

THE PROTECTION OF PROFESSIONAL ESPORTS PLAYERS  
AGAINST PHYSICAL AND MENTAL HEALTH PROBLEMS  
UNDER THE INTERNATIONAL COVENANT ON ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS

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I. INTRODUCTION

Electronic sports (“esports”) have been recognized as competitive video games.<sup>1</sup> Thanks to the development of digital media technologies, online game-streaming services, and cloud gaming technologies, the esports industry has rapidly developed and generated a huge amount of economic interests.<sup>2</sup> In a recent revenue forecast for the years 2020 through 2025, global esports market revenue was calculated to be \$996 million in 2020, with revenue predicted to

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<sup>1</sup> This article will use the term “esports” as online or offline “competitive video games,” but there is still no common definition of “esports.” See Cem Abanazir, *E-sport and the EU: The View from the English Bridge Union*, 18 INT’L SPORTS L.J. 102, 103, (2019); Kirstin Hallmann & Thomas Giel, *eSports – Competitive Sports or Recreational Activity?*, 21 SPORT MANAG. REV. 14, 15, (2017); *The Continued Rise of ESport – Efforts to Combat Match Fixing and Improve Integrity*, LAWINSPO (Sept. 2, 2016), <https://www.lawinsport.com/topics/anti-corruption/item/the-continued-rise-of-esport-efforts-to-combat-match-fixing-and-improve-integrity>.

<sup>2</sup> See Justin Ronquillo, *The Rise of Esports: The Current State of Esports, Its Impacts on Contract Law, Gambling, and Intellectual Property*, 23 INTELL. PROP. & TECH. L. J., 81, 81–82 (2019); Michel Boudot & Marianne Faure-Abbad, *La Qualification Juridique de l’E-Sport*, Presses Universitaires d’Aix-Marseille, 23, 29 (2017).

grow to \$1.87 billion by 2025.<sup>3</sup> Thus, it can be said that the esports industry has become a more attractive economic market for business enterprises.<sup>4</sup>

With this rapid economic growth, however, comes concerns about the impact on esports players. Yet, there has been no discussion from a legal perspective on how the esports community should protect esports players against negative consequences.<sup>5</sup> This is especially true concerning inflammation injuries (back, neck, elbow, wrist, fingers),<sup>6</sup> and mental health problems (e.g. depression<sup>7</sup> and insomnia (sleep disorder)<sup>8</sup>). It is clear that esports activity, especially at the

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<sup>3</sup> Christina Gough, *eSports Market Revenue Worldwide from 2020 to 2025*, STATISTA (Sept. 22, 2022), <https://www.statista.com/statistics/490522/global-esports-market-revenue/>.

<sup>4</sup> It is further worth noting that esports law has only recently developed and has led to the establishment of law school courses on esports law. *See Approach & Curriculum*, USC GOULD SCH. OF L. <https://gould.usc.edu/academics/concentrations/entertainment/approach/> (last visited Oct. 15, 2022). Besides, Esports Healthcare provides esports players with a simple guide for the prevention of physical and mental health problems. *See ESPORTS HEALTHCARE*, <https://esportshealthcare.com> (last visited Oct. 15, 2022).

<sup>5</sup> Generally speaking, esports-related legal issues mainly concern intellectual property, such as copyrights and trademarks. *See generally* David Nathaniel Tan, *Owning the World's Biggest eSport: Intellectual Property and DotA*, 31 HARV. J.L. & TECH. 965, 966–89 (2018); Stephen Townley & Annie Townley, *eSport: Everything To Play For*, WIPO MAGAZINE (Feb. 2019), [https://www.wipo.int/wipo\\_magazine/en/2018/01/article\\_0004.html](https://www.wipo.int/wipo_magazine/en/2018/01/article_0004.html); Devashish Jaiswal, *Highlighting the Complex Relationship of Esports and Intellectual Property Rights*, IPLEADERS (July 12, 2021), [https://blog.ipleaders.in/highlighting-complex-relationship-esports-intellectual-property-rights/#Esports\\_and\\_copyrights](https://blog.ipleaders.in/highlighting-complex-relationship-esports-intellectual-property-rights/#Esports_and_copyrights).

<sup>6</sup> *See* Chris Baraniuk, *They Dreamed of Esports Glory. Then Their Bodies Broke Down*, WIRED (Oct. 27, 2020, 6:00 AM), <https://www.wired.co.uk/article/esports-injuries-mental-health>; Joanne DiFrancisco-Donoghue et al., *Managing the Health of the eSport Athlete: An Integrated Health Management Model*, 5 BMJ OPEN SPORT & EXERCISE MED. 1, 2 (2018); Hallie Zwibel et al., *An Osteopathic Physician's Approach to the Esports Athlete*, 119 J. AM. OSTEOPATHIC ASS'N. 756 (Nov. 2019); Line Lindberg et al., *Musculoskeletal Pain is Common in Competitive Gaming: A Cross-Sectional Study Among Danish Esports Athletes*, 6 BMJ OPEN SPORT & EXERCISE MED. 1, 2 (2020); Ana Monteiro et al., *Virtual Sports Deserve Real Sports Medical Attention*, 5 BMJ OPEN SPORT & EXERCISE MED. 1, 3 (2019).

<sup>7</sup> *See* Erick Messias et al., *Sadness, Suicide, and Their Association with Video Game and Internet Overuse Among Teens: Results from the Youth Risk Behavior Survey 2007 and 2009*, SUICIDE AND LIFE-THREATENING BEHAVIOR 307, 311, 313 (2011).

