose powers and functions should in principle be complementary but may actually conflict. In this context there are many different models for the distribution of powers and functions because, depending on the sport concerned, the frequency of international competitions or the number of national federations, the respective responsibilities of national and international bodies can vary greatly. There are, however, some clear general trends, which make it possible to establish the following main lines of division of responsibility.

In general, international sports federations are responsible for:

- laying down the disciplinary rules that apply to the competitions they hold;
- applying disciplinary sanctions for offences occurring during the competitions they hold or related to these competitions or even in some cases for offences not directly linked to competitions (such as defamatory public statements by coaches about federation bodies or bribery of an official for a competition to be awarded to a particular organising committee);
- extending sanctions – in general, suspensions – applied by national federations for offences relating to national competitions to international level (for example, the suspensions applied to players by national football federations for the manipulation of results, which FIFA has decided to apply at the world level);
- temporarily or permanently excluding the perpetrators of certain disciplinary offences committed in a national context from the competitions they hold (for example, the exclusion of Turkish clubs from competitions held by Union of European Football Associations (UEFA) for corruption offences occurring in relation to the Turkish championship);

National and, in some cases, continental and/or regional federations may:

- lay down the disciplinary rules that apply to the competitions they hold;
- apply disciplinary sanctions for offences occurring during the competitions they hold or relating to these competitions or even in some cases for offences not directly linked to competitions;
- "recognise" and apply sanctions applied by another national federation if the person to whom the sanction applies intends to carry out an activity in its country.

2.3.2.2.2. Arbitration – The preferred method

A general presentation of arbitration – To increase their autonomy vis-à-vis states, sports organisations have chosen to make use of arbitration, particularly to settle any disputes they may have with their members, such as cases in which

they contest disciplinary decisions taken against them. This preference for arbitration makes it possible, to a very broad extent, for sports organisations to escape the jurisdiction of state courts.

Arbitration is a private legal remedy in the sense that the parties to the dispute refer to a third party of their choice (a single arbitrator or a full tribunal), who is not a judge belonging to the state justice system but someone vested by the parties themselves with the power to settle legal disputes.

On the whole, there are many advantages to arbitration procedures:

- they make it possible to refer to judges who are experts in highly specialist areas of activity, such as sport;
- they make it possible to apply specially adapted control mechanisms, which are not subject to the judicial constraints of ordinary courts; accordingly, arbitration proceedings are often much faster than proceedings before the ordinary courts;
- in principle, they are confidential; some case documents and all or some of the decisions can nevertheless be made public, though in principle only if the parties have given their consent, or at least are not opposed to it;
- the proceedings are entirely guided by the principle of the independent will of the parties, who subject themselves voluntarily to arbitration; they appoint the arbitrators of their choice; they are free to determine which law is applicable;
- above all, the decisions given by courts of arbitration are considered to be final and cannot be appealed against, particularly before the state courts; that is not to say, however, that courts of arbitration are not subject to any supervision; national legislation generally makes provision for the possibility of lodging an application to set aside arbitration awards; however, the degree of supervision exercised by state courts is limited in such cases, as they are generally authorised only to check the conformity of the award with public policy rules and punish the most blatant infringements.

There are clear similarities between arbitration and ordinary law judicial procedures in terms of respect for fundamental procedural rights, particularly the principles laid down by the European Convention on Human Rights. The latter

may be applied to arbitration proceedings for at least two reasons. First, states are required to establish regulations on arbitration which offer equivalent procedural safeguards to those required by the Convention. If they do not do so, they may be held responsible for violations of human rights which may be committed in the case of arbitration proceedings by means of negative interference (see 2.2.2 above). In this way, therefore, arbitration is indirectly subject to respect for fundamental rights. Second, since courts of arbitration rule in first and last instance, the examination they carry out is the last opportunity to ascertain respect for fundamental rights. In so doing they must ensure that situations in which these rights were previously infringed are rectified. It is therefore essential for courts of arbitration to be required themselves to respect fundamental procedural rights. However, here again, courts of arbitration need not necessarily be subject to the same requirements as ordinary courts as it is accepted that parties appearing before courts of arbitration have agreed to waive certain safeguards which would apply in ordinary court proceedings.

Consequently, it is clear that the right to a fair trial, as enshrined in Article 6 of the Convention, applies to arbitration proceedings. It also goes without saying that courts of arbitration must be independent and impartial in their judgments. Otherwise, they could not be regarded as true courts (in the sport sphere, this requirement may, moreover, raise doubts as to whether certain mechanisms presented as arbitration mechanisms by the sports movement are truly so). The requirement forms part of a broader trend whose principles were laid down by the Court in a judgment of 10 February 1983,[6] ruling on the punitive disciplinary powers of the tribunals of professional associations (in this case, the Brabant Provincial Council of the ordre des médecins (medical association)). In the Court's view:

> 29. Since the "contestation" (dispute) over the decisions taken against them concerned a "civil right", the applicants were entitled to have their cases (in French: "causes") heard by a "tribunal" satisfying the conditions laid down in Article 6 para. 1 (art. 6-1) (see the above-mentioned Golder judgment, Series A no. 18, p. 18, para. 36). In many member States of the Council of Europe, the duty of adjudicating on disciplinary offences is conferred on jurisdictional organs of professional associations. Even in instances where Article 6 para. 1 (art. 6-1) is applicable, conferring powers in this manner does not in itself infringe the Convention (see the above-mentioned Le Compte, Van Leuven and De Meyere judgment, Series A no. 43, p. 23,

6. *Albert and Le Compte v. Belgium*, application Nos. 7299/75 and 7496/76.

> first sub-paragraph). Nonetheless, in such circumstances the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6 para. 1 (art. 6-1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1 (art. 6-1). In the present instance, the applicants' cases were dealt with by three bodies, namely the Provincial Council, the Appeals Council and the Court of Cassation. As in the case of Le Compte, Van Leuven and De Meyere, the Court does not consider it indispensable to pursue this point as regards the Provincial Council (ibid.). On the other hand, the Court must satisfy itself that before the Appeals Council or, failing that, before the Court of Cassation Dr. Albert and Dr. Le Compte had the benefit of the "right to a court" (see the above-mentioned Golder judgment, Series A no. 18, p. 18, para. 36) and of a determination by a tribunal of the matters in dispute (see the above-mentioned König judgment, Series A no. 27, p. 34, para. 98 in fine), both for questions of fact and for questions of law.

This principle has since been confirmed, particularly by a judgment of 20 May 2010,[7] in which the Court ruled as follows:

> 50. The Court concludes that the hearing of 11 July 2001 was not in compliance with the requirements of Article 6 § 1 of the Convention. Nevertheless, the Court observes that the proceedings should always be examined as a whole. Therefore, it is necessary to examine to what extent the subsequent proceedings were capable of restoring the applicant's right to a fair hearing.

While it is certain therefore that the right to a fair trial, as foreseen in Article 6 of the Convention, applies to arbitration proceedings, it is also true that some of the aspects of the principle of the right to a fair trial do not necessarily have to be transposed into arbitration cases. This applies for instance to the principle that hearings should be conducted in public, which is completely at variance with one of the key features of arbitration, namely confidentiality. Consequently, it must be concluded that while arbitration is subject to respect for fundamental procedural rights, a certain degree of flexibility in their application must be accepted to allow for the specific characteristics of this type of dispute settlement.

Arbitration in the sports sector – Sports arbitration rests largely on these same principles, which are common to all arbitration proceedings. It also possesses a number of specific features which set it apart from other types of

7. *Larin v. Russia,* application No. 15034/02.

arbitration, however. Of these, the most significant is the fact that, in most cases, rather than taking place under some formal agreement between the parties (the more traditional route), arbitration has a statutory basis, in that the sports federations insert a clause in their rules or statutes, making arbitration compulsory. In joining the federation, athletes and other parties involved in sports competitions have no choice but to accept arbitration. In circumstances such as these, where members of sports organisations have not voluntarily dispensed with the safeguards that attend ordinary court proceedings, it is all the more crucial to ensure that arbitration does not violate the basic procedural rights that need to be protected in arbitration proceedings (see below the comments on consent to arbitration).

There are a great many specialist arbitration mechanisms in the sports sector.

Some sports federations prefer to create arbitration bodies that specialise in disputes arising from the sport for which they are responsible. Examples include the International Volleyball Federation, which set up the International Volleyball Tribunal, and the International Handball Federation, which set up an Arbitration Tribunal. Because of their close relationship with the federations, however, such bodies are not independent and impartial, and so cannot be considered arbitration tribunals in the true sense.

In other cases, the arbitration mechanisms have been outsourced, in that they are not directly linked to any federation in particular.

Some have been set up at the national level. Sport Resolutions in the United Kingdom is one such example. Established in 1997 by the main sports organisations in the UK – the British Olympic Association, the Central Council of Physical Recreation, the Institute of Professional Sport, the Institute of Sports Sponsorship, the Northern Ireland Sports Forum, the Scottish Sports Association and the Welsh Sports Association – it receives funding from the public body in charge of top-level sport in the United Kingdom. More often, it is the national Olympic committees which set up institutions of this kind (e.g. the Luxembourg Arbitration Commission for Sport, the Belgian Sports Arbitration Board, the Italian Court of Arbitration for Sport or the Spanish Court of Arbitration for Sport).

Other arbitration centres have been set up at international level. Foremost of these is the CAS, which was established in 1983 by the International Olympic Committee (IOC) as a centre for the administration of the arbitral awards rendered

under its aegis. The CAS is administered and funded by the International Council of Arbitration for Sport (ICAS). The jurisdiction of the CAS is extremely wide, thanks to an arrangement which allows sports federations to include a compulsory arbitration clause directly in their statutes (or any other regulatory instrument binding on members of the organisation). The CAS arbitration panels are competent to hear appeals against disciplinary decisions handed down by sports federations. In this context, they have full jurisdiction to review all issues of fact or law arising from the dispute between the parties (on the independence of the CAS, see section 3.2.2.2, B, below).

An action to set aside an arbitral award made by the CAS may be brought before the Swiss Federal Tribunal (TFS) (the CAS being based in Lausanne) which will in that case carry out a review. Such reviews are limited, however, because under Article 190, paragraph 2, of the Swiss Federal Act on Private International Law, which applies to appeals against CAS awards, the circumstances in which such awards may be set aside are confined to the following:[8]

- the sole arbitrator or arbitral panel was not properly appointed;
- the arbitration tribunal wrongly accepted or declined jurisdiction;
- the arbitration tribunal's decision either went beyond the claims submitted to it or failed to address a specific element of the case before it;
- the principle of equal treatment of the parties or their right to an adversarial hearing was not respected;
- the award is incompatible with public policy.
- In the case of an award made in connection with an appeal against a disciplinary decision, the applicant cannot, therefore, ask the TFS to review the appropriateness of the sanction. In citing a violation of public policy, however, he or she can argue that the award manifestly infringed a number of his or her fundamental rights.

8. The grounds of appeal cited relate to international arbitrations; the, slightly different, grounds for national arbitrations, i.e. proceedings where the litigants all have their headquarters or place of residence in Switzerland, are not discussed here.

2.3.3. Limitations on self-regulation

Various limitations on the ability of sports organisations to regulate themselves have already been highlighted above. Below we take a closer look at the main ones.

2.3.3.1. Compliance with the law of the headquarters state and with supranational law

It is not uncommon, or rather it was not uncommon until fairly recently, for certain sports organisations to claim that their autonomous status conferred on them veritable legal immunity, placing the organisations concerned outside state law (see Arnaut 2006). Like any social activity, however, sport cannot fall completely outside all regulation by the public authorities. To claim otherwise would be tantamount to saying that sport operates in a realm which is inherently beyond the jurisdiction of the state, thereby contravening the principle that states enjoy full jurisdiction over their own territories.

Admittedly, many states cultivate a tradition of non-intervention in sport-related affairs and so allow sports organisations a degree of autonomy which goes well beyond that enjoyed by organisations active in other areas of community life. This is especially true of Switzerland, where numerous sports organisations, chief among them the IOC and various international federations, are based. Conversely, some countries, such as France, keep a very close eye on the activities of sports organisations through a government agency responsible for sport. Such countries are very much in the minority, however, and this highly intrusive method of regulating sport now attracts criticism.

In all countries, however, both liberal and interventionist, certain aspects of what sports organisations do can never escape the law of the headquarters state. As pointed out in a judgment delivered by the Belgian courts in 1992, "sports organisations can no longer invoke their autonomy if a potential conflict arises between the rules laid down by them

and those of the state legal order, the activity concerned coming within the scope of the state's public policy".[9] Labour law, tax law, contract law, criminal law and industrial property law accordingly apply to these private entities, in the name of the principle of equality before the law.

Sports organisations' autonomy may also be limited by international standards. First and foremost, international sports law as derived from unilateral instruments produced by certain international organisations which have sport on their agenda (the Council of Europe, UNESCO and the UN, for example) or from international conventions, such as the Council of Europe Anti-Doping Convention (CETS No. 135, 16 November 1989) and the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (CETS No. 120, 19 August 1985) or the International Convention Against Apartheid in Sport (10 December 1985), is binding on sports organisations. International human rights instruments may also, of course, restrict sports organisations' autonomy.

Sports activities and the context in which they take place nevertheless possess many specific features and sport, defined in very general terms, encompasses a multitude of situations, not every aspect of which is subject in the same way to ordinary law. A distinction therefore needs to be made between different cases in order to appreciate the areas where sports organisations' autonomy is greatest and those where state law is most firmly in control.

Sports organisations' greatest autonomy undeniably relates to regulation of the sport itself. When standards are to be laid down concerning the conduct of sporting competitions – the technical rules of the sport – it is perfectly logical to allow sports organisations the greatest discretion. State intervention in this sphere is neither justified nor appropriate, since the rules which have to be drawn up have a rationale of their own, one which has to be under the control of sports organisations. State courts generally tread very carefully in this area, declining to review the lawfulness of the rules of the game. In this respect they follow the line taken by the TFS, which, in a noteworthy judgment of 1993 in the Gundel case, clearly stated that "application of the rules of the game … does not in principle lend itself to court supervision".[10]

9. Civ. Liège, 11 June 1992, *Bosman*, Journal des Tribunaux, 1993, p. 284.
10. TFS, 15 March 1993, *G. v. FEI and CAS,* ATF 118 II 15.

The CAS has proven no less cautious. In a ruling of 13 July 2012,[11] it explained, for example, that:

> According to well-established jurisprudence of the CAS, "CAS arbitrators do not review the determination made on the playing field by judges, referees, umpires, or other officials who are charged with applying what is sometimes called 'rules of the game'". In other words, CAS arbitrators should not interfere with the application of the rules governing the play of the particular game – this is to be left to field officials, who are specifically trained to officiate the particular sport and are best placed (being on-site) to settle any questions. CAS arbitrators are not, unlike on-field judges, selected for their expertise in officiating the sport concerned. This position is consistent with traditional doctrine and judicial practice which have always stated that rules of the game, in the strict sense of the term, should not be subject to the control of judges.

The question nevertheless arises as to whether these rules of the sport are by their nature and in all circumstances exempt from supervision of their compatibility with state law. Certain sports organisations claim that this is so where "purely sporting" rules are concerned, relating to the proper conduct and integrity of sports competitions (see Arnaut 2006). In reality though, even the rules of the sport, however technical they may be, may have effects which go beyond the framework of sports law alone and connect with certain rules issued by the state. Both the CAS and TFS have acknowledged that the distinction between rules of the game and legal rules was irrelevant.[12] More specifically, it is clear from this case law that, if the rules of the game are capable of having financial or economic consequences, they cannot enjoy any kind of legal immunity and must therefore be able to be the subject of supervision of their compatibility with state law. Similarly, the CJEU, after suggesting that some purely sporting rules were excluded from the scope of the treaties, dismissed the very idea of an exception for sport, stating that any rule of sport, if it could have economic consequences, had to be able to be the subject of supervision of its compatibility with Community rules.[13]

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11. CAS 2012/A/2731, Brazilian Olympic Committee & Brazilian Taekwondo Confederation & Márcio Wenceslau Ferreira v. World Taekwondo Federation & Comité Olímpico Mexicano & Federación Mexicana de Taekwondo & Damian Alejandro Villa Valadez, 13 July 2012, § 104.
12. CAS JO 96/006, *M. v. AIBA,* 1 August 1996; TFS, judgment of 6 December 1994, *ATF 120 II 369,* No. 67.
13. The famous Bosman judgment, ECJ, Case C-415/93, judgment of 15 December 1995, *European Court Reports 1995 I-04921*.

In particular, a rule of the game which contravenes the rules of criminal law (particular reference is made here to certain extreme sports, such as ultimate fighting, which allow particularly violent fights) must be able to be the subject of supervision of their lawfulness under state law. And more generally, if a rule of the game is liable to interfere with the enjoyment of an athlete's fundamental rights – one example being a ban, which has the potential to affect his or her economic freedoms – it has to be recognised that such a rule cannot be regarded as falling outside state law. It all depends, therefore, on how the rule affects the rights of the individual to whom it applies.

When there are rules for the sole purpose of regulating a sports competition, the courts should nevertheless exercise only limited supervision, in order to protect sports organisations' scope for discretion. It may be pointed out in this respect that even the French administrative courts, when supervising decisions taken by the federations with a delegated public-service role, confine themselves to minimal supervision.[14]

Sports organisations' autonomy is far narrower – and their subjection to state law relatively greater – when sport is considered to be an economic activity. In respect of labour relations, commercial contracts and sponsorship, sport must effectively be regarded as an activity like any other. The clearest illustration of this ordinary treatment of the economic aspects of sports activities comes from the aforementioned Bosman judgment delivered on 15 December 1995 and which concerned, on the one hand, the FIFA rule that any transfer of a football player to a new team is subject to the agreement of the player's current club and to the payment, by the receiving club, of a transfer or training and development fee, and, on the other, FIFA's rule restricting the number of professional players who are nationals of other member states allowed to take part in national competitions. The Court held that these rules did in fact fall within the scope of the treaty provisions relating to freedom of movement for workers. It also held that the difficulty of severing the economic aspects from the purely sporting aspects of an activity could not justify excluding this activity from the scope of the treaty. The Bosman ruling was seen by large sections of the sports movement as a blatant intrusion on its rightful autonomy. Subjecting sports activities to ordinary law also paves the way, however, for more effective action

14. France, Conseil d'État, 25 January 1991, *Vigier,* application No. 104497.

against certain abuses arising from the extreme commercialisation of sport. Abuses connected with player transfers are a case in point.

Finally, the autonomy of sport may also be limited when sport is viewed in terms of its social, health, educational or indeed environmental benefits. Some states therefore develop policies in these sectors without any input from the sports movement. Others involve the sports movement in this process, but in a context managed by the public authorities, under the responsibility of the ministries of health, education or culture. This development clearly shows that sport can, to some extent, escape the exclusive control of sports organisations and be covered by states' public policies.

2.3.3.2. Possibility of judicial review

As long as sports organisations are subjects of law in the legal order of the country in which their headquarters are situated, the state courts have jurisdiction over them.

Some legal systems lay down a requirement that disciplinary decisions made by sports organisations must be able to be appealed against before the state courts. In France, for example, decisions adopted by the bodies of French sports federations which have been given a public-service role – i.e. which have been recognised by the Ministry of Sport as holding a monopoly over the organisation of competitions within their sport in France and the relevant selection procedures – "are in the nature of administrative acts capable of being the subject of an action for annulment before the administrative court" on grounds of abuse of authority, if they are taken for the purposes of public-service delivery and involve the exercise of governmental authority.[15] In the case of federations which have not received ministerial accreditation, the decisions "are always deemed to constitute private-law acts against which actions for annulment may be brought before the ordinary courts".[16] Likewise, in England, the jurisdiction of the ordinary courts cannot be excluded.

15. Conseil d'Etat, Sect., 22 November 1974, *Fédération des industries françaises des articles de sport (FIFAS)*, application No. 89.828.
16. Conseil d'Etat, 19 December 1988, *M^me^ P. et a. c. Fédération française d'aérobic et de stretching*, application No. 79.962 (sanctions imposed on local sports organisations or their senior officials), see Lamy Droit du sport, No. 612.25).

In legal systems where recourse to a state court is not obligatory, it does nevertheless remain an option if there is no other means of gaining access to an independent and impartial tribunal. In other words, recourse to the state courts is excluded only if decisions made by disciplinary bodies can be challenged before an arbitration tribunal that satisfies the requirements for independence and impartiality. Disciplinary boards and other federation bodies, howsoever called, do not constitute independent and impartial arbitration tribunals, and are merely internal bodies whose intervention is not a bar to subsequent proceedings before the state courts. It is chiefly through recourse to the CAS that the jurisdiction of state courts to hear the merits of a sport-related dispute can be circumvented. If the rules on disciplinary procedure do not allow for arbitration, however, the possibility of a judicial review always remains open.

To prevent state courts from interfering in sport-related cases, some organisations used to insert clauses in their rules of procedure, prohibiting any challenges to disciplinary decisions.

For example, the 1984 version of the Olympic Charter read as follows:

> The IOC is the final authority on all questions concerning the Olympic Games and the Olympic movement. On all matters, including matters of discipline affecting all concerned, and for permanent and temporary penalties of all kinds …, the powers of the IOC are paramount.

Such provisions are plainly at odds with the fundamental right of access to a court and cannot therefore be considered lawful by the state courts. Faced with a similar clause in the International Sporting Code adopted by the Fédération Internationale de l'Automobile, the Paris Regional Court unambiguously stated that:

> those provisions of the International Sporting Code which require racing drivers to undertake to avail themselves only of the procedures and to apply only to the bodies provided for in the said code in the event of a dispute with the Fédération internationale du sport automobile must be annulled.[17]

17. Paris Regional Court, 26 January 1983, *Alboreto and others v. FIA*.

Such clauses can still be found today, but the right of access to a court is preserved as long as the rules allow for the possibility of arbitration. Such is the case, for example, at the UEFA, whose statutes, after being amended at the Extraordinary Congress in Helsinki on 24 September 1997, used to read as follows:

> 1. CAS shall have exclusive jurisdiction to deal with all civil law disputes (of a pecuniary nature) relating to UEFA matters which arise between UEFA and Member Associations, clubs, players or officials, and between themselves.
>
> 2. There shall be no recourse to legal action in the ordinary courts of law in relation to such disputes.

In the May 2016 version of the UEFA statutes, the question of the jurisdiction of the CAS is dealt with in Articles 61 to 64.

As to the type of action that may be taken against decisions by sports organisations in the ordinary courts, this mainly falls into three categories.

- Applications to set aside. Although one immediately thinks here of challenges to sports organisations' decisions on the ground that they conflict with the law of the headquarters state, the ordinary courts can also be asked to review an organisation's compliance with its own rules (Latty 2007: 450-454).
- Proceedings to establish contractual or quasi-delictual liability. These may be instituted in cases where, for example, an athlete believes he or she has been wrongly punished and wishes to claim compensation for the pecuniary damage caused. Such cases are relatively rare. It is worth noting, however, that in a ruling dated February 2011, the Italian Constitutional Court stated that recourse to legal action in the ordinary courts could never be excluded – including in cases where the sports organisation's regulations provided for recourse to arbitration – if, following a disciplinary decision, the person sanctioned sought to obtain compensation for the damage suffered as a result of this sanction.[18]
- The last and most common type of action is an urgent application (request for interim measures) asking the court to, for example, order the sports organisation to suspend the effects of a sanction imposed on the applicant.

18. Judgment No. 49/2011, 7 February 2011.

Actions of this kind involve the greatest degree of interference with sports organisations' autonomy as they are intended (within a temporary and generally quick procedure) to neutralise the organisations' decisions.

One final point to note is that, even in cases where sports organisations have chosen to use arbitration, the possibility of review by the state courts can never be completely ruled out. For arbitration is valid only to the extent that the law of the state in which the tribunal has its seat permits this form of justice and solely within the limits and on the terms laid down by the relevant domestic law. Back-up is accordingly always available in the form of a state court which can be asked either to play a supporting role in the proceedings under way in the arbitration tribunal (for example, by issuing injunctions, something arbitration tribunals are generally unable to do) or to supervise the conduct of the proceedings or review the arbitral award. It must always be possible, therefore, to challenge arbitral awards, usually through an action for annulment. The supervision exercised by the ordinary courts over arbitral awards is limited, however. Being unable to re-examine the merits of a case, they cannot be regarded as an additional level of jurisdiction.

In the case of the CAS, the jurisdiction to hear applications to set aside awards made by the arbitration panels lies with the Swiss Federal Tribunal. As has already been pointed out, the grounds on which awards may be set aside are extremely limited and the number of cases in which this has occurred equally so.

2.3.3.3. Respect for human rights

Effectiveness of human rights vis-à-vis sports organisations and arbitration

With athletes no longer afraid to challenge disciplinary decisions in the national courts on the ground that they violate their human rights, such litigation is becoming increasingly common in the sports sector. In *Mitu, Nikolovski and Fassotte v. ASBL Union Royale Belge des Sociétés de Football Association (URBSFA)* for example, the applicants, who were footballers, asked the Belgian courts to stay the disciplinary proceedings instituted against them by the URBSFA pending the outcome of the criminal case, on the ground that the disciplinary proceedings were incompatible with

the principles laid down in the Convention (in a judgment of 8 February 2007, the Brussels Court of Appeal ruled in favour of the athletes).

Likewise, it is no longer unusual for applicants to the CAS to challenge the lawfulness of disciplinary decisions in the light of various human rights.[19] Some athletes have even gone so far as to ask the TFS to set aside awards on the same grounds.[20]

Lastly, three applications are currently pending before the Court, against Switzerland.[21] In all three instances, the applicants accuse Switzerland, through the decisions of the TFS which denied their applications to set aside CAS awards for breach of the Convention, of having violated their human rights (and more specifically Article 6.1 on the right to a fair hearing). The Court has yet to rule on these cases.

Clearly, then, the obligation to observe human rights can apply, directly or indirectly, to sports organisations. To accept that sports organisations' autonomy is limited, in some respects, by state law while at the same rejecting the idea that the rules designed to protect the most basic rights do not apply to sports organisations would, moreover, be contradictory.The foregoing, which aims to show that human rights can apply in relations between private individuals, supports the claim that sports organisations may, in principle, be subject to compliance with human rights (see above, 2.2.2).

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19. See, among other examples, CAS, 2000/A/290, *A. Xavier & Everton F.C. v. UEFA,* 2 February 2001; CAS 2002/A/358, *UCI v. RFEC,* 24 September 2002; CAS, 2010/A/2311 & 2312, *Stichting Anti-Doping Autoriteit Nederland (NADO) & Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB) v. W.*, award of 22 August 2011; CAS, 2010/A/2268, *I. v. Fédération Internationale de l'Automobile,* award of 15 September 2011; CAS, 2010/A/2307, *World Anti-Doping Agency v. Jobson Leandro Pereira de Oliveira & Confederaçao brasileira de Futebol & Superior Tribunal de Justiça Desportiva de Futebol,* award of 14 September 2011 and the comparative commentary on these last three awards by Latty (2012: 665-669); CAS No. 2012/A2862, *Girondins de Bordeaux v. FIFA*, award of 11 January 2013, *JDI*, 2014, *chronique des sentences arbitrales du TAS*.
20. See for example TFS, *Abel Xavier v. UEFA,* decision of 4 December 2000, ATF III 429, *ASA Bulletin* 2001, p. 566; TFS, *Lu Na Wang,* decision of 31 March 1999, *CAS Digest* II, p. 767.
21. The cases of Claudia Pechstein (application No. 67474/10 of 11 November 2010), Adrian Mutu (application No. 40575/10 of 13 July 2010) and Erwin Bakker (application no. 7198/07 of 7 September 2012).

It can further be argued, however, that the general enforceability of human rights against sports organisations is all the more essential given the tremendous powers that they wield over their members, powers which go well beyond those normally enjoyed by entities of this type or capable of being recognised in a contract, and which can lead to serious infringements of athletes' fundamental rights. In the context of the fight against doping, for example, sports organisations place onerous obligations on athletes to provide details of their whereabouts (ADAMS system), potentially affecting their privacy and/or freedom of movement (see 3.3.1.1 below). In disciplinary proceedings, some organisations may require their members to produce specific items of evidence, using methods which, again, have the potential to encroach on the privacy of the athletes concerned. Also, after the disciplinary proceedings, the sanction imposed on an athlete, for example, a lifetime ban or hefty fine, may be so severe that his or her freedoms are infringed yet again.

In other words, the powers of sports organisations to make rules, punish and monitor their members are so extensive that they put the former in a position where their actions are liable to impinge on the fundamental rights of the latter, to no less a degree than action by the public authorities would. For this reason, the obligation to respect human rights must be able to be enforced against sports organisations.

In sports law, there is, however, considerable resistance to the idea that sports organisations may be directly subject to compliance with human rights.

In *Abel Xavier v. UEFA*, which gave rise to a ruling by the TFS on 4 December 2000, in answer to the applicant's arguments contesting a CAS decision under Article 27 of the Swiss Constitution and Article 8 of the Convention, the TFS concluded that such provisions did not apply as the applicant had not been subject to any state measure.[22]

22. TFS, *Abel Xavier v. UEFA*, Decision of 4 December 2000, ATF 127 III 429, ASA Bulletin 2001, p. 566, 573.

The CAS also rejects the thesis that human rights rules – and more specifically the provisions of the Convention – can apply directly to sports organisations. Accordingly, in *Diakite v. FIFA*,[23] concerning a case of attempted bribery, the arbitration panel ruled that:

> Regarding the European Convention on Human Rights (ECHR), on which the Appellant explicitly relies, the CAS Panel also emphasises that, in principle, fundamental rights and procedural guarantees provided by international treaties on the protection of human rights are not meant to apply directly in private relationships between individuals and so are not applicable in disciplinary cases heard by private associations.

The CAS took a similar view in a decision dated 11 January 2013, in *Girondins de Bordeaux v. FIFA*, when it pointed out that the Convention does not apply in relations between private individuals, thereby enabling it to dismiss the argument that one of the provisions of FIFA's Regulations on the Status and Transfer of Players was in breach of Article 8 of the Convention and Article 1 of the additional Protocol to the Convention (right to property).

The CAS recognises, however, that the provisions of the Convention can apply indirectly to arbitration bodies and, through a knock-on effect, to sports organisations. Accordingly, in the Amadou Diakite case mentioned above, the arbitrators acknowledged that some provisions of the Convention – and in particular Article 6.1 on the right to a fair hearing – could apply "even in proceedings before an arbitration tribunal" on account of the fact that the Swiss Confederation, in exercising supervision over CAS decisions, through its courts, was itself directly subject to the obligation to comply with the Convention:[24]

> … the Arbitration Panel is aware of the fact that certain procedural safeguards derived from Article 6.1 ECHR, in disputes concerning rights and obligations of a civil nature, are indirectly applicable even in proceedings before an arbitration tribunal – and all the more so in disciplinary cases. This is due to the fact that the Swiss Confederation, as a contracting party to the ECHR,

23. CAS 2011/A/2433 *Amadou Diakite v. FIFA,* arbitral award of 8 March 2012, paragraph 56.
24. CAS 2011/A/2433 *Amadou Diakite v. FIFA*, arbitral award of 8 March 2012, paragraph 58. This line of reasoning more or less echoes that taken by the Court (see the *Albert and Le Compte v. Belgium* and *Larin v. Russia* judgments, cited above).

