FIFA's self-constitutionalisation and its impact on access to effective remedy

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1. Introduction

Between 2015 and 2018 FIFA underwent significant reforms in how it approached and interacted with international human rights standards. In July 2015 the organisation announced that states bidding for the 2026 World Cup would have to meet several human rights standards to be selected to host the tournament. In February 2016 the FIFA Statutes were altered to include a provision that states that FIFA will respect all internationally recognised human rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs).[1] In May 2017 FIFA published a human rights policy, and finally, in May 2018, it launched a complaint mechanism for human rights defenders and media representatives.

One could wonder why a powerful transnational organisation such as FIFA would choose to implement rules that might limit how it can conduct business. According to Bützler and Schöddert, FIFA was moved to do this due to rising external pressure from civil society. They note that in the decade leading up to the reform of FIFA, the organisation had become subjected to increased scrutiny over the human rights abuses that had repeatedly been linked to World Cup tournaments. This scrutiny became especially pressing after FIFA announced that Russia and Qatar would host the 2018 and 2022 World Cups respectively, as both countries had troubled histories with human rights.

The reason FIFA chose to implement limitative rules into its private ordering is therefore quite simple: it was done to better FIFA's reputation. Bützler and Schöddert refer to the reforms as the self-constitutionalisation of FIFA. However, Bützler and Schödder noted that "it remains to be seen whether FIFA's formal inclusion of human rights will lead to a human rights regime that is actually enforceable and therefore effective at reducing negative externalities".[2]

This thesis will take a step towards answering the question of how effective FIFA's self-constitutionalisation will be at 'reducing negative externalities'. More specifically, it will examine what effect FIFA's reformation has had on overall access to effective remedy for victims of FIFA-related human rights abuses.

It will do so by evaluating two ways that emerged after FIFA's reformation that have already offered remedies to victims of FIFA-related human rights abuses or might do so in the

[1] FIFA, 'FIFA's Human Rights Policy' (2017) para 1. Derived from <https://digitalhub.fifa.com/m/1a876c66a3f0498d/original/kr05dqyhwr1uhqy2lh6r-pdf.pdf>.
[2] Bodo P. Bützler and Lisa Schöddert, 'Constitutionalizing FIFA: Promises and Challenges' (2020) 25(1) Tilburg Law Review 40, 53.

future. These two ways are the complaint mechanism for human rights defenders and media representatives and the Court of Arbitration for Sport (CAS).

As mentioned above, the complaint mechanism was launched by FIFA in May 2018. As the name suggests, the mechanism is not intended for all victims of FIFA-related human rights abuses, but rather the specific subset of human rights defenders and media representatives. The mechanism is analysed in this thesis because it has received little to no attention in journalistic or academic works. This thesis aims to fill this gap of knowledge.

In contrast to the complaint mechanism, the CAS was not developed to function as a remedy option for victims of FIFA-related human rights abuses, nor is FIFA recommending that the victims seek remedy at the CAS. However, as noted by Bützler, Schöddert and Heerdt, the introduction of human rights standards in the FIFA Statutes and bidding procedures for the 2026 World Cup means that human rights standards now directly apply to the CAS. It has also been noted by Heerdt that victims of FIFA-related human rights abuses are currently not able to start arbitration proceedings before the CAS.While that option will likely not be granted to victims in the near future, Bützler, Schöddert, Heerdt and John Ruggie have all theorised that the CAS could grow into both an important instrument for victims of FIFA-related human rights abuses[34], and an important factor in translating FIFA's own human rights obligations into substantial rules.[5] It is thereful still useful to explore how equipped the CAS currently is to handle proceedings started by victims of FIFA-related human rights abuses. This line of thinking is also substantiated by Heerdt: in her article on FIFA's new bidding and hosting agreements she wonders whether the current manner in which the CAS conducts its proceedings fulfils the effectiveness standards set by Article 31 of the UNGPs.[6] This thesis aims to answer this question.

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[3] John G Ruggie, '"For the Game. For the World." FIFA and Human Rights.' (2016) Corporate Responsibility Initiative Report No. 68. Cambridge, MA: Harvard Kennedy School <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Ruggie_humanrightsFIFA_report April2016.pdf> p 35.

[4] Daniela Heerdt, *Blurred Lines of Responsibility and Accountability - Human Rights Abuses at Mega-Sporting Events*, (Human Rights Research Series 94, Intersentia 2021) 203-234.

[5] Bodo P. Bützler and Lisa Schöddert, 'Constitutionalizing FIFA: Promises and Challenges' (2020) 25(1) Tilburg Law Review 40, 51.

[6] Daniela Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' (2018) 17 The International Sports Law Journal 170, 182.

The research question for this thesis is thus as follows:

What effect did FIFA's self-institutionalisation have on access to effective remedy for victims of FIFA-related human rights abuses, and to what extent do the new remedy options, namely the complaint mechanism for human rights defenders and the CAS, comply with existing international standards?

Based on this research question the following five sub questions have been identified.

1) What kind of human rights abuses occur in the context of preparing and staging FIFA's World Cup tournaments, and which groups of people are most likely to become victims?
2) What is the legal and political context in which FIFA's self-constitutionalisation occurred and the complaint mechanism and the new bidding and hosting regulations were developed?
3) What possibilities does the complaint mechanism give victims of FIFA-related human rights abuses to obtain remedy?
4) What possibilities does the CAS give victims of FIFA-related human rights abuses to obtain remedy?
5) To what extent do FIFA's complaint mechanism and the CAS meet international standards as established by the United Nations Guiding Principles on Business and Human Rights and the Accountability and Remedy Project?

Chapter 2 will answer the first two sub questions by placing FIFA into the broader discourse of business and human rights and identifying how broader trends in this discourse influenced FIFA to start the process of self-constitutionalisation. Secondary research conducted by Heerdt will be used to explore what kind of human rights abuses victims are most likely to face during the preparation and staging of World Cup tournaments. Different research by Heerdt will be used to

Chapter 3 will explore the complaint mechanism, broadly using the eight identified markers for an effective remedy mechanism provided by UNGP31 as a framework to structure the chapter. Recommendations by the Accountability and Remedy Project will supplement

specific benchmarks when relevant. Since the complaint mechanism has not been discussed in journalistic or academic works before, this chapter will rely on primary sources of information. In fact, most information provided in the chapter will be found in the second report published by FIFA's Human Rights Advisory Board (HRAB) in September 2018. It must be noted that the findings of this chapter are limited by the fact that outside of this report published by the HRAB little information on the operation and inner mechanisms of the complaint mechanism is available.

Chapter 4 will discuss the CAS. Since the CAS has been discussed extensively in academia since its conception, this chapter will not rely solely on primary sources of information. While the applicability of human rights to the CAS is recent, several works have been written on its potential for providing remedy for victims of FIFA-related human rights abuses. These secondary works will be used to flesh out this thesis' analysis. As in Chapter 3, the CAS will be explored using the identified markers for an effective remedy mechanism. However, as the CAS is not an operational-level mechanism seven markers will be used instead of eight. Attention will be paid to the CAS' foundations, statutes and workings, and how these interact with FIFA's new bidding requirements and statutes. Attention will also be paid to earlier criticism of the protection of procedural human rights levied at the CAS where relevant.

Chapter 5 will analyse the information that has been provided in Chapters 3 and 4 and will analyse to what extent the new emerging remedy pathways can provide effective remedy to victims of FIFA-related human rights abuses.

Finally, it must be noted that this thesis limits itself to discussing the human rights abuses that occur during the events that occur before, during, and after the staging of World Cup Events. FIFA has also been connected to human rights abuses of players, however, these will not be discussed in this work.

2. The self-constitutionalisation of FIFA

This chapter will set the stage for this thesis and will explore which human rights abuses have been connected to FIFA, which groups these abuses most commonly affect, and how the legal and political situation sparked FIFA's reform and the creation of the complaint mechanism and the new bidding and hosting regulations, which in turn make it a theoretical possibility for FIFA-related human rights abuses to be subject to proceedings before the CAS.

FIFA's self-constitutionalisation can be contextualised in the broader field of business and human rights. In the 1970s the first attempts were made to develop an international standard for the relationship between corporations and human rights, which resulted in the adoption of the OECD Guidelines for Multinational Enterprises in 1976 and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977.[7] Both of these primarily called upon corporations to contribute to matters of social justice, human and labour rights of its own volition. In the 1990s the discussion accelerated, and in the early 2000s both state and non-state actors had started calling for a convention that would put human rights obligations directly on companies. The call for corporations to become duty-bearers was controversial, and while *UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* were drafted in 2003, the draft was put on hold by the UN Commission on Human Rights (UNCHR) in 2005. After shelving the draft the UNCHR requested that a Special Representative on Business and Human Rights would be appointed by the UN Secretary General. The task of the Special Representative would be to "identify and clarify standards of corporate responsibility and accountability [...] with regard to human rights". Harvard professor John Ruggie was appointed Special Representative and he took three years to develop the "Protect, Respect and Remedy" Framework, which was published in 2008. Ruggie was then asked to develop the framework into a concrete set of recommendations and guidelines, which resulted in the UNGPs. The UNGPs were unanimously endorsed by the UN Human Rights Council in June 2011.[8]

The UNGPs would create an important shift in the discourse on human rights and business. What was particularly innovative about the new framework was Ruggie's conclusion

[7] 'What is the ILO MNE Declaration?' (ILO) Derived from <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm> accessed 15 August 2022.
[8] UNHRC 'Human rights and transnational corporations and other business enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4

that while corporations do not have the duty to protect human rights, they do have a responsibility to respect human rights, meaning they must act in a manner that prevents human rights violations. Ruggie also concluded that corporations must address human rights abuses they have caused or contributed to.