<sup>8</sup> *See* Karoline Lange et al., *Electronic Media Use and Insomnia Complaints in German Adolescents: Gender Differences in Use Patterns and Sleep Problems*, J. NEURAL TRANSMISSION 79, 85 (2017); Neralie Cain & Michael Gradisar, *Electronic Media Use and Sleep in School-Aged Children and Adolescents: A Review*, 11 SLEEP MEDICINE 735, 738 (2010).

professional level, can cause esports players physical and mental health problems.<sup>9</sup>

To solve these health problems, this article considers whether Articles 7 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) should serve to protect esports players against physical and mental health problems caused by esports activity. This article seeks to clarify what necessary measures esports duty bearers should take to prevent such health problems, thereby enhancing the protection of esports players.

However, it is important to note that international human rights law cannot impose any legal obligations on non-state actors, so the implementation of human rights obligations depends on their voluntary commitment.<sup>10</sup> For instance, the Swiss Esports Federation (SESF) has created the Human Rights Clause in its statutes (Article 1.6).<sup>11</sup> In accordance with this provision, the SESF declared its voluntary intention to be bound by international human rights law ratified by Switzerland. It is worth noting that the SESF is the only esports federation that has declared its intention to respect human rights in esports activities.<sup>12</sup> Thus, it is important to explore whether human rights law can meaningfully contribute to improving the working conditions of esports players.

Considering the above, this article will be divided into the following sections: First, it will review Articles 7 and 12 of the ICESCR in the context of the protection of physical and mental health problems. After this review, this article will consider whether Articles 7 and 12 should serve to protect esports players against such health problems in esports activity. In doing so, it will examine three questions: (1) Who can exercise the rights guaranteed by Articles 7 and 12?; (2) Who are considered duty bearers in the esports community under the ICESCR?; and (3) What should duty-bearers do to ensure the enjoyment of rights guaranteed by Articles 7 and 12? Finally, this article will answer the main question of whether Articles 7 and 12 should serve to protect esports players against physical and mental health problems caused by esports activity.

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<sup>9</sup> See Keyi Yin et al., *Linking Esports to Health Risks and Benefits: Current Knowledge and Future Research Needs*, J. SPORT HEALTH SCI. 485, 486–87 (Apr. 17, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7749245/>.

<sup>10</sup> WALTER KÄLIN & JÖRG KÜNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 72–77 (2d ed. 2019).

<sup>11</sup> The SESF shall strive to promote the respect and protection of all human rights conventions which are ratified by Switzerland. SWISS ESPORTS FED’N, STATUTES 1 (2020). See also Tsubasa Shinohara, SWISS ESPORTS FED’N, *THE PROJECT ON HUMAN RIGHTS PROTECTION FOR GAMERS AND STAFFS IN SWISS ESPORT ACTIVITY: A BRIEF INTRODUCTION* 1 (2021).

<sup>12</sup> Tsubasa Shinohara, SWISS ESPORTS FED’N, *INTERPRETATION OF HUMAN RIGHTS CLAUSE AND NON-DISCRIMINATION AND EQUALITY CLAUSE* 1, 3–4 (2021). See generally Tsubasa Shinohara, *The Protection of Esports Players Against the Use of Doping Substances and Methods Under the European Convention on Human Rights: The Swiss Example*, INT’L J. ESPORTS 1, 1 (2021).

## II. PROTECTION AGAINST PHYSICAL AND MENTAL HEALTH PROBLEMS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The ICESCR was adopted in December 1966 and entered into force in 1976.<sup>13</sup> It was originally signed by 71 states and has since been ratified by 171 states to date.<sup>14</sup> The ICESCR recognized the Economic and Social Council (ECOSOC) as its monitoring body under Part VI of the ICESCR.<sup>15</sup> According to Part VI, the Committee on Economic, Social and Cultural Rights (CESCR) was established as a subsidiary body of the ECOSOC under the ECOSOC Resolution 1985/17 of May 28, 1985.<sup>16</sup> In addition to this, the Optional Protocol to the ICESCR (OP-ICESCR), adopted on December 10, 2008, and entered into force on May 5, 2013,<sup>17</sup> established individual communication procedures which allows individuals or groups of individuals to lodge complaints with the CESCR.<sup>18</sup> The ICESCR guarantees economic, social, and cultural rights, transforming the rights guaranteed by the Universal Declaration of Human Rights (UDHR) into a legal instrument that should legally bind state parties. It contains not only positive obligations to prevent human rights violations by third parties, but also negative obligations to refrain from arbitrarily interfering with

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<sup>13</sup> See Int'l Covenant on Econ., Soc. And Cultural Rts., *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>14</sup> *Id.*

<sup>15</sup> BEN SAUL ET AL., THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMMENTARY, CASES, AND MATERIALS 4 (2014).

<sup>16</sup> *Review of the Composition, Organization, and Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Economic and Social Council Resolution 1985/17, U.N. Doc. E/RES/1985/17 (May 28, 1985).

<sup>17</sup> See Optional Protocol to the Int'l Covenant on Econ., Soc., and Cultural Rts., G.A. Res. 63/117, GAOR, 63d Sess., Supp. No. 49, UN Doc. A/RES/63/117 (2008).

<sup>18</sup> MALCOLM LANGFORD ET AL., THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A COMMENTARY 6, 45 (2016).

the enjoyment of the ICESCR's rights.<sup>19</sup> Of course, it also comprises three obligations to respect,<sup>20</sup> protect<sup>21</sup> and fulfill under the ICESCR.<sup>22</sup>

Given all this, this section will consider the following issues: (1) substantive obligations under the ICESCR; (2) the right to just and favorable conditions of work (Article 7); and (3) the right to health (Article 12).

