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Fall 2016 Symposium: Corruption in International Sports

“When We Know Better, We Do Better.” Embedding the Human Rights of Players as a Prerequisite to the Legitimacy of Lex Sportiva and Sport’s Justice System

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INTRODUCTION

Players are people first, and athletes second. Former American National Football League (“NFL”) linebacker Scott Fujita, who was also a member of the management committee of the National Football League Players Association (“NFLPA”) during his career, wrote in 2013 of a conversation he was having with his three young daughters

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on the United States of America's historic struggle for progress. His words were prompted by the United States Supreme Court considering legal questions associated with same sex marriage:

At some point, they will hear the term “separate but equal,” and will learn there was a time when their father would not have been able to go to the same school or sit in the same restaurant with many of the same friends that he now shares an N.F.L. locker room with. But then I can say to them, “That was a long time ago, and look how far we’ve come.”

I anticipate us having similar conversations about women's suffrage or Rosa Parks. And each time, I'll be able to say that this country moved toward progress. Sometimes, change is slow, but *when we know better, we do better*.

Sometimes, people ask me what any of this has to do with football. Some think football players like me should just keep our mouths shut and focus on the game. But *we're people first, and football players a distant second*. Football is a big part of what we do, but a very small part of who we are. And historically, sports figures like Jackie Robinson, Billie Jean King and Muhammad Ali have been powerful agents for social change. That's why the messages athletes send — including the way they treat others and the words they use — can influence many people, especially children.”²

The continued revelations of wide-spread and systemic corruption, cheating, and human rights abuse in world sport illustrate just how difficult progress can be. When will world sport finally know better so it can do better?

Players are the public face of world sport.³ Athletic performances are essential to the prestige, popularity and viability of the Mega Sporting Events (“MSEs”) that sit at the pinnacle of world sport, including football's⁴ World Cup and the Olympic Games.

² N.Y. TIMES, *Acceptance by Example, on the Field and at Home* (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/sports/football/scott-fujita-acceptance-by-example-in-locker-room-and-at-home.html> (emphasis added).

³ The words “players” and “athletes” are used interchangeably in this paper.

⁴ Football, as used in this paper, refers to the sport known as soccer in the United States,

Accordingly, the players are essential to the success of the sporting and multi-billion-dollar business undertakings of International Sporting Organisations (“ISOs”) such as the International Olympic Committee (“IOC”), the Fédération Internationale de Football Association (“FIFA”), World Rugby, the International Cricket Council (“ICC”) and other international sporting federations.⁵

The work of professional athletes is, by its nature, highly skilled and valuable, yet risky and precarious. As a condition of that work, athletes are made subject to regulations by ISOs that are extraordinary and far-reaching in their complexity and subject matter.⁶ Increasingly, those regulations are not justiciable in accordance with national law.⁷ The athlete, therefore, is at the centre of the intersection between sport and human rights.

Respect for the fundamental rights of the individual is essential to progress, the lifting of standards, and is an indispensable element of any effective governance system. In adopting the *Universal Declaration of Human Rights* in 1948, the peoples of the United Nations “reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”⁸ The corporate responsibility to respect human rights is, according to the United Nations *Guiding Principles on Business and Human Rights* (“UNGPs”), “a global standard of expected conduct for all business enterprises wherever they operate” and one which “exists independently of States’ abilities and / or willingness to fulfil their own human rights obligations, and does

unless noted.

⁵ See generally, Rütter+Partner, THE ECONOMIC IMPORTANCE OF INTERNATIONAL SPORTS ORGANISATIONS IN SWITZERLAND (2013), http://www.fifa.com/mm/document/affederation/footballgovernance/02/22/25/11/international_sports_organisations_report_en_ok_neutral.pdf (last visited April 7, 2017); FIFA, FINANCIAL AND GOVERNANCE REPORT 2015 (2016), http://resources.fifa.com/mm/document/affederation/administration/02/77/08/71/gb15_fifa_web_en_neutral.pdf (last visited April 7, 2017); see also International Olympic Committee, IOC ANNUAL REPORT 2015 (2015), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Annual-Report/IOC-Annual%20Report-2015.pdf#_ga=1.203402001.1222881834 (last visited April 7, 2017).

⁶ Action for Good Governance in International Sports Organisations, *Good governance in International Non-Governmental Sports Organisations* at 203, http://www.playthegame.org/fileadmin/documents/Good_governance_reports/AGGIS-report_-_16Good_governance_in_INGSOs__p_190-217_.pdf.

⁷ *Id.*

⁸ *Universal Declaration of Human Rights*, UNITED NATIONS HUMAN RIGHTS at 1, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf

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not diminish those obligations.”⁹ Further, “it exists over and above compliance with national laws and regulations protecting human rights.”¹⁰

This paper examines the governance and conduct of ISOs and their impact on players by reference to internationally recognised human rights. It does so by firstly reviewing the applicable international human rights instruments and standards, including those promulgated within sport.¹¹

Secondly, this paper considers the governance of ISOs and how they, as cartels, couple the notions of the specificity and autonomy of sport with mandatory arbitration clauses to achieve a dominant position in their dealings with athletes.¹² This dominance is particularly pronounced at the global level notwithstanding an historic legal battle having been waged by players throughout the world for the recognition of their rights to work and contract in their chosen field with liberty and freedom. The notions of the autonomy and specificity of sport, which are becoming increasingly discredited, run counter to the development of a governance framework that has the requisite cultural, institutional and legal commitment to the fundamental human rights of the players.