This new approach would prove popular, and although the UNPGs are a soft law instrument and lack an oversight mechanism, the guidelines have increasingly been codified into policies and hard law by corporations, states and organisations across the globe.[9] [10]

While FIFA is technically a private non-profit organisation, according to Heerdt "there is no doubt that [...] FIFA [is] active in a commercial capacity".[11] This, combined with the fact that FIFA is in a rather unique position where it wielding significant political, social and economic power with little legal constraints,[12] proved to be enough cause for civil society to start calling upon FIFA to start respecting human rights in accordance with the UNGPs.

According to Ruggie, FIFA took its first step towards re-evaluating how host states were selected in 2011. In June 2014 Ruggie and Mary Robinson, former United Nations High Commission for Human Rights, sent a letter to Sepp Blatter, then president of FIFA, in which they recommended that FIFA incorporate the UNGPs into its private ordering. After this, FIFA introduced human rights requirements into its private ordering in a relatively short period of time. In July 2015 FIFA announced that states bidding for the 2026 World Cup would have to meet several human rights thresholds as part of the selection criteria. In December 2015 FIFA asked Ruggie to provide recommendations on how FIFA could implement the UNGPs in its policies and practices. In February 2016 the FIFA Statutes were altered to include a provision that states that FIFA will respect all internationally recognised human rights. Ruggie's recommendations were published soon after, in April 2016, in a report called *For the Game. For*

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[9] John Gerard Ruggie, Caroline Rees and Rachel Davis, 'Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations' (June 2021) 6(2) Business and Human Rights Journal <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/ten-years-after-from-un-guiding-principles-to-multifiduciary-obligations/CCC2D26AFED66E29865B1AB8D2D7219A> accessed 11 May 2022 p 189-190

[10] For an overview of some of the immediate effects of the UNGPs see Michael Addo, 'The Reality of the United Nations Guiding Principles on Business and Human Rights' (Februari 2014) 14(1) Human Rights Law Review <https://heinonline.org/HOL/PDFsearchable?handle=hein.journals/hrlr14&collection=journals&section=9&id=&print=section&sectioncount=1&ext=.pdf&nocover=&display=0> accessed 19 May 2022

[11] Daniela Heerdt, *Blurred Lines of Responsibility and Accountability - Human Rights Abuses at Mega-Sporting Events*, (Human Rights Research Series 94, Intersentia 2021) 64.

[12] Guillermo Jorge, 'Fixing FIFA: The Experience of the Independent Governance Committee' (2014) 21 (1) Southwestern Journal of International Law 165.

the World. In May 2017 FIFA published a human rights policy, and in May 2018 it launched a complaint mechanism for human rights defenders and media representatives, accompanied by a statement on human rights defenders and media representatives. While not all of these developments will be discussed in this thesis, they are mentioned here to illustrate how quickly FIFA went through a self-constitutionalising process that would, in theory, ensure abuses of human rights would be limited. The following section will provide an overview of the most common FIFA-related human rights risks to illustrate why more remedy mechanisms are necessary.

FIFA-related human rights abuses

This section is based on research by Heerdt which identifies the human rights abuses and risks that occur during the four life stages of the organisation of a mass sporting event (MSE), namely the bidding stage, the planning and construction stage, the delivery and operations stage, and the legacy stage.[13]

During the bidding stage nations that plan to submit a bid, often start preparations and negotiations for the MSE before their bid has even been accepted. According to Heerdt's analysis, some of these preparations lay the groundwork for later human rights abuses. Examples include host nations passing legislative acts that limit protest rights or secure the rights to land that still has people living on it.

During the planning and construction stage, which usually lasts at least seven years, many forms of infrastructure are destroyed, altered or constructed. The actors who are most involved in this stage is, in the case of FIFA, the Local Organising Committee (LOC). Most human rights abuses that occur in this stage are connected to housing and labour conditions. Because of the high pressure on a hosting nation to finish massive new infrastructure projects, labour conditions that were already less than ideal can worsen. Those who work in construction often face unsafe working conditions, or are subjected to forced labour. Amnesty International's reporting on the preparation for the 2022 World Cup in Qatar illustrates this well. According to Amnesty International, migrant workers are barred from changing jobs, leaving the country or leaving the building site. Additionally, the migrant workers often do not receive their salary for

[13] Daniela Heerdt, *Blurred Lines of Responsibility and Accountability - Human Rights Abuses at Mega-Sporting Events*, (Human Rights Research Series 94, Intersentia 2021) 21-57.

months on end. Workers that refuse to work out of protest for the appalling living conditions are threatened with deportation.[14]

Heerdt also identifies that the right to housing is often broken down during the planning and construction stage. According to the Washington Post, thousands of people have been evicted from their homes to make room for new infrastructure in the time leading up to the 2014 World Cup in Brazil.[15]

During the delivery stage victims of human rights abuses are commonly local homeless people and street vendors and traders, who are removed or banned from the scene of the World Cup, often resulting in the loss of livelihoods, and displacement. The time shortly before, during, and after a World Cup is also often marked by increased violence against homeless people, protesters and journalists.

During the legacy stage victims overlap with those of the planning and constructions stage. Most of the people who became victims of human rights abuses during the planning and construction and the delivery stages are not able to obtain justice, due to a lack of appropriate remedy mechanisms in place and the difficulty in determining which of the myriad actors responsible for staging a World Cup contributed or caused the human rights abuse.

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[14] 'Qatar World Cup of Shame' (*Amnesty International*, 2016) <https://www.amnesty.org/en/latest/campaigns/2016/03/qatar-world-cup-of-shame/> accessed 7 August 2022.

[15] Ilya Somin, 'Brazil forcibly displaced thousands of people to make way for the World Cup' (*The Washington Post*, 18 June 2014) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/18/brazil-forcibly-displaced-thousands-of-people-to-make-way-for-the-world-cup/> accessed 18 August 2022.

3. FIFA's complaint mechanism for human rights defenders and media representatives

On 29 May 2018, FIFA launched an online human rights complaints mechanism for human rights defenders and media representatives as part of its commitment to providing remedy to those negatively affected by FIFA-related human rights abuses. In an online announcement FIFA stated that the mechanism is specifically meant for human rights defenders and media representatives "who consider their rights to have been violated while performing work related to IFA's activities".[16]

In addition to the mechanism a 20-page statement on human rights defenders and media representatives was published online, which included promises to protect human rights defenders and media representatives and provide options for them to bring forward complaints.[17] The statement also contains two paragraphs that state FIFA's intentions for the complaint mechanism. The statement will be referred to throughout this chapter as 'the accompanying statement'.

This chapter will provide an overview of how the complaint mechanism provides victims of FIFA-related human rights abuses with access to effective remedy. The structure will be inspired by the eight effectiveness criteria proposed by Article 31 of the UNGPs and the ARP. UNGPs31 sets out that for a non-judicial grievance mechanism to be effective it must be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning. If the mechanism is operated by a business enterprise it must also be based on engagement and dialogue. The ARP sets out the same eight criteria, but it also provides additional recommendations for each criterion. Several of these will be used when relevant. It must be noted that the eight criteria are all interconnected, meaning there is some overlap in what each criterion demands. This, combined with the fact that there is relatively little secondary information available on the complaint mechanism means that the last three sections of this chapter are rather short.

The aim of this chapter is to provide a well-rounded overview of the complaint mechanism. The information provided in this chapter will form the basis for the analysis performed in Chapter 5.

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[16] 'FIFA launches complaints mechanism for human rights defenders and journalists' (*FIFA*, 29 May 2018) <https://www.fifa.com/legal/football-regulatory/media-releases/fifa-launches-complaints-mechanism-for-human-rights-defenders-and-journalists> accessed 13 April 2022

[17] FIFA statement on human rights defenders and media representatives (*FIFA*, May 2018)

Legitimacy

According to UNGP31, legitimacy mainly refers to how a grievance mechanism is developed and operated. To assess legitimacy one must determine whether or not stakeholders were and are involved in creating, managing and evaluating the mechanism. The ARP adds to this that one must also determine whether the people assigned to handling the complaints possess the right expertise (article 7.7) and whether they are able to run the mechanism with an "appropriate degree of independence" from the corporation (Article 7.5).