#### A. What Are Substantive Obligations Under the ICESCR?

Because each state party faces different political and economic circumstances, state parties have substantial discretion in determining the strength of the rights established by the ICESCR. However, the ICESCR does impose obligations (i.e., substantive obligations) to encourage the implementation of these rights. Thus, this subsection will identify what substantive obligations are included under the ICESCR.

Substantive obligations under the ICESCR can be divided into two categories: obligations of conduct and obligations of result.<sup>23</sup> While the ICESCR allows state parties a substantial amount of discretion in determining how to achieve the intended result with each state's available resources, the obligation of conduct is more specific and does not leave such discretion to the states.<sup>24</sup> In this context, Article 2(1) of the ICESCR stipulates a duty of progressive

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<sup>19</sup> *Id.* at 217.

<sup>20</sup> *See id.* at 219 (“[T]he obligation to respect appears to prevent interferences with (1) the ‘autonomy’ of social rights as rights enjoyed through some form of ‘self-effort’ or ‘private action’ and (2) diminutions in ‘legal entitlements’ such as laws and practices governing security of tenure, workplace relations, access to natural resources, use of public goods, environmental management, financial and credit regulation, educational standards.”).

<sup>21</sup> Comment on Econ., Soc. & Cultural Rts., *General Comment No. 12: The Right to Adequate Food* (Art. 11), 20<sup>th</sup> Sess., U.N. Doc. E/C.12/1999/5, para. 15 (May 12, 1999) (“The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food.”). In other words, the obligation to protect imposes duties on state parties to take necessary measures to ensure enterprises or individuals the enjoyment of the ICESCR's rights. [hereinafter *General Comment No. 12*]. *See generally* Comment on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties' Obligations* (Art. 2, para. 1, of the Covenant), 5<sup>th</sup> Sess., U.N. Doc. E/1991/23, para. 10 (Dec. 14, 1990).

<sup>22</sup> This point had already been established by the CESCR in its General Comment No. 12 concerning the right to food. *See General Comment No. 12, supra* note 21.

<sup>23</sup> Comment on Econ., Soc. And Cultural Rts., U.N. Doc. E/1991/23, para. 1 (1990).

<sup>24</sup> LANGFORD, *supra* note 18, at 215–16.

realization (obligation of result) and an obligation to take steps (obligation of conduct).<sup>25</sup> It provides that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>26</sup>

The CESCR observed that the non-discrimination rule (Article 2(2) of the ICESCR) and the duty to take steps (Article 2(1) of the ICESCR) have been interpreted as immediate obligations that are not limited by other considerations.<sup>27</sup> In this regard, General Comment No. 3 states that:

[W]hile the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.<sup>28</sup>

Based on this understanding, Malcolm Langford, University of Oslo Professor of Public Law, suggested the obligations to respect and protect under the ICESCR “are often viewed as generating obligations of immediate effect.”<sup>29</sup> Thus, the immediate obligations can be interpreted to mean that state parties shall promptly realize the rights prescribed in the ICESCR without considering resource constraints.

Regarding the duty of progressive realization, state parties are responsible for fulfilling ICESCR rights independently or through international assistance and cooperation if the available resources are lacking.<sup>30</sup> This duty

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<sup>25</sup> SAUL, *supra* note 15, at 134; Int'l Covenant on Econ., Soc. And Cultural Rts., *supra* note 13; Comm'n on Econ., Soc. And Cultural Rts., *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights* (Art. 2, para. 2), 42<sup>nd</sup> Sess., U.N. Doc. E/C.12/GC/20, para. 7–8 (July 2, 1990) [hereinafter *General Comment No. 20*].

<sup>26</sup> Int'l Covenant on Econ., Soc. And Cultural Rts., *supra* note 13, at art. 2.

<sup>27</sup> See *General Comment No. 3*, *supra* note 21; *General Comment No. 20*, *supra* note 25.

<sup>28</sup> *General Comment No. 3*, *supra* note 21.

<sup>29</sup> LANGFORD, *supra* note 18, at 228.

<sup>30</sup> Brian Griffey, *The 'Reasonableness' Test: Assessing Violations of State Obligations Under the Optional Protocol to the Int'l Covenant on Econ., Soc. and Cultural Rts.*, 11 HUM. RTS. L. REV. 275, 280–85, (2011).

should be distinguished from the duty to take steps (obligation of conduct) because “[i]t is not sufficient for a State to merely point to conduct; results must follow.”<sup>31</sup> More specifically, the UN General Assembly Third Committee stated that:

It must be understood that the guarantee of economic, social and cultural rights raised problems of a material nature, which the guarantee of civil and political rights did not. The former group of rights could not be ensured simply by enacting legislation and providing for enforcement, but depended on the level and economic development.<sup>32</sup>

According to this interpretation, developed countries could be held responsible for providing economic and technical support to developing countries, but the CESCR importantly noted in its General Comment No. 3 that richer states should not be directly responsible for providing assistance and cooperation to poorer states.<sup>33</sup> However, Article 2(1) of the ICESCR emphasizes that richer states and international organizations have an opportunity to assist poorer states, rather than a responsibility or duty to provide the maximum support possible under international cooperation.<sup>34</sup> Accordingly, the ICESCR can be considered a quasi-judicial and policy-oriented instrument which, while taking the availability of national budgets and financial resources into account, still aims to achieve the full realization of ICESCR rights.<sup>35</sup>

In addition to these obligations, the CESCR, in General Comment No. 3, highlights minimum core obligations required by the ICESCR stating that:

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party . . . . By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resources constraints applying within the country concerned. . . . In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>36</sup>

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<sup>31</sup> LANGFORD, *supra* note 18, at 228.