> is required to ensure that, at the time when arbitral awards are implemented (at the stage of the enforcement of the award or when an appeal is lodged to have it set aside), the judges satisfy themselves that the parties to the arbitration have been afforded the opportunity for a fair hearing, conducted within a reasonable timeframe by an independent and impartial tribunal.

The CAS's tendency to depart from Convention case law stands in contrast to its attitude towards EU law. In *Girondins de Bordeaux v. FIFA*, for example, the CAS held that the European Union (EU) principle of free movement of labour could apply directly "where justified by sufficient interests".[25] One explanation for this deference on the part of the CAS towards EU law may lie in the large number of sport-related cases coming before the CJEU and the firm line taken by the latter since the Bosman ruling. It is odd, however, that the CAS should accept that EU law is directly applicable to sports organisations yet not the Convention, given that neither body of rules is part of sports law and that only the Convention is binding on Switzerland, where the CAS is based. In other cases, moreover, the CAS has agreed to review the compatibility of sports rules with the Convention, without concerning itself as to whether these provisions apply directly or merely indirectly to the sports organisations concerned. Accordingly, in *NADO & KNSB v. W.* which gave rise to an award on 22 August 2011, and in which the applicant challenged the validity of the arbitration agreement under Articles 6 and 7 of the Convention, the arbitration panel, referring specifically to the case law of the Court, considered that the system of derogations from mandatory arbitration provided for in the World Anti-Doping Code did not violate the Convention.[26]

Although the CAS's position may seem ambiguous or indeed contradictory, it is merely a reflection of the extremely sensitive nature of the issue as to whether sports organisations can be considered to be directly subject to human rights obligations. The situation is much clearer in countries which, like France, have adopted a system whereby responsibility for a public sport service is delegated to sports federations: here the sports organisations which have been assigned a public-service remit are directly subject to compliance with human rights standards in respect of any decisions they may make which involve the exercise of governmental authority. It is a well-known fact, however, that such arrangements are very much the exception.

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25. CAS No. 2012/A2862, *Girondins de Bordeaux v. FIFA,* 11 January 2013, paragraph 102.
26. CAS, 2010/A/2311 & 2312, § 6.15.

From the foregoing discussion, two points emerge:

- in theory, the obligation to observe human rights must apply to private parties, including sports organisations which possess significant powers of constraint vis-à-vis their members;
- in practice, the obligation to observe human rights – and in particular those enshrined in the Convention – applies to sports organisations mostly indirectly (through the supervision exercised by the CAS whose decisions are themselves subject to review by the TFS).

Nevertheless, and staying with the fundamental rights that are liable to be affected by the power of sports organisations to discipline their members, it would be neither sensible nor realistic to seek to subject those organisations to compliance with all the guarantees arising from the basic procedural rights, for several reasons:

- since sport disciplinary bodies cannot be considered judicial authorities in the true sense, there is no call for them to be subject to the self-same rules as those which apply to state courts;
- since arbitration is a consensual method of settling disputes which rests on the will of the parties, who may dispense with certain safeguards observed by state courts, the arbitration procedure may also derogate from certain fundamental safeguards;
- this more nuanced approach to subjecting sports organisations and arbitration to the obligation to respect human rights is especially appropriate given that, apart from a few rights inseparably related to human existence itself (in particular the right to life), fundamental rights are not absolute; they may be derogated from, as long as the interference in a person's rights is necessary and proportionate to the legitimate aim pursued (see above).

In other words, the manner in which sports organisations exercise their powers may be subject to review for compliance with human rights standards only insofar as, first, the powers thus exercised are capable of seriously undermining certain human rights and, second, subjecting the organisations to this requirement does not unduly interfere with the achievement of the objectives of the sports movement. It is important to note, too, that not all fundamental rights necessarily operate as a constraint on the activities or modus operandi of sports organisations.

In addition, where a decision by a sports organisation is reviewed to determine whether it interferes with the exercise of a fundamental right, the person carrying out the review – the judge or arbitrator – should show a degree of flexibility. In EU law, for example, the tendency to treat sports rules in the same way as other rules, from the point of view of basic economic freedoms, has been counterbalanced by the willingness of European judges to take account of the specific nature of sport. When presented with rules which "derive from a need inherent in the organisation of [the] competition",[27] "purely sporting rules" or rules which are "intimately linked to sport as such",[28] the ECJ/CJEU has, depending on the circumstances, shown a degree of tolerance towards the restrictive effects of such rules. Likewise, in the human rights field, accommodating this special character may mean that the fundamental guarantees surrounding respect for individuals have to be adjusted somewhat to fit the objectives and, above all, the means available to sports organisations, so as to preserve what makes their activities authentic. This is no easy task, of course, since it involves striking the right balance between the principle that human rights are universal and preserving the uniqueness of sport. As has already been pointed out, however, the principle of proportionality, which plays a cardinal role in establishing the existence and extent of human rights violations, can provide precisely this kind of balance. In effect, therefore, such an approach involves granting some leeway to the sports organisations, which are sometimes the most well-placed to determine what means would best serve the interests of sport.

Incorporating human rights into sports law

The sports organisations are no fools: faced with growing criticism, many national and international federations have amended their regulatory instruments to include rules which are essentially a reflection of fundamental rights. This is especially true as regards the procedural safeguards that must attend disciplinary proceedings.

27. ECJ, 11 April 2000, Deliège, Joined Cases C-51/96 and C-191/97, ECR 2000, I-2549, paragraph 69.
28. Court of First Instance of the European Communities, 30 September 2004, *Meca-Medina and Majcen*, T-313/02, paragraph 47.

First and foremost, however, mention should be made of the crucial role played by the CAS which, through its work in enshrining general legal principles, as already discussed above and which are enforceable against both sports organisations and their members, has been instrumental in incorporating various human rights into sports law. In some cases, these broad principles are explicitly adopted by federations in their regulatory instruments. Such is their scope, however, that they apply to the sports movement at large, whether they have been enshrined in a particular regulatory instrument or not.

Of these general principles, a number are of particular relevance to disciplinary proceedings, such as the principle of upholding the rights of the defence or the principle of due process of law, which essentially refer to the guarantees derived from the right to a fair hearing.[29]

29. CAS 2000/A/290, *A. Xavier & Everton F.C. / UEFA,* 2 February 2001, paragraph 10.

3. Respect for specific rights

3.1. Introduction

It is important for each sports organisation to have institutions and procedures that enable it to deal with disciplinary offences fairly and effectively, i.e. via speedy proceedings that respect individual rights, allow evidence to be adduced in the appropriate manner (i.e. evidence that is sufficient but confined to what is genuinely relevant) and ensure that decisions are made having regard to all the circumstances of the case.

In principle, sports organisations are free to design their own bodies and disciplinary procedures in whatever manner they deem most appropriate, provided that these bodies and procedures ensure that the proceedings as a whole may be considered fair (see in particular Beloff et al. 2012: 219). Should they fail to offer the relevant safeguards, they would invite the censure of the CAS, other arbitration tribunals or state courts, as the case may be.

In Switzerland, where numerous international federations are headquartered, this freedom is very wide, within the limits indicated earlier: Articles 60 et seq. of the Swiss Civil Code, governing associations, contain only a few mandatory provisions and, significantly, no clauses on disciplinary proceedings, whether in relation to the competent bodies or the proceedings themselves; Article 75 of this code merely states that "All members are permitted by law to challenge before the courts, within one month of becoming aware of them, any decisions to which they did not consent and which violate legal provisions or regulations", something which also applies to disciplinary decisions. In France, on the other hand, sports federations' freedom to organise is very much restricted by state law and, in fact, a decree has been issued, setting out the standard disciplinary regulations with which federations must comply if they wish to be granted, or have renewed, a public-service remit (Appendix 1-6 to the Sports Code). These regulations require, among other things, that disciplinary bodies have at least five members, that an appeals procedure be in place and that sittings be conducted in public (save in exceptional circumstances). They set a time limit within which cases are to be investigated and decided and prescribe certain types of sanctions, etc. The disciplinary rules of each sports federation governed by French law "shall comply with the provisions laid down in (this) decree. The latter may nevertheless be supplemented and adapted according to the specific nature of each discipline".[30]

It should further be noted that if a party's rights to a fair hearing within the meaning of Article 6.1 of the Convention have been violated in disciplinary proceedings, the procedural defects are in principle rectified in the subsequent proceedings before a state court or an arbitration tribunal. In fact, according to the case law of the CAS, appeal proceedings before it are proceedings *de novo* and the advantage of a procedure enabling a full rehearing before an appeals body is that any issues relating to the fairness of the first-instance proceedings are therefore only of peripheral importance. The system which the appellants have signed up to enables any defects in the first-instance proceedings to be rectified through the proceedings before the CAS.[31]

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30. See Art. L. 131-8 of the Sports Code and Lamy, Droit du sport, No. 612.60.
31. See, for example, CAS 98/2008, which refers, among other things, to Pierre Moor (1991: 19), which cites TFS judgments ATF 114 Ia 307 and ATF 110 Ia 81. See also the *Albert and Le Compte v. Belgium* and *Larin v. Russia* judgments, cited above.

However that may be, it is in any case in the interests of sports federations themselves to design and apply their rules of disciplinary procedure in a manner consistent with the concept of a fair hearing. Indeed, if they want to be able to settle the bulk of the disputes involving their members internally, they cannot content themselves with procedures which violate individual rights, and first and foremost those provided for in Article 6 of the Convention. If these individual rights were to be disregarded, the result would be that, increasingly, athletes and clubs disciplined by their federations would bring actions before arbitration or state bodies, with detrimental effects on the image of the federations, their finances and functioning. Understandably, therefore, the trend in federations' regulations is towards an augmentation of the rights of the parties, as the procedures become increasingly judicial in nature.

Below we will look at how arbitration tribunals and organisations' disciplinary bodies view the rights enshrined in Article 6 of the Convention, in criminal proceedings and, to some extent too, in civil proceedings.

3.2. Human rights before sports disciplinary and arbitration bodie (compliance with the procedural guarantees of Article 6 of the Convention)

3.2.1. Introduction

Under Article 6.1 of the Convention, which applies to both criminal and civil proceedings, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

In the case of criminal proceedings, Articles 6.2 and 6.3 of the Convention expressly enshrine the following additional guarantees:

- presumption of innocence;
- information about the charges;
- adequate time and facilities to prepare one's defence;

- right to defend oneself in person or through a lawyer;
- assistance of a court-appointed lawyer, where necessary;
- right to examine or have examined witnesses against one;
- right to obtain the attendance and examination of witnesses on one's behalf;
- assistance of an interpreter, where necessary.

In the case of disciplinary and arbitration proceedings, the question arises of whether these guarantees apply and, if so, to what extent. As will be observed below (3.2.2.1), the issue has yet to be addressed by the Court and, as has already been mentioned, the tendency at present is rather to apply Article 6 of the Convention to such proceedings only indirectly and partially, for reasons related to the fact that the Convention is directed at governments rather than private organisations, and also for other reasons to do with the specific nature of sport.

In practice, and in keeping with the more conventional approach to human rights, sports organisations and, to a degree, the CAS, take the view that the rights of those involved in disciplinary proceedings, at whatever stage, and of which more later, are in any case not absolute. FIFA, for example, has provided that the right to a hearing, and all that goes with it, may in some cases be restricted by the competent disciplinary body "in exceptional circumstances, such as when confidential matters need to be safeguarded or the proceedings need to be conducted properly"[32] or "in exceptional circumstances, such as when confidential matters need to be safeguarded, witnesses need to be protected or if it is required to establish the elements of the proceedings".[33] In addition, certain regulations provide that defendants may waive all or some of their rights, or that these rights lapse if certain persons are not present during the proceedings or if a declaration is not made in due time. At UEFA, for example, "[t]he disciplinary bodies may hold hearings and take

32. Article 95, paragraph 1, of the FIFA Disciplinary Code (FDC).
33. Article 39, paragraph 2, of the FIFA Code of Ethics (CEF).

decisions in the absence of one or all of the parties",[34] which means, for example, that if a party fails to attend, it is deemed to have waived its right to appear in person. In addition, the International Cricket Council states, in Article 4.7 of its Anti-Corruption Code, that if the "Participant" fails to respond to the "notice of charge" by the deadline specified, he or she is deemed to have waived his or her entitlement to a hearing, admitted that he or she has committed the offence and accepted the sanctions specified in the notice of charge.[35]

It should also be stressed that, broadly speaking, if a party believes himself or herself to be the victim of a human rights violation, he or she must say so at once in the proceedings. Otherwise he or she will not be able to rely on that argument later, it being contrary to the principle of good faith to refrain from invoking a violation until the appeal stage, when it could have been invoked at first instance. Human rights protection may be diminished or even non-existent, therefore, if the party concerned fails to avail itself of that protection in time.

3.2.2. The minimum procedural safeguards required in disciplinary and arbitration proceedings

3.2.2.1. General

The Swiss Federal Tribunal (Tribunal Fédéral Suisse, TFS), which has jurisdiction to set aside awards made by the CAS, has on several occasions ruled on the nature of the disciplinary sanctions imposed by sports associations.

It considers these to be private sanctions which are solely a matter of civil law, and not criminal law. These sanctions are a form of contractual penalty and are therefore based on the parties' autonomy. They are unconnected with the criminal courts' power to punish, although they sometimes penalise conduct also punished by the state.[36] The same

34. Article 34, paragraph 4, of the UEFA Disciplinary Regulations (UEFA DR), 2016.
35. Article 4.7.2 in fine, ICC Anti-Corruption Code.
36. TFS, *Gundel v. FEI*, ATF 119 II 271.

TFS states that the Convention is an international treaty which seeks to protect individuals against measures taken by states. And since disciplinary sanctions are not measures taken by a state, the Convention does not, in principle, apply directly to arbitration proceedings to which the parties have voluntarily consented. Nor is violation of the Convention one of the grounds of appeal mentioned in Article 190, paragraph 2, of the Swiss Federal Act on Private International Law, which applies to appeals before the TFS.[37]

The Swiss Federal Tribunal accepts, however, that certain guarantees derived from Article 6 of the Convention may apply indirectly because they fall within the ambit of Swiss public policy. These are the right to an independent and impartial tribunal, the right to have one's case determined within a reasonable time and the right to a fair procedure.[38] Consequently, the TFS would overturn any arbitration awards made under a procedure that was unfair.

This view is broadly shared by some legal writers (Rigozzi 2005: 471-472). The CAS takes a similar view (CAS 2011/A/2384, Contador). Another writer, however, argues that Article 6 of the Convention should be applied directly by ordinary courts hearing appeals against arbitral awards; in particular, this would include the TFS when it is called upon to rule on an appeal against a CAS award (Besson 2006; 395, 402).

In two cases concerning the application of Article 6 of the Convention to sport-related procedures, namely *Adrian Mutu v. Switzerland* (application No. 40575/10) and *Claudia Pechstein v. Switzerland* (application No. 67474/10), the Court invited the parties to answer the following question: "Did Article 6 § 1 of the Convention apply to the procedure followed in the case in question before the Court of Arbitration for Sport (CAS)?". In the second case, it also asked the parties for their comments on the CAS's status as an "independent and impartial tribunal", within the meaning of Article 6 of the Convention. The very fact the Court chose to proceed in this manner shows that the answer to these questions is not obvious and that it is impossible to predict what the Court's response will be. The third case pending before the Court (*Erwin Bakker* v. *Switzerland*, application No. 7198/07) also involves a sport-related procedure but concerns a different

37. TFS 4A_612/2009, *Pechstein v. ISU*; 4A_458/2009, *Mutu v. FIFA*; 4P_64/2011, *Abel Xavier v. UEFA*; 4A_198/2012, *X v. FIBA*.

38. ATF 127 III 429, *Abel Xavier v. UEFA*; TFS, 4A_370/2007, X v. Association A, SASP B, paragraph 5.3.2.

issue. We will come back to the Pechstein case, and generally speaking on the CAS's independence and impartiality, later on in section 3.2.2.2.

As matters stand therefore, Article 6 of the Convention cannot be held to apply directly to arbitration proceedings in the sports sector, still less to disciplinary proceedings. The sports arbitration courts based in Europe – in particular the CAS – and numerous disciplinary bodies of sports federations are, however, very much guided by it in their practice, even though they recognise, as will be seen below, that some of the guarantees afforded by Article 6 of the Convention do not apply, even indirectly, to their procedures.

3.2.2.2. Independence and impartiality in the context of tribunals

A. Sports federation disciplinary bodies

a. Disciplinary bodies

Sports federations in principle have considerable freedom to set up, organise and appoint members to their disciplinary bodies.

In particular, this freedom allows them to provide for disciplinary cases to be dealt with by a single body, the rulings of which are not open to appeal within the federation, or to set up a two-tier procedure, with a first level of jurisdiction and an appeals body. The federations, indeed, are under no obligation to provide for an internal appeals procedure (see Beloff et al. 2012: 241) with the notable exception of federations subject to French law, which, under the standard disciplinary regulations, are required to have an appeals procedure. The main advantage of having two disciplinary bodies is that any incorrect decisions may be rectified internally. The obvious disadvantage is that two-tier proceedings inevitably take longer, which may be damaging where decisions relate, for example, to the running of competitions.

Federations may also freely decide on the membership of their disciplinary bodies, providing for a single-judge system (as in MLB and the NFL), opting instead for more than one (examples being the AIBA and FIFA), or even using a single judge for some kinds of cases and more than one for others (examples being UEFA and the Swiss Football League).

Similarly, federations may themselves determine the methods of appointment of their disciplinary bodies' members. Some have opted for election by their regulatory body (general assembly, at the ASF for example), while appointment by the executive body is more common (executive committee, at UEFA for example), or even by the president of the organisation (examples include the IOC and AIBA).

b. Independence and impartiality in the context of disciplinary bodies

Some federations make provision, in their articles of association and regulations, for their disciplinary bodies to be independent of their other bodies (examples being Article 26 of the UEFA DR, Article 34 of the FCE, Article 85 of the FDC, Appendix 1 to the ICC Anti-Corruption Code).

That is not enough for them to be considered independent and impartial tribunals within the meaning of Article 6.1 of the Convention, however. The method whereby the members of disciplinary bodies are appointed, the financing of their activities (fully financed by the federation itself), the functional relationships between them and the federation (with the latter, in particular, generally providing the disciplinary bodies' secretariat) and other aspects mean that those bodies are not true courts or tribunals. Nor do sports federations claim true judicial status for their disciplinary bodies, whatever terms may be used to refer to them in their articles of association and regulations.

The fact that organisations' disciplinary bodies lack the status of independent and impartial tribunals within the meaning of Article 6.1 of the Convention is not in itself a problem insofar as disciplinary decisions may be reviewed by a state court or by an independent and impartial arbitration body, so the decisions taken by organisations' own bodies are not final (on the subject of the independence and impartiality of sports federations' bodies, also see Rabu 2013: 11 et seq.; see also the *Albert and Le Compte v. Belgium* and *Larin v. Russia* judgments, cited above). Arbitration consent

clauses which preclude the possibility of any further referrals, including to ordinary state courts (see below, Section 3.2.3), can be problematic on this score.

That said, it is nevertheless in the interest of federations themselves and their members for their disciplinary bodies to appear to members and the public alike to have sufficient independence to prevent any suspicion of undue influence: a federation has a clear interest in the majority of its disciplinary cases being resolved internally, without referral to a state court or an arbitration body. That can be achieved only if the disciplinary bodies follow procedures which respect individual rights and take decisions which the persons concerned are able to regard as impartial. Failing this, referral of cases to state courts or to arbitration bodies would surely become more or less systematic, and that would be detrimental to the independence, functioning and image of the federation concerned.

c. Good practice

It makes sense, therefore, for sports federations' disciplinary bodies to be as independent and impartial as possible. By way of good practice, a number of measures could be taken, especially in the following areas:

- method of appointment: election by the regulating body (general assembly, board of representatives, congress) rather than by the executive or even the president of the federation;
- selection: when selecting individuals to serve on bodies, choose respected individuals known for their integrity and independent frame of mind;
- own budget;
- own administrative support, rather than reliance on services provided by the federation;
- culture of respect, among the organisation's other bodies, for the decisions taken.

In this regard, the Monitoring Group of the Council of Europe's Anti-Doping Convention, in application of Article 11.1.d of the convention, adopted on 17 February 2017 a recommendation on ensuring the independence of hearing panels (bodies) and promoting fair trial in anti-doping cases.

This recommendation is based on Article 7.2.d of the convention, which requires states parties to encourage their sports organisations to harmonise "their disciplinary procedures, applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sportsmen and sportswomen; these principles will include:

i. the reporting and disciplinary bodies to be distinct from one another;
ii. the right of such persons to a fair hearing and to be assisted or represented;
iii. clear and enforceable provisions for appealing against any judgment made."

The recommendation is also based on Article 8 of the World Anti-Doping Code (2015), in particular point 1, which strongly recommends that anti-doping organisations with responsibility for result management "provide, at a minimum, a fair hearing within a reasonable time by a fair and impartial hearing panel".

Finally, its aim is to guarantee respect for the rights under Article 6.1 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.

This recommendation is an important instrument for all states because it has been drawn up in such a way as to be able to be implemented in different legal systems. It recommends that states set up an independent, impartial and centralised hearing panel, separate from the national sport federations, in charge of all hearing proceedings in anti-doping cases. It also sets out conditions relating to the panel's independence and composition. Finally, it specifies the way in which the right of access to a hearing and the right to an effective defence can be guaranteed, as well as how to manage access to the relevant documents and evidence, third-party intervention and the right of appeal, etc.

B. Arbitration tribunals

In order to keep disputes, as far as possible, out of the state courts, which are seen as being too slow and as having little awareness of sport-related needs, many federations recognise the authority of arbitration tribunals to review decisions taken by organisations' disciplinary bodies (see above, 2.3.2.2.2).

As we have already seen, certain international federations have set up arbitration tribunals to settle disputes arising from their own sport (volleyball, basketball and cricket in corruption cases). A few national federations have taken the same path, as evidenced by the arbitration tribunals established by the Turkish and Luxembourg football federations. Most sports organisations, however, have preferred to submit to the jurisdiction of the CAS which is now the main centre for sports arbitration.

The question is: can these arbitration tribunals be considered independent and impartial tribunals within the meaning of Article 6 of the Convention?

The TFS, which adjudicates on appeals against awards made by arbitration tribunals based in Switzerland (including the CAS), applies Article 6 of the Convention by analogy here (TFS, 2P_216/2003, consid. 3.2). It began by tentatively acknowledging the independence of the CAS, despite some concerns over the tribunal's links with the IOC, which meant that the CAS was not sufficiently independent and impartial to hear disputes to which the IOC was a party (ATF 119 II 271, Gundel, in 1993). Later, following radical reforms within the CAS in the areas in question, the TFS fully acknowledged the latter's status as an independent tribunal (ATF 129 III 445, Lazutina, in 2003). The German Bundesgerichtshof basically came to the same conclusion (Pechstein judgment of 7 June 2016, KZR 6/15).

This general acceptance of the CAS's jurisdiction sometimes attracts criticism, not least on the following scores:

- closed list of arbitrators;
- independence of the arbitrators themselves;
- links between the CAS and its arbitrators, on the one hand, and international sports federations, in particular FIFA, on the other;

- the fact that the CAS, an arbitration tribunal, has the power to deal with doping cases, which are "quasi-criminal in nature".

In the Pechstein case (see above), Claudia Pechstein, a German speed skater, was suspended for two years for doping by the disciplinary bodies of the International Skating Union (ISU). In order to be able to participate in the world championships held in Norway in 2009, she had had to sign an arbitration clause in favour of the CAS. After her suspension, she lodged an unsuccessful appeal with the CAS. An appeal to the TFS against the CAS ruling was dismissed on 28 September 2010. The athlete then brought the case before the European Court of Human Rights (see 3.2.2.1 above). At the same time, she brought an action against the ISU before the Munich Regional Court (*Landgericht*) seeking payment of a considerable sum of money to cover the damage suffered as a result of her suspension and to compensate her for the non-pecuniary damage she had allegedly been caused. In particular, she asserted that the arbitration clause in favour of the CAS was invalid. On 26 February 2014, the Munich Regional Court dismissed her application. The Munich Court of Appeal (*Oberlandesgericht*), in an appellate judgment on a preliminary point of law delivered on 15 January 2015, held that the arbitration clause was indeed invalid, that the German courts had therefore had jurisdiction to hear the case and that Claudia Pechstein's application should accordingly be examined on its merits. On 7 June 2016, the Federal Court of Justice (*Bundesgerichtshof*), in a decision on an appeal lodged by the ISU, set aside the lower court's judgment, holding that, in short, the CAS was indeed a court of arbitration within the meaning of German law. Although an international sports federation had a dominant position with regard to the admission of athletes to the competitions it organised, it did not abuse that dominant position by making an athlete's participation dependent on him/her signing an arbitration clause in favour of the CAS, within the meaning of the anti-doping regulations. The Federal Court of Justice also pointed out that the CAS rules of procedure provided sufficient guarantees of athletes' rights and that an appeal to the TFS could be lodged against a CAS decision. The parties to the proceedings before the CAS had to choose the arbitrators from a closed list, mostly made up of representatives of the IOC, national Olympic committees and international sports federations, but that did not mean that the CAS rules of procedure did not provide sufficient guarantees for athletes, since in the fight against doping the interests of those sports organisations did not conflict with those of athletes. The arbitration clause in favour of the CAS was thus not contrary to the right to a fair

trial nor to the free exercise of a profession. In March 2017, the proceedings before the German courts had not yet been finally determined, as Claudia Pechstein had lodged a constitutional complaint against the Federal Court of Justice's judgment. The athlete's ground of appeal concerning an alleged breach of her right to be heard was dismissed in September 2016, but the Federal Constitutional Court has yet to decide whether to declare her complaint admissible.

Another, more recent ground for complaint, namely that the CAS's scope of review is insufficiently wide in doping cases, was raised in the Malisse and Wickmayer case. The Swiss Federal Tribunal (TFS) declared the appeal inadmissible in this respect, as in order for it to be able to consider the complaint, it would have had to have been raised before the CAS first, which was not the case. The TFS did not examine this ground therefore.[39] It is true that as a rule, the CAS adheres strictly to the World Anti-Doping Code (WADA Code) (in particular Article 10.5, concerning the – limited number of – circumstances in which a penalty may be reduced), while recognising that this code significantly reduces its room for manoeuvre, especially when it comes to determining penalties. In other words, the CAS, if it wishes to apply the necessity test in this context, may do so only within the very narrow confines established by the WADA Code.[40] The CAS considers, however, that a flexible interpretation of this intentionally restrictive system "could jeopardise the uniform application and effectiveness thereof".[41] Sometimes, however, it departs from the WADA Code, for example by imposing a more lenient penalty than the one prescribed, in order to comply with the proportionality rule, for example, if it considered that the circumstances were truly extraordinary (*Puerta v. ITF*, CAS 2006/A/1025). Based on its current case law, the TFS would consider there to be a problem with proportionality only if the award amounted to an extremely serious attack on personal rights, one that was totally disproportionate to the behaviour penalised.[42]

39. TFS, 4A_428/2011, *A & B v. AMA & VTV*.
40. *Squizzato v. FINA*, CAS 2005/A/830; *Knauss v. FIS*, CAS 2005/A/847.
41. H., Swiss Cycling, Swiss Olympic, WADA, UCI, CAS 2005/A/922.
42. *N. et al. v. FINA*, 5P.83/1999; the only example where the TFS has held a penalty to be disproportionate: Matuzalem *case*, judgment of 27 March 2012, 4A_558/2011.

As it stands, therefore, the CAS may be considered an independent and impartial tribunal. To date, there has been no occasion to rule on the other arbitration tribunals set up by specific sports federations, but it is reasonable to suppose that these federations have taken sufficient precautions to ensure that the bodies in question are independent, with particular reference to the TFS's decisions in the Gundel and Lazutina cases, so the likelihood of them incurring the censure of the TFS is fairly low.

As we have already seen (section 3.2.2.1), the CAS's status as an independent tribunal is currently being challenged before the Court, in the Pechstein and Mutu cases, and it is impossible at this stage to predict what the outcome of these proceedings will be.

Similar questions about the impartiality of the national disciplinary bodies have led certain experts to consider setting up, at national level, independent disciplinary authorities, separate from the bodies which establish the facts and impose penalties in doping cases. The Monitoring Group of the Anti-Doping Convention is preparing a draft recommendation which encourages, among other things, the setting up of independent disciplinary bodies within national federations, to ensure that the hearing and sanctions process complies more closely with Article 7 of the Anti-Doping Convention and Article 6 of the European Convention on Human Rights. It should, however, be noted that doubts about the impartiality of disciplinary bodies are not enough to call into question the independence and impartiality of the CAS, which is a court of arbitration with no link to any federation.

C. Withdrawal from proceedings and challenges

For a court – and arbitration tribunals – to be regarded as independent and impartial, the individuals who serve on it must themselves offer guarantees of independence and impartiality.

Such guarantees are presumed to exist but there must also be procedures in place so that judges or members of an arbitration tribunal can withdraw from involvement in the proceedings if they believe they cannot rule with complete impartiality, for instance because of their connection with one or other party or with the case itself, or because they

have a personal interest in the outcome of the dispute. The parties must also be able to challenge a judge or member of the arbitration tribunal in the same circumstances, as a natural consequence of their right to an independent and impartial tribunal.

Although withdrawal in the case of members of disciplinary bodies cannot be regarded in the same light, if only because of the relationship such persons inevitably have with the federation concerned, the organisation's rules should include the possibility, for the parties, to challenge a member in cases where there are concrete reasons to doubt, objectively and without being judgmental, his or her ability to give an impartial decision.

In the case of the international federations, it might be suggested, by way of good practice, that, under the rules on disciplinary procedure, judges and arbitrators should be able to be challenged in the following circumstances (unless the parties agree that the member concerned may nevertheless serve on the body in question):

- if they have had prior involvement in the same case, in another capacity (for example, a member of the executive body which refused to authorise the postponement of a football match may be disqualified from serving on the disciplinary board which is to examine the consequences of the forfeit of the match);
- if they hold the same nationality as one of the parties to the proceedings, in international disputes;
- if they have a particular relationship based on friendship or enmity with one of the parties to the proceedings or their representative;
- if they have a personal interest in the case (for example, a member of a handball club which is due to play against the club of a player whose suspension the body is required to consider);
- if there are any other circumstances which cast doubt on the impartiality of the member in the case in question.

In order to avoid delaying tactics, the procedural rules should make it clear that the request for disqualification must be made immediately, i.e. within a short time frame, as soon as the party concerned learns of the possible ground for disqualification.

3.2.2.3. Investigatory body separate from the body making the disciplinary decision

Ever since the judgment handed down by the Court in *de Cubber v. Belgium* on 26 October 1984, it has been inadmissible in criminal proceedings for the functions of investigating judge and trial judge to be exercised by the same person in the same case.

The question arises as to whether the combination of the investigating and adjudicating functions is admissible in disciplinary proceedings. In other words, must the investigation and adjudication functions be separated by having, within each federation, persons who are responsible for investigation and others who are responsible for taking decisions?