Reports released by the HRAB show that FIFA sought out help from experts when developing the complaint mechanism. In the first report released by the HRAB, published in September 2017, FIFA announced that it was engaged in discussions with "relevant experts and shareholders" about producing a policy on human rights defendants and media representatives and developing a complaints mechanism designated specifically for this set of people.[18] In the second report published by the HRAB in September 2018 (after the mechanism had been launched), the HRAB noted that FIFA had worked together with a "leading human rights defender´s advocacy group" to develop both the policy and the accompanying mechanism.[19]

While information on stakeholder involvement in the development of the complaint mechanism is available, this is not the case with regards to information on the personnel that handles incoming complaints. It is therefore not known if the personnel handling the complaints possess adequate knowledge of the relevant human rights law. It is also unclear how many people are involved in the handling of the complaints, or how independent the individual or the team handling the complaints is within FIFA's organisation. However, the hosting of the online complaint mechanism is done by an external provider, namely Business Keeper.

Accessibility

UNPG31 suggests that for a grievance mechanism to be accessible it must spread awareness of the mechanism amongst stakeholders and remove as many barriers as possible that could prevent a stakeholder from using the mechanism. Possible barriers to access could be costs, language, fears of reprisal and physical location. Additionally, Article 8.2 of the ARP

[18] 'Report by the FIFA Human Rights Advisory Board: First Report With The Advisory Board's Recommendations And An Update By FIFA' (*FIFA Human Rights Advisory Board*, September 2017) p 43

[19] 'Second Report by the FIFA Human Rights Advisory Board including the Board's Recommendations and FIFA's Responses' (*FIFA Human Rights Advisory Board*, September 2018) p 12

recommends that a mechanism's eligibility criteria are both clear and kept to a minimum to improve accessibility.

FIFA announced that the complaint mechanism had been created through a press release in May 2018.[20] Additionally, FIFA reached out to human rights organisations to encourage them to spread the word on the new mechanism.[21] However, as will be discussed further on in this chapter, no new information on the mechanism has been released by FIFA since September 2018.

The barrier to accessing the mechanism is quite low. The mechanism is web-based, which means that anyone who has access to a device with an internet connection can submit a complaint. The mechanism is also accessible on mobile devices, which also provides easier access. According to the website of Business Keeper, the mechanism is available in all countries.[22] Physical location is therefore not a barrier to submitting a complaint. Costs or fear of reprisal have been removed as possible barriers too, as the system allows for anonymous submission of complaints and is free to operate. One possible barrier is language. The mechanism is available in English, French, German and Spanish, which some could argue is rather limited. According to Business Keeper their services are available in more than 70 languages.[23] It can therefore be assumed that the decision to make the mechanism available in the four aforementioned languages was taken by FIFA.

Finally, the eligibility criteria are fairly minimum. To access the mechanism a stakeholder must meet three eligibility criteria. First, the person complaining must be a human rights defender or a media representative. Second, the person complaining must have been subjected to human rights violations, or represent someone who has. Finally, the human rights violations must be linked to FIFA's activities. The criteria are clearly stated when accessing the complaint mechanism online.

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[20] 'FIFA launches complaints mechanism for human rights defenders and journalists' (*FIFA,* 29 May 2018) <https://www.fifa.com/legal/football-regulatory/media-releases/fifa-launches-complaints-mechanism-for-human-rights-defenders-and-journalists> accessed 15 August 2022.

[21] 'Second Report by the FIFA Human Rights Advisory Board including the Board's Recommendations and FIFA's Responses' (*FIFA Human Rights Advisory Board*, September 2018) p 68.

[22] Home page (*Business Keeper*) <https://www.business-keeper.com/en/products/bkms-system> accessed 17 August 2022.

[23] Ibid.

Predictability

For a remedy mechanism to be predictable, UNGP31 suggests that information is provided to stakeholders about the procedures that are set in motion after a complaint or case is submitted. Indicative time frames would preferably be provided for the stages the complaint goes through. Finally, information on the types of remedy and redress available must be provided.

FIFA has not released official information on the specific stages a complaint must go through nor how long it takes for a complaint to progress through the mechanism. However, some information can be deduced from the second report published by the HRAB. According to this report seven individual complaints were submitted to the complaint mechanism between its launch in late May 2018 and the publication of the report in September 2018. In the report FIFA states:

> "We pursued all cases in accordance with FIFA's relevant policy commitments. As part of these measures, we had substantial interactions with complainants in four cases. One of these cases is closed, three are ongoing. In the remaining three cases, we did not receive an answer to our first response to the complainant. [...] Two of the seven cases were associated with the 2018 FIFA World Cup. In both of these cases, FIFA engaged with relevant authorities in support of the respective media representative or human rights defender and in both situations, we saw positive developments subsequent to our interventions."[24]

From this excerpt a rough estimate of the different stages a complaint goes through can be made. Firstly, after receiving a complaint FIFA sends an initial response to the complainant. If the complainant responds a dialogue is opened ('substantive interactions'). If relevant, FIFA "[engages] with relevant authorities in support of the [complainant]", after which it appears to monitor the situation for at least a short period of time. The fact that in four months one case was opened and closed and three other cases are ongoing indicates that FIFA responds to complaints and opens a dialogue rather quickly.

[24] 'Second Report by the FIFA Human Rights Advisory Board including the Board's Recommendations and FIFA's Responses' (*FIFA Human Rights Advisory Board*, September 2018) p 65.

While FIFA did not provide information on procedures that occur after a complaint is submitted, it did provide some indication of the type of redress the complaint mechanism could offer. In the accompanying statement FIFA said that it will "use its leverage to prevent, mitigate or, where required, remedy the adverse impact in question".

Still, this is rather vague. FIFA has also not released more specific information on what was done to support the complainants in the four cases mentioned above. However, it is possible to find examples of FIFA using its leverage in support of human rights defenders and media representatives outside of the complaint mechanism. In the second report published by the HRAB FIFA reported that it had intervened in nine additional cases where human rights defenders and media representatives were facing abuse, censorship or unlawful detentions.
The type of support FIFA provided here included:

> "engagements with security authorities to convey FIFA's views and expectations on a particular case, including at the highest levels of the organisation; public statements in support of human rights defenders and direct exchanges with them, such as through attendance and active participation at their events; engagement with third parties, such as embassy personnel, with a mandate to support FIFA's efforts in a particular case; or, in one case, attendance of a court hearing."[25]

Equitability

A common problem that is seen when individuals try to obtain remedy for business-related human rights abuses is a great imbalance between the two parties. Corporations often have more access to information, more monetary funds and better access to expert counsel. For this reason UNGP31 and the ARP both recommend that grievance mechanisms address this imbalance and implement policies and processes that provide or direct victims to sources of monetary and legal aid.

However, a lack of equitability is not as much a concern for the complaint mechanism as it is a non-judicial grievance mechanism. Based on the available information it does not seem as if FIFA invites the parties that caused or contributed to the alleged human rights abuse to state

[25] 'Second Report by the FIFA Human Rights Advisory Board including the Board's Recommendations and FIFA's Responses' (*FIFA Human Rights Advisory Board*, September 2018) p 67.

their case. This means that complainants will not have to face an opposing party that possesses more legal and financial assets.

Transparency

UNPG31 states that for a remedy mechanism to be transparent it must ensure that stakeholders are kept informed on the progress a submitted complaint is making. It is also important that the mechanism periodically provides information on its own performance and on the outcome of complaints or cases.

While FIFA has not provided information on the stages a complaint goes through (see the section on predictability), it does appear as if FIFA remains in touch with complainants throughout the process of assessing the complaint and deciding upon an effective solution. This becomes clear from both the second HRAB report and the statement on human rights defenders and media representatives. As has been discussed in the section on predictability, according to the second HRAB report FIFA engages in 'substantial interactions' with complainants as part of its assessment of complaints. According to the statement, FIFA does not speak out publicly in support of human rights defenders and media representatives if it is "not in the best interest of the person in question". Whether or not a statement is in the best interest of an individual is decided in consultation with stakeholders and those affected.[26] The statement also notes that as part of its assessment of complaints FIFA engages with 'relevant stakeholders', unless the complainant asks them not to. Overall, there seems to be a high level of transparency towards the complainant.

The same cannot be said for transparency about the performance of the complaint mechanism and the outcomes of complaints or cases. As stated in the section on predictability, FIFA received seven complaints between May 2018 and September 2018. One case was closed, three were ongoing, and in three cases FIFA did not receive a response after it reached out to the complainant. The report in which this information was published also mentions that "two of the seven cases were associated with the 2018 FIFA World Cup" and that it "engaged with relevant authorities in support of the respective media representative or human rights defender" in both of these cases.[27]

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[26] FIFA statement on human rights defenders and media representatives (*FIFA*, May 2018) p 5.
[27] 'Second Report by the FIFA Human Rights Advisory Board including the Board's Recommendations and FIFA's Responses' (*FIFA Human Rights Advisory Board*, September 2018) p 65.