<sup>32</sup> U.N. GAOR, 17th Sess., 3rd Comment, 1203rd meeting, A/C.3/SR.1203 (Dec. 5, 1962).

<sup>33</sup> *General Comment No. 3*, *supra* note 21.

<sup>34</sup> SAUL, *supra* note 15, at 139.

<sup>35</sup> *See id.* at 149–51.

<sup>36</sup> *General Comment No. 3*, *supra* note 21, at para. 10.

Furthermore, the CESCR noted that “even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”<sup>37</sup> In this context, state parties are held responsible for the full realization of ICESCR rights based on their maximum available resources<sup>38</sup> and subject to the minimum core obligations,<sup>39</sup> which are to be given immediate effect without exception.<sup>40</sup>

In a nutshell, the ICESCR imposes on state parties (1) immediate obligations that they shall promptly realize the rights prescribed in the ICESCR, (2) duties of progressive realization that they shall ensure the widest possible enjoyment of these rights based on their maximum available resources, and (3) minimum core obligations to ensure that individuals or groups can enjoy the minimum essential levels of these rights.

#### B. The Right to Just and Favorable Conditions of Work

Based on the understanding established in the previous subsection, Article 7(b) and (d) of the ICESCR stipulate that:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular. . .

(b) Safe and healthy working conditions; . . .

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>41</sup>

The CESCR explained these provisions further in its General Comment No. 23:

The reference to “everyone” highlights the fact that the right applies to all workers in all settings, regardless of gender, as

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<sup>37</sup> *Id.* at para. 11.

<sup>38</sup> The 1987 Limburg Principles of the Implementation of the ICESCR and the 1997 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights also indicate this interpretation of the term “to the maximum of its available resources” under Article 2(1) of the ICESCR. See SAUL ET AL., *supra* note 15, at 147–48.

<sup>39</sup> See Griffey, *supra* note 30, at 287–88.

<sup>40</sup> SAUL ET AL., *supra* note 15, at 152. See also Comment on Econ., Soc. and Cultural Rts., *Concluding Observations of the Comment on Econ., Soc. and Cultural Rts.*, U.N. Doc. E/C.12/IND/CO/5, para. 45 (2008).

<sup>41</sup> Int’l Covenant on Econ., Soc. and Cultural Rts., *supra* note 13, at arts. 7(b), 7(d).



well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.<sup>42</sup>

On this basis, Article 7 should apply to *all workers*; thus, individuals must be recognized as “workers” to enjoy the rights guaranteed by Article 7. Furthermore, General Comment No. 23 also stated that “[p]reventing occupational accidents and disease is a fundamental aspect of the right to just and favourable conditions of work, and is closely related to other Covenant rights, in particular the right to the highest attainable level of physical and mental health.”<sup>43</sup>

According to this, workers are entitled to exercise their rights under Article 7(b) to be safeguarded against physical and mental health problems in the workplace. For instance, workers may receive compensation if they are injured in the workplace (“workplace injury compensation”) under Article 7(b), in conjunction with the right to social security guaranteed by Article 9.<sup>44</sup> This obligation should be progressively realized in light of Article 2(1), but “certain aspects of Article 7(b) must be regarded as minimum core obligations which are immediately applicable.”<sup>45</sup>

With this in mind, the International Labour Organization (ILO) has established some important instruments to protect workers against occupational health problems. For instance, it codified the ILO Conventions No. 155 (Occupational Safety and Health Convention),<sup>46</sup> No. 161 (Occupational Health Services Convention),<sup>47</sup> and No. 187 (Promotional Framework for Occupational Safety and Health Convention).<sup>48</sup> In the context of esports, these instruments require state parties to progressively realize safe and healthy working conditions for esports players if they are qualified as “workers” under national labor law.<sup>49</sup> General Comment No. 23 pointed out that, in doing so:

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<sup>42</sup> Comment on Econ., Soc. and Cultural Rts., *General Comment No. 23*, U.N. Doc. E/C/12/GC/23, para. 5 (2016) [hereinafter *General Comment No. 23*].

<sup>43</sup> *Id.* at para. 25.

<sup>44</sup> SAUL ET AL., *supra* note 15, at 448.

<sup>45</sup> *Id.* at 450. See *General Comment No. 23*, *supra* note 42, at para. 65.

<sup>46</sup> Occupational Safety and Health Convention, INT’L LAB. ORG., June 22, 1981, No. 155.

<sup>47</sup> Occupational Safety and Health Convention, INT’L LAB. ORG., June 25, 1985, No. 161.

<sup>48</sup> Promotional Framework for Occupational Safety and Health Convention, INT’L LAB. ORG., June 15, 2006, No. 187.

<sup>49</sup> The applicability of this provision depends on the legal status of “esports players.” In other words, if esports players are qualified as “workers,” Article 7 of the ICESCR applies. This point will be discussed in section 3.1. below.