Some federations make a body equivalent to a prosecutor responsible for deciding to open disciplinary proceedings, conducting the investigation, submitting the case to an adjudicating authority and arguing the case against the accused before that body. In football, for example, those functions are exercised by the "prosecuting officer" of the Federazione Italiana Giuoco Calcio (FIGC) in domestic cases relating to Italian football (Article 32 of the FIGC's Codice di Giustizia Sportiva), and in the UEFA context by UEFA's Disciplinary Inspector (Article 25 of UEFA's Disciplinary Regulations). In cricket, it is the ICC's Anti-Corruption and Security Unit (ACSU) that investigates and brings charges in corruption cases (Article 4 of the ICC's Anti-Corruption Code), whereas in tennis this role is performed by the Tennis Integrity Unit (Article X (F)(2)(a) of the Uniform Tennis Anti-Corruption Programme). FIFA's system for dealing with cases relating to ethics differs slightly, in that its Ethics Committee is divided into two chambers, one responsible for investigation and the other for adjudication (Article 26.1 FCE), although, in complex cases, the investigatory chamber may "engage third parties – under the leadership of the chief of the investigation – with investigative duties", the work of those third parties having to be clearly defined (Article 66.3 FCE). Other federations prefer to ask their first-instance disciplinary authority to open proceedings and conduct investigations before making a decision on the case. One such federation is the AIBA (Article 13.2.1 of the AIBA Disciplinary Code).

It has been suggested that a "central integrity unit" should be set up as an independent body to conduct match-fixing investigations on behalf of some or all sports federations, which would retain a subsequent right to decide on any

sanction. Those who advocate such a mechanism note that many federations do not have the necessary resources – and may not have the necessary will – to set up sufficiently developed investigation units with competent staff, preventing them from dealing effectively with corruption cases in the broad sense.

It is important to note that, legally speaking, federations are under no obligation to separate the investigating and adjudicating functions within their disciplinary bodies. In the interests of the federation and of the athletes and clubs concerned, the main thing is that proceedings should be fair and prompt. The recent events at FIFA, where the Ethics Committee's investigatory and adjudicatory chambers clashed publicly and rather acrimoniously over what action to take on an inquiry report, to the point where the chair of another committee had to be called in to arbitrate, have hardly helped the case for separation. One drawback of separating the investigation and adjudication functions is that it creates a potential source of conflict within the federation concerned. Another drawback is the additional time necessarily taken when a case is examined by two different persons or groups of persons, prolonging the time taken for the proceedings. The counter-argument to all of this is that the separation of functions preserves the impartiality of the decision-making body, which accordingly has no need to involve itself in seeking evidence.

3.2.2.4. Public nature of proceedings

Court hearings are generally conducted in public (see Article 6.1 of the Convention). Disciplinary proceedings, however, are not normally open to the public, being internal to the sports organisation in question and, by definition, private. In principle, therefore, the parties to disciplinary proceedings are not entitled to a public hearing, despite Article 6 of the Convention (one exception to this is Article 4 of the standard disciplinary regulations imposed on state-approved sports federations in France, according to which hearings in disciplinary cases must generally be held in public; see Appendix I-6 to the French Sports Code).

In principle, the same applies to proceedings before an arbitration tribunal, since arbitration proceedings are not normally public, as illustrated by the CAS Code which states that "At the hearing, the proceedings take place in camera,

unless the parties agree otherwise" (Article R57, paragraph 2, of the CAS Code). Parties which agree to settle a case via arbitration are deemed to have waived their right to a public hearing, as guaranteed by Article 6 of the Convention (Beloff et al. 2012: 270, with references). The issue was, however, raised before the Court in the Mutu case (see above, 3.2.2.1) since the Court asked the parties whether Article 6.1 of the Convention applied to the procedure followed in the present case before the CAS.

In any case, it has to be said that athletes involved in disciplinary proceedings rarely want their dirty linen to be washed in public and usually prefer their cases to be settled relatively discreetly. It is significant, moreover, that since the CAS was established, it has held only one public hearing[43] and none in the past 15 years or so. Even if one were to apply Article 6 of the Convention in this connection, therefore, or at least be guided by it in disciplinary and arbitration proceedings, the parties, or in any case the athletes and clubs accused, should still have the option of seeking and obtaining, without any particular formalities, permission for the hearing to be held in camera, in order to protect their privacy.

The generally confidential nature of disciplinary and arbitration proceedings means that information supplied during the proceedings by an individual must be treated as precisely that, i.e. confidential. There are, however, some exceptions to this rule, such as the need to disclose information in order to argue a case, disclosure that is required by law, information which is already in the public domain or has already been published, or exchange of information with other bodies and authorities.[44]

3.2.2.5. Equal treatment and adversarial procedure

When the rules of an association make no provision for any prosecuting authority (a "sports prosecutor"), the accused athlete or club is in principle the only party to disciplinary proceedings. In this context, there can therefore be no

43. *B. v. FINA*, CAS 98/221 B, award of 7 June 1999.

44. For example, Article 4.4 ICC Anti-Corruption Code; Article 34, paragraph 8, UEFA DR.

question of equal treatment of the parties. The right to procedural equality takes on its full significance, however, in the other eventuality, where there should be appropriate procedural provisions to ensure equal treatment.

In disciplinary proceedings before arbitration tribunals, where an athlete, club or federation facing sanctions is pitted against the sports federation which made the impugned decision, equal treatment should be a given. Granted, the fact that individual athletes do not usually have access to the same resources as their federation (trained staff, funding, logistics, etc.) means there may be some imbalance in terms of the procedural arms available to each side but under the procedures themselves, each party must be able to make written and, where appropriate, oral submissions, enabling them to state their case based on the same file.

In practical terms, equal treatment of the parties to proceedings is assessed in relation to certain criteria, such as:

- access to the entire case file;
- possibility of being assisted or represented during the proceedings;
- possibility of presenting one's factual and legal arguments on the subject matter of the proceedings;
- number of exchanges of submissions and time limits for filing those submissions;
- possibility of adducing relevant evidence (such as witness statements and expert opinions);
- possibility of attending hearings, if any;
- allocation of speaking time at hearings.

Consequently, there can be no question, for example, of a disciplinary body or arbitration tribunal disclosing certain case-file items to one party only, conferring with one party without the other being present, allowing one party to file more submissions than the other or restricting speaking time at the hearing in an unequal manner.

3.2.2.6. Reasonable time

Under Article 6.1 of the Convention, litigants have the right to a hearing within a reasonable time. The same requirement holds for arbitration proceedings and should also apply to sports' organisations' disciplinary bodies.

What constitutes a reasonable time has to be assessed in each specific case, according to its nature and difficulty. It is important to weigh up sometimes conflicting interests, such as the federation's interest in a speedy settlement of the dispute and that of the defendant in having the necessary time to prepare his or her defence. In complex cases where the burden of proof lies with the defence, such as doping cases, the athlete in question may have to be able to produce evidence – witness statements, expert reports, documents, etc. – which takes time to obtain, and there should be no question of setting excessively short time limits for this for the sole purpose of expediting the proceedings. Conversely, the disciplinary body must ensure, for example where an athlete is not provisionally suspended, that the proceedings are not prolonged indefinitely through unreasonable time-limit demands. Ultimately it is a question of moderation and common sense.

3.2.2.7. Presumption of innocence

A. Introduction

In criminal proceedings, the presumption of innocence as defined in Article 6.2 of the Convention postulates, in substance, that any person charged with an offence is presumed innocent until proven guilty. It implies, among other things, that it is not for the accused to prove their innocence, but rather for the prosecution to prove their guilt (burden of proof) and that guilt cannot be established unless it is proved beyond all reasonable doubt (standard of proof which gives the benefit of doubt to the accused; the *in dubio pro reo* principle).

The situation is different in disciplinary proceedings, where the presumption of innocence does not apply. That does not mean that a sanction can be imposed in any random way. But disciplinary procedure may provide that the onus for proving certain facts lies with the defendant (burden of proof) and that a finding of guilty may be made even if some doubt remains (standard of proof). These "exceptions" can be found in arbitration proceedings instituted against disciplinary decisions.

B. Burden of proof

The onus for proving that an offence has been committed rests in principle with a disciplinary body – or the federation concerned, if the disciplinary proceedings are considered as being between the federation and the defendant – and not with the defendant (Lewis and Taylor 2014: 397). There are two possible models depending on how the sports federation is organised. In the first, there is a prosecuting authority, which may or may not be responsible for the investigation, and the burden of proof is on that authority (for example, the ACSU General Manager, Article 3.1 ICC; the UEFA disciplinary inspector, Article 25 UEFA Disciplinary Regulations; the PTIO (Professional Tennis Integrity Officer), Article 3 Uniform Tennis Anti-Corruption Programme). In the second model, in the absence of a prosecuting authority, the burden of proof is on the decision-making authority itself (for example, Article 52 FIFA Code of Ethics, Article 99 FIFA Disciplinary Code).

In some situations, however, the rules of procedure may provide that if certain facts are proved, an offence is found to have been committed unless the defence provides evidence to the contrary (Lewis and Taylor 2014: 397). For example, the anti-doping system is based on testing of biological samples and a – rebuttable – presumption of guilt when the test produces a positive result (Article 2.2.1 of the World Anti-Doping Code). It is for the federation to prove the positive test result and to show that it was obtained by a sample-taking and analysis procedure consistent with the rules in force. If this proof is provided, athletes can exonerate themselves in principle only if they prove certain facts, such as how the prohibited substance got into their bodies and the absence of any fault, i.e. negligence or intent, on their part.

Regarding this principle, there is no objection to disciplinary rules establishing presumptions (see Beloff et al. 2012, Nos. 7.81 and 7.82: 212-213). But reliance on presumptions must be proportional to the aim pursued and not violate the principle of a fair trial.

For example, a federation may provide for a presumption of accuracy of the facts established, in final, unappealable decisions, by a state court, an arbitration tribunal, a disciplinary body or any other competent state or sports tribunal. A case in point is the ICC. This federation's Anti-Corruption Code specifies that its anti-corruption tribunal may – but is

not obliged to – accept these facts as established and that, if it does so, the presumption is then irrebuttable. The defendant may, however, attempt to prove that the procedure which led to the decision in question violated the principles of a fair trial (Article 3.2.1 ICC Anti-Corruption Code). In football, there are also several rules stipulating an irrebuttable presumption of accuracy of the reports produced by match officials, particularly referees and match commissioners (Article 38 UEFA Disciplinary Regulations; Article 98 FDC).

Independently of any presumption, defendants may be required to prove the facts they allege in disciplinary proceedings. If, for example, an athlete is accused of having been approached by a third party to rig a result and of not having reported this fact and the athlete claims that he or she did in fact notify a federation official, it is for the athlete to prove that he or she did so. In the same situation, if the athlete claims that he or she only spoke with the alleged briber because he or she was a childhood friend, it is for the athlete to prove these pre-existing ties.

Lastly, it should be noted that, to accept facts as proven, it is not necessary to have direct evidence. Circumstantial evidence may suffice, in other words a combination of circumstances which, taken separately, would not be sufficient, but which, taken together, may create a strong suspicion of guilt.[45] The CAS has held that circumstantial evidence may be sufficient to prove that samples were tampered with in a doping context (*B v. FINA*, CAS 98/211 paragraph 56).

C. Standard of proof

In criminal law, according to the *in dubio pro reo* rule, the standard of proof applied by the courts is that the facts must be proven beyond reasonable doubt. This means, in other words, that no conviction may be handed down if there is any remaining doubt as to the defendant's guilt which cannot be reasonably dispelled.[46]

45. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraph 30, citing Pollock CB in *R v. Exall,* 1866 4 F F 922.

46. For a definition of this concept as applied in English law, see the ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraph 27, citing Denning J. in *Miller v. Minister of Pensions,* 1947, 2 All ER 372 and 373H.

As we have already seen, application of the *in dubio pro reo* principle is not an obligation in disciplinary proceedings. In their rules of procedure, sports federations can therefore provide for their disciplinary bodies to make do with a lower standard of proof.

Some federations adopt the standard applied in civil proceedings in some legal systems, mainly in the English-speaking world, namely that of the "balance of probabilities", also known as the "preponderance of evidence", the two terms being synonymous. What is applied here is the "more likely than not" test (Beloff et al. 2012, No. 7.87: 214), meaning that a fact is considered sufficiently proven when, in the light of the evidence, that hypothesis appears more likely than any other. A 51% probability of guilt may therefore suffice to impose a sanction. This system is adopted in tennis, for example, in corruption cases (Article 3.a, Uniform Tennis Anti-Corruption Programme).

The CAS has developed another standard of proof, namely that of "comfortable satisfaction".[47] This standard lies between those of proof beyond reasonable doubt and the preponderance of evidence in that it is necessary, but also sufficient, for the evidence provided to be such that the decision-making body can be comfortably satisfied that the facts are proven, a complete absence of doubt being unnecessary. The standard varies according to the gravity of the offence: the more serious the offence and the more severe the proposed sanction, the more substantial the body of evidence must be to meet with the satisfaction of the body responsible for resolving the dispute (Beloff et al. 2012, No. 7.89: 215). The comfortable satisfaction standard has been adopted in cricket, for example, for offences against anti-corruption regulations (Article 3.1 ICC Anti-Corruption Code).

When a case is referred to the CAS, it applies the standard of proof enshrined in the regulations of the federation concerned. If there are no specific regulations, it refers to the standard of sufficient conviction, with the upshot that most sports disputes which come before arbitration tribunals are resolved according to this standard.

47. See, among others, *Wang v. FINA*, CAS 98/208; *Michelle Smith de Bruin v. FINA*, CAS 98/211, No. 10.2; *Mohamed Bin Hammam v. FIFA*, 19 July 2012, CAS 2011/A/2625.

It is legitimate for sports organisations and arbitration tribunals not to make the imposition of sanctions conditional on the facts being proven beyond all reasonable doubt. Of course, there is a risk, and even some likelihood, that innocent people will be punished. But this kind of injustice must be accepted in the higher interest of integrity in sport. As the CAS has stated:

> The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or by negligence of unaccountable persons, which the law cannot repair ... It appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors.[48]

3.2.2.8. Information about the charges

Informing the defendant of the charges against him or her, i.e. the specific offences of which he or she stands accused, is a key requirement in criminal proceedings. It is an essential prerequisite if the defendant is to be able to mount an effective defence.

The same is true in disciplinary proceedings: the defendants must be informed of the charges against them in time to be able to organise their defence and, for example, submit evidence refuting the charges.

In practice, disciplinary bodies can meet this requirement by specifying the charges in a notice of the opening of an investigation, in a final investigation report submitted to the parties or in the summons to appear before the body with jurisdiction to decide the case (for an example of a practice showing great respect for the rights of the defendant, see Article 4.5 ICC Anti-Corruption Code). If the charges are clear from the case file, its timely disclosure may be sufficient. For example, it is probably unnecessary to issue a special notice to a handball player who is accused of striking an opponent in the course of play if this fact is mentioned in a report by the match referee which is brought to the player's

48. *Quigley v. UIT*, CAS 94/129.

attention prior to the hearing. On the other hand, some form of special notice setting out the charges should be the norm in complex corruption cases involving a number of people.

Informing defendants of the charges against them should not be a problem in arbitration proceedings: the acts of which the individual stands accused are usually clearly apparent from the disciplinary decision which the arbitration tribunal is asked to consider. If the decision is not sufficiently precise in this respect, the tribunal will most probably invite the federation concerned to elaborate, unless it considers that the charges are too weak and is content to allow the appeal and revoke the sanction on that ground.

3.2.2.9. Assistance of a lawyer or other representative

In standard court proceedings, the parties have a right or duty, as the case may be, to arrange for themselves to be represented.

The parties to disciplinary proceedings must also have the option of being assisted or represented by a person of their choice.

It would seem that, in some sports, assistance and representation are not permitted in disciplinary proceedings; however, in the current context of sport and the related litigation, it cannot seriously be argued that a ban on athletes receiving assistance in disciplinary proceedings is an acceptable practice, especially as disciplinary bodies themselves are tending to become increasingly professional. If the charges are of some seriousness, such a ban will not guarantee fair proceedings (on these matters, see, among others, Beloff et al. 2012, Nos. 7.126 et seq.: 225 et seq., with references); as for Lewis and Taylor (2014, C1.106: 398), they contend that it would be good practice to allow representation in all disciplinary proceedings, pointing out that even where associations' rules prohibit such representation, it should nevertheless be possible, especially in cases where the effect of the proceedings could be to prevent the athlete from pursuing his or her career.

In arbitration proceedings, the right to be assisted by a lawyer or other representative is guaranteed in all circumstances.

The federations could possibly require representatives to have legal training, to ensure that proceedings run smoothly. But the norm is rather to refrain from setting any such conditions, the upshot of which is that defendants can genuinely be assisted by the person of their choice (Article R30 CAS Code; Rule 46 ASF DR).

The rule is that the parties themselves must bear the cost of representation (for example, Section 7.3 ASOIF Model Rules 2012; Article 40 FCE 2012; Article 145 FIBA Internal Regulations 2010, Book 1). It would seem that no exception is made to this rule in proceedings before disciplinary bodies. Until recently, the same rule applied in arbitration proceedings, which might appear to pose a problem in more complex proceedings where the penalties facing the defendant are significant (lifetime ban, exclusion): not all athletes can afford proper professional representation, yet in doping cases, for example, it is difficult to see how an effective defence of their interests could be secured without it. Mindful of this, the CAS has instituted a system of free legal aid. Applications are examined by the president of the CAS on the basis of the CAS Legal Aid Guidelines of 1 September 2013. Legal aid may be granted to any natural person who cannot cover the cost of his or her defence. It is subject to the condition that the case is not devoid, from the outset, of any chance of success. When the conditions are satisfied, the president appoints a counsel acting pro bono, i.e. without charging his or her client any fees, who is chosen from a list drawn up by the CAS. Legal aid may also take the form of a dispensation from having to pay an advance on costs and/or a lump sum granted to the applicant by the CAS to cover costs (travel and accommodation costs of the beneficiary and those of his or her witnesses and experts, as well as those of the pro bono counsel).

Should sports federations perhaps introduce a system similar to that of the CAS for disciplinary cases? In itself, a legal aid system has much to recommend it as it would allow athletes who are not well-off to secure a proper defence. It has to be recognised, however, that many sports organisations have only limited funds at their disposal and were they to follow the CAS's example and provide lump sums to cover costs, their spending could quickly become unmanageable. There would, however, be nothing to stop these organisations creating a pool of lawyers who would be willing and able to act on a pro bono basis for individuals facing disciplinary action and who do not have the resources to pay for counsel

themselves. Possible reasons why lawyers might want to provide this service include an interest in sport-related issues, a desire to make a name for themselves in what is a relatively closed environment or simply a willingness to help their fellow citizens in need. Even if such a system were introduced, however, there would still remain the problem of the – in some cases significant – costs involved in mounting a defence, whether as regards the travel costs of the defendants, their representatives and witnesses, if any (for example, cases coming before the International Weightlifting Federation's (IWF) Anti-Doping Hearing Panel gave rise to hearings in Kazan (Russia), Almaty (Kazakhstan) and Houston (USA), i.e. in the cities that hosted world championships; some of the athletes accused, in particular those from Mauritius and Mexico, waived their right to attend because they could not afford to make the journey) or the fees payable to experts employed by the defence (a common and often necessary practice in doping cases).

3.2.2.10. Assistance of an interpreter

In criminal proceedings, a person accused who does not speak the language in which the proceedings are conducted is entitled to the assistance of an interpreter (Article 6.3 of the Convention). The Court has inferred from this that interpreters' fees cannot be charged to the accused and must therefore be borne by the public authority concerned.

While the right to the assistance of an interpreter is recognised in arbitration and disciplinary proceedings (see, among others, ASOIF Model Rules 2012, Section 7.3), it is generally not accepted that this service should be free of charge and it is in principle for the defendant to choose an interpreter and pay his or her fees (R.64.3 CAS Code, subject to the possible granting of legal aid), although some federations leave it to the disciplinary body to decide who should bear these costs (for example, Article 8 IWF Anti-Doping Policy). The same applies to any costs involved in translating the documents in the case file, which the defendant does not necessarily understand, particularly in proceedings before international federations and before the CAS, where proceedings are usually conducted in English or French, unless the parties and the panel agree otherwise (Article R29 CAS Code).

This puts defendants in a potentially difficult situation when they lack sufficient resources. Disciplinary case files can be voluminous and complex, and hearings can last several days, as in corruption and doping cases. Interpretation costs can therefore represent significant sums.

By way of good practice, it could be recommended that the federations provide for translation or interpretation costs to be borne by the federation itself, to the extent deemed reasonable by the competent disciplinary body, but in such a way as to at least enable the charges to be understood.

3.2.2.11. Hearing

The parties' right to a hearing before a tribunal is in principle absolute, in both criminal and civil proceedings (Article 6.1 of the Convention). However, the accused may waive this right, particularly in "sentence order" proceedings. In such proceedings, the prosecution service, if it considers itself to be sufficiently informed and provided the proposed sanction does not exceed a certain level of severity prescribed by law, may issue the defendant with a sentence order which, from a legal standpoint, is effectively an offer to terminate the proceedings. The defendant then has a certain statutory period within which to object. If he or she does so, the case is usually referred to the courts. If there are no objections, the sentence order is deemed to constitute a legally binding judgment. Experience has shown that in the countries which have introduced this system and set a relatively high sentence threshold, up to 90 or even 95% of criminal cases are settled in this manner. In civil proceedings, the parties can, in some cases, also make do with a ruling based on written submissions.

Sports federations' disciplinary procedures generally provide for the possibility of a hearing, at least before an appeals body when the system provides for one. Some have introduced a procedure similar to the sentence order, for example the Swiss Football League (Article 13 et seq. of its rules of disciplinary procedure). Often, first-instance disciplinary proceedings are conducted exclusively in writing and defendants can state their case only in writing (for example, Article 162 FIBA Internal Regulations 2010, Book 1; Article 34.2 UEFA Disciplinary Regulations; Article 94 FDC; Article

5.1 ICC Anti-Corruption Code, which provides for an exchange of briefs between the ICC as prosecuting party and the defendant), whereas some federations provide for a hearing in the event of an appeal (such as Articles. 4.7 and 5.1 ICC Anti-Corruption Code; Article 162 FIBA Internal Regulations 2010, Book 1). The ASOIF Model Rules propose restricting the right to a hearing to cases where the facts and/or proposed sanctions are disputed (Article 7.1 ASOIF Model Rules 2012). It should be noted that the standard disciplinary regulations in French law require the holding of a hearing, which, furthermore, must be public unless public policy or privacy considerations require otherwise (Article 4 of Appendix I-6 to the Sports Code).

The right to a hearing is not wholly unrestricted in arbitration proceedings. In the case of the CAS, the panel may, for example, decide not to hold a hearing and to rule on the basis of the case file if it feels that it is sufficiently informed; it is, however, required to consult the parties before taking any such decision (Article R57, paragraph 2, CAS Code). In other words, the right to a hearing is not absolute in CAS proceedings and the CAS may choose not to allow oral submissions even if one or both of the parties object. In practice, however, the CAS exercises considerable restraint and there have been very few instances in which a panel has dispensed with a hearing against the parties' wishes. More often, the parties themselves ask the CAS to rule on the basis of written evidence, because they feel they have sufficiently stated their case in writing and wish to avoid the costs involved in attending a hearing.

By way of good practice, parties should be afforded the right to a hearing at least once in disciplinary proceedings, either before the single authority or, in the case of a two-tier procedure, before the appeals body. That would not preclude federations from introducing simplified procedures and allowing the parties to waive their right to a hearing.

3.2.2.12. Evidence and evidence taking: general considerations

A. Introduction

In evidentiary matters, sports disciplinary bodies are not bound by such strict rules as those with which state judicial authorities have to comply. They can confine themselves to applying the organisation's internal rules, in principle

without having to refer to the formal rules of evidence applied by the courts, but nevertheless while observing the general principles of a fair trial (Beloff et al. 2012: 190).

As a result, the judicial rules on the admissibility of evidence do not apply for the purpose of establishing the facts in disciplinary proceedings. For example, courts in the English-speaking world reject hearsay evidence, unless otherwise provided for in common law or statute.[49] This exclusion does not apply in disciplinary proceedings, however. Furthermore, even unlawfully obtained evidence may sometimes be used (see below, 3.2.2.13). Another difference is that there are no restrictions on the types of evidence that can be used in disciplinary proceedings and the facts can be established by any appropriate means. In theory, therefore, the only exceptions are methods which are unsuitable for establishing the truth because they are random, unscientific or inappropriate for other reasons (trial by ordeal, divination, etc.; the issue of lie detectors is discussed below, in section 3.2.2.13) and methods which violate human dignity (torture, truth serums, etc.). Subject to these exceptions and any provisions to the contrary contained in sports organisations' internal regulations, all types of evidence are therefore admissible. Consequently, the question facing disciplinary bodies is not that of the admissibility of evidence, since blanket admissibility is the rule, but rather that of its probative value.[50]

Nevertheless, regulations may set limits on the bringing of evidence. For example, they may stipulate that certain types of evidence cannot be used or can be used only in a limited fashion. Usually, however, they recognise that all types of evidence may be brought (for example, Article 3.1 ICC Anti-Corruption Code; Article X, section G.3.c of the Uniform Tennis Anti-Corruption Programme; Article 46 FCE; Article 96.1 FDC, followed by a list of examples; Article 37, paragraph 1, UEFA Disciplinary Regulations; NFL Rule 17, Section 2, Article 3).

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49. For an example of how legislation in England and Wales has evolved in this area, compare the Criminal Justice Act 1988 (Section 23 to 28) with the Criminal Justice Act 2003 which entered into force in April 2005 (Chapter 2, Part 11) and the Coroners and Justice Act 2009; see also the Court, GC, 15 December 2011, *Al-Khawaja and Tahery v. United Kingdom,* Application Nos. 26766/05 and 22228/06, paragraphs 41-46.
50. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraph 29.

In arbitration proceedings, the parties are, in theory, free to adduce evidence. The CAS Code, for example, does not impose any limits on the type of evidence, even though it essentially refers to documentary evidence, witnesses and experts. The CAS may therefore also accept other types of evidence. Even though there is nothing in the history of the CAS to suggest that parties have attempted to rely on evidence that violates human dignity, it is clear that, should they ever do so, the CAS would disallow it. Its position on unlawfully obtained evidence and lie detector evidence will be examined below (see section 3.2.2.13).

B. Right of the parties to bring evidence

The evidence-related rights of persons charged with a criminal offence are enshrined in Article 6.3.d of the Convention, which provides that they have the right to "examine or have examined witnesses against [them] and to obtain the attendance and examination of witnesses on [their] behalf under the same conditions as witnesses against [them]". The Court has inferred from this that the defendant has a right to have exonerating facts admitted into evidence, as regards witnesses, but also other evidence; it accepts, however, that there are limits to this right (see, among others, European Court of Human Rights 2014: 48 et seq., with references).

In disciplinary proceedings too, the parties have the right to adduce evidence, particularly in the form of witnesses and documents (for example, Articles 162 and 168 FIBA Internal Regulations 2010, Book 1; Article 94 FDC; Article 7.3 ASOIF; Article 39.1 FCE; Article R44.1 CAS Code).

This right is not absolute, however, because the arbitration tribunal or disciplinary body can refuse to admit evidence it deems irrelevant, in order to limit the proceedings to what is necessary to resolve the dispute (for instance, "The Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance", Article R44.2, paragraph 5, CAS Code). For example, the arbitration tribunal or disciplinary body may consider that it is unnecessary to hear a witness because the facts on which the witness was to be questioned are already sufficiently well established, because the witness is manifestly lacking in credibility or because several other witnesses proposed by the same party are to be heard on the same subject. Nevertheless, some degree of restraint should be

observed in this regard: on the one hand, a piece of evidence which may at first sight not appear strictly relevant may turn out to be useful in the end, and on the other, the persons against whom proceedings have been instituted should be able to defend themselves by their chosen means, as long as they do not abuse their rights.

Furthermore, it is not inconsistent with a fair trial to make the right of evidence subject to formal requirements, especially as regards the time limits within which evidence must be submitted in order to be admissible. For example, the CAS does not usually admit evidence which the parties neglected to submit during the disciplinary proceedings: "The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered" (Article R57, paragraph 3, CAS Code). More generally, the TFS has held that, in arbitration proceedings, anyone wishing to call witnesses must exercise this right within the time limits, and in the form, prescribed by the applicable rules of procedure, failing which the arbitration tribunal may reject the evidence (TFS, ATF 4A_162/2011, Milutinovic).

The parties to disciplinary and arbitration proceedings are generally responsible for ensuring that their witnesses and experts attend the hearing, and for meeting the relevant costs. Such is the case in proceedings before the CAS, whose rules provide that: "The parties may only call such witnesses and experts which they have specified in their written submissions. Each party is responsible for the availability and costs of the witnesses and experts it has called" (Article R44.2, paragraph 3, CAS Code; see also, Article 39.3, UEFA DR and Article 75.2, FCE). The same rules further state: "If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award" (Article R57, paragraph 4, CAS Code; subject to legal aid, see section 3.2.2.9 above). Some disciplinary regulations require the parties themselves to bear the costs relating to their witnesses (for example, Article 145 FIBA Internal Regulations 2010, Book 1). In practice, these rules restrict the possibility for defendants to have exonerating facts admitted into evidence as some of them might not have sufficient resources to finance travel and accommodation for their witnesses and experts to attend a hearing held in a distant place, as is often the case with proceedings conducted by international federations and the CAS. The only means of remedying

this situation would be, as the CAS has done, to allow the body responsible to grant legal aid to parties needing it (see above, 3.2.2.9).

In order to safeguard the right of the parties to bring evidence, which is an essential part of the right to be heard, the rules on disciplinary and arbitration proceedings should provide for the possibility of adducing evidence, in principle without any restriction as to the nature of this evidence. In order to avoid abuses and unnecessarily protracted proceedings, however, it seems sensible to include a provision in the rules of procedure whereby the arbitration tribunal or disciplinary body can refuse to admit evidence which, on inspection, is deemed to be irrelevant. The same rules should require evidence to be submitted in the form and within the time limits prescribed. They could also expressly grant the parties the right to participate in the investigation (as in Article 94 FDC), subject to possible exceptions (for anonymous hearing of witnesses, see below, 3.2.2.13). Lastly, it should be self-evident that the parties to arbitration and disciplinary proceedings must have equal access to evidence, meaning, for example, that evidence submitted by the defence must be no less capable of being admitted than evidence submitted by the body bringing charges.

3.2.2.13. Some specific forms of evidence

A. Examination of the parties – Obligation to co-operate

In criminal proceedings, persons charged with an offence have the right not to incriminate themselves, in particular the right to refuse to answer questions, without this refusal being interpreted to their detriment.

This right does not exist in disciplinary proceedings, where defendants are in principle obliged to co-operate with the investigation and provide any information the disciplinary body may require from them. As the sports federations see it, this obligation is justified by the importance of their being able to prosecute and punish offenders, particularly in corruption cases (see, among others, Article 1.1.4 ICC Anti-Corruption Code). This stems from practical imperatives, given that defendants often possess valuable information. For example, athletes generally have sole access to their bank statements, detailed telephone bills and e-mail correspondence, while a club necessarily possesses information

about the contracts signed with its employees and their lifestyle. If sports organisations do not have rules requiring defendants to co-operate, their disciplinary bodies cannot have access to information which may prove essential. The obligation to co-operate is also justified sometimes by the fact that sports organisations do not have coercive investigation methods, such as searches of premises or telephone tapping, which means that a minimum of co-operation is needed from the persons concerned if the facts are to be established. Obviously, the persons subject to this obligation may not necessarily welcome the idea of revealing confidential information concerning them, because this information may lead disciplinary bodies to draw conclusions which might be unfavourable to them (for example, proof of numerous telephone contacts with a person suspected of rigging competitions) or because it will provide ammunition for proceedings already instituted against them.