However, no new information on the input and output of the complaint mechanism has been made available since September 2018. The three other reports that have been published by the HRAB since September 2018 do not mention the complaint mechanism, nor are there any mentions of FIFA using its leverage in cases involving human rights defenders or media representatives that it became aware of through other channels. The only exception is noted in the fourth report, in which FIFA states that it spoke out against the fact that the Football Federation of the Islamic Republic of Iran banned women from attending football matches that were played by men.[28]

It is possible that this lack of outward transparency is caused by the manner in which the complaint mechanism was created. FIFA started to develop after the HRAB recommended in September 2017 that FIFA put 'clear channels in place' through which media representatives and human rights defenders could alert FIFA of the human rights harms they were facing. After the complaint mechanism was created, the HRAB announced that the recommendation had been sufficiently implemented and was now closed out. This signifies that both the HRAB and FIFA consider the establishment of a grievance mechanism a one-time goal, instead of a continuous process.

Rights-compatibility

For a remedy mechanism to be considered rights-compatible it must ensure "that outcomes and remedies accord with internationally recognized human rights", as stated by UNPG31. The ARP reports elaborate on this criterion and recommend inter alia that complainants get a hand in determining what type of remedy will be delivered (Article 12.2a), and that remedy mechanisms implement arrangements that reduce the risk of retaliation against stakeholders (Article 12.4c).[29]

It has already been established in the previous section on transparency that complainants have a say in deciding how FIFA will support them. This conduct also lowers the risks of retaliations against stakeholders. By engaging in dialogue with victims and giving them the

[28] 'Fourth Report by the FIFA Human Rights Advisory Board including the Board's Recommendations from May-December 2019' (*FIFA Human Rights Advisory Board*, January 2020) p 7.
[29] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 p 16.

option to say that they would prefer it if FIFA did not engage publicly, FIFA decreases the chance that human rights defenders and media representatives will face harassment or threats.

A source of continuous learning

UNGP31 states that for a remedy mechanism to be a source of continuous learning it must engage in periodic introspective analysis of its inner workings and its output. According to the ARP this can be done by 1) seeking out feedback from past complainants, 2) searching for patterns in its body of complaints and 3) contributing to future prevention of human rights harms.[30] These recommendations are found in Articles 13.1a, 13.1b and 13.2 respectively.

As mentioned in the section on transparency, the complaint mechanism was based on a recommendation by the HRAB. After the complaint mechanism was created, the HRAB considered the recommendation closed. Based on this, it can be assumed that there is no intention to engage in regular analysis of the mechanism itself, at least not with the help of an independent board. It is therefore unclear if and how FIFA seeks out feedback from individuals that have previously submitted complaints.

It is also unclear whether FIFA seeks to discern patterns or commonalities from the body of complaint it has received and whether it uses this knowledge to hone its policies on preventing human rights abuses.

Based on engagement and dialogue

This final criterion is specifically meant for operational-level grievance mechanisms, which refers to a mechanism fully or partly administered by a business enterprise or organisation. To fulfil it, the mechanism must cooperate with relevant stakeholders for both the design and the working of the mechanism. UNPG31 also states:

> "Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism."

[30] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 p 17.

Again, it has been established that FIFA engages in dialogue with complainants to determine what course of action it will take to remedy possible human rights abuses. It has also been established that FIFA cooperated with experts to design the complaint mechanism.

The suggestion that an option for independent third-party adjudication is provided is not quite relevant for this complaint mechanism, as FIFA does not and does not seem to intend to make any adjudicative decisions. However, the suggestion is mentioned here as a vehicle to note that since the HRAB has closed off the recommendation for FIFA to establish a channel through which human rights defenders and media representatives can report human rights abuses, there is no more independent body that monitors the complaint mechanism.

Concluding remarks

The aim of this chapter was to provide an overview of the complaint mechanism and explore how it contributes to effective remedy for victims of FIFA-related human rights abuses, using the eight effectiveness criteria established by UNPG31 as a guide. The chapter has found that the complaint mechanism has certain strengths, such as its accessibility and its rights-compatibility. However, the complaint mechanism also has certain drawbacks, such as the lack of transparency on its inner workings and its output, and the lack of independent oversight. A more in depth analysis will be provided in Chapter 5.

4. The Court of Arbitration for Sport

The Court of Arbitration for Sport is a private international arbitral body that concerns itself with sports-related disputes. It was established by the International Olympic Committee (IOC) in 1984 and is based in Lausanne, Switzerland. The CAS has evolved in the last four decades. According to Lindholm, it is now 'the international "supreme court" for sports'.[31] Several different types of arbitration proceedings occur before the CAS. The most important ones are the Ordinary Arbitration Procedure and the Appeal Arbitration Procedure. The latter accounts for 80% of the CAS caseload, the former for around 16%. The final 4% of the CAS workload consists of Ad hoc Procedures, Anti-Doping Procedures, Mediation Procedures and Consultation Procedures.[32]

As noted in the introduction to this thesis, it is currently not possible for victims of FIFA-related human rights abuses to start proceedings before the CAS. This will be explored further in the section on accessibility. The aim of this chapter is to explore to what extent the CAS currently fulfils the other six effectiveness criteria found in UNGP31, and to provide more information on other facets of accessibility.

Like in Chapter 3, the effectiveness criteria found in UNGP31 will inspire the structure of this chapter. Given that the CAS is not an operational-level mechanism only the first seven criteria will be used. However, while this chapter follows the same structure as the previous chapter, the manner in which information on the CAS is established is different. Whereas the complaint mechanism has not been explored in academic literature before, an extensive body of academic literature exists on the CAS, including literature on its relationship to human rights. This chapter will therefore rely more heavily on secondary sources. For brevity's sake this chapter will not provide an overview of all facets of the CAS. Analysis will be limited to exploring the CAS and its relationship to FIFA.

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[31] Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence* (Springer 2019) 5.
[32] 'Statistiques / Statistics' (*CAS*) derived from <https://www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2020.pdf> accessed on 17 July 2022.

Legitimacy

As mentioned in Chapter 3, to strengthen legitimacy of a grievance mechanism is to strengthen stakeholder trust in it.[33] This is done by consulting stakeholders during the designing process of the mechanism and by establishing an appropriate amount of independence from the business enterprises and organisations whose actions might be subject to proceedings before the mechanism.

Given that the CAS was not developed to preside over issues of business-related human rights abuses, it is only natural that stakeholders were not invited to contribute to the creation of the CAS. This is therefore not a fitting benchmark to measure the CAS's legitimacy within this context. The focus of this section will instead be on the independence of the CAS in regards to FIFA (ARP 7.5). Additionally this section will explore how risks of undue influence or conflicts of interest are minimised by the CAS (ARP 7.6a and b). Finally, this section will evaluate the expertise of the people employed at the CAS (ARP 7.7).

The CAS saw significant reforms in the nineties. The reforms of 1994 were triggered in 1992 when Elmar Gundel brought proceedings before the CAS to challenge a decision that had been issued by the Fédération Équestre Internationale (FEI) in a horse doping case. FEI had suspended Gundel for three months. While the CAS reduced this suspension to one month Gundel was not satisfied and filed an appeal before the Swiss Supreme Tribunal. According to Gundel, the CAS was not sufficiently impartial and independent to be considered a true court of arbitration under Swiss law. The Supreme Tribunal disagreed, but in its judgement it did note that the CAS was quite closely linked to the IOC. The IOC bore the costs of operating the CAS and its Statutes could be amended only by the IOC. Additionally the IOC could appoint 15 CAS members out of 60.

Following this judgement, the CAS saw a substantial restructuring and the International Council of Arbitration for Sport (ICAS) was established. The ICAS became responsible for many of the duties the IOC previously fulfilled: it is responsible for financing the CAS, appointing the arbitrators and bearing overall responsibility for the CAS. It must be noted here that four out of the twenty members of the ICAS are appointed by the IOC. The reforms were tested not even a decade later when Larissa Lazutina and Olga Danilova, both Russian skiers,

[33] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms: explanatory notes' (3 June 2020) UN Doc A/HRC/44/32/Add.1 para 33.

argued before the Supreme Tribunal that the CAS was still a "vassal" of the IOC because it still received funding from the organisation. The Tribunal disagreed and stated that the CAS was independent and impartial enough. It did however have some notes about the arbitrators employed by the CAS.

The Tribunal made note of the fact that the hiring process of arbitrators is not very transparent. According to the addendum to the ARP Part III report, a transparent hiring process is one of the things that can enhance the independence of a mechanism. The Tribunal recommended that the CAS makes it clear on its list of arbitrators by which ICAS member they have been put forward. This would allow complainants who, for example, were bringing a case against the IOC, to select arbitrators that were not proposed by one of the four members on the ICAS that were appointed by the IOC. According to the Tribunal it was important parties could make this more informed decision. As of yet, the CAS has not implemented this recommendation: on its website the CAS does not volunteer information on which arbitrator was appointed by whom.