[s]tates parties should adopt a national policy for the prevention of accidents and work-related health injury by minimizing hazards in the working environment and ensuing broad participation in formulation, implementation and review of such a policy, in particular of workers, employers and their representative organizations.<sup>50</sup>

If they qualify, workers should be protected against physical and mental health problems caused by their employment under Article 7(b).<sup>51</sup>

In addition to this, Article 7(d) guarantees the right to rest and leisure.<sup>52</sup> Regarding this, General Comment No. 23 noted that “[r]est and leisure, limitation of working hours and paid periodic holidays help workers to maintain an appropriate balance between professional, family and personal responsibilities and to avoid work-related stress, accidents and disease.”<sup>53</sup>

Based on this, the enjoyment of rest and leisure should prevent workers from suffering physical and mental health problems. They should avoid work-related stress, accidents, and diseases if their employers effectively and reasonably limit their working hours. To aid in this process, state parties must take legislative and administrative measures that require employers to limit the working hours of their employees.<sup>54</sup>

In short, Article 7(b) requires state parties to progressively realize safe and healthy working conditions. They must take legislative and administrative measures to protect individuals from excessive working conditions in accordance with Article 7(d).

### C. The Right to Health

Article 12(1) of the ICESCR stipulates that “[t]he State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>55</sup> This provision guarantees “a right to individuals to obtain a certain standard of health and health care”<sup>56</sup> to overcome physical and mental health problems.<sup>57</sup>

In its General Comment No. 14, the CESCR described the right to health as underlying determinants of health that may help individuals lead a healthy life, including the following elements: (1) access to safe and potable water and

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<sup>50</sup> *General Comment No. 23, supra* note 42.

<sup>51</sup> *Id.*

<sup>52</sup> SAUL ET AL., *supra* note 15, at 472–84.

<sup>53</sup> *General Comment No. 23, supra* note 42.

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

<sup>55</sup> Int’l Covenant on Econ., Soc. and Cultural Rts., *supra* note 13, at art. 12(1).

<sup>56</sup> SAUL ET AL., *supra* note 15, at 979.

<sup>57</sup> See Off. of the U.N. High Comm’r on Hum. Rts. and World Health Org., *Fact Sheet No. 31, The Right to Health*, at 9 (June 13, 2008) [hereinafter *U.N. Fact Sheet No. 31*].

adequate sanitation; (2) adequate supply of safe food, nutrition, and housing; (3) healthy occupational and environmental conditions; and (4) access to health-related education and information.<sup>58</sup> Additionally, the CESCR also noted that “the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.”<sup>59</sup> In this sense, state parties must allow individuals to achieve the underlying determinants of health to ensure the enjoyment of this right under Article 12(1).

In addition, state parties must satisfy positive obligations to protect individuals against human rights violations caused by private actors within their jurisdictions. Thus, individuals may claim a violation of their right to health due to acts or omissions of non-state actors, including private associations and organizations, that are within the jurisdiction of state parties.<sup>60</sup> In other words, non-state actors within the jurisdictions of state parties have obligations to protect human rights and, in doing so, must take necessary measures to protect individuals from physical and mental health problems under Article 12(1).<sup>61</sup>

In summary, the right to health prescribed in Article 12(1) requires state parties to protect individuals from human rights violations caused by non-state

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<sup>58</sup> See *id.* at 3. Regarding basic knowledge of the right to health, see generally OHCHR and the Right to Health, Off. of the U.N. High Comm’r on Hum. Rts., <https://www.ohchr.org/EN/Issues/ESCR/Pages/Health.aspx>, (last visited Oct. 16, 2022) (explaining the right to health as defined by the United Nations and its key aspects).

<sup>59</sup> *General Comment No. 23*, *supra* note 42, at para. 9. See also Paul Hunt (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Rep. of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (Aug. 8, 2007), paras. 46–47, U.N. Doc. A/62/214 (Aug. 8, 2007).

<sup>60</sup> See SAUL ET AL., *supra* note 15, at 992.

<sup>61</sup> Article 12(1) of the ICESCR contains the following four categories of interrelated and essential elements: “(a) [a]vailability, which requires functioning public health and health-care facilities, goods and services to be available in sufficient quantity within the State; (b) [a]ccessibility, which requires health facilities, goods and services to be affordable and physically accessible to all on the basis of non-discrimination; (c) [a]cceptability, which requires health facilities, goods and services to be gender-sensitive, culturally, scientifically and medically appropriate and respectful of medical ethics; and (d) [q]uality, which requires health facilities goods and services to be scientifically and medically appropriate.” Rep. of the U.N. High Comm’r for Hum. Rts.: Contributions of the Right to Health Framework to the Effective Implementation and Achievement of the Health-Related Sustainable Development Goals, at 4, U.N. Doc. A/HRC/38/37 (Apr. 20, 2018). For more detail, see *General Comment No. 23*, *supra* note 42, at para. 12; SAUL ET AL., *supra* note 15, at 994–1038. In addition, women, children, and persons with disabilities should also enjoy special protection from physical and mental health problems under Article 12(1) of the ICESCR and other human rights treaties. See *U.N. Fact Sheet No. 31*, *supra* note 57 at 11–22; *General Comment No. 23*, *supra* note 42, at paras. 2, 18–29.

actors within their jurisdictions. By doing so, they help individuals achieve the necessary underlying determinants of health.

### III. PROTECTIONS OF ESPORTS PLAYERS AGAINST PHYSICAL AND MENTAL HEALTH PROBLEMS UNDER ARTICLES 7 AND 12 OF THE ICESER?