So, unlike criminal procedure, disciplinary procedure does not recognise the defendant's right to remain silent and refuse to provide evidence against himself or herself (right not to incriminate oneself). Disciplinary rules may accordingly impose an obligation to co-operate on persons subject to the organisation's jurisdiction and even make it a disciplinary offence to refuse to co-operate or to be insufficiently co-operative.

Various organisations actually provide for this type of obligation in their regulations, in the form of a fairly general clause stipulating, for example, that players "must fully co-operate with the federation in its fight against [corruption]" (see Article 12.1, UEFA Disciplinary Regulations; see also Article 41.2, FCE and Article 110.1, FDC), or making it a disciplinary offence not to make all reasonable efforts to co-operate with investigations (Article 3.2.11 BWF). Some federations have chosen to adopt more detailed and/or specific provisions, requiring persons charged with corruption offences to submit any information and documents they possess which may be of relevance to the investigation, such as a written statement on the facts of the case, detailed phone bills, text messages, bank statements, internet service records, computers, data storage and retrieval devices (text, pictures, sound, etc.), or other electronic storage devices, documents relating to sources of income, etc. (see, for example, Article 2.4.4 ICC Anti-Corruption Code).

If co-operation is withheld, the disciplinary body reaches its decision on the basis of the documents in its possession (for example, if the parties fail to collaborate, the adjudicatory chamber of the FIFA Ethics Committee "may reach a

decision on the case using the file in its possession, taking into account the conduct of the parties to the proceedings"; Article 41.5, FCE; Article 110.4, FDC) and may, in its assessment of the evidence, draw adverse inferences from a person's refusal to co-operate (for example, Article 3.2.2 ICC Anti-Corruption Code; Article 39.1 *in fine*, UEFA Disciplinary Regulations). Failure to co-operate may in itself constitute a disciplinary offence or lead to the person's provisional exclusion from all competitions until he or she has provided the information requested (Article X, Section F.2 of the Uniform Tennis Anti-Corruption Programme).

The obligation to co-operate is no doubt necessary if effective action is to be taken against certain particularly serious offences, such as the manipulation of sports results. However, sports bodies must not use it as an excuse for making people provide information which is unrelated to the case or the facts to be proved or is totally out of proportion to the aim pursued and the importance of the case. Rules restricting the obligation to what is reasonable and necessary are therefore appropriate and, in applying them, sports federations should observe a degree of restraint with regard to any confidential information which their rules allow them to demand from persons involved in disciplinary proceedings. Their rules should reflect a concern not to intrude excessively on the privacy of their members, but should be flexible enough to enable effective proceedings to be conducted against them.

The situation is different in arbitration proceedings as, by this stage, the federation concerned has already gathered the evidence required to establish the disciplinary offence and decide what the sanction should be. The person on whom the sanction has been imposed is the one who has instituted the arbitration proceedings, by filing an appeal against the disciplinary decision, so it is for that person to decide by what means he or she wishes to defend himself or herself and there is no need for the arbitration tribunal to compel him or her to co-operate or even respond.

B. Hearing of witnesses

Witnesses are persons who are not parties to the proceedings and who, on the face of it, are able to furnish useful information.

As in criminal proceedings, a person who is under disciplinary investigation or a party to arbitration proceedings has the right to have witnesses heard, subject to the relevance of their testimony and compliance with certain procedural rules (see above, 3.2.2.12, B). This applies both to witnesses against the person, to whom he or she may wish to put questions, particularly in order to try to undermine their credibility, and to witnesses on his or her behalf, whom it is obviously in his or her interests to call to the witness stand.

Specific problems arise when statements by witnesses may expose them to dangers to themselves and/or those close to them, which could lead disciplinary bodies and arbitration tribunals to hear them in such a way that their anonymity is preserved.

In criminal proceedings, the right to a hearing (Article 6 of the Convention) is considered to be affected when facts are established on the basis of statements by anonymous witnesses. This right is not violated, however, if the statements are backed up by other evidence adduced before the court, i.e. if they are not the only incriminating evidence in the case in point. In principle, the Court recognises a party's right to rely on anonymous witness evidence and to prevent the opposing party from questioning its witnesses if that is justified by the safeguarding of legitimate interests, particularly when the personal safety of witnesses and those close to them is in danger. Nevertheless, the right to a hearing and to a fair trial must be protected as far as possible by other means, such as the use of audiovisual techniques to protect witnesses and detailed identity and background checks by the court to ascertain whether a witness is reliable (for a summing-up of the relevant case law, see, for example, a judgment of the TFS, ATF 133 I 33). Similar principles may be applied *mutatis mutandis* in disciplinary and arbitration proceedings.

Consequently, some federations have adopted procedural rules allowing for the possibility of anonymous witness evidence (Article 40 UEFA Disciplinary Regulations and Articles 47 and 48 FCE). Others, currently the majority, have dispensed with this possibility, at least for the moment.

The rules adopted by UEFA (Article 40 UEFA Disciplinary Regulations) are based partly – but only partly – on the criteria developed by European case law for anonymous witness evidence in criminal proceedings, the main points of which are the following.

- This form of evidence is reserved for cases where a person's testimony may endanger his or her life or put him or her or his or her family or close friends in physical danger.
- The chair of the competent disciplinary body may order that the witness not be identified in the presence of the parties, that the witness not appear at the hearing and that all or some of the information that could be used to identify the witness be included only in a separate, confidential case file.
- In contrast to criminal procedure, the UEFA procedure allows a finding of guilt to be made solely on the basis of statements by an anonymous witness.
- In the light of all the circumstances, and in particular if no other evidence is available to corroborate that of the anonymous witness, and if it is technically possible, the chair of the disciplinary body may exceptionally order that the witness's voice be distorted, that the witness's face be masked, that the witness be questioned outside the court room or in writing.
- Anonymous witnesses are identified behind closed doors in the absence of the parties, and the witness identification is recorded in minutes containing the witness's personal details. These minutes are not communicated to the parties, who, however, receive a brief notice confirming that the anonymous witness has been formally identified and containing no details that could be used to identify this witness.
- The rules provide for sanctions against anyone who discloses the identity of an anonymous witness or any information that could be used to identify him or her.
- The CAS rules of procedure make no provision for anonymous witness evidence. In a case involving match-fixing, however, the CAS has agreed to protect the anonymity of witnesses.[51] Referring to relevant European and Swiss case law (ATF 133 I 33 and Court judgments in the Doorson, Van Mechelen and Krasniki cases) it essentially found that, in the case in question, the witnesses concerned had argued convincingly that their statements personally exposed them to threats, insults, pressure and intimidation. The CAS provided the appellants with the

51. CAS 2009/A/1920 *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski v. UEFA.*

minutes of the interrogations of the anonymous witnesses and allowed them to cross-examine the witnesses over the telephone during the hearing, after a counsel of the CAS had ensured that the witnesses were properly identified and that they were alone at the time when they gave their answers. It rejected the appeal and upheld the sanctions, on the basis of the statements made by the anonymous witnesses.

The use of anonymous witnesses is becoming a necessity in disciplinary and arbitration proceedings. By way of good practice, it should be recommended that sufficient procedural safeguards be put in place to ensure that, first, the witness's anonymity is effectively preserved and, second, that the rights of the defence are nevertheless able to be exercised to a sufficient degree, in particular as regards the possibility of having relevant questions put to the anonymous witness.

C. Documents

As in conventional legal proceedings, disciplinary bodies and arbitration tribunals may obviously use documents as evidence.

This may prove problematical when the persons against whom proceedings are instituted are strongly requested to file documents pertaining to their private life, failing which sanctions or other restrictive measures would be applied. For example, in the case of Butt, Asif and Amir, Pakistani cricketers accused of "spot-fixing", the disciplinary bodies of the ICC demanded that they file records of their phone calls in the form of billing records. These records played a significant role in assessing the evidence and provided the basis for imposing sanctions. They were used to prove that the accused had contacted not only each other but also their agent by phone and by text message at particular times, and to establish a link between these contacts and pictures and audio recordings taken secretly at a meeting between a journalist and the agent, in the course of which the agent had guaranteed, in return for payment, that his players would fix aspects of a forthcoming match at particular times, which they subsequently did.[52] Records of the same type

52. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraphs 48, 51, 53, 56, 59, 120.

also played a major part in the outcome of the Kaneria case (Appeal Panel of the Cricket Disciplinary Commission of the England and Wales Cricket Board, decision of May 2013).

It is quite a different matter in the case of the arbitration tribunals where the procedure is basically dependent on the attitude of the parties involved, as the one calling for a disciplinary sanction to be imposed by the association in question is not under any obligation to co-operate.

D. Expert opinions

In conventional legal proceedings, the practice of calling upon experts is commonplace. The latter are professionals in a given specialist area who carry out part of their work for the courts. They are generally registered on a list drawn up by the court in whose jurisdiction they are located, which, after carefully considering their application, appoints them during disputes where they can provide a technical opinion regarding certain specific points. A legal expert opinion provides those seeking justice with the guarantee that their claims will be examined in a thorough manner.

In some circumstances, disciplinary bodies and arbitration tribunals may call on experts to help establish facts requiring scientific knowledge in a particular area. However, such evidence is only credible, and hence admissible, if the experts in question enjoy sufficient independence, give an objective and impartial opinion based on facts and deductions, while also taking account of any contrary facts, clearly define their area of expertise and are ready to inform the disciplinary body or arbitration tribunal of any new facts which might lead them to revise their opinion (Beloff et al. 2012: 192 and 212; Lewis and Taylor 2014, C1.94: 393).

For example, a statistician with a good knowledge of cricket was asked to give an opinion on the probability of three no-balls being bowled by chance at three particular times in the same match. He estimated the odds at 1.5 million to 1 against, which confirmed the disciplinary body in its belief that the events which had occurred during the match at issue were not a "fluke" but a "fix".[53]

53. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraph 40.

A more questionable instance of reliance on expert opinion occurred when an expert was asked to determine on the basis of recorded images whether or not a goalkeeper had deliberately let in goals. The expert given this task was Bob Wilson, who had once played in goal for the English club Arsenal and was a sports commentator (see Beloff et al. 2012: 211). As the members of disciplinary bodies are very often assumed to be people with a good knowledge of the sport that is the subject of the proceedings that have been initiated, it is debatable whether this type of expert opinion can really be accepted as incriminating evidence, if indeed it is actually possible for anyone to tell the difference between a deliberate error and an error due, for example, to miscalculation of the ball's trajectory or not being on form.

Consequently, there are limits to reliance on expert opinions, which have to do with the scientific merit of the methods employed, the relevance of any findings which may be based on them and also the credibility of the experts themselves. In any event, from a human rights' perspective, there would be a problem with evidence brought against the relevant person if it failed to meet the stringent criteria of objectivity and relevance.

E. Lie detectors

A lie detector is a device to which a person is connected. This equipment measures and records several physiological parameters, such as blood pressure, pulse rate, breathing and skin conductance, while the person is asked a series of questions. The system is based on the belief that untruthful replies will produce physiological reactions which can be distinguished from those associated with truthful answers (Odell 2013).

The use of lie detectors is fairly common in criminal proceedings in some states of the USA, although it does not replace the role of the jury in deciding the truth (Gibbs 2013). In the United Kingdom, lie detector tests are not admissible as evidence in the courts, but their use for certain criminals subject to licence conditions has been legalised and sex offenders can now be assessed for release based in part on such investigations (ibid.). In Australia, a judge of the New South Wales District Court rejected lie detector evidence in the Raymond George Murray case (1982), particularly on the grounds that the method had no accepted and proven scientific basis, combined with the fact that it was for the jury to assess the credibility of the accused and to weigh up the evidence (Odell 2013). A respected legal reference

work, *Phipson on Evidence*, expresses a certain degree of scepticism, with its author doubting that evidence based on lie detector tests would be permitted, given the current state of development of this method (ibid.). On the other hand, lie detectors appear to be used fairly commonly by the police in India (ibid.). Use of this type of method is not permitted in the Swiss courts.[54]

A former captain of the Australian cricket team recently suggested that lie detectors should be used in disciplinary proceedings as part of the fight against corruption. He himself took a test, which apparently demonstrated convincingly that he had never participated in match-fixing. His initiative met with some degree of scepticism, however (Gibbs 2013). The president of a Bulgarian football club reportedly made his players take a lie detector test after a match had been lost in what he considered to be suspicious circumstances.[55] The world cricket authorities do not rule out this method altogether, but they believe a wide-ranging debate should take place before its use is seriously considered (ibid.).

Is it possible, then, to contemplate the use of lie detectors in disciplinary proceedings or would this use infringe human rights?

The first problem is that opinions differ on the reliability of the results of these tests, which ranges from 60% to 95%, depending on the source (Gibbs 2013). In one case which came before the CAS, an expert who was heard claimed a reliability of 95%.[56] However, it can be stated in response to this that this expert was himself involved in this type of testing and could therefore hardly describe it as unreliable.

Another problem is that it is apparently possible to fool the lie detector through countermeasures such as hypnosis, drug use or other methods (ibid.). Detective and spy novels abound with examples of criminals and spies being trained

54. See in particular an award of the CAS in the Jessica Foschi case, CAS 96/156 paragraph 14.1.1; see also CAS 99/A/246, W. / FEI, paragraphs 5-9, with the references cited.

55. "Owner orders Lokomotiv Plovdiv players to take lie detector tests", Yahoo! Sports, https://sports.yahoo.com/blogs/dirty-tackle/lokomotiv-plovdiv-owner-orders-players-lie-detector-tests-184438423--sow.html, accessed 25 February 2016.

56. CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC*.

successfully to pass this type of test. The fact that Lance Armstrong offered in 2012 to take a lie detector test to prove that he was "clean" also shows that he seriously expected to be able to take the test without suffering any adverse consequences, whereas it has now been established – by his own admission – that he used doping agents on a large scale (ibid.).

Until recently, the CAS refused to admit evidence based on a lie detector test, referring to Swiss procedural law. It said that it would take account of statements made by a person during a test of this kind, but without assigning them a different probative value from that of statements made in other circumstances.[57]

Subsequently, in a doping case, the CAS admitted the evidence, but not as decisive proof that the athlete's statements during the test had been truthful, in the absence of any indication to the contrary detected by the device. It held that the results of the lie detector test gave some additional force to the defendant's statements during the proceedings, but still not sufficiently to outweigh other evidence. The rationale for its decision not to reject the evidence was the fact that the World Anti-Doping Code provides in Article 3.2 that facts relating to violations of anti-doping rules may be established by all appropriate means.[58]

However that may be, it would be inconceivable, for purely practical reasons, to use this type of test if the person concerned does not consent to it. At present, using a lie detector in both disciplinary and arbitration proceedings would not appear to be contrary to human rights, provided that the person in question can give his or her free consent, without any negative conclusions being drawn if he or she refuses. However, the fact remains that the reliability of the results of such a test is questionable.

F. Unlawful evidence

While, in criminal proceedings, the use of unlawfully obtained evidence is generally prohibited, it is nonetheless permitted under the law of some countries, subject to compliance with some fairly strict conditions. For instance, the Swiss Code

57. CAS 2008/A/1515, paragraph 119, drawing on the case law in CAS 99/A/246, paragraph 4.5, and CAS 96/156, paragraph 14.1.1.

58. CAS 2011/A/2384, *UCI v. Alberto Contador Velasco & RFEC*.

of Criminal Procedure (Articles 140 and 141) totally prohibits the use of evidence obtained through threats, deception or the use of force, but allows the use of evidence obtained by the criminal justice authorities unlawfully or in violation of the regulations on admissibility if the use of such evidence is essential in securing a conviction for serious offences. Swiss law also allows the use of evidence obtained in violation of administrative regulations.

For its part, the European Court of Human Rights traditionally considers, on the one hand, that Article 6 "does not regulate ... the admissibility of evidence *per se*, as this is a matter which largely comes under the jurisdiction of domestic law" and, on the other, that it "does not ... have the purpose of commenting, as a rule, on the admissibility of certain types of evidence, for instance, evidence obtained unlawfully in accordance with domestic law. It must examine whether the procedure, including the method for obtaining evidence, was fair overall"[59] (see Beernaert 2011, No. 86: 359-374; Thellier de Poncheville 2010, No. 3: 537-562; Beernaert 2007, No. 69: 81-105).

The question of the use of such evidence arises regularly in disciplinary and arbitration proceedings, for example in the case of unauthorised and secret audio and video recordings or stolen documents.

For example, the ICC Anti-Corruption Tribunal admitted as incriminating evidence the secret recording of conversations between a journalist and a person close to several cricketers. The tribunal noted that the parties did not dispute the authenticity of these recordings[60] and that the legal defence of fundamentally unfair entrapment was not raised.[61] It

59. Grand Chamber, 1 June 2010, *Gäfgen v. Germany*, Application No. 22978/05 – confession made under threat or the continuous effect of this threat during the investigation procedure; Grand Chamber, 10 March 2009, *Bykov v. Russia*, Application No. 4378/02 – the right to a fair trial cannot be infringed when an item of evidence is used which has been obtained in a manner that breaches conventional law (staging a scene intended to dupe the applicant and using a hidden recording); *Teixeira de Castro v. Portugal*, 9 June 1998, Application No. 44/1997/828/1034 – resorting to the use of "agents provocateurs".
60. ICC Independent Tribunal's Determination, *ICC v. Salman Butt, Mohammad Asif and Mohammad Amir*, Doha, January 2010, paragraphs 37-38.
61. Ibid., paragraph 19.

made extensive use of the recording transcripts to find the players guilty.[62] The defence of unlawfulness was not raised in the proceedings before the CAS concerning two of the players on whom the ICC imposed sanctions.[63]

On the other hand, the CAS had to give the question very careful consideration in a case concerning a high-ranking FIFA official on whom this federation had imposed sanctions for corruption on the basis of secret recordings made by *Sunday Times* journalists posing as lobbyists purporting to support a particular bid to host the FIFA World Cup.[64] The CAS considered that the evidence was probably illegal under Swiss law, but an international arbitration tribunal is not bound by the rules of evidence applicable before the civil or criminal state courts, in view of the arbitrator's discretionary power to admit evidence, which is limited only by procedural public policy. It also noted that the FIFA Disciplinary Code excluded only evidence that violated human dignity (Article 96), which was not the case with a secret recording. The CAS then weighed up the interests at stake, in particular the right to protection of privacy and freedom of expression of the media. It noted that FIFA itself, as a party to the proceedings, had not committed any unlawful act in relation to the secret recordings, given that the recordings had been made by third parties unconnected with it. The CAS took account of the fact that many details contained in the recordings were already in the public domain, because excerpts from the conversations had been published in the *Sunday Times* and on the internet, and held that the interest of FIFA and the public in general in ensuring that proper procedures are followed for awarding the right to host competitions outweighed the interest of the official in question in preserving the confidentiality of his conversations. The CAS concluded that the use of recordings – even if unlawfully obtained – in a disciplinary context was not incompatible with the values recognised in a state governed by the rule of law and did not violate Swiss procedural public policy, having regard also to the nature and seriousness of the conduct in question, the ethical need to discover the truth and punish any wrongdoing, the accountability of the relevant official linked to the holding of an elite position and the general

62. Ibid., paragraphs 80-81, for example.
63. CAS 2011/A/2364, *Salman Butt v. ICC*; CAS 2011/A/2362, *Mohammad Asif v. ICC*.
64. CAS 2011/A/2426, *Amos Adamu v. FIFA*.

consensus among sporting and governmental institutions that corruption is a serious threat which strikes at the heart of sport's credibility and must be combated with the utmost determination.

It can be seen from the foregoing that, while the use of unlawfully obtained evidence may be generally permitted by the CAS and therefore also accepted in disciplinary proceedings, interests must be weighed up to determine in each specific case whether the evidence is admissible depending on the particular circumstances of the case.

The procedural method adopted by the CAS could be used as a model for the disciplinary bodies of sports federations.

3.2.2.14. Reasoned decision

The right to a reasoned decision is one of the fundamental rights enjoyed by anyone charged with a criminal offence (European Court of Human Rights 2014: 21 *et seq.*, with the relevant references). There may, however, be legal provisions enabling an accused person to waive this right and make do with the operative part of the decision. In Switzerland, for example, the procedure for a sentence order does not require reasons to be given and, in some circumstances, the parties to criminal proceedings may waive receipt of the reasons after notification of the operative part of the judgment, either expressly or tacitly, simply by not asking for them.

In the case of proceedings brought before the CAS, it is stipulated that a summary will be given of the reasons for the award, unless the parties agree otherwise (Article R46 of the CAS Code). This means that the parties can waive the right to receive any reasons and make do with the operative part. This also means that the panel can make do with a fairly general summary of the reasoning, even though the reasons behind awards are, in practice, generally given in some detail.

Under the disciplinary procedure, the defendant generally has the right to receive a reasoned decision (see Article 39.1 FCE and Article 94 FDC), but, to simplify matters, some federations allow the parties to waive this right and make do with the operative part, at least in straightforward cases. The rule in such cases is that a decision not giving reasons is notified to the parties, who then have a short period in which to ask for the reasons, failing which they are deemed to have

waived their right to request them (for example, Article 52.1 UEFA Disciplinary Regulations, which also makes a request for a reasoned decision a precondition for lodging an appeal; the same system applies in Articles 78 FCE and 116 FDC).

It would appear that it is not essential to give reasons for disciplinary decisions and arbitration awards in all cases. When the parties themselves do not wish to know the reasons, an obligation to give reasons would entail unnecessary work for the arbitration bodies and tribunals concerned.

3.2.2.15. Clear and applicable provisions providing an effective remedy against any judgment before a body with the attributes of an impartial and independent tribunal

As has been seen earlier, there is no requirement for two levels of disciplinary body within a sports federation (see section 3.2.2.2 above).

On the other hand, as disciplinary bodies in sports federations are not independent and impartial tribunals, it is paramount that there be provision for an effective remedy against final decisions made by these organisations' bodies before a tribunal having such attributes.

At present, numerous international and national federations recognise the CAS's jurisdiction, and stipulate that it is the sole avenue of appeal. Others have created their own arbitration tribunal. In some countries (France for example), recourse to arbitration does not mean that a matter cannot be referred to the national courts.

Irrespective of the system adopted, it is clear that an effective remedy before a national judicial authority or an arbitration tribunal is always available to those who have had disciplinary sanctions imposed on them by the bodies of a sports federation.

3.2.2.16. Procedural public policy

When an appeal is lodged against an award by an arbitration tribunal, especially in connection with sport, the TFS examines whether procedural public policy has been breached, in the light of Article 182.3 of the Swiss Federal Act on International Private Law. This court believes that:

> a violation of procedural public policy occurs when fundamental and commonly recognised principles are breached, leading to an untenable conflict with the sense of justice, such that the decision seems incompatible with the values prevailing in a state governed by the rule of law. These guarantees include the right to a fair trial (TFS, 4P.64/2001, 11 June 2001).

It goes without saying that disciplinary bodies and arbitration tribunals must, in every situation, endeavour to conduct their proceedings in a manner which does not conflict with these major principles. If this is not the case, the TFS would doubtless annul the arbitration award in question.

3.2.3. Consent to arbitration and waiving the procedural guarantees under Article 6 of the Convention

Arbitration, and the CAS in particular, highlight how difficult it is to achieve a balance between the demands of a method of settling disputes adapted to the field of sport – to be specialist, rapid and simple – and protecting both the procedural and basic guarantees, such as those arising in particular from the Convention.

In point of fact, while the parties involved in a sports dispute still have the option to submit to arbitration by means of an arbitration clause inserted in a contract or an arbitration agreement concluded after the dispute has occurred, in most cases, opting for arbitration is a result of a third approach, namely the inclusion in sports organisations' statutes or regulations of an arbitration clause which applies to all their members.

In adopting this approach, the sports organisation gives its consent in advance to the jurisdiction of the arbitration tribunal for all or some of the disputes which may arise concerning the enforcement of the rules which apply within this organisation. Furthermore, this appointment of the arbitration tribunal generally excludes any other method of

redress, particularly in proceedings brought before ordinary national courts. Consequently, the arbitration clause used by the parties to waive the opportunity to bring a dispute before national courts is rarely accepted by athletes of their own free will, who, as direct or indirect members of a national federation, for example, adhere to the provisions of the statutes binding them to that federation, which include an arbitration clause. In other cases, it is a reference in the statutes of the national federation to those of the international federation which makes athletes subject to the arbitration clause. This clause is said to be "stipulated by reference". In yet other cases, this clause is explicitly inserted in the enrolment forms for a sports competition. For instance, the enrolment form for the Olympic Games contains an arbitration clause based on Article 61, paragraph 2, of the Olympic Charter, which reads as follows: "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the CAS, in accordance with the Code of Sports-related Arbitration". This form has to be completed and signed by all participants, not only the athletes but also, more broadly, by all those who participate in the staging of the sports event: referees, jury members, trainers, doctors, journalists, etc.

In these various cases, the arbitration of the CAS is more imposed than consented to. In other words, it is "forced". Recognition of indirect consent to arbitration varies from one national jurisdiction to another. In the case of Belgium, reference may be made, for instance, to the judgment by the Commercial Court of Charleroi (1st Division) on 15 May 2006, *SA Sporting du Pays de Charleroi and G-14 Groupement des clubs de football européens v. FIFA*, RG No. A/05/03843 (dismissal of the objection to jurisdiction raised by FIFA in favour of the CAS based on the absence of contractual links between the clubs and FIFA). Under French law, in the case of federations acting with delegated authority from the Minister for Sport under Article 17 of the Law of 16 July 1984, the Conseil d'Etat held that

> Whereas, in issuing a licence to Ms X … on 23 October 1987, the French Basketball Federation took an individual administrative decision allowing this player to play in official matches or friendlies organised under the auspices of the Federation … .[65]

65. 31 May 1989, *Union sportive de Vandœuvre v. Fédération française de Basket-Ball*, Application No. 99901.

Here again, there is no contractual undertaking. In the case of Germany, see the judgment of the Bundesgerichtshof dated 7 June 2016 in the case of Pechstein, which acknowledges that an athlete can be bound by an arbitration clause to which he or she has not freely consented. The TFS, which, as already stated, hears appeals against CAS rulings, also acknowledges this. More generally, it may be noted that there is currently broad consensus on the acceptance of "forced" arbitration, in the sense practised by many national and international sports federations. This consensus is based on both legal and pragmatic arguments: if sports federations' disciplinary decisions could always be challenged before domestic courts, then the organisation and smooth running of competitions would become difficult. The entirely relative independence of the judicial authorities in a number of states and the desire to defend a national athlete against a supposedly all-powerful sports organisation, not to mention many judges' ignorance of sporting necessities, could lead to bad or even contradictory decisions if one and the same dispute between, for example, clubs opposing one another in an international competition, were to be brought before courts in two or more countries.

Sports organisations, which have, in the vast majority of cases, a status as an association or undertaking established under private law, are subject to compliance with ordinary law. However, certain rules of domestic law, which are intended to apply in respect of relations between private individuals, reflect to a greater or lesser extent the fundamental guarantees of human rights. Article 28 of the Swiss Civil Code states, for example, that "any person whose personality rights are unlawfully infringed may petition the court for protection against all those causing the infringement". This provision transposes the duty to respect personality rights in the area of private relations. Moreover, it is not that uncommon for the CAS to refer to it as part of appeal proceedings against the disciplinary decision of the sports federations.[66]

However, the position adopted by the CAS with regard to sports organisations being subject to compliance with human rights does not seem to be completely satisfactory, even though a number of these organisations have attempted to incorporate into their statutes or disciplinary rules explicit references to the principles relating to the protection of human rights. In the above-mentioned *Amadou Diakite v. FIFA* case, concerning attempted corruption in sport, referring

66. See, for example, CAS 2006/A/1025, *Puerta v. ITF,* paragraph 11.7.17.

to the case law of the TFS, also mentioned above, of 4 December 2000 (*Abel Xavier v. UEFA*), the arbitration panel flatly refused to acknowledge that the Convention could have a horizontal effect and could be relied upon against sports organisations. However, and the point is worth reiterating, in the same case, the CAS also held that certain provisions of the Convention – in particular Article 6.1 on the right to a fair trial – could be applicable "even in proceedings brought before an arbitration tribunal", on account of the fact that, in exercising its control over the CAS's decisions, through the Federal Tribunal, the Swiss Confederation was itself directly subject to compliance with the Convention.

Accordingly, while the CAS takes into consideration the requirements of the Convention, it nonetheless does not acknowledge that sports organisations and the arbitration bodies which review their decisions are directly subject to compliance with the Convention.[67]

At this point, it can therefore be reasonably maintained that the CAS, while it does not recognise the direct applicability of the Convention, is prepared, at least for some of its provisions, to accept the idea of its direct substantive applicability. Furthermore, it can be argued that it has no choice other than to do this given that the issue of the compliance of sports law with the guarantees offered by the Convention now arises time and time again.

It is therefore understandable that this question mark over the CAS's position takes on its full significance in respect of the mandatory nature of arbitration and the waiving in a pseudo-voluntary manner of the right to recourse to national courts. This then raises the issue of consenting to arbitration and waiving the procedural guarantees under Article 6.1 of the Convention.

This issue is all the more important as the Court's case law is not very clear at all on this subject. It is at least clear that, as far as the Court is concerned, only a partial waiver of certain procedural guarantees under Article 6.1 of the Convention is permissible. In a decision of 23 February 1999, the Court held that:

67. For confirmation of this, see the above-mentioned decision of 11 January 2013 (CAS No. 2012/A2862, *Girondins de Bordeaux v. FIFA*).

> There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Art. 6. Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. … Waiver may be permissible with regard to certain rights but not with regards to others. A distinction may have to be made even between different rights guaranteed by Article 6.[68]

And according to one author:

> Whether and to what extent the parties, by concluding an arbitration agreement, also waive other basic procedural rights enshrined in art. 6(1) of the European Convention on Human Rights, is not clear. The Convention organs have so far at least left this open. Legal literature quite rightly and overwhelmingly points out that the parties have at least three expectations, also before arbitral tribunals: namely that their case will be heard before an independent and impartial arbitration court, that they can expect fair proceedings in which they are given a full hearing, and that they will receive a binding decision within a reasonable period of time. At least as far as the right to an independent and impartial court is concerned, the Swiss Federal Tribunal also seems to presume that the parties have not waived the observance of this principle by concluding an arbitration agreement (Haas 2012: 43-60).

The position of the TFS on this matter is also clear, based on its well-known decision in *Guillermo Cañas v. ATP Tour* of 22 March 2007 (BGE/ATF 133 III 235 c). An appeal had been lodged by a professional tennis player against an award made by the CAS, which confirmed the suspension imposed on this player – for breaching the anti-doping rules – by the Association of Tennis Professionals. It emerged from the facts of the case that any professional tennis player wishing to compete in ATP tournaments had to basically waive the jurisdiction of national courts to rule on the merits (in this case, in favour of the CAS) and the competence of national courts (in this case the TFS) to hear any appeal against the arbitration award. It is this second point which was disputed before the TFS, with the ATP referring to a document dated 12 March 2005, produced on ATP headed paper and signed by the appellant, with the conclusion that the appeal was inadmissible. The relevant passage in the document was as follows: "I, the undersigned player, consent and agree as follows: ... The decisions of CAS shall be final, non-reviewable, non-appealable and enforceable ... ". The

68. *Suovaniemi v. Finland*, Application No. 31737/96.