Lazutina and Danilova also objected to the fact that one of the arbitrators that oversaw their case had previously defended the IOC in CAS proceedings. Nevertheless, the Tribunal held that this was not enough ground to accuse an arbitrator of partiality. According to Blackshaw, this was a sensible decision: the world of sport arbitration is not very large. However, the CAS established a new rule in 2009 that arbitrators cannot be on the other side of proceedings against the CAS.

The CAS has implemented several other measures to ensure its arbitrators are impartial and independent. Arbitrators are assigned by the ICAS for renewable periods of four years[34], and they can be removed if their conduct violates CAS rules.[35] Additionally, the CAS requires arbitrators to sign "a declaration undertaking to exercise their function personally capacity, with total objectivity and independence".[36] The CAS also established a new rule in 2009 that arbitrators employed by the CAS cannot be on the other side of proceedings against the CAS.[37] However, according to Černič these measures are not enough to fully guarantee the impartiality

[34] 'Code: ICAS Statutes' S5 (*CAS*) <https://www.tas-cas.org/en/icas/code-icas-statutes.html> accessed 9 July 2022.
[35] Ibid. S19
[36] Ibid. S18
[37] Ian Blackshaw, 'CAS 92/A/63 GUNDEL v FEI' in Jack Anderson (ed), *Leading Cases in Sports Law* (Asser Press 2013) p 72.

of arbitrators, citing the fact that the CAS does not provide information on which ICAS member appointed each arbitrator.[38]

Finally, according to the ARP guidelines personnel employed by a remedy mechanism must be 'suitably qualified' for the tasks that are set out for them to do.[39] It was noted by Ruggie in his report that the personnel employed by the CAS has very little human rights expertise.[40] According to Heerdt the only human rights issues that have been dealt with by the CAS are those who are connected to the human rights of athletes. These disputes often have a commercial character and are concerned with topics such as employment and sponsorship. It is also common for the CAS to weigh in on decisions made about doping.[41] So far the CAS has not made any decisions in any proceedings that concern the human rights of those involved with or affected by the staging of a World Cup tournament, or any other mass sporting event.

Accessibility

UNPG31 states that for a grievance mechanism to be accessible it must remove barriers that could prevent stakeholders from accessing the mechanism. These barriers can include costs, location and language. The ARP expands upon this by stating a mechanism's criteria must be clear and kept to a minimum (Article 8.2). Additionally, a mechanism must not require stakeholders to "waive their rights to seek a remedy using an alternate grievance mechanism [...] as a condition of access to participation" (Article 8.4).[42]

It is in this section that a significant gap is revealed between FIFA's intentions and FIFA's actions. As was noted in the introduction of this thesis, FIFA's bidding and hosting agreements do not directly provide for the rights of third parties. This means that if a contracting partner does not comply with the human rights provisions laid down in these agreements the victims of the ensuing human rights violations cannot seek reparations before the CAS. As noted by Heerdt, the

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[38] Letnar Černič, *Emerging Fair Trial Guarantees Before the Court of Arbitration for Sport* (2014) European Society of International Law, Conference Paper No. 9/2014 14.

[39] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 p 11.

[40] John G Ruggie, '"For the Game. For the World." FIFA and Human Rights.' (2016) Corporate Responsibility Initiative Report No. 68. Cambridge, MA: Harvard Kennedy School <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Ruggie_humanrightsFIFA_reportApril2016.pdf> p 26.

[41] Daniela Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' (2018) 17 The International Sports Law Journal 170, 181.

[42] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 p 12.

bidding agreements are based on contract law, which means that if one party to the contract shirks its duties, only the other contracting parties can call upon the CAS to enforce the contract.[43] According to Heerdt this results in a paradoxical situation. While clauses were added by FIFA to its bidding regulations to protect and promote human rights, it is not possible for individuals to actually claim these rights. This results in a situation where victims of World Cup related human rights violations will have to rely on FIFA to enforce the human rights promoted in the bidding and hosting agreements. The only way for victims to get redress or reparations is if FIFA chooses to start proceedings against a contracting party before the CAS and distributes the reparations amongst the victims. Whether or not FIFA will be willing to do this is unknown.

There is also the issue of waiving of rights. FIFA has laid down in its bidding agreements that:

> 'All disputes in connection with this Bidding Registration, including disputes as to its conclusion, binding effect, amendment and termination, are to be promptly settled between the parties by negotiation. If no solution can be reached, such disputes shall, to the exclusion of any court or other forum, be exclusively resolved by the Court of Arbitration for Sport (CAS) consisting of three (3) arbitrators. The seat of the arbitration is Lausanne, Switzerland, and the language of the proceedings shall be English. Any determination made by the Court of Arbitration for Sport (CAS) shall be final and binding on the parties.[44]'

In practice this would mean that if victims were parties to the bidding and hosting agreements, they would not be allowed to bring their case to a national court or any other remedy mechanism. This goes against the recommendation of ARP article 8.4. It must be noted here that the fact that parties must waive their rights to seek remedy outside the CAS obviously does not impact the overall accessibility of the CAS. However, it is mentioned here nonetheless because it highlights how FIFA's policies can impact access to effective remedy outside of the CAS. This will be explored further in Chapter 5.

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[43] Daniela Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' (2018) 17 The International Sports Law Journal 170, 182.

[44] FIFA, 'FIFA regulations for the selection of the venue for the final competition of the 2026 FIFA World Cup™' (2017) clause 12.17. Derived from <https://digitalhub.fifa.com/m/4ab6dd02a42e838d/original/stwvxqphxp3o96jxwqor-pdf.pdf> accessed 9 July 2022.

Though stakeholders currently cannot access the CAS, it must nevertheless briefly be noted that the CAS does have policies in place that mitigate barriers stakeholders could run into when starting arbitration proceedings before it. For example, the CAS has a legal aid program in place for persons "whose income and assets are not sufficient to allow the person to cover the costs of proceedings [45].

Predictability

Predictability is mostly measured in this context by how much information stakeholders are given on topics that include, but are not limited to, policies, procedures, rights of the stakeholders, arbitral awards given and previous cases.[46] Access to sufficient information ensures that rights holders can confidently start proceedings before the CAS.

It is possible to get most information necessary from the official CAS website.[47] The CAS has made a dedicated page for frequently asked questions, which includes information on topics such as the task of the CAS, the lengths of proceedings, how arbitrators are selected for proceedings, and who can refer a case.

Information on how to initiate proceedings and what stages the proceedings go through can also be found on the CAS' website, on a separate page on procedural rules. Information on both the Ordinary Arbitration Procedure and the Appeal Arbitration Procedure is available. Separate pages have also been made on arbitration costs, the list of arbitrators, legal aid, and of the rules and costs of mediation, which includes a list of mediators.

The CAS also provides information on previous cases, although this information is more limited. In 2019 Lindholm noted out of all proceedings that occurred between 1984 and 2014, 'less than one in ten decisions issued under the Ordinary Arbitration Procedures has been made public.'[48] Decisions issued under the Appeal Arbitration Procedure are much more represented. A look at the database appears to confirm this is still the case today. At the time of writing (August 2022) 27% of proceedings that have occured before the CAS can be read online (2130 out of 7869).

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[45] 'Guidelines on Legal Aid before the Court of Arbitration for Sport as from 1 November 2020' art 5 (*CAS*) <https://www.tas-cas.org/en/arbitration/legal-aid.html> accessed on 9 July 2022.
[46] See ARP III report and its addendum for a more complete overview of topics.
[47] CAS Home page (*CAS*) <https://www.tas-cas.org/en/general-information/index/> accessed 9 July 2022.
[48] Johan Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence* (Springer 2019) 5.

Equitability

As established in Chapter 3, UNGP31 dictates that grievance mechanisms must implement practices and procedures that remedy the common problem of victims having less legal and financial resources than the businesses and corporations they face when confronting them about their human rights abuses. Relevant for this chapter are ARP Article 10.1, which states that remedy mechanisms must provide (information) on financial support for stakeholders, and Article 10.6, which states that

> "The mechanism [adopts] and [implements] appropriate procedures to enable parties to challenge the manner in which the mechanism has responded to a grievance or the outcomes of grievance processes, which may include the possibility of a referral and/or appeal."[49]

While it is currently not possible for victims of FIFA-related human rights abuses to start proceedings before the CAS, it must still be noted here that the CAS offers legal aid to 'natural persons without sufficient financial means'.[50] This aid could entail pro bono counsel, waiving of procedural costs, and reimbursement for potential travel and accommodation costs if a hearing has been called and parties must travel to Lausanne, Sydney or New York. It is relevant to note this here to highlight the fact that if it becomes possible one day for victims of FIFA-related human rights abuses to start proceedings before the CAS, certain policies that would benefit victims are already in place.