This section will consider whether Articles 7 and 12 of the ICESCR should serve to protect esports players against physical and mental health problems in esports activities. To answer this question, this section will examine the following points: (1) Who can exercise the rights guaranteed by Articles 7 and 12?; (2) Who are considered duty-bearers in the esports community under the ICESCR?; and (3) What should duty-bearers do to ensure the enjoyment of the rights guaranteed by Articles 7 and 12?

#### A. Who Can Exercise the Rights Guaranteed by Articles 7 and 12 of the ICESCR?—“Professional Esports Players” or “Amateur Esports Players”?

First, it is necessary to consider who can exercise the rights guaranteed by Articles 7 and 12 in the context of esports. In this regard, esports players can be categorized as either “amateur esports players” or “professional esports players.” The latter have frequently suffered physical and mental health problems due to their excessive training for professional esports competitions. More importantly, some states qualify professional esports players as “workers” under their national labor laws. For instance, France and Germany consider them to be “workers” under their respective laws.<sup>62</sup> If they are “workers,” they should enjoy the rights guaranteed by Articles 7 and 12 since they are controlled by their employers (i.e. esports teams or organizations) under a command-order relationship.

On this basis, employers must allow their professional esports players to engage in esports activity only under *decent and reasonable working conditions*.<sup>63</sup> Additionally, state parties must take necessary measures (i.e.,

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<sup>62</sup> See Gabriel Ionica, *French Government Pass Legislation to Regulate Esports Player Contracts*, ESPORTS INSIDER (May 13, 2017), <https://esportsinsider.com/2017/05/5659/>; see also *Statut Des Joueurs Professionnels Salariés De Jeux Vidéo*, DIRECTORATE GÉNÉRALE DES ENTREPRISES (Mar. 29, 2022), <https://www.entreprises.gouv.fr/fr/numerique/politique-numerique/statut-des-joueurs-professionnels-salaries-de-jeux-video> (providing more detailed information about the legal status of professional esports players in France); Alexander Schlicht & Felix Hilgert, *eSports Player Contracts: Should Pro Gamers Be Treated Like Pro Athletes?*, VIDEO.GAMES.LAW (Feb. 20, 2018), <https://gameslaw.org/esports-player-contracts-should-pro-gamers-be-treated-like-pro-athletes/>.

<sup>63</sup> *General Comment No. 23*, *supra* note 42, at paras. 74–75.

legislative and administrative measures) to prevent physical and mental health problems in esports activity. Furthermore, esports teams and organizations should limit the excessive working hours of their professional esports players to prevent such health problems. They should provide their professional esports players with the necessary information and training programs to mitigate occupational health and safety risks in professional esports activities. Accordingly, it follows that professional esports players can exercise the rights guaranteed by Articles 7 and 12 if they are classified as “workers” under national labor laws.

#### B. Who Are Considered Duty-Bearers in the Esports Community Under the ICESCR?

Even given the fact that the rights guaranteed by Articles 7 and 12 would apply to esports activity, there is still the question of who should ensure enjoyment of these rights. In other words, who has a duty to protect professional esports players against physical and mental health problems? To answer this question, this section will consider who is a duty-bearer in the esports community. The following actors should be considered duty-bearers under Articles 7 and 12: (1) state parties; (2) esports governing bodies; (3) esports associations and organizations; and (4) business enterprises. It is important to note that individuals, i.e. professional esports players, should be recognized as right-holders under international human rights law.<sup>64</sup>

First, Walter Kälin & Jörg Künzli, Professors of Constitutional and International Law, point out that “responsibility for fulfilling the obligations arising from human rights treaties lies with states and state agents.”<sup>65</sup> Thus, state parties should be recognized as esports duty-bearers to ensure the enjoyment of the rights guaranteed by Articles 7 and 12 in order to protect professional esports players against physical and mental health problems caused by esports activities.

Second, there is the question of whether esports governing bodies and esports-related companies<sup>66</sup> should be held responsible for respecting the rights guaranteed by Articles 7 and 12. To answer this question, it is necessary to review the content of the United Nations Guiding Principles on Business and Human Rights (UNGPs),<sup>67</sup> as this instrument clarifies the corporate

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<sup>64</sup> See KÄLIN & KÜNZLI, *supra* note 10, at 68–77.

<sup>65</sup> *Id.* at 69.

<sup>66</sup> This term refers to four types of actors in the esports community: (1) videogame companies (or developers and publishers, such as Riot Games and Valve), (2) platform service providers (for example, Apple App Store, Google Play Store, and Sony PlayStation Platform, etc.), (3) streaming service providers (for example, Twitch and YouTube) and (4) esports tournament organizing companies (for instance, the ESL Gaming).

<sup>67</sup> See generally U.N. Hum. Rts. Off. of the High Comm’r., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect*

responsibility to respect human rights stemming from international human rights treaties.

The UNGPs establish three pillars, which read as follows:

1. States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
2. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
3. The need for rights and obligations to be matched to appropriate and effective remedies when breached.<sup>68</sup>

Regarding the second pillar, Principle 11 of the UNGPs stipulates that: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."<sup>69</sup> Under this provision, esports-related business enterprises have a voluntary responsibility to respect human rights in order to avoid human rights infringements caused by esports activities. This provision should also apply to esports governing bodies.<sup>70</sup>

More importantly, Principle 12 of the UNGPs provides that: The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.<sup>71</sup>

In other words, the corporate responsibility to respect human rights suggests that business enterprises should uphold the human rights prescribed in the International Bill of Human Rights (i.e., the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR). Given this, esports governing bodies and esports-related business enterprises should respect the rights guaranteed by Articles 7 and 12 in order to protect professional esports players against physical and mental health problems.