TFS considered that this wording was a valid waiver in terms of its form, in accordance with Article 192.1 LDIP, but that it was not enforceable on the athlete in view of the fact that

> the athlete's waiver of appeal against future awards will not generally be the result of a freely expressed desire on his or her part. The agreement that results when such a wish tallies with that expressed by the sports organisation concerned will therefore be affected from the very outset by the fact that one of the parties was forced to give his or her consent.

This acknowledged the lack of consent in sports arbitration and the consequences resulting therefrom in terms of waiving the right to challenge the arbitration award. However, as already mentioned, since the document signed by the appellant contained both an arbitration clause in favour of the CAS and a clause waiving an appeal, it might have been logical to draw the same conclusions with regard to the first clause, again due to the lack of any genuine consent. But this was not the case. While the TFS stressed that it was "rather illogical, in theory, to treat an arbitration agreement differently from an agreement to exclude all appeals in respect of form and consent", it decided, nevertheless, that contrary to the clause waiving the right to appeal and in spite of the similarity of the issue of forced consent, its reasoning did not imply that the arbitration agreement contained in a document such as the one signed by Guillermo Cañas or in the regulations of a sports federation was null and void. Two reasons mentioned by the TFS explain this difference in treatment. The first is an operational reason because of the assumed benefits of arbitration:

> ... in spite of appearances, this difference in treatment is logical insofar as it promotes the swift settlement of disputes, particularly in sport, by specialised arbitral tribunals that offer sufficient guarantees of independence and impartiality …, while at the same time ensuring that the parties, especially professional athletes, do not give up lightly their right to appeal awards issued by a last instance arbitral body before the supreme judicial body of the state in which the arbitral tribunal is domiciled.

The second is a more tactical reason: "the continuing possibility of an appeal acting as a counterbalance to the 'benevolence' with which it is necessary to examine the consensual nature of recourse to arbitration where sporting matters are concerned". The logic is simple: retaining a means of redress before a national body against arbitration awards helps provide a counterbalance to the effects related to the non-consensual nature of arbitration in sport. However, the very limited nature of the reasons which allow an appeal to be made against an award as part of international

arbitration proceedings (see Article 190.2 LDIP) leads to questions about this reasoning. The situation is summarised as follows by two authors:

> we feel that the third (and real) reason is a combination of two factors mentioned by the Federal Supreme Court, which could be summarised as follows: since arbitration in sport a) offers athletes the opportunity to challenge decisions issued by the sports federations before a specialist arbitration tribunal presenting sufficient guarantees in terms of independence and impartiality, and b) as it is more efficient than normal court proceedings, forced arbitration is acceptable in the field of sport. In other words, given that the CAS is a genuine (and even better) alternative to national courts, sports federations are authorised to force athletes to go to arbitration. Accordingly, athletes may be validly deprived of their right to appeal to a national court as they are offered a "suitable" alternative in return. Consequently, unlike a waiver of appeal against the award, waiving recourse to national courts in favour of arbitration is not "really" tantamount to waiving a right (in this case, the right of access to a court), which ought to require the athlete's free consent. The difference in approach with the waiver of appeal is now completely logical as the latter simply deprives the athlete of one legal remedy (BGE/ATF 133 III 235 c. 4.3.2.2. p. 244: "... by accepting in advance to abide by any future awards, an athlete deprives himself forthwith of the right to complain in due course of subsequent breaches of fundamental principles and essential procedural guarantees which may be committed by the arbitrators called upon to decide in his case"), without, so to speak, "offering him an alternative in return" (Rigozzi and Robert-Tissot 2012).

However, it is by no means certain that this reasoning is sufficient to satisfy the requirements arising from the provisions of Article 6.1 of the Convention and, more specifically, from the right to appeal. It is certainly the case that when disputing parties choose private court proceedings, they are opting for a mechanism which, because it offers advantages, can be exempt from certain procedural guarantees which nonetheless apply to national courts. Furthermore, entering into an arbitration agreement definitely presupposes the waiver of the right to be judged by "an independent and impartial tribunal established by law", to quote the terms used in Article 6.1 of the Convention. However, if the Court acknowledges that the "right to a court" is not an absolute right, in neither criminal nor civil law, and that the parties

can waive this right, this can only happen, provided that this waiver is not tainted by constraint.[69] The same applies to other guarantees arising from Article 6.1.[70] Accordingly, when the disputing parties choose to resort to arbitration because of the benefits it offers in terms of efficiency and speed, and to waive the right to be judged by a national court, it is acceptable that the procedure does not have to be subject to all the requirements arising from the right to a fair trial (see on this point Jarrosson 1989: 576 *et seq.*), but, once again, provided that this choice has not been made under constraint. This is all the more true, especially as it has been noted:

> … it seems that the ECHR [European Court of Human Rights] itself brought arbitration into the Convention. In a decision dated 3 April 2008, in the *Regent Company v. Ukraine* case, the Court considered, regarding commercial arbitration, that an arbitral tribunal could be regarded as a tribunal "established by law" within the meaning of Article 6 § 1, insofar as the establishment of such a jurisdiction, even if it depends on the will of the Parties, is only possible within the framework of the State's commercial law which also submits arbitration awards to possible annulment proceedings before the national courts. According to the level of inclusion of arbitration proceedings in the judicial system of general law (common procedures, possible recourse…), arbitration can be attached to the State's judicial system and allow the application of the guarantees contained in Article 6 § 1. (ICSS 2014, Part 3, Title 3: 664).

But it is also through the intervention of state control that procedural guarantees equivalent to those featuring in Article 6.1 must be offered to the parties who have decided to resort to arbitration. Consequently, and even though the Court has confirmed this in cases where recourse to arbitration was imposed by the law itself, the mandatory, even forced, nature of arbitration in sport seems to dictate compliance with the provisions of the Convention.This "forced" nature was also a feature clearly recognised by the TFS when delivering its judgment in its decision mentioned earlier:

> In principle, when two parties are on an equal footing, each expresses its wishes without being subject to the goodwill of the other. This is generally the case in international commercial relations. The situation is quite different in the world of sport. Apart from the fairly hypothetical situation where a famous athlete is so well known that he is able to dictate his conditions

69. The Court, *Deweer v. Belgium,* 27 February 1980, paragraph 49.
70. The Court, *Bramelid and Malmström v. Sweden*, 12 October 1982, paragraph 30.

> to the international federation governing his sport, experience shows that, most of the time, athletes do not have a great deal of power over their federation and have to adhere to its wishes whether they like it or not. Therefore, an athlete who wishes to participate in a competition organised under the auspices of a sports federation whose regulations include an arbitration clause has no option but to accept such a clause, particularly by adhering to the statutes of the sports federation in question in which the clause appears. This is especially true where professional athletes are concerned. They are confronted with the dilemma of either agreeing to arbitration or practising their sport as an amateur ... Faced with the choice of either submitting to arbitral jurisdiction or practising his sport "in his garden" ..., while watching the competitions "on television" ..., an athlete who wishes to face genuine opponents or who wishes to do so because it is his only source of income (prize money or earnings in kind, advertising income, etc.) will in effect be compelled *nolens volens* to take the first option.

As things stand, and, given the Swiss and German case law in this area, it is clear that retaining a right to challenge the arbitration award can make this lack of choice acceptable in view of the need for the requirements of Article 6.1 (of which the right of appeal is just one part) to apply to arbitration panels.

3.3. Other examples of the application of human rights in the sports context

In addition to the obligation, in numerous cases, to resort to arbitration in the event of a dispute, the sports movement enjoys considerable powers in relation to its members, the exercise of which can lead to some not insignificant consequences.

This is particularly the case, for example, with regard to the arrangements for monitoring athletes, which may be intrusive and could affect their privacy or their freedom of movement, as has already been highlighted by a number of controversies surrounding the anti-doping measures implemented. A further example can be seen in the limits imposed on their freedom of expression.

Furthermore, and in order to illustrate the complexity there may be in reconciling the regulations governing the conduct of athletes with human rights, we shall look at the risks which certain mechanisms pose with regard to the right of athletes to respect for their private and family life, their home and their freedom of movement (section 3.3.1), to their physical safety and moral integrity (section 3.3.2) and, lastly, to their freedom of expression (section 3.3.3).

3.3.1. Right of athletes to respect for their private and family life, their home (Article 8 of the Convention) and their freedom of movement (Article 2 of Protocol No. 4 to the Convention)

The right of athletes to respect for their private and family life, their home and their freedom of movement is sometimes threatened by certain arrangements, particularly in terms of carrying out tests and whereabouts filing requirements, which have been introduced as part of anti-doping measures (section 3.3.1.1). The process of collecting personal health data, as part of the anti-doping tests, also poses certain risks in terms of violating respect for the athletes' private and family life (section 3.3.1.2).

3.3.1.1. Right of athletes to respect for their private and family life, their home and their freedom of movement, and testing and whereabouts arrangements

We shall first of all look at the substance of each of these rights (sections 3.3.1.1.1, 3.3.1.1.2 and 3.3.1.1.3) and then assess how compatible these rights are with the arrangements for anti-doping tests and whereabouts filing requirements to which athletes are subject (section 3.3.1.1.4).

3.3.1.1.1. Right to respect for private and family life

We must first clarify the substance of the right to respect for private and family life (section 3.3.1.1.1.1) and then look at how this right is implemented in practice (section 3.3.1.1.1.2).

3.3.1.1.1.1. Substance of the right to respect for private and family life

Under the terms of Article 8.1 of the Convention, "Everyone has the right to respect for his private and family life, his home and his correspondence". The right of respect for private life is traditionally understood to mean protection against any intrusion into the personal and private areas of an individual's life. Accordingly, protection is considered as the right to preserve the confidentiality of one's private life. In this sense, the main objective of Article 8 of the Convention is to avoid any arbitrary interference by the public authorities in the rights which are guaranteed. Furthermore, it allows a certain quality of life to be promoted. In addition, as this article protects a number of rights, the Court sometimes uses the concept of "limbs".

In the case of the right to respect for private life, in accordance with the Court's case law, the concept of "private life" is broad and does not lend itself to an exhaustive definition,[71] nor can it be interpreted in a restrictive manner.[72] This means that it comprises a number of aspects and covers, for instance: 1) moral integrity and physical safety;[73] 2) personal independence[74] and the individual's capacity for self-determination;[75] 3) right to development of the personality;[76] 4) right to achieve one's potential;[77] and 5) the right to establish and maintain relations with other human beings and the outside

71. Some of the numerous examples include *S. and Marper v. United Kingdom*, 4 December 2008, Application Nos. 30562/04 and 30566/04, paragraph 66 and *El-Masri v. "the former Yugoslav Republic of Macedonia"*, 13 December 2012, Application No. 39630/09, paragraph 248.
72. *Amann v. Switzerland*, 16 February 2000, Application No. 27798/95, paragraph 65.
73. See *El-Masri v. "the Former Yugoslav Republic of Macedonia"* 13 December 2012, Application No. 39630/09; *Nada v. Switzerland*, 12 September 2012, Application No. 10593/08 (physical or mental health); *Gillberg v. Sweden*, 3 April 2012, Application No. 41723/06, paragraph 67 (honour and reputation).
74. See *Christine Goodwin v. United Kingdom*, 11 July 2002, Application No. 28957/95, paragraph 90 (physical, moral, social and ethnic identity).
75. See *S.H. and Others. v. Austria*, 3 November 2011, Application No. 2346/02, paragraph 80 (right for anyone to live their life as they intend).
76. See *Nada v. Switzerland*, mentioned above (sexual identification, orientation and sex life).
77. See *Von Hannover v. Germany*, 7 February 2012, Application Nos. 40660/08 and 60641/08 (right to protect one's image and right to obtain information helping to discover certain aspects of one's identity).

world in general (it would be too restrictive for the Court to limit private life to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle).[78] The examples mentioned in the footnotes are not necessarily linked to a single aspect of private life. Moreover, the concept of "private life" encompasses professional and commercial activities. Lastly, data about an individual's private life fall within the scope of Article 8 of the Convention "where it is systematically collected and stored in files held by the authorities".[79] Referring to the right to respect for family life, a state party to the Convention must act in a manner calculated to allow those concerned to lead a normal family life.[80] This covers both tangible interests (pensions, estates, etc.) and intangible interests (the bringing up and sociability of children) connected with family life. The Court has ensured that it does not stick rigidly to a prior definition of the family because, as far as it is concerned, the institution of the family is not fixed, whether at a historical, sociological or legal level. Furthermore, it has never attempted to define it. The concept of "family life" assumes an actual link to a real family life. In the view of the Court, being together means for the members of the same family "a fundamental element of family life".[81]

3.3.1.1.1.2. Means of implementing protection of the right to respect for private and family life

The states parties must observe a negative obligation: refrain from violating the rights guaranteed by Article 8 of the Convention in an unjustified manner or contrary to paragraph 2 of that article. In this case, such interference must be as a result of action taken by a public authority. There are, in addition to this negative obligation, positive obligations inherent in the actual respect for these rights (for a comprehensive study, see Madelaine 2014; Akandji-Kombe 2006). Once a state has committed to signing the Convention, it has assumed all the obligations required to effectively apply

78. See *Niemietz v. Germany*, 16 December 1992, Application No. 13710/88.
79. See *Rotaru v. Romania*, 4 May 2000, Application No. 28341/95.
80. See *Marckx v. Belgium*, 13 June 1979, Application No. 6833/74, paragraph 31.
81. See *El-Masri v. "the Former Yugoslav Republic of Macedonia"*, cited above; *K. and T. v. Finland,* 12 July 2001, Application No. 25702/94.

the rights enshrined in the Convention, regardless of the nature of these obligations. The first judgment in which the Court referred explicitly to positive obligations is one which related specifically to the right to respect for family life.[82]

Once the Court has identified in each case the relevant negative or positive obligation, it then verifies whether that obligation has been complied with.

In the case of positive obligations, a state party has the duty to prevent any interference by a third party in the private life of an individual, whose rights under Article 8 of the Convention are to be protected by means of reasonable and appropriate measures. These measures must help ensure respect for the rights guaranteed by the Convention, including in relations between individuals, or should involve the implementation of an effective and accessible procedure, aimed at protecting these rights, by creating a regulatory framework. Although the substance of these positive obligations varies from case to case, the Court has listed a number of relevant factors for assessing their content. They concern either the applicant (aspects of his/her private life which merit protection, principles at stake, etc.) or the state (nature and scope of the obligation incumbent upon it: for example, guaranteeing its citizens the right to effective respect for their physical safety and moral integrity,[83] facilitating family reunification,[84] enabling the development of the family bond, etc.).

However, it should be noted that the boundary between determining positive and negative obligations in the light of Article 8 of the Convention is not always easy to define.[85] This difficulty, inherent in certain obligations, is also related to the multitude of actions and obligations at stake which the Court is faced with as part of the same dispute. It could also cause states parties to be hesitant about initiating certain arrangements, especially relating to sporting sanctions or anti-doping control mechanisms where they might be afraid that the level of compatibility with the rights guaranteed

82. See *Marckx v. Belgium*, 13 June 1979, cited above, paragraph 31.
83. See *A, B and C v. Ireland*, 16 December 2010, Application No. 25579/05, paragraph 245.
84. See *K and T. v. Finland*, 12 July 2001, cited above.
85. See *Aksu v. Turkey*, 15 March 2012, Application Nos. 4149/04 and 41029/04.

by the Convention will be examined with varying degrees of rigour, depending on whether it is the observance of positive or negative obligations that is at issue. However, a state party may consider that it is its task, in any event, to legislate in respect of the positive obligations by which it regards itself as being bound, in order to guarantee in practice the protected right or rights, particularly so as to strike a fair balance between the general interest and the interests of the individuals concerned.

Nevertheless, once the obligation has been identified, the criteria to be fulfilled to ensure compliance with Article 8 of the Convention are comparable and are in line with the traditional approach described above: once interference in the rights guaranteed under Article 8.1 has been identified, the Court assesses whether this interference is justified in relation to the criteria defined in paragraph 2 of that article, which states:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In general, there must be two factors present for the interference to be deemed as being "in accordance with the law": the existence of a legal basis and the nature and attributes of the norm. For the former, the perpetrator of the interference must be able to link his or her action to a sufficient legal basis in domestic law (legislation, regulation, case law) or international law. For the latter, the norm must be sufficiently accessible and expressed with sufficient precision so that its consequences can be reasonably foreseen.[86]

Finally, it should be emphasised that, through its case law, the Court has held that while

> Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8. The Court must therefore determine

86. See *Silver and others v. United Kingdom*, 25 March 1983, Series A, No. 61, paragraphs 86-88.

> whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the applicants have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests".[87]

In a case relating to systems for carrying out secret surveillance of correspondence, post and telecommunications, introduced by the Federal Republic of Germany by a law of 13 August 1968, the Court held that in order to be compatible with Article 8 of the Convention, these systems

> must contain safeguards established by law, which apply to the supervision of the relevant services' activities. Supervision procedures must follow the values of a democratic society as faithfully as possible, in particular the rule of law, which is expressly referred to in the Preamble to the Convention. The rule of law implies, *inter alia*, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.[88]

3.3.1.1.2. Right to respect for the home

Here too, it is essential to first of all clarify the substance of the right to respect for the home (see 3.3.1.1.2.1) and then look at how it is implemented in practice (see 3.3.1.1.2.2).

3.3.1.1.2.1. Substance of the protection of the home

Protecting the privacy of the places where people conduct their private life is absolutely vital. This is, moreover, why an overly restrictive interpretation of the concept of "home" cannot be applied. Protection of the home is a right which

87. See *W. v. United Kingdom*, 8 July 1987, Application No. 9749/82, paragraph 64; *Elsholz v. Germany*, 13 July 2000, Application No. 25735/94, paragraph 52; *T.P. and K.M. v. United Kingdom*, 10 May 2001, Application no. 28945/95, paragraph 72.

88. *Klass and others v. Germany*, 6 September 1978, Application No. 5029/71, paragraph 55.

also derives from personal safety and well-being, as evidenced by the fact that its socio-economic aspect is taken into account.[89] The Court holds that the home, within the meaning of Article 8 of the Convention, is an autonomous concept referring not only to a residence which is legally occupied or acquired, but also to any place of residence when there are sufficient, continuous links.[90] The extensive interpretation of this concept has therefore led to the Court taking into account the strength of the links with a given asset, consequently linking a secondary residence to the broad concept of a home.[91] Furthermore, it is important to point out that respect for the home also presupposes that it is possible to access it in order to live there. In other words, any restriction in this regard amounts to a violation of Article 8.[92]

However, protection of the home is not an absolute right; accordingly, it may be subject to restrictions.

For this reason, searching of premises is not, as such, contrary to Article 8 of the Convention. There is certainly interference from the state, but if the requisite conditions are met, the Court cannot conclude that the Convention has been breached. On the other hand, this will not be the case if one of the conditions has not been met, whether the existence of a text, the pursuit of a legitimate aim or the fact that the interference is necessary in a democratic society. As far as the Court is concerned, precautions must be taken in any eventuality. Exercising powers of interference in the home and private life must be set out within reasonable limits, thereby helping to reduce its impact as much as possible on the private life of the person concerned.

Second, the protection of the home also relates to business premises. The Court has had no hesitation in extending the protection afforded by Article 8 of the Convention to business premises,[93] demonstrating the commitment to ensuring

89. See *Gillow v. United Kingdom,* 24 November 1986, Application No. 9063/80; *Chappell v. United Kingdom*, 30 March 1989, Application No. 10461/83; *Lopez Ostra v. Spain*, 9 December 1994, Application No. 16798/90; *Cvijetic v. Croatia*, 26 February 2004, Application No. 71549/01; *Pibernik v. Croatia*, 4 March 2004, Application No. 75545/01.
90. See *Prokopovich v. Russia*, 18 November 2004, Application No. 58255/00.
91. See *Demades v. Turkey*, 31 August 2004, Application No. 16219/90.
92. See *Gillow v. United Kingdom,* 24 November 1986, cited above.
93. See *Niemietz v. Federal Republic of Germany,* 16 December 1992, cited above.

effective protection of fundamental rights. Such a stance could be seen as reflecting the socialisation of private life. A further step was taken with the Société Colas Est and others judgment,[94] in which the Court explicitly recognised the right of a commercial company to respect for its registered office, branches and business premises. In this case, such premises are no longer viewed merely as business premises used by natural persons whose private and professional lives are closely linked,[95] but as the residence of a legal entity which is subject to autonomous protection under Article 8 of the Convention.

3.3.1.1.2.2. Means of implementing protection of the home

Here too, we are in the realm of the positive obligations by which states parties are bound. The state must take all necessary measures to enable owners to exercise their rights, to take possession of their residence, to live there, be assured peaceful enjoyment and be free of any unnecessary inconvenience. More generally, the competent authorities must do all in their power to bring to an end any breaches of an applicant's right to his or her home, committed by third parties. In this way, the Court applies a horizontal effect to the right to respect for the home.[96]

3.3.1.1.3. Freedom of movement

We must first clarify the substance of freedom of movement (section 3.3.1.1.3.1) and then look at how this is implemented in practice (section 3.3.1.1.3.2).

3.3.1.1.3.1. The substance of freedom of movement

Freedom of movement, which comprises freedom to travel and settle in a given place, is a key component of individual freedom and is historically one of the great achievements of contemporary democracies. Its exercise must be balanced against the arrangements for maintaining public order.

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94. 16 April 2002, Application No. 37971/97.
95. See *Chappell v. United Kingdom*, 30 March 1989, cited above.
96. *Surugiu v. Romania*, 20 April 2004, Application No. 48995/99.

It is enshrined in several international instruments, in particular the International Covenant on Civil and Political Rights of 16 December 1966 and Article 5 of the Convention, as well as Article 2.1 of Protocol No. 4 to the Convention (ETS No. 46), opened for signature on 16 September 1963. These two articles need to be read together as Article 2 can be understood only if a connection is made with the right to physical freedom laid down by Article 5. Although these provisions enshrine the right to physical freedom, they recognise that it may be limited under strictly defined circumstances. However, there is a difference of degree between the restrictions on the right to freedom of movement governed by Article 2 of Protocol No. 4 and those governed by Article 5 of the Convention. While Article 5 relates to depriving individuals of their physical freedom, Article 2 applies only to simple restrictions on freedom of movement.

In accordance with the latter article, "(e)veryone lawfully within the territory of a State (has) the right to liberty of movement and freedom to choose his residence". The principles that flow from this have been set out in the Court's case law. As this article guarantees everyone the right both to move around a territory and to leave it, this implies their right to travel to any country they have permission to enter. It follows from this that freedom of movement requires the prohibition of any measure that could undermine or restrict the exercise of this right, as long as that prohibition is not necessary in a democratic society in pursuit of a legitimate aim.[97]

The first paragraph of the above-mentioned Article 2 is, however, tempered by paragraphs 3 and 4 of that article as they provide for a double limitation: the first refers to the customary conditions for state interference, providing that freedom of movement can be subject to other restrictions only if they are "in accordance with law" and constitute measures "necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The second adds that freedom of movement may also be subject, in particular areas, to restrictions imposed "in accordance with law and justified by the public interest in a democratic society".

Substantively, the Court has in particular held that the following constitute restrictions on freedom of movement: a measure requiring an individual not to leave his or her residence without informing an authority responsible for

97. See in particular *Labita v. Italy*, 6 April 2000, Application No. 26772/95.

monitoring him or her; a measure prohibiting an individual from going out in the evening after 8 p.m. or in the morning before 6 a.m.; or even a measure banning an individual from frequenting cafés.

3.3.1.1.3.2. Means of implementing freedom of movement

Generally speaking, the Court pays particular attention to the conditions for possible interference, which must be exceptional. It seems clear that the aim of the requirements set out in Article 2 of Protocol No. 4 to the Convention is to preserve the fundamental principle of any liberal society that freedom is the rule and a restriction the exception. Accordingly, the states parties to the Convention have the specific positive obligation to carry out periodic checks on whether an individual continues to pose the danger justifying certain security measures that restrict freedom of movement.[98]

Whether the issue is the right of athletes to respect for their private and family life, their home or freedom of movement, in connection with their sports activities, guaranteeing the effective exercise of these rights is primarily discussed in the context of the implementation of doping tests and the obligation to file whereabouts information.

It is therefore necessary to ensure the compatibility of these provisions with each of these rights.

The World Anti-Doping Agency, the World Anti-Doping Code and the World Anti-Doping Programme[99]

The World Anti-Doping Agency

When it was discovered at the end of the 1990s that doping was widespread, especially in cycling, this led the International Olympic Committee and a number of governments to set up the independent World Anti-Doping Agency (WADA). Founded in Lausanne on 10 November 1999, it has the status of a foundation governed by Swiss

98. See *Villa v. Italy*, 20 April 2010, Application No. 19675/06.

99. In part reproduced from the official version of the Word Anti-Doping Code (2015).

law. Its mission is to foster and harmonise international anti-doping activities in all areas. Its headquarters are in Montreal, Canada. It also has regional offices in Cape Town, Montevideo, Tokyo and Lausanne.

It consists of a Foundation Board, an Executive Committee and several committees of experts. The Foundation Board is WADA's supreme decision-making body. It has 38 members and is composed, on an equal basis, of representatives from the Olympic Movement and governments.

The World Anti-Doping Code and the World Anti-Doping Programme

The purposes of the World Anti-Doping Code, and the World Anti-Doping Programme that supports it, are to:

– protect athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for athletes worldwide;

– ensure harmonised, co-ordinated and effective anti-doping programmes at international and national level for detection, deterrence and prevention of doping.

The Code is the fundamental and universal document upon which the World Anti-Doping Programme in sport is based. Its purpose is to advance the anti-doping effort through universal harmonisation of core anti-doping elements. It is specific enough to achieve complete harmonisation on issues where uniformity is required, yet general enough to ensure flexibility in the implementation of agreed anti-doping principles. It was drafted taking into account the principles of proportionality and human rights.

After the first version was adopted in 2003, the Code was revised for the first time in 2007. The revision process, which began in November 2011 and ended in November 2013 with the adoption in Johannesburg of the version that came into force on 1 January 2015, resulted in 2 269 changes, some of them far-reaching, including:

(1) greater co-ordination between the anti-doping organisations, which is reflected in:

– a revised system of therapeutic use exemptions;

– enhanced powers of national anti-doping organisations to carry out tests at international events;

– emphasis placed on notification and information-sharing;

(2) increased target testing by means of intelligent and proportionate planning;

(3) a more appropriate system of penalties, which is reflected in:

– the prevention of doping under the influence of peers and support personnel;

– emphasis placed on the intentional nature of breaches of anti-doping rules and the imposition of tougher penalties to which the "real cheats" are potentially subjected;

– leniency measures granted in certain circumstances.

The World Anti-Doping Programme encompasses everything required to ensure optimal harmonisation and best practice in international and national anti-doping programmes.

Its main components are:

Level 1: The Code

Level 2: International standards

Level 3: Models of best practice and guidelines

WADA has published on its website a list of the sports organisations that have accepted the Code (Olympic Movement, government-subsidised organisations and organisations outside the Olympic Movement). It has also published a list of entities signatory to the Code (international sports federations, national anti-doping organisations or national Olympic committees acting as national anti-doping organisations) that have adopted anti-doping

rules which WADA considers compliant with the Code and a list of entities that have not yet adopted anti-doping rules that are in full compliance with the Code, or have not yet submitted such rules to WADA.

International standards

International standards for the various technical and operational parts of anti-doping programmes have been drawn up in consultation with signatories and governments and approved by WADA. The aim of these standards is to ensure harmonisation between the anti-doping organisations responsible for the technical and operational parts of anti-doping programmes. Compliance with international standards is compulsory in order to conform to the Code. WADA's Executive Committee can revise the international standards in due course after appropriate consultations with signatories, governments and other competent partners. The international standards and any updates are published on the WADA website and enter into force on the date specified in the international standard or its update.

Models of best practice and guidelines

Models of best practice and guidelines based on the Code and the international standards have been and will be drawn up to provide solutions in various areas of the fight against doping. These models and guidelines are recommended by WADA and made available to the signatories and other relevant partners but are not mandatory.

In addition to models of anti-doping documents, WADA makes training assistance available to signatories.

3.3.1.1.4. Compatibility of measures concerning doping tests and the provision of whereabouts information with the right of athletes to respect for their private and family life, their home and their freedom of movement

We shall look, in turn, at each individual aspect (sections 3.3.1.1.4.1, 3.3.1.1.4.2 and 3.3.1.1.4.3).

3.3.1.1.4.1. Compatibility of measures concerning doping tests and the provision of whereabouts information with the right of athletes to respect for their private and family life

In order to assess this compatibility, it is necessary to refer to, among other things, the provisions contained in the statutes and rules of procedure of certain federations and in some national laws on unannounced out-of-competition doping tests on athletes via the whereabouts requirements imposed on them for this purpose.

It should also be pointed out that, in application of the Word Anti-Doping Code, several authorities have the power to carry out doping tests:

- each national anti-doping organisation has authority to carry out in-competition and out-of-competition doping tests on athletes who are nationals, residents, licence-holders or members of sport organisations of that country or who are present in that national anti-doping organisation's country;
- each international federation has authority to carry out in-competition and out-of-competition doping tests on athletes who are subject to its rules, including those who participate in international events or in events governed by the rules of that international federation, or who are members or licence-holders of that international federation or its member national federations or their members;
- each major event organisation, including the IOC and the International Paralympic Committee, has authority to carry out in-competition and out-of-competition doping tests on athletes entered in one of its events or who have been made subject to the testing authority for a future event;
- WADA has authority to carry out in-competition and out-of-competition doping tests in accordance with the provisions of Article 20 of the Code.

After an initial stage in which tests were organised during training periods and preparations for competitions to prevent any temptation to take doping substances, it proved necessary to remove the constraints attached to places and periods of training and competitions by introducing measures for the provision of whereabouts information. These measures, which were established by, among others, the World Anti-Doping Code of 2003, were introduced in

their mandatory form by the 2009 revised version of the Code. Prior to that, Recommendation No. R (88) 12 on the institution of doping controls without warning outside competitions, adopted by the Council of Europe's Committee of Ministers in 1988, even before the 1989 Anti-Doping Convention, recognises the importance of tests conducted without advance warning (Article 7.3.a). In the 2003 version of the Code, no harmonisation between the federations was provided for, so there were very considerable disparities. The International Cycling Union therefore set up a very strict system in 2004 by stipulating that riders in the testing pool had to provide whereabouts information 24 hours a day, seven days a week. However, as other sports did not establish a testing pool during that period, a harmonisation process was necessary. This was initiated when the Anti-Doping Code was revised from 2007 onwards and, after numerous consultations, resulted in the issue of a standard making it compulsory for the athletes concerned to indicate one hour a day between 6 a.m. and 11 p.m. when they could be tested.

With some slight differences depending on the federations and countries that have introduced these measures, the procedure for the provision of whereabouts information in the case of athletes subject to this measure consists of providing the anti-doping authorities, via dedicated software (Anti-Doping Administration & Management System, or ADAMS), with information on their whereabouts for each day of the coming three months. However, they can change the information given at any time up to 5 p.m. Athletes provide a residential address and a sports programme (times and places of training and competition). They must also determine a 60-minute window during which they will make themselves available for a test. If a tester shows up during this period and the athlete is not present, a breach of the requirement to provide whereabouts information (a breach of the whereabouts rules, or "no show") is established. A penalty is incurred for three "no shows" over a period of twelve months. The case file is then forwarded by the national anti-doping agency to the relevant federation for the imposition of a penalty. The anti-doping authorities can and do carry out unannounced tests outside the 60-minute window (but excluding night hours between 9 p.m. and 6 a.m.). However, failure to attend an unannounced test outside the 60-minute window does not constitute a no show (see in particular Article 2.4 of the World Anti-Doping Code and Article 5, especially paragraph 6, as well as sections 4.0 and 5.0 of the International Standard for Testing and Investigations and the comments therein on Article 5 of the World Anti-Doping Code).