However, certain policies are not in place. Article 10.6 of the ARP notes that it is important for a mechanism's equitability to allow stakeholders to seek an appeal. While 'judicial recourse' to the Swiss Federal Tribunal is allowed if a complainant disagrees with the outcome of arbitration proceedings, the Tribunal does not function as a court of appeal for the CAS. In its own words, the Tribunal does not "oversee the CAS and freely review the accuracy of the international arbitral awards rendered by that private jurisdictional body".[51] The Tribunal does

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[49] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 para 10.6

[50] 'Guidelines on Legal Aid before the Court of Arbitration for Sport as from 1 November 2020' art 5 (*CAS*) <https://www.tas-cas.org/en/arbitration/legal-aid.html> accessed on 11 July 2022.

[51] The Swiss Federal Tribunal, Adrian Mutu v. Chelsea Football Club Ltd, (10 June 2010) 4A_458/2009 para 4.4.2. Derived from <https://www.swissarbitrationdecisions.com/sites/default/files/10%20juin%202010%204A%20458%202009.pdf>.

review CAS proceedings if a stakeholder has grounds to believe that the CAS did not have jurisdiction, violated procedural rules or that the award is incompatible with public policy.[52]

Transparency

As stated in Chapter 3, in order for a remedy mechanism to be truly transparent, it must keep complainants well-informed about the progress of their grievances and provide civil society with periodic updates on the mechanism's performance and its body of decisions. The remedy mechanism must also strike an appropriate balance between confidentiality and transparency when it decides how much of the dialogue between parties will be shared with the outside world, as stated by ARP Article 11.3a. [53]

Most of the information that is relevant here has already been provided in the section on predictability. The new information provided here will therefore be on a CAS policy that has not been mentioned yet. It is CAS policy that the awards provided in the Ordinary Arbitration Procedure 'shall not be made public unless all parties agree or the Division President so decides'.[54] The opposite is true for the Appeals Procedure, where 'the award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they should remain confidential'.[55]

Rights-compatibility

For a remedy mechanism to be rights-compatible it must, according to the UNGPs, ensure that the outcomes of its decisions must be in line with internationally recognised human rights.

Since the CAS was not established to handle human rights matters, it would not be fitting to evaluate it based on how its arbitral awards address business-related human rights harms and the problems surrounding them. Instead, this section will briefly note that the CAS has been criticised for not fully meeting procedural human rights guarantees. According to Černič the CAS fails to fully abide by fair trial guarantees, with the main issues being "lack of procedural

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[52] 'Frequently Asked Questions' <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html#c201?> accessed on 12 July 2022.
[53] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 p 15.
[54] 'Code: Procedural Rules' R43 (*CAS*) <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html> accessed 9 July 2022.
[55] Ibid R59

fairness, the non-publication of its proceedings, the issue of burden of proof and the absence of a right to an independent and impartial arbitration panel".[56]

Source of continuous learning

For a remedy mechanism to be a source of continuous learning it must regularly engage in self-evaluation, and then use this self-evaluation to discern common causes of grievances from the body of its cases. Preferably the conclusions that can be drawn from this process would then be used by itself or others to develop and implement new policies that prevent human rights abuses from occurring.

Whether or not the CAS regularly analyses its own database to look for commonalities or patterns is unknown. It could be argued that it does not need to as the CAS most common use is as a court of appeal. This means its primary objective is not to prevent or acquire knowledge on the roots of common issues.

However, since the CAS is not a human rights court, it can with certainty be said that it does not currently look for or disseminate knowledge on how to prevent FIFA-related human rights abuses from occurring.

Concluding remarks

While the CAS is overall seen as a mostly respected court of arbitration, it has become clear throughout this chapter that it is not ready to deal with human rights issues. This is because of several reasons, with the most important being that it is currently not possible for victims of FIFA-related human rights abuses to bring proceedings against the host member association, host state or host city before the CAS. Other important issues are the fact that personnel employed at the CAS have no human rights expertise and the lack of fair trial guarantees, as pointed out by Černič.

[56] Letnar Černič, *Emerging Fair Trial Guarantees Before the Court of Arbitration for Sport* (2014) European Society of International Law, Conference Paper No. 9/2014 22.

5. Analysis

This chapter will analyse to what extent the complaint mechanism and the CAS meet international standards as established by the UNGPs and the ARP, based on the information provided in the previous two chapters.

The complaint mechanism

There are definite positive aspects to how FIFA developed the complaint mechanism. For example, the complaint mechanism was developed with help from relevant stakeholders. While it is unclear which experts and advocacy groups were consulted, the fact that external stakeholders were involved gives the mechanism more credibility when discussing legitimacy. Proper cooperation between the developing party and the stakeholders during the developmental stage increases the trust stakeholders have in the system. It also ensures the mechanism is tailored to the needs of the stakeholder, resulting in a mechanism that is, in theory, more accessible, equitable and transparent.

It is because of this cooperation with experts that accessibility is one of the strongest suits of the complaint mechanism. The three eligibility criteria FIFA has set[57] are reasonable and so do not set a high threshold. It is commendable that representatives for victims from human rights violations are able to submit complaints on behalf of victims, as it broadens the scope and lowers the barrier towards accessing the mechanism. The criteria are also clearly stated when accessing the remedy mechanism. This ensures that the stakeholders do not have to seek out the information on their own and risk finding misinformation. Additionally, it prevents disappointment when stakeholders find their complaint has been rejected on grounds of inadmissibility after their complaint has been submitted.

While FIFA could have been clearer in its accompanying statement on the type of remedy it would offer, the examples available in the second HRAB report once again show that FIFA has developed the complaint mechanism in tandem with human rights experts. The solutions FIFA has offered stakeholders in the past all include using its political influence in a variety of ways to support human rights defenders and media representatives. This type of remedy is apt and fits the complaint mechanism quite well. While FIFA has no power to adjudicate host associations,

[57] A complainant must be a human rights defender or media representative, must have been subjected to or represent someone who was subjected to human rights violations and these human rights violations must be linked to FIFA's activities.

states or cities, it does have considerable political influence. It is fitting that they use it to promote respect and protection for human rights defenders and media representatives.

While FIFA's transparency on the performance of the complaint mechanism is lacking, it does look like FIFA maintains contact with the complainant while it assesses the complaint and decides upon a proper solution. It is especially noteworthy that stakeholders have input in deciding how FIFA wields its political power to apply pressure on third actors and whether or not it releases public statements in support of affected persons. By doing so FIFA increases trust from stakeholders.

This conduct also safeguards the safety of victims, which increases the complaint mechanism's rights-compatibility. To be rights-compatible it is important that a remedy mechanism ensures that it does not cause or contribute to additional human rights abuses by interfering with a complicated situation. The fact that FIFA reaches out to the complainant, victims and "other institutions and organisations that have a mandate to promote respect and protection of human rights defenders and media representatives"[58], shows that FIFA is committed to obtaining a detailed overview of the situation on the ground, which in turn allows it to make more precise decisions on how to wield its political power in a manner that centres the safety and well-being of victims.

Notwithstanding these positive attributes, there are certain aspects where FIFA's complaint mechanism fails to meet the effectiveness criteria. Most of the problems described below derive from the fact that FIFA has released very little information on the inner workings and outcomes of the mechanism, and has released no new information on the complaint mechanism since September 2018. This has significant negative impacts on all of the eight requirements set by the UNPGs and the ARP.

The legitimacy of the complaint mechanism is hurt because FIFA has not released information on the personnel that handles the incoming complaints. To guarantee stakeholders trust the complaint mechanism it would be advisable that FIFA releases more information on who handles the complaints and what their qualifications are to handle them.

With regards to predictability, it is possible to discern some information about the stages a complaint goes through and the time it takes for FIFA to respond and take action. For example, it was possible to deduce that FIFA engages in significant dialogue with complainants before

[58] FIFA statement on human rights defenders and media representatives (*FIFA*, May 2018) p 4.

deciding upon a solution, and that this process could occur within a few months. It would be preferable however if FIFA would provide this information directly and clearly to stakeholders. This is especially important since the stakeholders of this mechanism are media representatives and human rights defenders, who often face unlawful arrests and detentions. In these cases, swift intervention is often necessary, and if that is something FIFA can supply it would be useful to state so publicly.