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*and Remedy*" *Framework* (2011), [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciples/businesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciples/businesshr_en.pdf) [hereinafter *U.N. Guiding Principles*].

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See JOHN RUGGIE, HARV. KENNEDY SCH., "FOR THE GAME. FOR THE WORLD." FIFA & HUMAN RIGHTS 11 (2016).

<sup>71</sup> *U.N. Guiding Principles*, *supra* note 67.

However, it is important to note that esports governing bodies are different from other sports governing bodies. Internationally recognized esports events, such as the FIFA eWorld Cup, Intel Extreme Masters (IEM), World Cyber Games (WCG), Electronic Sports World Cup (ESWC), Cyberathlete Professional League (CPL), and the League of Legends World Championship (LOL World Championship), are usually organized by esports tournament/league organizers (e.g. ESL Gaming)<sup>72</sup> or esports publishers (e.g. Riot Games).<sup>73</sup> This dynamic exists because video game companies possess copyrights that allow them to exercise exclusive control over their invented creative products, and esports organizing companies have license contracts with video game companies to use their products in commercial esports competitions.<sup>74</sup> Therefore, esports governing bodies usually cannot organize esports competitions without some form of agreement with video game companies to use their products.<sup>75</sup> When esports governing bodies decide to organize esports competitions in collaboration with esports-related business enterprises, they are both held responsible for taking necessary measures to respect human rights in accordance with the provisions of the UNGPs. Taken in conjunction with the provisions of the UNGPs, both esports-related business enterprises and esports governing bodies should be considered duty-bearers under Articles 7 and 12.

In summary, it can be said that there are three duty-bearers in the esports community: (1) state parties; (2) esports governing bodies; and (3) esports-related business enterprises.

C. What Should Duty-Bearers Do to Ensure Enjoyment of the Rights Guaranteed by Articles 7 and 12 of the ICESCR?

This section will consider what esports duty-bearers should do to protect esports players from physical and mental health problems. It is important to note that non-state actors are not responsible for ensuring the enjoyment of the rights guaranteed by Articles 7 and 12 since the ICESCR cannot directly impose obligations on them. However, the UNGPs clarify the “responsibility” of non-

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<sup>72</sup> For instance, the IEM was organized by ESL Gaming in 2006 under the sponsorship of Intel and other partner companies. *See Intel Extreme Masters: ESL*, <https://www.intelxtrememasters.com> (last visited Oct. 12, 2022).

<sup>73</sup> The LOL World Championship is organized by Riot Games. *See Taylor Cocke, How the League of Legends World Championship Shaped an Entire Esport*, ESPORTS OBSERVER (Oct. 11, 2018), <https://archive.esportsobserver.com/esports-essentials-league-worlds/>.

<sup>74</sup> *See Moritz Jäggy, Guide to the Organisation of an E-Sports Tournament*, VISCHER (June 2, 2020), <https://www.vischer.com/en/knowledge/blog/guide-to-the-organisation-of-an-e-sports-tournament-38697/>.

<sup>75</sup> *See Handout from the 11th Annual Cambridge Int'l L. Conf. Cambridge Int'l L.J., Strengthening Glob. Governance Through Int'l L.: Challenges and Opportunities* (Mar. 27, 2022) (on file with author).

state actors to respect human rights,<sup>76</sup> which stems from international human rights treaties, especially the International Bill of Rights (which includes the UDHR, ICCPR, and ICESCR).<sup>77</sup> In this sense, the obligations required by the ICESCR should be implemented by state parties in collaboration with non-state actors within their jurisdictions. Given this dynamic, this section will be divided into the following subsections: (1) States and (2) Esports governing bodies and business enterprises.

### 1. *States*

The ICESCR requires state parties to enforce their human rights obligations under Articles 7 and 12, but the means of doing so vary from state to state.<sup>78</sup> Given the positive obligations of Articles 7 and 12, state parties should take all appropriate actions, including legislative and administrative measures, to protect esports players from physical and mental health problems caused by esports activity.<sup>79</sup> For instance, state parties should adopt national strategy plans to ensure the enjoyment of the right to health in esports activity (administrative measure). To give another example, they should adopt legislation focused on preventing the physical and mental health problems of professional esports players (legislative measure).

However, it is important to note that state parties must consider the autonomy of private associations and organizations. For instance, Switzerland has recognized the autonomy of private associations under Article 60 of the Swiss Civil Code (SCC).<sup>80</sup> This autonomy can be restricted when there is a violation of public policy (or public order) under Article 190(2)(e) of the Swiss Private International Law Act (PILA).<sup>81</sup> Such cases are limited to situations

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<sup>76</sup> Concerning the term “responsibility” in the UNGPs, a report submitted to the Human Rights Council in 2010 explained that “[t]he term ‘responsibility’ to respect, rather than ‘duty’, is meant to indicate that respecting rights is not an obligation that current international human rights law generally imposes directly on companies, although elements may be reflected in domestic laws.” See John Ruggie, U.N. Special Representative of the Secretary-General, *General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 12, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

<sup>77</sup> U.N. *Guiding Principles*, *supra* note 67, at 14.

<sup>78</sup> U.N. *Fact Sheet No. 31*, *supra* note 57, at 24.

<sup>79</sup> *Id.*

<sup>80</sup> Margareta Baddeley, *The Extraordinary Autonomy of Sports Bodies Under Swiss L.: Lessons to Be Drawn*, 20 INT’L SPORTS L.J. 3, 4–5 (2019).