Reference may also be made to Rule 35 ("Testing and Investigation") of the Anti-Doping and Medical Rules of the International Association of Athletics Federations in their most recent version dated 11 December 2014 (in force from 1 January 2015) and Rule 35 of the same association's Competition Rules 2014-2015 in force from 1 November 2013.[100]

These rules are summarised in the IAAF Anti-Doping Athlete's Guide, which was updated in January 2015.[101]

This 2015 version should be compared with the one in force in 1999 (see Siekmann, Soek and Bellani 1999: 69-87).

It should be noted that there is a difference in wording between 1999 and 2015, especially with regard to the constraints imposed on tested athletes.

It is also interesting to refer to Article 5.2. ("Scope and Testing") and 5.6 ("Rider Whereabouts Information") of the most recent version of the Anti-Doping Rules of the International Cycling Union (UCI) (Part 14 of the UCI Rules).[102] These provisions should be compared with Articles 5.3 and 5.5 of the ICU Testing and Investigations Regulations on "Whereabouts Filing Requirements".[103]

Finally, on its website under the heading "Whereabouts responsibilities", USADA states:

> 60-Minute Window
>
> Any athlete who is in the USADA International Testing Pool (ITP) must provide a specific 60-minute time slot every day between 5 a.m. [and] 11 p.m. that anchors the athlete to a specific location. The athlete chooses the 60-minute time slot to fit their schedule and must be available and accessible for testing at a specific location during the entire 60-minute time slot. Please

100. For both texts, see www.iaaf.org/about-iaaf/documents/rules-regulations, accessed 14 November 2017.

101. See www.iaaf.org/about-iaaf/documents/anti-doping, accessed 14 November 2017; in the same connection, see Athlete Advisory Notes: The IAAF Registered Testing Pool, Whereabouts Information and Missed Tests, 2 January 2015.

102. See www.uci.ch/mm/Document/News/Rulesandregulation/16/85/60/20150101UCIADRPart14-FINAL_English.pdf, accessed 14 November 2017.

103. See www.uci.ch/mm/Document/News/CleanSport/17/47/44/UCITIREN.2016_English.pdf, accessed 14 November 2017.

> note that USADA can choose to, and does test athletes outside of their 60-minute window. You will be directly notified of your inclusion in the international testing pool.

Further examples would be superfluous. Suffice it to say that the regulations of the international sports federations generally contain one or more provisions on unannounced tests and the whereabouts filing requirements imposed on their members, in accordance with Article 5.2.2 of the World Anti-Doping Code. Other available examples are the version in force in 1999 of the Regulations Governing Doping Control of the International Basketball Federation (FIBA) (Article 6.3, "Unannounced doping control tests"), the Procedural Guidelines for Doping Controls of the International Canoe Federation (ICF) (2. Out-of-Competition Doping Controls – Articles 2.3 and 3.2) or the Doping Control Regulations of the International Gymnastics Federation (FIG) (Article 5, Tests made out of competition/Training controls).

As far as current national legislation is concerned, it is first necessary to emphasise the role of states in the implementation of the World Anti-Doping Programme and, consequently, the implementation of the Code. As stated in the comments accompanying the most recent version of the Code:

> Most governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code. For that reason, governments are not asked to be Signatories to the Code but rather to sign the Copenhagen Declaration and ratify, accept, approve or accede to the UNESCO Convention. Although the acceptance mechanisms may be different, the effort to combat doping through the co-ordinated and harmonised programme reflected in the Code is very much a joint effort between the sport movement and governments. This Article sets forth what the Signatories clearly expect from governments. However, these are simply "expectations" since governments are only "obligated" to adhere to the requirements of the UNESCO Convention (see comment on Article 22).

That being said, when governments decide to meet these "expectations" they often do so by setting up programmes that involve laying down whereabouts filing requirements and arrangements for unannounced testing that, while ensuring effective anti-doping measures, are not without risks to human rights. In order to limit these risks, one could consider testing arrangements introduced through legislation as being a good practice.

For example, measures for the provision of athletes' whereabouts information were introduced in France by Order No. 2010-379 of 14 April 2010, ratified by the Act of 1 February 2012 to enhance sports ethics and athletes' rights. Under Article L. 232-15 of the French Sports Code, athletes belonging to the "testing pool", which is designated for a 12-month period by the French Anti-Doping Agency (AFLD), "are required to provide precise up-to-date information on their whereabouts in order to enable the tests referred to in Article L. 232-5 to be carried out …".

In this connection, athletes designated by the AFLD's Director of Testing are obliged to provide information that enables a detailed daily schedule to be drawn up. Before the beginning of each quarter, athletes must specify a one-hour slot during which they would be prepared to submit to a potential test without advance warning. However, the AFLD can also conduct tests outside these time slots.

If the athlete commits three failures of any kind (filing failures/missed tests), during a 12-month period, the AFLD will forward the file to the relevant federation's disciplinary bodies. The individual concerned can then be banned for up to two years.

The above-mentioned 12-month period is less than the 18 months that applied before the new version of Article 2.4 of the World Anti-Doping Code, which was adopted by WADA's Foundation Board on 15 November 2013 and came into force on 1 January 2015.

Article L. 232-15 of the Sports Code also provides that information on the athlete's whereabouts may be subject to automated data processing after a reasoned opinion published by the National Commission for Data Protection and Liberties (CNIL).

In Belgium, Chapter IV of the Anti-Doping Decree of 20 October 2011 (Belgian Official Gazette, 16 December 2011) on athletes' whereabouts filing requirements lays down similar obligations. It establishes various categories of testing pools and sets out the requirements to be met by each of them. It also precisely specifies the personal information gathered for each category of athlete.

In the United Kingdom, UK Anti-Doping (UKAD), which was set up in 2009 in the form of a "non-departmental public body", is in charge of anti-doping at national level. The 2015 UK Anti-Doping Rules, in force since 1 January 2015, adopt the provisions of the World Anti-Doping Code and of the International Standard for Testing and Investigations (ISTI) (see Article 5.1). ISTI refers directly to the provisions of the Code, especially Article 5.2 on "Scope and Testing". It is accompanied by the following comment:

> Comment to Article 5.2: Additional authority to conduct Testing may be conferred by means of bilateral or multilateral agreements among Signatories. Unless the Athlete has identified a 60-minute Testing window during the following-described time period, or otherwise consented to Testing during that period, before Testing an Athlete between the hours of 11:00 p.m. and 6:00 a.m., an Anti-Doping Organisation should have serious and specific suspicion that the Athlete may be engaged in doping. A challenge to whether an Anti-Doping Organisation had sufficient suspicion for Testing during this time period shall not be a defence to an anti-doping rule violation based on such test or attempted test.

Whatever the wording, the whereabouts filing requirements are full of constraints and are generally resented by athletes. Some observers point out that privacy becomes almost non-existent for athletes in a testing pool, inclusion in which involves the implementation of particularly intrusive measures with all the characteristics of an emergency regime in which they are permanent suspects and are subjected to continuous surveillance, which not only deprives them of a normal family life, particularly when the athlete has to plan his or her family commitments, and constitutes a breach of their right to respect for their private life but also establishes unequal treatment compared with other athletes.

Statements gathered by the French newspaper *Le Monde* in an article of 23 January 2015 ("Contrôles anti-dopage: pas vu, (pas) pris", by Florent Bouteiller, Yann Bouchez, Adrien Pécout and Henri Seckel), confirms this perception and the limits to whereabouts filing arrangements.[104]

This is why a number of French athletes applied to the Conseil d'État to have the above-mentioned Order No. 2010-379 of 14 April 2010 annulled as soon as it entered into force. This appeal, which was lodged by the Union of French

104. See www.lemonde.fr/sport/article/2015/01/23/controles-antidopage-pas-vu-pris_4561957_3242.html, accessed 14 November 2017.

Footballers, gave the Conseil d'État the opportunity to endorse the whereabouts filing requirements in view of the public interest in the fight against doping.[105]

The appellants were of the opinion that the whereabouts filing requirements were a serious and disproportionate breach of several freedoms. In their view, these requirements, by their very nature, resulted in a reduction in their freedom of movement and also infringed their right to lead a normal family life because tests could be carried out at the athlete's home between 6 a.m. and 9 p.m.

However, the Conseil d'État held that

> these provisions only interfere with the right to respect for private and family life to the extent necessary and proportionate to satisfy the public interest pursued by the fight against doping, especially the protection of athletes' health and the guarantee of equity and ethical conduct in sports competitions.

It confirmed its findings in a decision of 29 May 2013.

This approach has been strongly criticised by some legal writers (see for example Collomb 2011; Lapouble 2011: 901 et seq.; Korcha and Pettiti 2012). Some writers have argued that another line of reasoning was possible and that the Conseil d'Etat could have given more thought to the concept of "proportionate interference" in the anti-doping field. In their opinion, the right to a normal family life was reduced to its bare minimum since the test must be able to be carried out in the place assigned for that purpose. Any activity that, even if previously entered in the athlete's schedule, would render it impossible to conduct the test (walk, excursion, sightseeing tour, cruise, etc.) was therefore prohibited. Whereabouts filing requirements, they point out, allowed for no respite and no let-up, a situation that could be compared to house arrest for an hour a day. Other writers have pointed out that the whereabouts requirements could seem excessive, especially compared with the measures taken by the French state to protect public health in other areas (smoking or alcoholism, for example) (see Renucci 2012: 284).

105. Conseil d'État, 24 February 2011, Union Nationale des Footballeurs Professionnels, Case 340.122.

However, this assessment is not shared by the rapporteur of the French Senate's Commission of Inquiry on the fight against doping, Jean-Jacques Lozach, who in July 2013, delivered his report on doping entitled "Lutte contre le dopage: avoir une longueur d'avance".

It is therefore possible to argue that the many different measures based on this model for establishing an athlete's whereabouts provide sufficient guarantees to ensure that they are not contrary to the rights of athletes to lead a normal family life and to respect for their private life and, accordingly, that they interfere with the rights guaranteed by Article 8 of the Convention only to the extent that is necessary and proportionate.

However, these guarantees did not seem sufficient for the Union of French Footballers, which filed an application with the European Court of Human Rights.[106] It is ultimately the Court's responsibility to determine the proportionality threshold.

For the American conception of the right to the protection of the right of privacy, see the case of *Hill v. National Collegiate Athletic Association*.[107]

In addition, although the whereabouts filing model described above is fairly widespread, other models offering less protection continue to exist or could be adopted, especially on the basis of Article 5.2 of the most recent version of the World Anti-Doping Code, which states: "Scope of Testing. Any Athlete may be required to provide a sample at any time and at any place by any Anti-Doping Organisation with testing authority over him or her". However, this article raises a number of questions (see in particular section 3.3.1.1.2 above on the inviolability of the athlete's home).

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106. *Fédération Nationale des Syndicats sportifs (FNASS) and Others v. France*, lodged on 23 July 2011, Application No. 48151/11. See also *Longo and Ciprelli v. France*, lodged on 6 December 2013, Application No. 77769/13.

107. *Hill v. National Collegiate Athletic Association, Board of Trustees of Leland Stanford Junior University*, Court of Appeal of California, USA, 25 September 1990, Drug testing on student athletes; breach of constitutional right of privacy; justification of tests by a compelling interest; NO but the decision of the Court of Appeal has been reversed by the Supreme Court of California (No. S018180. Jan 28, 1994). See also the case of *Miller v. Cave City School*, United States Court of Appeals (8th circuit), 31 March 1999, Drug testing of student athletes; breach of constitutional right of privacy; justification of tests by a compelling interest; YES.

Accordingly, and in order to minimise the risks of whereabouts filing arrangements being incompatible with the right of athletes to a normal family life and to respect for their private life, various improvements can be made to the mechanisms in force. For example, consideration could be given to the adoption of a precise list of places where it would be possible to carry out unannounced tests or measures to improve specifying the time of the test (see the above-mentioned report by Jean-Jacques Lozach (2013: footnote 262)).[108]

It is also necessary to determine whether systems for testing athletes and establishing their whereabouts are compatible with respect for their home.

3.3.1.1.4.2. Compatibility of arrangements for testing athletes and measures for the provision of whereabouts information with respect for their home

As far as protecting the athlete`s home is concerned, experience has shown that training and recovery periods are "at-risk" phases from the point of view of taking doping substances. However, although unannounced tests cannot be conducted between 9 p.m. and 6 a.m. in countries that have transposed the World Anti-Doping Code, cases have been identified in which athletes used this window to take micro-doses of doping substances that were undetectable the following morning.

This is why one of the proposals made in connection with the revision of the World Anti-Doping Code was to authorise a doping test "at any time", i.e. including at night, in duly justified exceptional cases. The most recent version of Article 5.2 accordingly provides: "Scope of testing. Any Athlete may be required to provide a sample at any time and at any place by any Anti-Doping Organisation with testing authority over him or her", while Article 5.5. provides: "All testing shall be conducted in conformity with the International Standard for Testing and Investigations". Article 5.2 contains a comment worded as follows:

108. See also the website dedicated to the ADAMS system: www.wada-ama.org/en/updates, accessed 14 November 2017, which has a section on the ADAMS Mobile App.

> Additional authority to conduct testing may be conferred by means of bilateral or multilateral agreements among Signatories. Unless the athlete has identified a 60-minute testing window during the following-described time period, or otherwise consented to testing during that period, before testing an athlete between the hours of 11:00 p.m. and 6:00 a.m., an Anti-Doping Organisation should have serious and specific suspicion that the athlete may be engaged in doping. A challenge to whether an Anti-Doping Organisation had sufficient suspicion for testing during this time period shall not be a defence to an anti-doping rule violation based on such test or attempted test.

The Spanish parliament has been tempted to adopt Article 5.2 of the World Anti-Doping Code to the letter, but to the best of our knowledge no country has actually gone down this route.

It is in fact very likely that such a power conferred on a national or international anti-doping authority would at the very least have risked running foul, if not of the constitutional rules and principles of the country concerned, then of the above-mentioned case law of the Court. It is necessary to add here that the Court pays particular attention to respect for the principle of proportionality by the states parties' legislation with regard to home visits and seizures for the purpose of establishing material evidence of an offence. In practice, this principle seems to be upheld where the legislation of states complies with a number of guarantees. First of all, a home visit should be authorised in advance by a judicial authority.[109] Second, the Court verifies that the warrant authorising a visit should be worded in such a way to ensure that the limits of the authorities' powers are sufficiently clear.[110]

In France, for example, Article 59 of the Code of Criminal Procedure sets out the principle that home visits must be carried out between 6 a.m. and 9 p.m. While it is possible for a law to derogate from this principle, the Constitutional Court has stipulated that the inviolability of the home is an aspect of individual freedom, which requires both the intervention of an ordinary court, pursuant to Article 66 of the Constitution, and strict controls regarding provisions

109. *Maschino v. France*, 16 October 2008, Application No. 10447/03.

110. *André and Another v. France*, Application No. 18603/03 judgment of 24 July 2008.

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that interfere with that freedom. However, the serious nature of the infringements in question would not appear to justify such an exception. If exceptions to this rule are provided for, then they apply only in the case of terrorism, drug trafficking and procuring. Consequently, if night-time tests were to be authorised this should be done in compliance with the principle of the inviolability of the home, in particular by limiting them to exceptional cases justified by corroborating investigations, and subject to the authorisation of a judge. As stated by Pascal Deguilhem in his information report of 10 December 2014 to the French National Assembly (Report No. 2441):

> under the current law, the adoption of such a provision would have the effect of allowing the anti-doping authorities to carry out tests at night between 9 p.m. and 6 a.m. at an athlete's home. This possibility is contrary to the constitutional principle of the inviolability of the home. Moreover, even under the criminal law, searches at night are possible for only particularly serious offences, such as acts of terrorism or organised crime. This provision also violates the principle of respect for private and family life guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), such that the European Court in Strasbourg could find against France if it were to apply such a measure. It is for this reason that the Conseil d'Etat, in an opinion of 26 June 2014, held that the transposition of that provision was possible only if the test in question were carried out with the consent of the athlete concerned. According to the information available to me, the Government wishes to make these night-time tests not only subject to the athlete's consent but also conditional upon a strong suspicion in his/her case. The aim would therefore not be to check all athletes in this way. The measures being contemplated would not only seem proportionate but would fill one of the gaps in current legislation, which enables athletes to take doping substances at night that would be undetectable the following morning. This applies in particular to growth hormones or low doses of EPO.

As far as the protection of the athlete's professional domicile is concerned, it has been emphasised that the concept of "home" has been understood in the broad sense by the Court, which has held that the inviolability of the home covers the individual's professional domicile (*Niemietz v. Germany*, 16 December 1992, cited above). The place where athletes train or participate in a competition can in fact be considered their professional domicile. Consequently, and since Article L. 232-13-1 of the Sports Code provides that "tests may be carried out wherever training or an event takes place", the question must be asked whether there is a clear lack of proportion given the aim of the fight against doping, which is to protect the athlete's health and provide a guarantee of equity and ethical conduct in sports competitions.

According to the above-cited decision of the French Conseil d'État of 24 February 2011 (Union nationale des footballeurs professionnels, Case 340.122), that is not the case.

The arrangements for the provision of whereabouts information have the additional effect of limiting athletes' freedom of movement.

3.3.1.1.4.3. Compatibility with freedom of movement of arrangements for conducting doping tests and for the provision of whereabouts information

It seems fairly certain that the arrangements for the provision of whereabouts information considerably limit athletes' freedom of movement by forcing them to stay at a fixed place for an hour a day, which is not unlike house arrest. Wherever they may be, they are no longer free to move about as they wish.

In the light of the above, it is fairly probable that if asked to decide on an application in this connection, the Court would find that such arrangements constituted a restriction on freedom of movement, but would it rule that this restriction pursued a legitimate aim (in this case, the protection of the athlete's health and the maintenance of public order by guaranteeing equity and ethical conduct in sports competitions) and was therefore necessary? It is due to answer these questions in the judgments it will deliver on the applications mentioned above.[111]

More broadly, it may be asked whether inclusion in a testing pool that obliges athletes to make themselves available for tests, including outside sports events and periods of training, in other words when they are no longer available to their employer but on leave, at rest, sick or recovering from an occupational accident, does not unduly restrict their right to personal development, which includes regular contacts with the outside world. As has been pointed out, the Court takes a broad view of Article 8 of the Convention:

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111. *Fédération Nationale des Syndicats sportifs (FNASS) and Others v, France*, submitted on 23 July 2011, Application No. 48151/11; *Longo and Ciprelli v. France*, submitted on 6 December 2013, Application No. 77769/13.

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> The Strasbourg Court has never offered a clear and precise definition of what is meant by private life: in its view it is a broad concept, incapable of exhaustive definition. What is clear is that the notion of private life is much wider than that of privacy, encompassing a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world (Roagna 2012: 12).

In its *Pretty v. United Kingdom* judgment of 29 April 2002 (Application No. 2346/02), the Court therefore held that "private life is a broad concept, incapable of exhaustive definition", adding that Article 8 "also protects a right to personal development, and the right to establish and develop relationships with other human beings". Accordingly, "the right to private life does not only encompass relationships which are already established, but also extends to the possibility of 'developing relationships with the outside world'. This concept lies at the heart of Article 8" (Roagna 2012: 14).

Even more broadly, whereabouts requirements necessarily limit the freedom of athletes to lead their lives as they wish.

Some people have drawn a parallel with criminal law, which also provides for a system that may be likened to whereabouts requirements, namely electronic tagging. This system, implemented in the United States and Canada from the mid-1980s, then the United Kingdom in 1989, followed by Switzerland in 1993 (canton of Vaud), the Netherlands in 1994, Sweden in 1995, Spain in 1996 and Belgium in 2001, to mention only these countries, is used as an alternative to remand in custody and in connection with probation, conditional release or end-of-sentence tracking, depending on the country.

It should also be pointed out that, in contrast to electronic tagging, which is to monitor individuals who have been placed under a formal investigation procedure or convicted by a court and are in some cases considered relatively dangerous, whereabouts filing requirements are imposed as a general rule on athletes presumed innocent, despite the fact that the use of doping substances does not generally constitute a criminal offence.

An athlete's right to private and family life can also be threatened by the gathering of personal health data.

3.3.1.2. Arrangements for collecting personal data, and respect for the athlete's private and family life

We shall first of all consider the reasons why the protection of personal data has been recognised as a fundamental right (section 3.3.1.2.1), before looking at what this right comprises (section 3.3.1.2.2) and then assess the compatibility with this right of arrangements for the collection and processing of athletes' personal data in sports matters (section 3.3.1.2.3).

3.3.1.2.1. Reasons for recognising the protection of personal data as a fundamental right

Specific rules to protect personal rights and freedoms – especially those of a fundamental nature – from threats posed by the management of personal data by private individuals and public bodies, underpin the right to protection of personal data. This right basically emerged in Europe at the beginning of the 1970s in response to the concern raised by the advent of information technology, initially in the form of the computer, which enabled data on individuals to be collected, stored, processed and distributed. Concerns about the systematic and widespread keeping of files, especially by the state, designed to render people's lives transparent and control them, coupled with the inadequacy of the positive law of the time, the rapid development of technological capabilities and the individual and collective, private and public use of data, prompted the emergence of a separate and unique right to protection of personal data at national, European Community and international level. Alongside a biological and legal identity, individuals are gradually being characterised by a digital identity. Although the Convention does not explicitly refer to the protection of personal data on account of the date on which it was drawn up, it is through Article 8 that it guarantees this protection because the Court distinguishes it from the concept of private life and confers upon it extensive and unique treatment of its own.[112] For example, the Court considers it a breach of this article to record information in a police register on a person's private life and pass it on to an administrative authority without that person being able to refute it.[113] In addition, particular

112. *Z. v. Finland*, 25 February 1997; *Aman v. Switzerland*, 16 February 2000, cited above; *Rotaru v. Romania*, 4 May 2000, cited above.

113. *Leander v. Sweden*, 26 March 1997, Application No. 9248/81.

attention is paid to health data, since the Court describes the confidentiality of such information as "a vital principle in the legal systems" of all the contracting parties to the Convention.[114] More recently, it reiterated the importance of the protection of medical data both from the point of view of the right to respect for private and family life within the meaning of Article 8 of the Convention and of the preservation of the patient's confidence in the medical professions and the health services in general.[115] It was also in 2008 that it delivered its aforementioned well-known *S. and Marper v. United Kingdom* judgment in a case that involved the recording in databases of biometric information (digital fingerprints and genetic data) on convictions. The Court held that the concept of "private life" can embrace multiple aspects of a person's physical and social identity. Accordingly, the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 of the Convention.

The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) of 28 January 1981 attempts to balance the principle of the protection of individuals against the circulation of personal data. Open for signature by member and non-member states of the Council of Europe, it is the first legally binding international instrument in this area and was supplemented by its additional protocol regarding supervisory authorities and transborder data flows, that came into force on 1 July 2004 (ETS No. 181). The convention asserts the right of any person to access their own personal information and have it rectified in the event of an error or erased if it has been processed in breach of the applicable legislation.

3.3.1.2.2. The scope and substance of the protection of personal data

The substance and, thenrefore, the scope of the protection of personal data are to be understood in the broad sense.

Accordingly, and contrary to what is often written, the protection of personal data is not the same as, but differs significantly from, the protection of private life alone. However, that does not prevent some overlap. Consequently, from

114. *Z. v. Finland*, 25 February 1997, cited above.

115. *I. v. Finland*, 17 July 2008, cited above.

among instances of interference by public authorities in the private lives of individuals, an oft-cited example is interference resulting from the storing of data relating to private life. According to the method established by the Court:

> in determining whether the personal information retained by the authorities involves any of the private-life aspects cited above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained.[116]

However, quite apart from these overlaps, the protection of personal data is about protecting the whole of the individual's personal life well beyond private life alone. The protection applies if two conditions are met. First of all, the data in question must be personal data within the meaning assigned to them by the majority of legislation. Personal data are data that have any purpose whatsoever, are in any form and can be directly or indirectly linked to an identified or identifiable individual. It is then necessary for the data to be subject to manual processing – using a structured and stable set of data – or automated processing. The name and technical features of the tool are of little importance. Processing also covers any action or operation relating to the information lifecycle, from the collection, retention, consultation, modification or transmission of the data to their ultimate deletion. The consequence of this extended definition of personal data and the processing thereof is that few cases fall outside its scope.

With regard to the guiding principles of the protection afforded, a distinction needs to be drawn between the rights conferred upon the person whose data are processed (including that person's consent to the processing of the information collected, the right to object, the right to access and receive a copy of the information, the right to challenge the legality or purpose of the processing, the right to demand that the information be deleted, supplemented or modified, etc.) and the obligations of the data controller, whether public or private (management of the data with a fixed, lawful, explicit and legitimate purpose; retention of the data for a limited period in an appropriate form and enabling their security and confidentiality to be safeguarded, etc.). Any breach of these obligations is often punished under criminal law.

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116. *S. and Marper v. United Kingdom*, 4 December 2008, cited above.

3.3.1.2.3. Compatibility of arrangements for collecting and processing athletes' personal data with the protection of personal data

The fight against doping entails the creation and processing of large quantities of information, some of it very sensitive. Since this involves various players, including WADA, it is vital to ensure that the information is shared and circulated in a reliable way and to guarantee the transparency of these operations, which in particular requires the individual's consent to the processing of personal data. Transparency enables athletes to access data relating to them and to retain control over their private life. In all these matters, WADA plays a key role through its ADAMS computerised platform in overseeing and harmonising arrangements for the collection, retention and disclosure of personal information produced in the anti-doping context.

One relevant example of the guarantees covering the processing of health data is that of Therapeutic Use Exemptions (TUEs). Just like everyone else, athletes must be able to look after their health, but they are prohibited from using some procedures and substances, even though they could heal them. This means that there is a conflict between the fight against doping and the maintenance of the athlete's health and, more broadly, the protection of health data collected in connection with the procedure put in place under the rules governing the use of drugs for therapeutic purposes. This procedure is covered by Article 4.0 of the International Standard for Therapeutic Use Exemptions (ISTUE). In view of the very specific purpose of this article and the rules it contains on collecting, sharing, circulating and retaining information, it may be argued that ISTUE offers satisfactory protection for the private life of athletes, in particular in view of the very strict rules contained in Articles 9.1 to 9.5 on access to information collected.[117]

A further example of the guarantees covering the processing of personal data is the principle of medical confidentiality that can be found in the French Sports Code (Article L. 232-14), which provides that "only doctors may gather medical information" when doping tests are conducted.

117. See www.fia.com/sites/default/files/basicpage/file/20141224/WADA-2015-ISTUE-Final-EN.pdf, accessed 14 November 2017.

The introduction of the biological passport also raises certain questions, as this necessitates a longitudinal analysis of athletes' blood parameters, which are recorded in a database (see Coccia 2013: 9-26). Parallel to the analytical testing made possible by the direct detection of prohibited substances in the body, the monitoring of the athlete's biological parameters over a long period enables signs of doping to be identified. This comprises several separate modules that make it possible not only to detect doping through the administration of growth or steroid hormones but also blood doping, the aim of which is to increase the number of red blood cells. The biological passport is used both as a targeting tool, for the purpose of carrying out precise tests on certain athletes, and as a means of sanction. The mere communication of medical data with no legal authorisation and no actual consent by the athlete constitutes a breach of medical confidentiality in itself. Moreover, the establishment of medical databases by national anti-doping authorities has to be authorised in order for it to be legal, at least in some countries. It should be emphasised in this connection that the results themselves of doping test analyses are already considered medical data. It seems that, whatever the case, test results must be considered protected medical data. The concept of medical data is generally understood in a broad sense as everything to do with the means of preserving a patient's health.

Following the Operation Puerto case (on 23 May 2006, the seizure of about 200 bags of blood in a Spanish laboratory revealed the existence of an extensive doping network, which once again caused serious damage to the image of professional cycling), the UCI obliged professional cyclists to give a DNA sample to compare it with the bags of blood seized by the Spanish judicial authorities. However, this case, which had many twists and turns, shone a harsh spotlight on the limits to the legal pluralism that is a constituent element of sport law because the juxtaposition of multiple sets of rules too often leads to deadlock. Bastien Soulé and Ludovic Lestrelin described this case thus:

> On August 29 2007, based on the information exposed in the second Puerto file, the UCI barred [Valverde] from participating in the World Championship. On September 7, the RFEC refused to take any disciplinary measure against Valverde, announcing its intention to select him. The Spanish Secretary of Sport expressed support for the rider, emphasising the lack of new elements proving his involvement in Dr Fuentes's network. This stand taken by the Spanish government led to a letter from the president of the UCI to the Secretary of Sport, pointing to damning evidence of Valverde's guilt and deploring the lack of transparency shown by the Spanish government. The CAS, arguing that it did not have sufficient elements to bar Valverde

from racing, allowed him to participate in the World Championship. The WADA and the UCI unsuccessfully requested from the Spanish judge access to a blood bag labelled with a code supposedly designating Valverde to perform a DNA test. The pouch was then requested by the CAS but the request was denied by Judge Serrano, arguing that the "private organisation" status of the CAS rendered impossible the transmission of evidence. This denial led, on July 11 2008, to the UCI and the WADA jointly filing an appeal to implement the decision of the CAS. In July 2008, the CAS gave the Spanish justice system six months to hand over the blood bag. Valverde is also at the centre of another imbroglio. Taking advantage of a brief moment when the 2008 Tour de France was going through Italy, CONI gave Valverde a blood test. A DNA comparison of that blood with a blood sample seized during the Puerto operation allowed CONI to confirm that the latter belonged to Valverde. Supported by the UCI, the anti-doping court of CONI then pronounced the sanction mentioned above [see part 4.4 in Soulé and Lestrelin 2012] for the violation of the WADA code. The Spanish cyclist filed a complaint, arguing that CONI had not respected the prohibition from using elements of the Puerto files that had been issued by the Spanish justice system. His team (Caisse d'Épargne) accused CONI of being incompetent and characterised the procedure as irregular. The Madrid Superior Court declared invalid the procedure used by CONI for gathering evidence, arguing (a) that because it was not a representative of the Italian justice system, CONI did not have the right to request from Spain blood samples susceptible to establish Valverde's guilt; and (b) that the evidence gathered during the Spanish investigation could not be used in another affair. The president of the Spanish Olympic Committee also asserted the innocence of Valverde. The RFEC completed this front of support for Valverde, arguing that it is "the only organisation allowed to impose disciplinary sanctions in doping cases". Finally, there was nearly a diplomatic incident when the Spanish Secretary of Sport declared that it was the responsibility of the Spanish Justice system to judge this Spanish citizen. According to the CONI anti-doping prosecutor, Valverde's lawyers present at his hearing did not respond to the accusations, claiming only that the Italian authorities did not have the legitimacy to act in this affair. (Soulé and Lestrelin 2011: 186-208).

In French law, apart from the cases referred to in Article 16-11(3) of the Civil Code (such as identification for medical purposes or for scientific research), only genetic data from the National DNA Database (FNAEG) can be used for identification. The use of FNAEG data is governed by Articles 706-54 ff. of the Code of Criminal Procedure, which limit that use to criminal offences. However, since the entry into force of Act No. 89-432 of 28 June 1989 the use of doping substances has no longer constituted an offence, and the use of genetic data by a federation to prove that a rider is guilty of doping would not appear to fall into this legislative framework and is therefore illegal in French law.