While FIFA communicates well with complainants and victims while it is assessing their complaint, there are still things that could be done to enhance the transparency of the complaint mechanism. The main improvement that could be made is rather straight-forward: stakeholder trust would grow if new information on the remedy mechanism would be released more often. As of now, it is unclear whether or not complaints have been submitted since September 2018. This is not good for stakeholder trust in the complaint mechanism. At this point in time the complaint mechanism appears abandoned. There is a slim chance that FIFA is not providing updates on the complaint mechanism anymore to protect the privacy of the complainants. If this is the case this is not a bad reason. According to ARP 11.3(a) a grievance mechanism must 'strike an appropriate balance between the need for transparency and the need for confidentiality'[59]. However, if this is the case, FIFA has tipped too far towards confidentiality. Since no new information has been released it seems as if the complaint mechanism is not in use anymore, which would discourage stakeholders from submitting complaints. A more appropriate balance between transparency and confidentiality was struck in the second HRAB report: in this report information was released on the number of complaints that were submitted from May 2018 to September 2018, whether or not the cases were ongoing or closed, and whether or not they were connected to a World Cup tournament. All of this information could be disclosed without encroaching upon the privacy of the stakeholders involved. But that's kinda bullshit innit alright maybe scrap that.

The above thoughts are also connected to the complaint mechanism being a source of continuous learning. Since no new information has been released since September 2018 and the recommendation has been closed out, it does not seem as if FIFA is engaging with stakeholders to gain feedback or that it is analysing what patterns can be found in its caseload. It is also

[59] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms' (19 May 2020) UN Doc A/HRC/44/32 p 15.

unclear whether FIFA has been able to draw conclusions on common root causes for human rights abuses from the complaint mechanisms, and whether it is using these conclusions to improve its efforts to protect human rights defendants and media representatives. It could be argued that these latter two are less relevant. After all, the complaint mechanism caters to a specific subset of people, namely human rights defenders and media representatives. Because this group is comparatively small and because FIFA has developed the mechanism in cooperation with relevant non-profit organisations and stakeholders, it seems as if FIFA already has a rather good grip on the type of threats human rights defenders and media representatives face. It even provides a short overview of these types of threats in the accompanying statement. It is therefore unclear how much new information FIFA could reasonably be able to learn from new cases that would help with the prevention of human rights abuses, especially since in most cases FIFA did not directly cause or contribute to the human rights abuses (at least not in the case of human rights defenders and media representatives). However, just like the transparency issue, it is still important for the effectiveness of the complaint mechanism that information on it is released. In addition to releasing periodic information on complaints that come in, FIFA would do well to implement an additional habit for itself to measure stakeholder satisfaction.

On being based on engagement and dialogue: FIFA meets most of the requirements provided here. However, it is worrying that the HRAB is no longer involved in monitoring the complaint mechanism.

It has become clear that the complaint mechanism does not meet international standards as established by UNPG31 and the ARP. The main problem is the lack of updates on the complaint mechanism since September 2018. However, based on the information available, it seems as if the complaint mechanism was a helpful and even effective option for human rights defendants and media representatives to turn to.

If FIFA were to self-constitutionalise further and set stricter rules for itself in regards to improving access to remedy, it would do well to reawaken the complaint mechanism. Ideally, FIFA would establish an independent board that would monitor the mechanism. In this ideal situation FIFA would also provide periodic updates output of the mechanism. Finally, it would provide information on the type of remedy that can be expected, the stages the complaint goes through and the personnel that handles the complaints. If developed further the complaint mechanism would be a worthy option in what the ARP calls ‘a bouquet of remedies’.

The Court of Arbitration for Sport

According to Heerdt, "bringing the CAS in connection with the unprecedented developments of sports governing bodies committing themselves and the actors involved in delivering their respective MSEs to human rights protection is not far-fetched", since the jurisdiction of the CAS is already accepted by all member associations.[60] This section will therefore analyse how effective the CAS would currently be in providing effective remedy to victims of FIFA-related human rights abuses if these victims would suddenly be allowed to start proceedings before the CAS.

As discussed in Chapter 4, the CAS has a colourful history with regards to its independence from international organisations, in particular the IOC. A lack of independence could have effects on the CAS' overall legitimacy. However, while it is important to take note of the CAS' ties to the IOC, no such ties exist in connection to FIFA. It can therefore be assumed that there is less bias in potential CAS' dealings with FIFA compared to the cases related to the IOC.

Independence of the arbitrators has been improved by the CAS in recent years. It has, for example, established a rule that states that arbitrators employed by the CAS cannot be part of proceedings against the CAS. The ARP addendum remarks that 'restrictions on movements of personnel from the mechanism to relevant business operations (and vice versa)' are a useful strategy in avoiding conflict of interest.[61] Another positive development is that the CAS can remove arbitrators if their conduct violates CAS rules. This hopefully prevents possible subjective arbitrators from remaining employed for a long period of time. However, according to Černič there are still issues with the right to an independent and impartial arbitration panel". He mainly criticises the fact that it is currently not transparent which ICAS representative chose

Overall, the CAS is fairly legitimate with regards to its independence from FIFA. Nevertheless, if the CAS were to oversee more human rights related cases in the future, one aspect would need urgent improvement to ensure that the CAS would be fully legitimate. This aspect is the current lack of arbitrators that possess expertise in human rights law. While it is

[60] Daniela Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' (2018) 17 The International Sports Law Journal 170, 12.
[61] UNHRC 'Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms: explanatory notes' (3 June 2020) UN Doc A/HRC/44/32/Add.1 para 37.

unclear if and when the CAS will see a case on FIFA-related human rights abuse, it is worrying that if such an issue reaches the CAS it will be inadequately prepared for it.

As mentioned before, accessibility is one of the greatest issues in the effectiveness of the CAS in the context of FIFA-related human rights abuses at the moment. As has been mentioned in Chapter 4, the way in which the CAS is currently organised does not make it possible for third parties to initiate arbitration proceedings before the CAS. This means that if human rights abuses occur during the preparation or staging of a World Cup tournament, it is FIFA alone that can demand damages or reparations from the host association, states or city.

It is not the fault of the CAS that victims of human rights abuses are not eligible to bring cases. In fact, the CAS currently allows for third parties to join the proceedings, if they are bound by the arbitration agreement or the other parties agree in writing.[62] The lack of access for victims of FIFA-related human rights abuses could therefore be mitigated by FIFA including stakeholders in the bidding and hosting agreements, or by providing case-by-case permission for third parties to join the proceedings. However, given that the later option also depends upon the other parties agreeing, the former option has a higher chance of successfully mitigating the current lack of access.

Possible stakeholders that FIFA in arbitration agreements could be labour organisations, non-profit organisations for human rights or any other organisation that represents the interests of the groups most likely to be affected by the staging, hosting and aftermath of a World Cup Tournament. FIFA would have to identify, preferably together with the host country, which groups these are on a case-by-case basis. However, as was seen in chapter 2, there are certain groups who are most likely to face FIFA-related human rights abuses. These groups are the workers who build the necessary infrastructure and the residents who live close to the places the new infrastructure is being built. Other groups who are more susceptible to human rights abuses include human rights defenders and media representatives, homeless people, street vendors and children.

However, even if FIFA decides to include third parties in the contracts, and it would therefore become possible for third parties to start proceedings before the CAS, the CAS would not automatically become a properly accessible remedy mechanism. As seen in Chapter 4, FIFA

[62] 'Code: Procedural Rules' R41.4 (*CAS*) <https://www.tas-cas.org/en/arbitration/code-procedural-rules.html> accessed 9 July 2022.

currently demands that its contractual partners direct disputes exclusively to the CAS. While this does not affect the overall accessibility of the CAS, it is nevertheless mentioned here because it highlights how FIFA provides extra barriers to access to justice for its partners. If future bidding and hosting regulations were to include third party stakeholders, it would be beneficial for their right to access effective remedy if FIFA removed provisions that forbid partners to seek remedy outside of the CAS.

If third parties were to be included in the arbitration agreements they would find the CAS to be fairly predictable. As mentioned in Chapter 4, the CAS provides a significant amount of information on the procedural rules that govern arbitration proceedings. This information would allow stakeholders to paint a clear picture of what they can expect from the CAS after they set proceedings in motion, even if they have no previous experience with arbitration proceedings. The only significant gaps in the information available are on past procedures. The fact that approximately a quarter of CAS decisions is publicly available does impact the predictability of the CAS. It must however be said that it is common for courts of arbitration to keep awards confidential. This might even be a strength of the CAS, as will be explored later in this section. Overall, the CAS scores decently on predictability. The main area to be improved would be a more complete overview of its previous cases.

The next effectiveness criterion is equitability. As mentioned in Chapter 4, a grievance mechanism must ensure that victims do not find themselves outmatched by business or corporations because the latter possess more financial and legal resources. Whereas this criterion was not relevant for the complaint mechanism because it is a non-judicial mechanism, it is incredibly relevant here because of the nature of arbitration proceedings. The CAS has already implemented a legal aid mechanism. This legal aid could provide individuals with pro bono counsel and financial assistance. This type of aid would be incredibly helpful for victims if they would one day be able to start proceedings before the CAS. As explored in Chapter 2, victims of FIFA-related human rights abuses are often working-class individuals. This means that they are most likely not very wealthy. It would therefore be imperative that a complaint to the CAS does not further drain their financial resources. Additionally, victims often do not possess the knowledge necessary to manoeuvre through judicial proceedings on their own. The fact that pro bono counsel is provided would fit perfectly with the needs of victims.