<sup>81</sup> The “public policy” is composed of substantive and procedural public policy. See BERNARD DUTOIT, *DROIT INTERNATIONALE PRIVE SUISSE: COMMENTAIRE DE LA LOI FEDERALE DU 18 DECEMBRE 1987* 868 (Helbing Lichtenhahn Publ’g House, 5th ed. 2016).



where acts and/or omissions of private actors can be recognized as violations of fundamental human rights or general principles of law.<sup>82</sup>

In short, state parties must take legislative and administrative measures to protect esports players from physical and mental health problems caused by esports activity under Articles 7 and 12. When they do so, state parties must avoid excessive interference with the autonomy of private associations and organizations. However, this autonomy can be restricted for public policy purposes set forth in Article 190(2)(e) of the PILA. Specifically, when there is a violation of fundamental human rights or general principles of law that is contrary to public policy, private autonomy can be restricted. Thus, esports players who suffer from physical and mental health problems may require state parties to take legislative and/or administrative measures to prevent infringements of the right to health under Articles 7 and 12.

## 2. *Esports Governing Bodies and Business Enterprises*

Esports governing bodies and business enterprises are not responsible for implementing obligations required of state parties by the ICESCR. However, in light of the provisions of the UNGPs, business enterprises have a corporate responsibility to respect human rights guaranteed by international human rights laws.

In this context, Principle 17 of the UNGPs clarifies what business enterprises should do to respect human rights. It stipulates that:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.<sup>83</sup>

Under this principle, esports-related business enterprises should conduct human rights impact assessments to do their due diligence. Additionally, they should examine whether esports activity has adverse effects on the rights guaranteed by Articles 7 and 12<sup>84</sup>

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<sup>82</sup> Tribunal fédéral [TF] [Federal Supreme Court] Feb. 20, 2018, 4A\_260/2017, III Arrêts du Tribunal fédéral Suisse [ATF] § 5.1 129–30 (Switz.); GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, *ARBITRAGE INTERNATIONAL: DROIT ET PRATIQUE A LA LUMIERE DE LA LDIP 535* (2d ed. 2010).

<sup>83</sup> *U.N. Guiding Principles*, *supra* note 67, at 17.

<sup>84</sup> In fact, some esports-related business enterprises have already engaged in the prevention of physical and mental health problems. See Andy Miah, *How Do Esports Cos. Support Their Cmty.'s Wellness?*, *INT'L J. ESPORTS* 1, 1, 5–7.

This theory should be applied to esports governing bodies as well as other sport governing bodies.<sup>85</sup> Along this vein, John Ruggie published a report titled “*FOR THE GAME. FOR THE WORLD.*” *FIFA & Human Rights* (“FIFA Ruggie Report”) in April 2016. In this report, Ruggie examined how the UNGPs could be incorporated into soccer to achieve the following goals: (1) incorporate human rights language into the FIFA Statutes and the bidding requirements of the FIFA World Cup; (2) identify key gaps in current FIFA policies and practices; and (3) create a report on how FIFA should respect human rights in accordance with the UNGPs.<sup>86</sup> To help achieve these goals, the FIFA Ruggie Report identified “where and how some of the main risks may arise in and around the world of association football that FIFA governs.”<sup>87</sup>

Additionally, the FIFA Ruggie Report provided six recommendations on how to incorporate corporate responsibility to respect human rights in accordance with the UNGPs:

1. To develop and adopt a clear and coherent human rights policy;
2. To embed the commitment to respect human rights through proactive engagement by the top management and FIFA’s political levels where critical decisions are made;
3. To identify and evaluate human rights risks associated with activities and business relationships of the FIFA, including bidding process of host selection;
4. To address human rights risks through building leverage to deal with such risks;
5. To track and report on implementation of respecting human rights; and
6. To enable access to effective remedy for redressing human rights harms that have occurred.<sup>88</sup>

According to the FIFA Ruggie Report, esports governing bodies should follow these recommendations to ensure the enjoyment of the rights guaranteed by Articles 7 and 12.

#### IV. CONCLUSION

In conclusion, Articles 7 and 12 of the ICESCR serve to protect “professional esports players” from physical and mental health problems caused by esports activity. However, “amateur esports players” would fall outside the

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<sup>85</sup> See Domenico Carolei & Nadia Bernaz, *Accountability for Hum. Rts.: Applying Bus. and Hum. Rts. Instruments to Non-Governmental Orgs.*, 13 J. HUM. RTS. PRAC. 507, 513, 517, 519–520 (2022).

<sup>86</sup> RUGGIE, *supra* note 70, at 9.

<sup>87</sup> *Id.* at 21.

<sup>88</sup> *Id.* at 29–35.

Fall 2022] *PROTECTION OF PROFESSIONAL ESPORTS PLAYERS* 19

scope of Articles 7 and 12 because they are not qualified as “workers” under national labor laws.

On this basis, the following must be done to achieve the implementation of human rights responsibilities by esports duty-bearers under Articles 7 and 12:

1. State parties must take legislative and administrative measures to protect professional esports players against physical and mental health problems caused by esports activity;
2. Esports-related business enterprises should conduct human rights impact assessments to do their due diligence. In this context, they should examine whether esports activity has adverse effects on the rights of professional esports players under Articles 7 and 12;
3. Esports governing bodies should take necessary measures to respect the rights guaranteed by Articles 7 and 12.

By following these suggestions, esports duty-bearers will satisfy their human rights responsibilities to protect “professional esports players” against physical and mental health problems caused by esports activity.