However, the question of the protection of personal data has also been raised in connection with the processing of whereabouts information cited above in section 3.3.1.2.3. When information collected when an athlete complies with whereabouts requirements is subjected to automated processing, the processing should be preceded by an opinion issued by an independent authority. This happened in France with the CNIL, which, prior to the creation of the file for collecting data obtained during testing, issued an opinion on 25 April 2007 on the AFLD's draft deliberation on the creation and sharing of the automated processing of information on athletes' compliance with whereabouts requirements. According to the opinion:

> the commission notes that Article 1 of the draft Deliberation refers to the use of the Anti-Doping Administration & Management System (ADAMS) developed by the World Anti-Doping Agency. It considers it desirable for these provisions to be complemented so as to state explicitly that automated data processing will only be implemented to this end by the Agency's Testing Department in respect of the athletes' whereabouts module. The commission also notes that the French Anti-Doping Agency has referred to it a file of formalities to be completed before carrying out the aforementioned processing. The personal data gathered will be confined to information relating to the athlete's identity, schedule and training venue or to the events in which he/she is participating. They will be entered directly on the World Anti-Doping Agency's secure internet platform, located in Canada, and will only be made available to users authorised by the organisations to which they belong, in accordance with the World Anti-Doping Programme (World Anti-Doping Agency, international member federation) and to the athletes themselves via personal passwords …. The commission notes the measures taken by the French Anti-Doping Agency to ensure that, in accordance with the provisions of Chapter V of the Act of 6 January 1978, as amended, athletes subject to individual tests, and therefore obliged to comply with the whereabouts requirements, are informed by the French Anti-Doping Agency's Director of Testing about the existence of the data processing and their rights under the Act on the Protection of Data and Freedoms (Loi informatique et libertés).

The CNIL's recommendations were taken into account by the AFLD, which provides for these two items of information to be communicated to athletes when notifying them of their inclusion in the testing pool.

The matter was then the subject of the above-mentioned Order of 14 April 2010, issued in application of the revised World Anti-Doping Code.

In Belgium, the Commission for the Protection of Privacy, in its Opinion No. 08/2010 of 24 February 2010 on the preliminary draft Anti-Doping Decree (CO-A-2010-001), laid down the conditions to be met regarding the automated processing of data gathered in connection with the arrangements for ensuring compliance with whereabouts requirements. Its conclusions are as follows:

> 10. Conclusions:
>
> 54. The Commission proposes that the preliminary draft Decree be amended as follows:
>
> 1) in Article 12.2, add that the Government's intervention shall be preceded by an opinion issued by the Commission for the Protection of Privacy (see paragraph 22);
>
> 2) in Article 18.3, second indent, add that the Government's intervention shall be preceded by an opinion issued by the Commission for the Protection of Privacy (see paragraphs 29 and 35).
>
> 55. In addition, the following measures must be taken by the authority responsible as the data controller:
>
> 3) informing and educating athletes and their support personnel about the processing of personal data (see paragraph 36);
>
> 4) taking the steps necessary to ensure data security and confidentiality (see paragraphs 42 to 48);
>
> 5) informing the data subjects about their right of access and rectification (see paragraphs 49 and 50);
>
> 6) notifying the Commission of the processing carried out (see paragraphs 51 to 53).

Although it is not possible to obtain exhaustive data, it should be pointed out that in those countries that have adopted whereabouts systems, the already low number of athletes sanctioned for repeated whereabouts failures seems to be falling.

Finally, there must be even stronger guarantees of the protection of the personal data gathered given that such data are intended to be shared by the anti-doping authorities. Accordingly, in contrast to competitions, when a single authority is responsible for conducting tests, in the case of unannounced out-of-competition tests, no one body is

responsible and any can potentially take action in this regard, whether it be the international federation to which the athlete belongs or the national anti-doping authority in whose territory the athlete is located.

However, in order to be fully effective, this sharing of responsibilities makes it necessary for whereabouts data files generated via the ADAMS system to be shared by the federations and agencies. As has been pointed out:

> some authorities do not wish to pass on – or do so incompletely or with a delay – whereabouts data on their athletes in order to avoid their being tested by other testing authorities. For example, the testing of Lance Armstrong at Saint-Jean-Cap-Ferrat in 2009, in a period of preparation for the Tour de France, was not carried out by the AFLD on the basis of the transmission of whereabouts information by the UCI but on the basis of information provided by the local press.
>
> This reluctance to share files may be related to the guarantees of confidentiality which must apply to these transmissions of information. Jean-Christophe Lapouble has therefore stated to your Commission of Inquiry that he has "the same doubts concerning the ADAMS system as for any data transfer system. Data on French athletes collected by the AFLD are forwarded to WADA in Montreal under the authority of the Quebec Commission for Access to Information, then sent to third countries if the athlete is travelling. The degree of protection may vary in these cases as it is subject to computer faults, or even indiscretions". In response, however, Olivier Niggli referred to the guarantees inherent in the system. First of all, the authorities with access to it are limited in number: "data can be accessed only by authorised individuals or bodies: athletes, international federations and relevant national agencies". Moreover, the transmission of information is not automatic but takes places solely on the authorisation of the authority in possession of the whereabouts data: "a national agency can, voluntarily, authorise a foreign organisation in the country to which the athlete is travelling to carry out tests and see if it considers the guarantees sufficient. This can only be a voluntary act, which can be contractually agreed. There is no immediate and general sharing of information. The system is self-contained" (Lozach 2013: 147-148).

In order to put an end to these problems of the transmission of information, it is possible to imagine that national anti-doping authorities could be authorised to conclude specific agreements on sharing whereabouts data with the main federations involved in periods of training. The federations will have even less reason to object to this as the national data processing systems will provide all guarantees as far as the protection of these data is concerned.

While the arrangements for meeting whereabouts requirements set up under national legislation in application of the World Anti-Doping Code must be balanced against the protection of athletes' personal data, they must also be balanced against the right to respect for their home.

The protection of the integrity of athletes is also a question posed by anti-doping measures.

3.3.2. The physical and moral integrity of athletes (Articles 3 and 8 of the Convention)

We should first of all define exactly what is meant by the concept of "physical and moral integrity" (section 3.3.2.1), then describe the requirements for ensuring its protection (section 3.3.2.2) and finally assess the possible impacts of doping tests on athletes' physical and moral integrity (section 3.3.2.3).

3.3.2.1. The substance of physical and moral integrity

The protection of the physical and moral integrity of individuals must be linked to the concept of respect for human dignity and, more particularly, to the prohibition of degrading punishment or treatment enshrined in Article 3 of the Convention.

In most cases, the protection of physical and moral integrity derives from the more general right to health. The aim is to protect individuals against any action which could result in physical harm and which fails to take account of the possible physiological consequences. For example, medical intervention without the patient's consent for other than therapeutic purposes, in an endeavour to secure evidence,[118] would amount to degrading treatment. However, even when medical

118. See *Jalloh v. Germany*, 11 July 2006, Application No. 54810/00, concerning the forcible administration of emetics to oblige the applicant to regurgitate the drugs he had allegedly swallowed, and *Nevmerjitski v. Ukraine*, 5 April 2005, Application No. 54825/00, concerning forced feeding.

interventions are carried out for therapeutic reasons, the manner in which a person is forced to undergo the intervention must remain below the degree of severity defined in the Court's case law relating to Article 3 of the Convention.[119]

3.3.2.2. The protection of physical and moral integrity

As the Court has held on numerous occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances or the victim's conduct; the nature of the offence of which the applicant has been found guilty is therefore irrelevant for the purposes of the examination of the application under Article 3.[120]

In order to fall within the scope of Article 3, ill-treatment must also attain a minimum level of severity. The assessment of that minimum is relative; it depends on all the circumstances of the case, in particular the duration of the treatment, its physical and/or mental effects and, in some instances, the sex, age and state of health of the victim.[121] If a penalty or treatment is to be considered "inhuman" or "degrading", the suffering or humiliation it entails has to go beyond that inherent in a given form of treatment or legitimate penalty. A further issue to be taken into account is whether the aim of the ill-treatment was to humiliate or belittle the victim.[122] However, the absence of such an aim cannot definitively rule out a finding of violation of Article 3.

In each case, the allegations of ill-treatment constituting violations of Article 3 of the Convention must be proved "beyond all reasonable doubt". In this respect, a reasonable doubt is not a doubt based on a purely theoretical possibility or one that is raised to avoid an unpleasant conclusion; the reasons for that doubt must be able to be drawn

119. See *Naumenko v. Ukraine*, 10 February 2004, Application No. 42023/98, concerning the administration of psychoactive drugs to a prisoner.
120. See *V. v. United Kingdom*, 16 December 1999, Application No. 24888/94, *Labita v. Italy* cited above and *Kudła v. Poland,* 26 October 2000, Application No. 30210/96.
121. See the *Labita v. Italy* and *Kudła v. Poland* judgments, cited above.
122. See for example, *V. v. United Kingdom* cited above and *Raninen v. Finland*, 16 December 1997, Application No. 20972/92.

from the facts presented. Proof may also arise from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.[123] Consequently, in order to determine whether the applicant's allegations of ill-treatment actually took place, the Court must draw on all of the evidence submitted to it or, where necessary, the evidence it obtains itself.[124]

Moreover, the Court points out that where an individual raises an arguable claim that he or she has been seriously ill-treated by the police or other such agents of the state unlawfully and in breach of Article 3, that provision, read in conjunction with the state's general duty under Article 1 of the Convention "to secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be an effective official investigation.

3.3.2.3. The compatibility of certain arrangements with athletes' physical and moral integrity

Here, we must first of all consider the compatibility of doping test arrangements with athletes' physical and moral integrity (section 3.3.2.3.1) and situations of overtraining which can have far-reaching consequences (section 3.3.2.3.2). Other situations will be looked at in the final paragraphs (section 3.3.2.3.3).

3.3.2.3.1. The physical and moral integrity of athletes and doping test arrangements

Anti-doping efforts primarily reflect the concern to protect the health of those who take part in physical and sports activities.

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123. See *Ireland v. United Kingdom*, 18 January 1978, Application No. 5310/71; *Labita v. Italy,* cited above; and *Dikme v. Turkey*, 11 July 2000, Application No. 20869/92.

124. See, for example, *Vilvarajah and others v. United Kingdom*, judgment of 30 October 1991, Series A No. 215, p. 36, paragraph 107.

The question must therefore be asked whether it is possible, in certain circumstances, to consider the ways in which doping tests are organised as constituting degrading treatment. In view of the existing anti-doping regulations of national or international sports federations, the answer is "no".

Another, more complex, question is whether doping tests must be considered to be a derogation from the principle of the inviolability of the human body. By definition, they entail the taking of a biological sample and should therefore be governed by the rules relating to use of parts or products of the human body, which differ slightly according to the legislation dealing with the matter. This applies in particular to blood samples: if the collection of such samples does not meet a certain number of requirements, it may appear to some to be a somewhat invasive practice (see for example the "WHO guidelines on drawing blood: best practices in phlebotomy"). Accordingly, some national federations are obliged in the event of a doping test to ask the parents of underage athletes and protected adult athletes for authorisation to take blood samples using an invasive technique.

There is also the question of ownership of the samples. To take but a few examples, Article 6.6.1. of the version of the UCI's anti-doping rules in force at 1 January 2015 stipulates that "Samples collected from a rider under these Anti-Doping Rules are owned by the UCI". The same applies to the International Association of Athletics Federations: Rule 36 paragraph 2 ("Analysis of Samples") of its Competition Rules in force since 1 January 2015 stipulates that: "All Samples (and related data) collected under the testing authority of the IAAF, both in and out-of-competition, immediately become the property of the IAAF". The IOC's anti-doping rules say more or less the same: "Samples shall be stored in a secure manner at the laboratory or as otherwise directed by the IOC and may be further analysed. Consistent with Article 17 of the Code the ownership of the samples is vested in the IOC for eight years" (Article 6.5 "Storage of Samples and delayed analysis" of the IOC Anti-Doping Rules applicable to the Beijing 2008 Olympics).

These rules are in line with the World Anti-Doping Programme, in particular the Standard on Testing and Investigations (see Article 10.0: "Ownership of Samples" and 10.1 "Samples collected from an athlete are owned by the Testing Authority for the sample collection session in question").

It is however difficult to consider that the fact that athletes do not own the samples taken from them in doping tests supports the claim that their dignity is inadequately protected because their physical and moral integrity is not

guaranteed. It even seems difficult to rely on the Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164) of 4 April 1997: "Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine" (Article 1).

Finally, and this is perhaps the most straightforward avenue to explore, the physical and moral integrity of athletes can be linked to respect for private life. However, as has already been pointed out, the concept of "private life" is broadly interpreted by the Court. It can, in some circumstances, include the physical and moral integrity of the individual. For example, a non-consensual or compulsory medical treatment or examination, regardless of its importance, may fall within the protection of private life within the meaning of Article 8 of the Convention.

It is therefore possible to recommend that sports organisations ensure that the doping tests carried out on athletes belonging to their organisations scrupulously comply with the rules. Consequently, it is not impossible to imagine that they may report some examples of abuse (for example, an unjustifiably large number of tests, tantamount to undue zeal in the case of athletes who have no past history of drugs and do not present any particular risk).

3.3.2.3.2. Athletes' physical and moral integrity and overtraining

Athletes' physical and moral integrity may also be threatened by overtraining.

This can lead to certain disorders caused by work overload while training and taking part in competitions. An imbalance between training and rest periods leads to a decrease in the athletes' physical fitness, meaning that they have increased difficulty in keeping up the momentum of training sessions, and that their performance levels drop over a long period (between several weeks and several months). The symptoms of overtraining can usually be placed in one of three categories: physical, cognitive and psychological. It should be noted that, although many theories have been put forward, there is no clear physiopathology. There is no biological examination from which a primarily clinical diagnosis can be made, as it is muscular, ligament, articular or bone pains and injuries that are often associated with

overtraining. Moreover, the injuries suffered by overtrained athletes usually restrict their ability to practise their sport and they become susceptible to minor viral infections. Loss of appetite, insomnia and weight loss should also serve as a warning to those around them. In addition to these physical symptoms there may be cognitive symptoms linked to the way in which athletes perceive themselves, their performance and the conditions in which they practise their sport. The final category comprises psychological symptoms: mood changes, apathy, irritability, decreased trust in others and reduced self-confidence.

A problem that is very similar to overtraining and which is seldom mentioned is exhaustion or sports burnout, which may be considered as a derived form of overtraining. It may take the form of physical and emotional exhaustion, certain types of depression, insomnia or loss of self-confidence.

All athletes are concerned by overtraining: professionals and amateurs, adults and minors.

In the case of professional athletes, the amount of training they are obliged to do and the demands of the competitions they take part in mean that they are constantly pushed to the limits and have to rise to levels which they cannot maintain over the long term.

The consequences for athletes vary and can be very serious. They may result in their having to forego sport or professional life either temporarily or permanently and they also include two categories of costs: direct costs (medical treatment, vocational retraining or reintegration, etc.) and indirect costs (lower productivity, performance levels, etc.).

In some cases, the overtraining of minors may be considered to be ill-treatment. The United Nations defines ill-treatment of children as "all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". Ill-treatment in sports can take on several forms:

- a physical form: physical duress owing to the intensive or unmonitored practice of sports as a result of the extent of constraints on the musculoskeletal system and the body, leading to metabolic damage;
- a psychological form: disparagement, threats, the use of coarse language, insults, excessive familiarity, humiliation, infantilisation and blackmail, etc.;

- a form linked to negligence: ignorance of or lack of interest in and attention to the needs of the individual and failure to meet those needs through negligence or the refusal to inform about risks for the health/integrity of the person, through the continuation of an activity beyond the limits individuals say they can tolerate, by deliberately exposing them to violation of their integrity or by continuing or resuming an activity regardless of the existence of a health problem;
- a sexual form: any type of sexual act, any attempt by a person in a position of authority to obtain a sexual favour, or any comments or sexual advances by that person; this includes sexual assault as well as voyeurism, exhibitionism and sexual harassment.

This latter form of ill-treatment is not directly linked to overtraining but is worth underlining as the sporting environment brings with it clearly identified potential risks for minors.

Indeed, numerous cases of ill-treatment, sexual assaults and sexual abuse are now recorded at all levels in the world of sport. While the growing number of cases reported is one of the reasons for the high number of cases that have come to light, it is nevertheless a real problem which is increasingly highlighted either by the press or by research. Irrespective of the situation in which the minor is placed – training centre, residential course, being away from home to take part in a competition – strict rules must be imposed on the sports officials responsible for coaching athletes.

There are several instruments that have been drawn up to counter the risks of ill-treatment, one of which is the Charter on Children's Rights in Sports of the International Institute for the Rights of the Child (Sion, Switzerland, 2010):

> which is in keeping with the normative framework, the spirit and principles of the UN Convention on the Rights of the Child (hereinafter CRC) and its two Optional Protocols and is based on the universal recognition of the dignity of the child. It reiterates the obligation of states, under Article 4 CRC (effective implementation of the Convention, bearing in mind the state's resources) and calls for the application, in all the situations envisaged, of the principles of non-discrimination (Article 2 CRC), the best interests of the child (Article 3 CRC), the right to life, survival and development (Article 6 CRC) and the child's participation (Article 12 CRC).

There are also charters of good conduct drawn up by a number of national Olympic committees, which are then passed on by the federations affiliated to them, as well as information and awareness-raising sessions. In some cases, the training of sports officials includes a module focusing on such issues.

Other situations may also threaten the physical and moral integrity of athletes.

3.3.2.3.3. The physical and moral integrity of athletes and other situations

Without going into detail, the aim here is to draw the attention of sports stakeholders and to ask whether certain situations should not be considered as threats to the physical and moral integrity of athletes, given that, as already mentioned, in most cases the protection of physical and moral integrity derives from the more general right to health and that it should be possible to protect individuals against any action which could result in physical harm and which fails to take account of the possible physiological consequences.

The question must therefore be asked whether situations in which athletes are forced to accept doping or are unaware that they are being doped – sometimes by agents of the state or with state resources – and the widespread use of blood tests (an invasive technique) in cases where urine tests would suffice, or even the refusal to authorise the therapeutic use of drugs, constitute threats to the physical and moral integrity of athletes.

Last but not least, we must take a look at the issue of an athlete's right to freedom of expression.

3.3.3. Athletes' freedom of expression (Article 10 of the Convention)

We should first of all clearly define the right to freedom of expression (section 3.3.3.1), then look at how it is implemented (section 3.3.3.2) and finally the cases in which athletes must be allowed to benefit from the guarantees covered by this freedom (section 3.3.3.3).

3.3.3.1. The right to freedom of expression

Under Article 10 of the Convention:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

For the Court, freedom of expression "constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every individual".[125] Subject to paragraph 2 of Article 10, freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb …: Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".[126]

Article 10 therefore protects not only the substance of the ideas or information expressed but also the way in which they are expressed.[127] The very wording of Article 10 also shows that freedom of expression includes both freedom of opinion and freedom to receive or communicate information or ideas without any interference by the public authorities and regardless of frontiers or political regime.

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125. See, among many examples, *Mouvement Raëlien Suisse v. Switzerland*, 13 July 2012, Application No. 16354/06).
126. See, for example, *Mouvement Raëlien Suisse v. Switzerland,* cited above; *Axel Springer v. Germany*, 7 February 2012, Application No. 39954/08; *Gillberg v. Sweden*, 3 April 2012, Application No. 41723/06).
127. See *Palomo Sánchez and others v. Spain*, 12 September 2011, Application No. 28955/06 et al.

As regards freedom of opinion more particularly, it should be emphasised that the hallmarks of a democratic society are pluralism, tolerance and broadmindedness: that is why Article 10 guarantees everyone the right to have and express an opinion, regardless of whether it is a minority or a shocking opinion. Freedom of expression therefore also applies to opinions that offend, shock or disturb the state or any sector of the population.[128]

Nevertheless, even though the guarantee of freedom of expression is particularly strong, the freedom granted should not be used to violate other freedoms. The Court therefore acknowledges that freedom of expression is not an absolute right, that there are possible exceptions which nonetheless call for a narrow interpretation and that the need for a restriction must be convincingly established.[129]

3.3.3.2. Ways in which athletes' freedom of expression is put into practice

In order to guarantee respect for freedom of expression, the Court conducts a traditional two-stage appraisal: after determining the state's obligations in the case under consideration, the Court examines whether it has fulfilled this obligation, which may be negative or positive. With regard to positive obligations, the measures taken by the state to protect individuals' freedom of expression also apply to relationships between private individuals, irrespective of any form of involvement by the state party.[130] In its decision of 16 December 2008 in the *Khurshid Mustafa and Tarzibachi v. Sweden* case, Application No. 23883/06, the Court held as follows:

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128. See *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/7.

129. See *Mouvement Raëlien Suisse v. Switzerland*, *Axel Springer v. Germany* and *Gillberg v. Sweden*, cited above.

130. See *Palomo Sánchez and others v. Spain*, 12 September 2011, Application No. 28955/06 et al., concerning relationships between employers and dismissed employees; *Verein Gegen Tierfabriken Schweiz (VgT) v. Switzerland (No. 2)*, 30 June 2009, Application No. 32772/02, concerning the refusal by the private company in charge of television advertising on programmes from the Swiss radio and television broadcasting company to broadcast a commercial by an animal rights association; *Appleby and others v. United Kingdom*, 6 May 2003, Application No. 44306/98, concerning the refusal by the owner of private premises open to the public (a shopping centre) to allow political activists to express and disseminate their ideas; Özgür Gündem v. Turkey, 16 March 2000, Application No. 23144/93, concerning assaults on and harassment of journalists by "unknown perpetrators" with the result that their newspaper could no longer be published.

> 33. Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or … inconsistent … more broadly with the principles underlying the Convention (*Pla and Puncernau v. Andorra*, 13 July 2004, ECHR 2004-VIII, paragraph 59).

Once the public authorities' interference in a person's right to freedom of expression has been demonstrated, the Court seeks to establish whether the interference was justified. In order to be justified, it must have been prescribed by law (in a substantive way and not merely a matter of form, meaning that it must be accessible – and therefore expressed in clear and precise terms – and have a predictable effect), have one or more of the legitimate aims set out in Article 10.2 of the Convention and be necessary in a democratic society for the pursuance of one or more of these aims.[131] With regard to the latter point, in order to be considered necessary, the restriction or interference must meet a pressing social need. Nevertheless, the states parties have a margin of appreciation as regards the necessity and scope of the interference in freedom of expression, and the scope of this margin of appreciation varies according to the circumstances of the case and the nature of the impugned comments: it is limited or restricted when freedom of expression concerns the substance of political issues, issues of general interest or freedom of the press; it may be broader when the right to freedom of expression is applied in the field of trade or advertising or where personal beliefs are involved. But this margin of appreciation goes hand in hand with the monitoring carried out by the Court with regard to both legislation and the decisions on its application, even where they are issued by an independent judicial body. The Court therefore has jurisdiction to hand down a final decision on the question of whether a restriction is compatible with the right to freedom of expression. In performing this role, it considers the interference in question in the light of the entire case under examination, including the substance of the disputed comments and the context in which they were made. Finally, the Court examines whether they were proportionate to the legitimate aims pursued: in carrying out this verification, it is for the Court to determine whether the restriction on a person's freedom of expression was proportionate and whether the grounds relied upon by the domestic courts to justify the interference were relevant and sufficient.

131. See *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, 7 June 2012, Application No. 38433/09.

Finally, in cases where confidential information has been disclosed, the Court has established specific criteria for evaluating the need for the interference in question in relation to the aims pursued. The same principles apply when seeking to strike a balance between the right to freedom of expression and the right to respect for one's private life, particularly where a person's reputation is at stake.

3.3.3.3. Athletes' freedom of expression

In the case of athletes' right to freedom of expression, it must first of all be pointed out that the Convention, and Article 10 in particular, is addressed to the states parties. Consequently, as highlighted above, although it has a horizontal effect, it is through states' positive obligation to take measures to protect freedom of expression, even in relationships between private individuals, that it has a real and effective impact. Athletes are therefore entitled to expect states parties to ensure that their right to freedom of expression is not unfairly restricted, provided the aforementioned conditions (type of discourse, contribution to the public debate, nature and scope of the restrictions, the existence of alternative solutions, balance struck between the interests at stake, etc.) are met.

To be more precise, it should be possible to ensure that states parties' positive obligation to protect individuals' right to freedom of expression against violations resulting from the actions of a private entity is applicable to athletes in their relationships with the organisations to which they are affiliated, or of which they are employees in the case of professional athletes.

In the first case, and over and above the issue of whether athletes who take part in the Olympic Games have an employee/employer relationship with the IOC, the question must be raised as to whether the provisions of Rule 50 of the Olympic Charter in the version in force as of 8 December 2014 are compatible with freedom of expression. Rule 50 is worded as follows:

Advertising, demonstrations, propaganda.

1. The IOC Executive Board determines the principles and conditions under which any form of advertising or other publicity may be authorised.

2. No form of advertising or other publicity shall be allowed in and above the stadia, venues and other competition areas which are considered as part of the Olympic sites. Commercial installations and advertising signs shall not be allowed in the stadia, venues or other sports grounds.

3. No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas.

Bye-law to rule 50

1. No form of publicity or propaganda, commercial or otherwise, may appear on persons, on sportswear, accessories or, more generally, on any article of clothing or equipment whatsoever worn or used by the athletes or other participants in the Olympic Games, except for the identification – as defined in paragraph 8 below – of the manufacturer of the article or equipment concerned, provided that such identification shall not be marked conspicuously for advertising purposes … .

Any violation of the provisions of the present clause may result in disqualification or withdrawal of the accreditation of the person concerned. The decisions of the IOC Executive Board regarding this matter shall be final.

It appears that these provisions are more broadly applied from year to year – prohibition of political gatherings or demonstrations, blanket ban on publicity or propaganda on sportswear, etc. and even a blanket ban on advertising or propaganda by means of the athlete's body (tattoos, markings, incisions, etc.) – without any clear definition of their scope and substance. It follows that athletes are frequently liable to penalties. On the basis of the aforementioned decisions of the Court and in particular the decision of 16 December 2008, in the *Khurshid Mustafa and Tarzibachi v. Sweden* case, one writer suggested that these decisions constituted indications of what the Court's position might be if it had to deal with an application claiming that there had been a violation of the right to freedom of expression because a judicial body had wrongly interpreted Rule 50 of the Olympic Charter (see Faust 2014: 253-263).

While waiting to see what the Court may decide in such a case, and with a view to improving a situation in which athletes seem to be rather powerless vis-à-vis the IOC's prerogatives, two approaches could be envisaged: first, more transparent sanction mechanisms and less severe penalties, and, second, greater tolerance towards statements made by athletes which would, by design, give rise to fewer violations of Rule 50 of the Olympic Charter. In this regard, the example of FIFA appears to have been followed as it authorises players to wear black armbands as a sign of mourning (Faust 2014: 262).

In the second case, that of professional athletes bound to their employer by a work contract, the decisions of the Court again provide indications as to the manner in which it might rule if an athlete lodged an application claiming that he or she had been penalised, for example, on account of statements that were made in the context of a public debate on a subject of general interest and if those statements did not exceed the admissible limits with regard to criticism in the context of a working relationship. Salaried athletes must enjoy the same rights as employees in a business enterprise.

In France, the solution in principle is as follows: except in cases of abuse, employees enjoy the right to freedom of expression both within and outside the company; the only possible restrictions to freedom of expression are those which are justified by the nature of the task to be performed and proportionate to the aim pursued (See Court of Cassation, Social Chamber, 2 May 2001, Bulletin civil No. 142). For example, in a dispute between a football club and one of its players, the club informed the employee that his contract of employment was terminated for serious misconduct on the ground that the player had failed to comply with his duty of confidentiality and loyalty and on account of his insubordination and disobedience and a permanent provocative attitude. The subject of the dispute was the statements which the player had made in the press regarding the team's coach. The parties managed to put an end to their dispute before a court judgment was required (*Gazette du Palais*, 21 October 2008, p. 49).

The same solution is applied in Belgium, for example in the context of the collective work agreement of 12 June 1998 concerning the working conditions of professional football players. In the agreement it is underlined that salaried football players and their employers may freely express their opinions in the media but must refrain from any statements that may cause harm to the contracting parties, colleagues, associates and agents (Article 15 A). This is a simple

reminder of the fundamental principles which apply to all players, as they do to all other citizens or workers. As Roger Blanpain pointed out:

> In purely practical terms, this means that a player is free to talk to the press and give interviews, and also be paid for doing so. Nevertheless, just like any other employer or employee the parties concerned are under an obligation to observe professional confidentiality [obligation covering information which has been acquired in the course of practising an occupation and which is unknown to others … such as team tactics … specific coaching programmes and so on] and also to bear in mind the need for discretion [information which does not fall under the heading of professional confidentiality but for example concerns another person's privacy]. Prejudicial comments are also fundamentally wrong – meaning, here, pronouncements that cause damage to others. (Blanpain 2003: 84).

Recent, and also less recent, events have provided examples of cases showing the limits to the right to freedom of expression, at least as imposed by the employers of athletes who have been given penalties and by the bodies to which they are affiliated at national level (leagues) or supranational level on the occasion of certain competitions (UEFA or FIFA, for example). They also provide examples of statements for which the people who made them have been penalised, even though one might legitimately question whether this constituted a violation of their right to freedom of expression, irrespective of whether they are players, coaches or other employees of sports bodies. This does not apply to supporters, who may be prosecuted under criminal law.

For example, in February 2014 the Disciplinary Commission of the English Football Association (FA) suspended the footballer Nicolas Anelka for five games and sentenced him to a £80 000 fine and a compulsory education course for the so-called "quenelle" gesture (made famous by a French comedian renowned for his revisionist views) which Anelka made after scoring a goal. The Disciplinary Commission held that the player's gesture constituted "an aggravated breach" of the FA rules, which forbid all abusive, indecent, insulting or improper gestures including a reference to ethnic origin, race or religion. The player thought he could avoid this penalty by leaving the British championship. But just as he had announced on social networks that he was terminating his contract with his club, West Bromwich Albion, the latter responded by dismissing the attacker, leaving the way open for him to find a new club and play again immediately. However, the FA did not see things the same way and brought the matter before FIFA, requesting that the penalty be

applicable worldwide, which was duly granted. The same had already happened when Joey Barton of Queens Park Rangers (then of the Premier League) was transferred to Olympique de Marseille. The English player, who had been suspended for 12 matches in the UK, had to wait until 25 November (matchday 14) to play in Ligue 1. Once Nicolas Anelka had completed his education programme, he was considered to have served his sentence, which allowed him to join Mumbai City FC in the Indian Super League before seeking a place at the Algerian club NAHD.

A number of statements by José Mourinho, a Portuguese football coach, provide more textbook cases: "I saw Ferguson [the Scottish former coach of Manchester United] walking alongside the referees during half-time. And when the man in black came back on to the pitch for the second half of the game, he behaved in a completely different way" (January 2005); "Barcelona is a cultural city with many great theatres and this guy [Lionel Messi] has learned to play-act very well" (February 2006); "Jorge Costa was intelligent. He must continue and not pay any attention to people like Jaime Pacheco who has only one neuron and even that one doesn't work properly…" (February 2007); "The Manchester players are cheats. They are masters of simulation" (April 2007); "Claude Makélélé is not a football player, he's a slave" (May 2008), with regard to the selection of Makélélé to play for France in 2008; "If you can't go hunting with your dog then you have to take your cat" (December 2010), said when talking about Karim Benzema. And, above all, following the defeat of his team (Real Madrid) in the semi-finals of the Champions League in April 2011, the Portuguese coach said: "Well done Barcelona. I congratulate this club on the power it has over the decision makers. How do they manage to gain such power ... is it because they have UNICEF on their shirts? I would be ashamed to win the Champions League in that way." UEFA subsequently announced that disciplinary proceedings would be opened on grounds of "inappropriate comments".