However, it is currently not possible for stakeholders to challenge arbitral awards. This factor, combined with the fact that FIFA often lays down in its contracts that the CAS has exclusive jurisdiction over disputes, narrows options considerably for stakeholders that seek remedy for MSE-related human rights abuses.

According to Heerdt, the fact that the CAS cannot be held accountable by other mechanisms means that "'victims of MSE-related or more generally sports-related human rights abuses are to a certain extent denied access to remedy".[63] Access to justice is already a difficult endeavour, and the number of mechanisms that are able to take binding decisions is limited. It would be in the interest of stakeholders to broaden up the conditions on which a decision of the CAS is allowed to be reviewed. It is especially important that the content of CAS decisions would be able to be up for appeal.

The next criterion is transparency. The CAS does well in providing those who start arbitration proceedings with sufficient information on the progress of their complaint. The procedural rules, available on the CAS website, show that the CAS has established policies in how it keeps both parties evenly informed on the proceedings.

Whether or not CAS strikes an appropriate balance between confidentiality and transparency is a different matter. As mentioned in Chapter 4, outcomes of Ordinary Arbitration Procedures are by default kept confidential unless both parties agree to make them public or the Division President decides to do so. Outcomes of the Appeals procedure are by default made public unless both parties agree they should remain confidential.

There are those who argue that these current policies should be changed. According to Heerdt, outcomes of proceedings should be released publicly by default, unless the security of a stakeholder is at risk.[64] There would be certain benefits to this approach. If the barrier to making proceedings confidential was heightened, more information about awards would be made available to the public and stakeholders. This would increase the transparency and predictability of the CAS, making it more effective. It would also provide stakeholders with more information on how to navigate the CAS. Heerdt also notes that more exposure to the public "would also add

[63] Daniela Heerdt, *Blurred Lines of Responsibility and Accountability - Human Rights Abuses at Mega-Sporting Events*, (Human Rights Research Series 94, Intersentia 2021) 221

[64] Daniela Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' (2018) 17 The International Sports Law Journal 170, 232.

another layer of accountability, namely the court of public opinion".[65] This latter argument is especially convincing in this context of the CAS being used as a remedy mechanism for FIFA-related human rights abuses. As has been explored in Chapter 2, pressure from civil society was a potent motivator for FIFA's self-constitutionalisation process. Additional scrutiny from the public would be another incentive for FIFA to remain committed to protecting human rights.

Černič argues in favour of more transparency for similar reasons, stating that "public proceedings would also ensure the greater legitimacy of the arbitral award and create a stronger appearance of independence"[66]. He also notes that the CAS seems to have been growing more transparent over the years.

While Heerdt and Černič accurately note that more transparency leads to more public scrutiny, which in turns leads to greater legitimacy, public awards might also lead to more risks for victims. Victims of human rights abuses are particularly vulnerable, and arbitration might be a more appealing option becauses it can guarantee privacy. It could be argued that the current system might not need to be amended if the CAS would see more arbitration proceedings on FIFA-related human rights abuses.

However, there are still ways in which the CAS could be more transparent and protect victims of human rights abuses. One simple solution is to anonymise the awards before they are published online, perhaps on request by a party involved. The CAS could also implement Heerdt's advice and publish all awards unless this would endanger an involved party.

Ultimately, it can be concluded that if the CAS would one day be accessible for victims of FIFA-related human rights abuses the manner in which confidentiality and transparency are balanced would need to be reassessed and more weight should be given to the importance of transparency. It would also be important that the CAS involved relevant stakeholders in this process of recalibration as this would increase stakeholder trust.

This leads into the second to last effectiveness criterion, that on rights-compatibility. As noted in Chapter 4, according to Černič the non-publication of proceedings and the lack of transparency on who appoints what arbitrator means that the CAS fails to meet fair trial guarantees by the ECtHR. Since this thesis does not use these guarantees as benchmarks Černič's

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[65] Daniela Heerdt, 'Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements' (2018) 17 The International Sports Law Journal 170, 232.

[66] Letnar Černič, *Emerging Fair Trial Guarantees Before the Court of Arbitration for Sport* (2014) European Society of International Law, Conference Paper No. 9/2014.

research will not be explored more in depth. However, his conclusions are repeated here to emphasise that the CAS currently does not promote procedural human rights through its arbitration proceedings.

The last effectiveness criterion suggests that a remedy mechanism must be a source of continuous learning. Given that the CAS was not developed to handle human rights, it can easily be concluded here that the CAS currently does not function as a source of continuous learning for FIFA.

However, if victims would gain access to the CAS the CAS could grow into an important source of continuous learning for FIFA.

This analysis has made it clear that even if FIFA mitigated the current accessibility problem by including third parties in arbitration proceedings, the way the CAS is set up does not meet the seven effectiveness criteria provided by UNGP31. The main problems that would need to be addressed are the lack of oversight on who appoints CAS arbitrators, the lack of CAS arbitrators that are equipped to handle human rights cases, the lack of accountability the CAS has towards other judicial mechanisms and the lack of other fair trial guarantees. In addition to this the way in which the CAS balances transparency and confidentiality would need to be reassessed.

However, the analysis has also revealed several smaller benefits that are already in place at the CAS. These benefits include the legal and financial aid the CAS offers to individuals in need and the fact that much of the information that is necessary to access the CAS is available online.

Concluding remarks

This chapter aimed to see to what extent the complaint mechanism and the CAS meet the effectiveness standards set by UNGP31 and the ARP. It has been found that neither of the two mechanisms meets these standards.

This means that broadly speaking, and as far as is known with regards to the output of the complaint mechanism, FIFA's self-constitutionalisation has had little substantive effect on access to effective remedy for victims of FIFA-related human rights abuses. Of course, this was somewhat foreseeable, as the complaint mechanism only provides solutions to a limited group of people and the CAS is not yet, and might not ever be, a feasible option for victims of

FIFA-related human rights abuses. However, this thesis hopefully succeeded in filling a gap of knowledge on the complaint mechanism, the current readiness of the CAS to handle human rights complaints connected to World Cup tournaments, and what effect the launching of the mechanism and the inclusion of human rights provisions in bidding and hosting agreements had on overall access to effective remedy.

6. Conclusion

According to Bützler and Schöddert, "the task to coordinate [...] the prevention of human rights violations, can only be tackled effectively through internal regulation".[67] If this is to be believed, the logical conclusion is that if we want victims of FIFA-related human rights abuses to enjoy access to effective remedies, we must rely upon FIFA to make this a reality. This is a worrying thought as FIFA's conscious effort to improve access to remedy by establishing a complaint mechanism for human rights defenders and journalists was seemingly abandoned after mere months. FIFA's, perhaps unintentional, choice to let human rights be applicable at the CAS meanwhile, currently does nothing to improve access to remedy for victims of FIFA-related human rights abuses as third parties cannot start proceedings before the court.

To recall, the aim of this thesis was to answer the following question:

What effect did FIFA's self-constitutionalisation have on access to effective remedy for victims of FIFA-related human rights abuses, and to what extent do the new remedy options, namely the complaint mechanism for human rights defenders and the CAS, comply with existing international standards?

While FIFA's self-constitutionalisation has been lauded, this thesis unfortunately reveals that the self-constitutionalisation of FIFA has so far not not succeeded in significantly improving access to effective remedy for victims of FIFA-related human rights abuses. In addition to this, the complaint mechanism and the CAS do not comply with existing international standards.

A cynic could read this answer and conclude that FIFA's process of self-constitutionalisation was merely a ploy to boost its reputation, and that FIFA consciously implemented human rights provisions into its private ordering in a way that would avoid the creation of enforceable or effective standards.

However, a more hopeful critic could conclude that FIFA's self-constitutionalisation process is simply not done yet.

This thesis' final analysis of the answer to the research question falls somewhere between these two readings. While it is disappointing that FIFA's new rules did not have a limitative

[67] Bodo P. Bützler and Lisa Schöddert, 'Constitutionalizing FIFA: Promises and Challenges' (2020) 25(1) Tilburg Law Review 40, 42.

effect that forced FIFA to improve access to effective remedy, it is hopeful that FIFA implemented human rights provisions in its statute and bidding and hosting agreements in the first place.

Finally, it is certainly possible that FIFA's self-constitutionalisation is not done yet. As established by Bützler and Schöddert, it was significant social pressure from civil society that motivated FIFA to put human rights provisions into its private ordering. It is certainly possible that in the time leading up to the 2026 World Cup, attention will be paid to how successful the new hosting and bidding agreements are in preventing human rights abuses. Hopefully journalists and academics will continue to put pressure on FIFA to develop more limitative rules for itself, as FIFA's work is currently far from done, at least in regards to how it promotes access to effective remedy for victims of FIFA-related human rights abuses.

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