In a somewhat different vein, when they were just about to play a European Championship qualifying match against Sweden in 1995, the players of the Swiss national football team unfurled a banner reading "Stop it, Chirac" in front of the cameras: it was a way of adding their voice to the protests against the nuclear weapons tests which France was preparing to carry out in the South Pacific. The Swiss Football Association (ASF) received a warning from UEFA but decided not to penalise the players. The players' action was broadly applauded by the population and the media.

More recently, Pep Guardiola, the (now former) Bayern Munich coach, was disciplined for wearing a T-shirt demanding justice for a journalist. This gesture was considered inappropriate by UEFA, which has strict rules governing the freedom of expression of both natural persons and legal entities. He received a warning because the UEFA regulations prohibit "the use of sporting events for manifestations of a non-sporting nature". Similarly, in December 2013, the Côte d'Ivoire players in the Galatasaray team, Didier Drogba and Emmanuel Eboué, were threatened with penalties for having displayed T-shirts paying tribute to Nelson Mandela, "Thank you, Madiba".

Article 21 of the Regulations of the UEFA Champions League for the 2012-2015 cycle, 2014/2015 season, reads as follows:

> Article 21
>
> UEFA disciplinary regulation
>
> 21.01 The provisions of the UEFA Disciplinary Regulations apply for all disciplinary offences committed by clubs, officials, members or other individuals exercising a function at a match on behalf of an association or club, unless the present regulations stipulate otherwise.
>
> 21.02 Participating players agree to comply with the Laws of the Game, UEFA Statutes, UEFA Disciplinary Regulations, UEFA Anti-Doping Regulations, UEFA Kit Regulations as well as the present regulations. They must notably:
>
> a) respect the spirit of fair play and non-violence, and behave accordingly;
>
> b) refrain from any activities that endanger the integrity of the UEFA competitions or bring the sport of football into disrepute;
>
> c) refrain from anti-doping rule violations as defined by the UEFA Anti-Doping Regulations.

Article 14.7 of the UEFA Disciplinary Regulations, 2014 Edition, to which the Champions League regulations refer, stipulates that: "All forms of ideological, political and religious propaganda are forbidden. If this provision is breached, paragraphs 1 to 6 above apply by analogy".

In a recent case, the disciplinary commission of the French Ligue de Football Professionnel (LFP) imposed a moderate penalty – a three-match suspension – on Zlatan Ibrahimovic, who, when speaking about the referee of the Paris

Saint-Germain (PSG) v. Girondins de Bordeaux match on 15 March 2015 said: "In 15 years, I have never seen such a referee. This shit country does not deserve the PSG." However, it is well known that the LFP followed the recommendation of the mediators of the French Olympic Committee (CNOSF) to reduce the penalty imposed on the PSG attacker, which was originally, in the disciplinary commission's decision, a suspension from four games. The mediators' report is interesting because it shows the overall approach adopted when freedom of expression is the subject of dispute. The report states that:

> Although professional athletes, in particular those who enjoy a certain reputation, must at all times show restraint in situations in which they are in the public eye, the mediators are mindful of the context in which the disputed facts were revealed and which led to the opening of disciplinary proceedings. They also note that the disputed comments were not made directly against an official but were rather a criticism of referees in general. It is also clear that the disputed facts took place in a tense context, given that the [French Ligue 1] is particularly competitive, which, without wishing to excuse the applicant, may explain why he was so angry at a what he considered questionable decision taken by the referee … In view of all of these elements, the mediators consider that there is no reason to accede to Mr Zlatan Ibrahimovic's request that the LFP defer the decision of its disciplinary commission of 9 April 2015. On the other hand, the mediators believe that, in view of the above and for the purposes of conciliation, it would be advisable to propose to the LFP that it reduce the number of matches for which Mr Zlatan Ibrahimovic is to be suspended to three, including one for which his suspension had been put on hold.

In the light of all the circumstances of the case, the LFP finally agreed to reduce the penalty imposed on the PSG attacker as the latter's criticisms formed part of a general debate on the issue of refereeing and the consequences of errors that may be made by referees.

There have also been examples in the news of a degree of uncertainty as to what should be done about some of the ways in which athletes express their opinions. The difference is sometimes striking. For example, during the London Olympic Games, the Greek delegation anticipated the decision which the IOC was about to take and immediately expelled triple jumper Voula Papachristou after she posted a racist joke on Twitter. The IOC fully endorsed the delegation's decision. This was an example of the logical and literal application of the regulation prohibiting athletes from breaching the principles of the Olympic Charter.

On the other hand, the issue of women athletes wearing the Islamic headscarf is much more complex and the way it has been addressed by the IOC has raised numerous questions. Wearing the hijab does indeed seem incompatible with the prohibition imposed by the Olympic Charter on any "kind of demonstration or political, religious or racial propaganda". Nevertheless, the Islamic headscarf has gradually gained acceptance. While in 1984 and 1992, two female athletes, a Moroccan and an Algerian, both won Olympic gold medals without their arms, legs and heads being covered up, at the 1996 Olympic Games in Atlanta, the hijab made its first appearance with the Iranian rifle shooter, Lida Fariman. In 2008 in Beijing, no fewer than 14 delegations took part in the opening ceremony with women wearing headscarves walking behind their male counterparts. At the 2012 London Olympics, a Saudi female judoka was allowed to participate wearing a headscarf that was adapted to the practice of her sport. Jacques Rogge, who was President of the IOC until 2013, welcomed this as progress, but her presence was condemned by a number of people in the sports movement and women's rights associations, and a difference of opinion emerged between national and international organisations. To circumvent the prohibition of any kind of demonstration of political, religious or racial propaganda, the IOC followed the example of the International Football Association Board (IFAB) which, in a decision dated 5 July 2012, authorised female footballers to wear headscarves on the pretext that it was "a cultural and not a religious symbol"; the decision was endorsed by FIFA but this interpretation has since been strongly challenged by various sport stakeholders.

The above cases suggest that, with some exceptions, athletes' freedom of expression is not currently genuinely at risk. Nevertheless, it would be worthwhile identifying good practices and drafting guidelines for the various parties concerned, as some restrictions on freedom of expression can be justified when there are legitimate reasons, such as guaranteeing security at competitions, ensuring law and order and countering racism, etc.

3.3.4. Other rights

3.3.4.1. Introduction

After the fairly detailed review of the impact on the sporting world of certain rights and freedoms guaranteed by the Convention, a brief overview needs to be provided for other rights and freedoms that arise under the same Convention but seem to play a less important role in sports activities.

3.3.4.2. Right to liberty and security (Article 5 of the Convention)

The right to liberty and security, within the meaning of Article 5 of the Convention, has in particular been asserted before the Court by a football supporter who complained he had been held in detention by the police for four hours with the aim of preventing him from organising and participating in a violent brawl among hooligans. In its judgment delivered on 7 March 2013, the Court held that there had been no violation of Article 5.1 of the Convention. In its opinion, the applicant's detention had been justified because it had been imposed in order to ensure his compliance with a specific and concrete obligation to refrain from organising a violent brawl among hooligans at a football match.[132]

3.3.4.3. Freedom of thought, conscience and religion (Article 9 of the Convention)

In an application on which judgment was delivered in 2009, the Court had to consider the case of two Muslim girls who had accused France of a violation of Article 9 of the Convention. They had been expelled from their school after repeatedly refusing to remove their headscarves in physical education classes. The Court held that it was not unreasonable to consider the wearing of a headscarf to be incompatible with attendance in physical education classes on health and safety grounds. It also held that the sanction imposed on the girls resulted from their refusal to comply with the rules applicable on the school premises and not, contrary to their submission, from their religious convictions.[133]

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132. *Ostendorf v. Germany,* 7 March 2013, Application No. 15598/08.

133. *Dogru v. France* and *Kervanci v. France,* 4 December 2008, Application Nos. 27058/05 and 31645/04.

A fairly similar case was ruled on by the Court in 2017. It concerned the refusal of Muslim parents to send their daughters, who had not yet reached the age of puberty, to compulsory mixed swimming lessons provided by their school. The parents criticised Switzerland for refusing to exempt their daughters from the lessons. The Court held that the refusal to grant an exemption did not violate Article 9 of the Convention. The Swiss authorities had not abused their wide margin of discretion by insisting on the obligation to participate in lessons and giving the objectives of integrating the children priority over the parents' interest in obtaining an exemption based on their religious convictions. The Court also held that the interest of the children in receiving a full education that helped to bring about their social integration in line with local customs and practices was more important than their parents' desire for them to avoid mixed swimming lessons. In ruling that there had been no violation of Article 9 of the Convention, the Court also took into account the fact that the school authorities had offered the parents very flexible arrangements, which included allowing their daughters to wear a burkini during swimming lessons and to change their clothes with no boys present.[134]

3.3.4.4. Freedom of assembly and association (Article 11 of the Convention)

In 2011, the Court declared inadmissible as manifestly ill-founded an application made by an association of supporters of the football club, PSG, who complained that their association had been disbanded by a decree issued by the French Prime Minister. That decision had been taken after members of the association had unfurled a banner that was offensive not only to RC Lens, the club against which their own was playing, but more generally to the inhabitants of the club's home region in a final of the Coupe de France football competition. The Court held that freedom of association, within the meaning of Article 11 of the Convention, had not been violated. It accepted that the French authorities had rightly seen a pressing social need to impose drastic measures on supporter groups. The decision to dissolve the association had been necessary in a democratic society to prevent disorder and criminal offences. The Court also took the view

134. *Osmanoglu and Kocabas v. Switzerland*, 10 January 2017, Application No. 29086/12.

that associations whose official aim was to support a football club were, in terms of democracy, less important than political parties. The measure taken was also proportionate to the aim pursued.[135]

The Court had to consider similar issues in 2016 in cases that concerned two associations of PSG supporters that had been disbanded after their members had been involved in disturbances during which one supporter had lost his life. The Court reached the same conclusion as in the case adjudicated in 2011, namely that the dissolution of the associations was necessary and proportionate.[136]

135. *Association Nouvelle Des Boulogne Boys v. France*, 22 February 2011, Application No. 6468/09.

136. *Les Authentiks v. France* and *Supras Auteuil 91 v. France,* 27 October 2016, Application Nos. 4696/11 et 4703/11.

`Summary, conclusions and recommendations

4.1. Summary and conclusions

The issues surrounding sports activities are becoming increasingly significant, both for athletes and the national and international federations that organise competitions. The maintenance of a certain amount of discipline within these federations is necessary to guarantee that competitions take place in a fair and consistent manner, thus ensuring their attractiveness.

It must be possible to find a solution in disciplinary cases based on proceedings that are as straightforward and swift as possible. Being anxious to preserve their autonomy, sports federations have developed instruments – regulations and the establishment of ad hoc internal bodies – that enable them to deal with the bulk of these disputes internally. In order to avoid bringing cases before the ordinary courts, the sports movement also gives priority to referring cases to arbitration bodies, generally specific to sport, when the individuals affected are unable to accept decisions taken by associations. However, a review (generally limited in scope) of arbitration decisions may be carried out by domestic courts.

Sports federations generally have an interest in disciplinary proceedings taking place very quickly, while athletes, clubs and sometimes federations that are the subject of these proceedings are keen to have their case given a fair hearing. A balance must be struck between these interests that seem at first sight to be contradictory. When striking this balance, human rights play a key role, even though, in formal terms, compliance with them is not an obvious and exhaustive formal requirement in the context of sports associations: sports federations' disciplinary bodies and arbitration tribunals cannot simply overlook principles that are as universal as, for example, the right to be heard or, more generally, the right to a fair hearing. Protecting human rights has therefore become a key concern when consolidating the instruments and mechanisms designed to regulate sport, from the viewpoint of both sports organisations and states. It is not unusual for sports federations to incorporate human rights-related provisions into their articles of association and disciplinary regulations. Many states are also proving more and more demanding vis-à-vis sports organisations, especially in terms of good governance, one component of which is respect for human rights, even though these are primarily rights granted to individuals to enable them to protect themselves against interference by the authorities.

There are many human rights liable to be infringed by sports organisations. These may be substantive rights, such as the right to respect for private life or the right to freedom, which may be affected, for example, by the implementation of anti-doping regulations that provide in particular for the provision of regular whereabouts information via the ADAMS system. They may also be procedural rights, which every individual should be able to enjoy when he or she appears before an authority passing judgment. Restrictions to these rights may be justified when there is a legitimate purpose, such as upholding sports ethics, protecting the political neutrality of sports organisations or improving athletes' safety, but infringements of fundamental rights must not be excessive.

Some fundamental rights can be applied to relations between private individuals, such as the right to respect for private life in the context of relations between employers and employees, but that is not the case with all human rights. The most important issue is the degree to which a private person or body – like a sports organisation – may encroach on the freedoms of another.

Any sports organisation will have its own system of supervision through which it can ensure its members' proper compliance with its rules, particularly its disciplinary rules, which is not dissimilar to a "justice system". Moreover, disciplinary procedures are tending to become increasingly judicial in nature, taking state structures as their model, a trend prompted by increasing recognition of fundamental procedural rights. This process is also the result of the desire of sports organisations to preserve their autonomy, which they consider essential for them to function properly. It gives rise to the emergence of a *lex sportiva* on all the rules of international scope drawn up by sports organisations themselves to regulate the conduct of sports competitions.

In the disciplinary field, the autonomy of sports organisations is generally very extensive. There are, however exceptions to this autonomy principle in countries like France which have adopted a system whereby responsibility for a public sport service is delegated to sports federations and where the autonomy of sports federations may be closely regulated, especially by laws that impose specific rules of procedure in disciplinary matters.

To increase their autonomy vis-à-vis states, sports organisations have chosen to make use of arbitration, particularly in disciplinary cases. This private legal remedy has many advantages, in particular the fact that it makes it possible to have recourse to judges who are experts in specialist areas of activity and apply specially adapted supervisory mechanisms, while maintaining a certain degree of confidentiality and the autonomy of the parties, and obtaining decisions with the status of final judgments.

Sports federations' disciplinary bodies cannot be considered independent and impartial tribunals.

In order to avoid appeals against their disciplinary decisions being brought before state courts, some sports federations have therefore chosen to set up an arbitration body that specialises in disputes arising from the sport for which they are responsible (such as volleyball or handball). Arbitration mechanisms have also been put in place at national level to deal with sports disputes (United Kingdom, Luxembourg and Italy). Other arbitration centres have been set up at international level. Foremost among them is the Court of Arbitration for Sport (CAS), whose jurisdiction is recognised today by the vast majority of international sports federations and a very large number of national federations.

However, arbitration is only possible within the limits imposed by national and international law. Some legal systems lay down that appeals against sports federations' disciplinary decisions may be brought before a state court, as in France. In other legal systems, an appeal to a state court is possible if there is no other means of accessing an independent and impartial tribunal, i.e. if the sports federations have not provided for a system of arbitration for appeals against their disciplinary decisions. It should be noted in this connection that the vast majority of international sports federations have their headquarters in states that do not require appeals to be made to a state court (they are generally located in Switzerland) and that it is therefore possible to make use of arbitration in connection with their disciplinary decisions.

Even in cases where sports organisations have chosen to use arbitration, the possibility of review by the state courts can never be completely ruled out. It is in fact possible to challenge arbitration decisions in a state court, usually through an action for annulment, but it should be pointed out that the review of arbitration decisions by the ordinary courts is limited. For example, appeals against the rulings of the CAS may be made to the Swiss Federal Tribunal (TFS) but the grounds on which decisions may be set aside are extremely limited, as are instances of annulment.

At the moment, human rights litigation is becoming increasingly common in the sports sector, with athletes no longer afraid to challenge disciplinary decisions on the ground that they violate their human rights. The CAS is of the opinion that the provisions of the Convention cannot be applied directly to arbitration bodies, but it does allow their indirect application, especially with regard to the right to a fair trial (although it should be pointed out that the CAS accepts the direct application of certain rules of EU law, for example those relating to freedom of movement for workers). In its current case law, the TFS also takes into consideration the fact that the provisions of the Convention do not apply directly in sports disciplinary matters, on the ground that persons on whom disciplinary sanctions have been imposed have not been subject to measures by the state. On the other hand, it allows the indirect application of certain guarantees derived from Article 6 of the Convention, especially the right to an independent and impartial tribunal, the right to have one's case determined within a reasonable time and the right to a fair trial, as it considers that these guarantees fall within the ambit of Swiss public policy (the TFS can review arbitration decisions from the point of view of public policy). Accordingly, while the obligation to observe human rights could in theory apply to private parties,

including sports organisations that possess significant powers of constraint vis-à-vis their members, in practice these rights mostly apply indirectly to sports organisations, through the supervision exercised by the CAS, whose decisions are themselves subject to review by the TFS. In connection with two cases brought before it by athletes sanctioned by international sports federations (the CAS confirmed the sanctions and the TFS dismissed the appeals then lodged against them), the European Court of Human Rights is due to examine shortly whether Article 6 of the Convention applies to proceedings before the CAS. It is hard to predict what position the European Court will take.

Nonetheless, many national and international sports federations have incorporated in their regulatory instruments compliance with rules that essentially reflect fundamental rights, especially as regards the procedural safeguards that must apply in disciplinary proceedings. The CAS also participates in incorporating various human rights into sports law by enshrining general legal principles.

- A number of federations seek to ensure that their disciplinary bodies have a degree of independence and impartiality. However, as already pointed out, sports federations' disciplinary bodies cannot be considered independent and impartial tribunals. As the law currently stands, the situation is different with the CAS, which the TFS and, in particular, the German Federal Court of Justice (*Bundesgerichtshof*) acknowledge to be an independent and impartial tribunal, in spite of some criticism by legal writers with regard, for example, to the closed list of CAS arbitrators, the links between the CAS and international sports organisations and the limits to the CAS's scope of review in doping cases. It must also be pointed out that what is termed "forced" arbitration, whereby athletes wishing to take part in competitions have no other choice but to sign arbitration clauses (generally in favour of the CAS) and thus agree not to bring matters before state courts, does not violate Article 6 of the Convention and is therefore admissible, within the meaning of the case law of the TFS and the German Federal Court of Justice, even though the legal constructs employed to establish this may be open to some criticism.
- Most sports federations and the CAS provide for the possibility of challenging members of disciplinary bodies who do not appear to be sufficiently independent and impartial.
- By contrast, neither the federations – with some exceptions linked to binding rules of national law – nor the CAS allow proceedings to be held in public. This is due to the general confidentiality of disciplinary and arbitration

proceedings, which is also appreciated by most athletes involved in those proceedings.

- Equal treatment of the parties and adversarial procedure are in principle guaranteed both in proceedings before association bodies and before the CAS. At the same time, the bodies in question generally try to deliver their decisions within a reasonable time.
- The presumption of innocence does not apply in disciplinary proceedings, as proving certain facts may be the responsibility of the person concerned (burden of proof) and a penalty may be imposed even if doubts persist as to guilt (standard of proof; some federations adopt the preponderance of evidence standard and others the "comfortable satisfaction" standard; the CAS refers to the latter standard if the applicable association rules do not provide for any other).
- The assistance of a lawyer or other representative is not yet fully guaranteed in the case of individuals subject to disciplinary proceedings. While some federations still exclude assistance for defendants, they are now very much in a minority. There seems to be no system of legal aid for proceedings before sports federation bodies, in contrast to proceedings before the CAS, for which lawyers are available to take on pro bono work, and the parties may be exempted from paying certain fees or have them covered by the CAS.
- There are rules concerning hearings before disciplinary bodies and the CAS. There is no absolute right to a hearing but, with rare exceptions, it is granted in practice in proceedings before the CAS.
- The parties generally have the right to adduce relevant evidence, but it is their responsibility to ensure the attendance of their witnesses and experts. The admission of the evidence adduced by the parties may, however, be subject to deadlines and formal requirements.

Below are a number of recommendations concerning good practices which sports organisations could adopt in relation to procedural safeguards to be offered to individuals subject to disciplinary proceedings by way of the indirect application of procedural human rights.

The right to a fair trial (Article 6 of the Convention) is not the only fundamental right that comes into play in the area of sports activities.

In particular, the sports movement cannot disregard the right to respect for private and family life (Article 8 of the Convention) and freedom of movement (Article 2 of Protocol No. 4 to the Convention). In this connection, the anti-doping rules, which involve testing and arrangements for the provision of information on athletes' whereabouts, are sometimes criticised. They are nevertheless applied, even though some improvements do seem possible.

The physical and moral integrity of athletes must be protected (Articles 3 and 8 of the Convention). This protection must in particular be taken into consideration in connection with anti-doping testing arrangements (refraining from degrading treatment) and training (avoiding overtraining).

The right to freedom of expression (Article 10 of the Convention) is not absolute. In the world of sport, it is limited by the fact that disciplinary sanctions may be imposed on members of sports organisations if they make offensive remarks to other members or about organisations themselves or if they take part in events incompatible with the ideological, political and religious neutrality of these organisations. The practice of sports federations provides numerous examples of such sanctions. A case in point is the wearing by participants (especially female participants) of clothing with a religious connotation, such as the hijab. In this connection, the practice of sports organisations has changed significantly over the last decade and currently reflects a certain tolerance, although this is only to be seen in certain sports and the debate, even in these sports, is ongoing.

In addition, the European Court of Human Rights has had to consider the restrictions imposed in the sports context on the right to liberty and security (Article 5 of the Convention): in the case of a violent football supporter forced to spend several hours at a police station to prevent him from organising a violent confrontation between groups of hooligans, the Court held that there had been no violation of Article 5; on the right to freedom of religion (Article 9 of the Convention): the Court agreed that Muslim pupils could be penalised by the school authorities if they refused to remove their headscarves in physical education lessons or to participate in mixed swimming lessons, despite being allowed to wear a burkini; and on the right to freedom of association (Article 11 of the Convention): the Court held that

the state's dissolution of associations of football supporters was lawful in the case of a threat to public order. It should be noted that all these cases concerned decisions taken by states, not disciplinary sanctions imposed by sports bodies.

In conclusion, it may be pointed out that while sports organisations are in principle not directly subject to the provisions that guarantee human rights, since these provisions apply first and foremost to states, the fact remains that they do not operate in a legal vacuum and that some of the safeguards provided by such instruments as the Convention apply to them indirectly insofar as they are relevant to their activities, especially as regards disciplinary procedures. These procedures should therefore afford the parties safeguards based on those inherent in human rights. It is the responsibility of sports organisations, in both their own interest and that of individuals subject to disciplinary proceedings, to adapt procedures in such a way as to properly safeguard parties' rights so that states are not tempted to intervene in a way that would undermine the autonomy of the sports movement. It must be possible for disciplinary decisions taken by national and international sports federations to be subject to review by an independent and impartial tribunal. This may be either a state court or an arbitration tribunal when the latter is not prohibited by the relevant national legislation. The sports movement has chosen the wise option of submitting disputes to arbitration tribunals, in particular the CAS. Even though it only recognises the indirect application of human rights in disciplinary matters, the CAS has nonetheless developed a body of case law that clearly points towards respect for these rights to the extent applicable in this area. It may therefore be assumed that the sports movement is being increasingly required to respect human rights, in particular within the meaning of the Convention, with some exceptions in certain cases, as well as in others, despite the reluctance of some federations regarding their implementation. This trend does not unnecessarily impede the running of sports organisations and seems set to continue.

4.2. Recommendations

A number of recommendations could be taken into consideration by sports organisations to ensure respect for fundamental rights in connection with disciplinary proceedings.

a. It seems advisable for disciplinary bodies of sports federations to be as independent and impartial as possible in the association system. As good practices, mention may be made of measures that can be taken in the following areas in particular:

- method of appointment: election by the regulating body (general assembly, board of representatives, congress) rather than the executive or even the president of the federation;
- selection: when selecting individuals to serve on bodies, choose respected individuals known for their integrity and independent frame of mind;
- own budget;
- own administrative support, rather than reliance on general services provided by the federation;
- culture of respect, among the organisation's other bodies, for the decisions taken.

b. Rules of procedure should provide for a member of a disciplinary body or arbitration tribunal to be challenged in the following cases (unless the parties agree that the member concerned may nevertheless serve on the body in question):

- if a member has had prior involvement in the same case, in another capacity (for example, a member of the executive body that refused to authorise the postponement of a football match may be disqualified from serving on the disciplinary board that is to examine the consequences of the forfeit of the match);
- if a member is of the same nationality as one of the parties to the proceedings, in international disputes;
- if a member has a particular relationship based on friendship or enmity with one of the parties to the proceedings or their representative;
- if a member has a personal interest in the case (for example, they are a member of a handball club which is due to play against the club of a player whose suspension the body is required to consider);
- if there are other circumstances that cast doubt on the impartiality of the member in the case in question.

In order to avoid delaying tactics, the procedural rules should make it clear that the request for disqualification must be made immediately, i.e. within a short time frame, as soon as the party concerned learns of the possible ground for disqualification.

c. The equal treatment of the parties to disciplinary proceedings should be guaranteed, especially with regard to the following criteria:

- access to the entire case file;
- possibility of being assisted or represented during the proceedings;
- possibility of presenting one's factual and legal arguments on the subject matter of the proceedings;
- number of exchanges of submissions and time limits for filing those submissions;
- possibility of adducing relevant evidence (such as witness statements and expert opinions);
- possibility of attending hearings, if any;
- allocation of speaking time at hearings.

d. Disciplinary proceedings should be conducted in such a way that their implementation does not lead to unnecessary delays. The rules should provide that disciplinary bodies must deliver their verdicts within a reasonable time.

e. Parties to disciplinary proceedings should in all cases be able to call on the assistance of a lawyer or other representative of their choice if they so wish.

f. Sports organisations could provide for a system of legal aid, provided by lawyers prepared to work pro bono and with the waiver of certain costs (modelled on the CAS system).

g. They could provide for translation or interpretation costs to be paid by themselves rather than by individuals facing disciplinary action, to the extent considered reasonable by the competent disciplinary body, but so as at least to enable these individuals to understand the charges against them and to participate in the proceedings in the appropriate way.

h. Parties should be afforded the right to a hearing at least once in disciplinary proceedings, either before the single authority or, in the case of a two-tier procedure, before the appeals body. That would not preclude federations from introducing simplified procedures in less serious cases and allowing the parties to waive their right to a hearing.

i. In order to safeguard the right of the parties to bring evidence, which is an essential part of the right to be heard, the rules on disciplinary and arbitration proceedings should provide for the possibility of adducing evidence, in principle without any restriction as to its nature. In order to avoid abuses and unnecessarily protracted proceedings, however, it seems sensible to include a provision in the rules of procedure whereby the arbitration tribunal or disciplinary body can refuse to admit evidence that, on inspection, is deemed irrelevant. The same rules should require evidence to be submitted in the form and within the time limits prescribed. They could also expressly grant the parties the right to participate in the investigation, subject to possible exceptions (for example, for the anonymous hearing of witnesses).

j. The parties to arbitration and disciplinary proceedings must have equal access to evidence, meaning, for example, that evidence submitted by the defence must be no less capable of being admitted than evidence submitted by the body bringing charges.

k. The use of anonymous testimony, which may prove necessary, should be accompanied by sufficient procedural safeguards to ensure that, first, the witness's anonymity is effectively preserved and, second, that the rights of the defence can nevertheless be exercised to a sufficient degree, in particular as regards the possibility of having relevant questions put to the anonymous witness.

l. Expert reports should only be commissioned and used as evidence against the person subject to disciplinary proceedings if they meet stringent objectivity and relevance criteria.

m. While the use of unlawful evidence in disciplinary proceedings, especially recordings made without the consent of the person concerned, may not be incompatible with the values recognised in a state governed by the rule of law and not violate procedural public policy – for example having regard to the nature and seriousness of the conduct in question and the ethical need to discover the truth and punish any wrongdoing – the interests at stake should

be weighed up in each specific case to determine whether the evidence is admissible depending on the particular circumstances of the case.

n. As far as athletes' freedom of expression is concerned, it would be worthwhile identifying good practices and drafting guidelines for the various parties concerned, as some restrictions on freedom of expression can be justified when there are legitimate reasons such as guaranteeing security at competitions, ensuring law and order and combating racism, etc.

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List of abbreviations and acronyms

ACSU: Anti-Corruption and Security Unit

ADAMS: Anti-Doping Administration & Management System

AFLD: French Anti-Doping Agency (Agence française de lutte contre le dopage)

AIBA: International Boxing Association

ASA: Swiss Arbitration Association (Association suisse de l'arbitrage)

ASF: Swiss Football Association (Association suisse de football)

ASOIF: Association of Summer Olympic International Federations

ATF: Judgment of the Swiss Federal Tribunal (Arrêt du Tribunal fédéral suisse)

BWF: Badminton World Federation

CAS: Court of Arbitration for Sport

CJEU: Court of Justice of the European Union

CNIL: National Commission for Data Protection and Liberties (Commission nationale de l'informatique et des libertés)

CNOSF: French National Olympic Committee (Comité national olympique et sportif français)

CONI: Italian National Olympic Committee

ECJ: European Court of Justice

FCE: FIFA Code of Ethics

FDC: FIFA Disciplinary Code

FEI: International Federation for Equestrian Sports (Fédération Équestre Internationale)

FIA: Fédération Internationale de l'Automobile

FIBA: International Basketball Federation

FIFA: Fédération Internationale de Football Association

FIGC: Italian Football Federation (Federazione Italiana Giuoco Calcio)

FINA: Fédération internationale de natation

IAAF: International Association of Athletics Federations

ICAS: International Council of Arbitration for Sport

ICC: International Cricket Council

IFAB: International Football Association Board

IFDH: French Institute of Human Rights (Institut français des droits de l'homme)

IOC: International Olympic Committee

ISTUE: International Standard for Therapeutic Use Exemptions

ISU: International Skating Union

IWF: International Weightlifting Federation

LDIP: Swiss Federal Act on Private International Law (Loi sur le droit international privé)

LFP: Ligue de football professionnel

MLB: Major League Baseball

NFL: National Football League

PSG: Paris Saint-Germain

PTIO: Professional Tennis Integrity Officer

RFEC: Royal Spanish Cycling Federation

TFS: Swiss Federal Tribunal (Tribunal fédéral suisse)

UCI: Union cycliste internationale

UEFA: Union of European Football Associations

UIT: International Shooting Union

USADA: US Anti-Doping Agency

WADA: World Anti-Doping Agency

About the authors

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After a judicial career spanning 24 years, first as an investigating magistrate, then as a public prosecutor, Pierre Cornu, a lawyer by training, worked for a year with UEFA, where he was responsible for disciplinary matters and questions relating to integrity and regulations. In 2012, he joined the International Centre for Sports Studies in Neuchâtel (Switzerland) as a legal adviser. For many years he chaired the disciplinary bodies of the Swiss Football Association. He is currently co-chair of the International Weightlifting Federation (IWF) anti-doping committee. In the course of his judicial career, he often worked as an expert for the Council of Europe on judicial reform projects in central and eastern Europe. Since August 2015, Pierre Cornu has been a judge at the cantonal court in Neuchâtel, where he has mainly been active in the criminal appeals division.

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