Thirdly, this paper explains the enormous rise in the unionisation of professional athletes during a time of declining unionisation across industry.¹³ In so doing, it provides an overview of the circumstances and human rights risks confronting players which are encouraging them to organise.

Finally, this paper identifies the essential steps that ISOs must take to embed the fundamental rights of players and how those steps can fit comfortably within the vast global capacity of ISOs to regulate, through political influence and contract, the conduct of everyone involved in their sport at the international, regional, and national levels.¹⁴ Indeed, that legal and political authority can not only be a force for good but set a global benchmark for the respect and fulfilment

9. *Guiding Principles on Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS at 13 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

10. *Id.*

11. *See infra* Part I.

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

of human rights by business.

I. APPLICABLE INSTRUMENTS AND STANDARDS

A. *INTERNATIONAL INSTRUMENTS – SPORT AND HUMAN RIGHTS*

Article 1 of the United Nations Educational, Scientific and Cultural Organization's ("UNESCO") *International Charter of Physical Education, Physical Activity and Sport* ("UNESCO Charter")¹⁵ provides that the practice of physical education, physical activity and sport is a fundamental right for all.¹⁶ The UNESCO Charter sets out a number of universal defining principles which each ISO should ensure are upheld both by itself as an international governing body in sport and the various sporting bodies and stakeholders that operate under each ISO's auspices.¹⁷ Those defining principles include:

- Access to sport without discriminating on the basis of ethnicity, gender, sexual orientation, language, religion, political or other opinion, national or social origin, property or any other basis.¹⁸
- The freedom to develop through sport must be supported by all governmental, sporting and educational institutions.¹⁹
- Sport must be inclusive and promote equal opportunities for all.²⁰
- Every human being must have the opportunity to attain a level of achievement through sport.²¹
- All stakeholders must participate in creating a strategic vision for sport, including sport

15. *International Charter of Physical Education, Physical Activity and Sport*, UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, <http://unesdoc.unesco.org/images/0023/002354/235409e.pdf> (last visited April 7, 2017).

16. *Id.* at 2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

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professionals.²²

- All stakeholders must ensure their activities are economically, socially and environmentally sustainable.²³ In particular, the organisers of sports events “must pay due consideration to the overarching principle of sustainability, be it economic, social, environmental or sporting,”²⁴ especially in relation to the legacy of major sports events.²⁵
- Policy decisions must be based on sound factual evidence.²⁶
- Good governance must be implemented.²⁷

The link between good governance as emphasized in the UNESCO Charter and the protection of human rights is important and one that will be explored in this paper in relation to the position of the players. In his April 2016 report to FIFA *For the Game. For the World. FIFA and Human Rights*, Professor John G. Ruggie wrote:

Bribery and corruption is not only about giving and taking money for private gain that has been intended for broader social purposes. It may also enable the parties involved to evade legal and contractual requirements, including those protecting human rights. Lack of financial integrity, therefore, is a foundational source of human rights risks.²⁸

Article 10.5 of the UNESCO Charter imposes clear obligations on employers of the players in sport:

Any employer in the field of physical education, physical activity or sport or related areas must pay due consideration to the psychological and physical health of their employees, *including professional athletes. International labour conventions and basic human*

22. *Id.* at 4.

23. *Id.* at 5.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 7.

28. John G. Ruggie, *For the Game. For the World.*, HARVARD UNIVERSITY at 21 (2016), <https://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68>.

rights must be respected, in particular to avoid child labour and human trafficking.²⁹

Principle 12 of the UNGPs and its commentary provides that an “authoritative list of the core internationally recognised human rights is contained in the *International Bill of Human Rights*.”³⁰ The critical instruments include the: *Universal Declaration of Human Rights*;³¹ *International Covenant on Civil and Political Rights*;³² *International Covenant on Economic, Social and Cultural Rights*;³³ and the eight core conventions of the International Labour Organization (“ILO”) as set out in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.³⁴

Without limitation, the relevant instruments entitle everyone, including professional athletes, to the: right of freedom of association, to form trade unions and to collectively bargain; right to work and the free choice of employment; protection of wages; right to equal pay for equal work; elimination of forced labour, including through subtle means such as the accumulation of debt or the retention of identity papers; right, if a child, to special care and assistance; and right to be protected against discrimination.³⁵ The UNGPs also provide that, “[d]epending on circumstances, business enterprises may need to consider additional standards.”³⁶

Principle 24 of the UNGPs requires enterprises to prioritise their efforts to deal with actual or potential human rights risks “that would be most severe, recognizing that a delayed response may affect remediability.”³⁷ A complete analysis of the actual and potential human rights impacts of the conduct and activities of ISOs on players is

29. *International Charter of Physical Education, Physical Activity and Sport*, *supra*, note 15 at 8 (emphasis added).

30. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 14.

31. *Universal Declaration of Human Rights*, *supra*, note 8.

32. *International Covenant on Civil and Political Rights*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited April 7, 2017).

33. *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>

34. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf (last visited April 7, 2017).

35. *Universal Declaration of Human Rights*, *supra*, note 8; *International Covenant on Civil and Political Rights*, *supra*, note 32 at 5-6; *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, *supra*, note 34, at 2.

36. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 14.

37. *Id.* at 26.

beyond the scope of this paper. This paper focuses on three key rights of players: (1) the right to organise and collectively bargain; (2) the right to work and to the free choice of employment; and (3) the protection of wages. These are, in many ways, the foundational and most important rights that players need to have respected by ISOs, employers, and other enterprises involved in the governance of world sport. A failure by sport to respect these rights can end a player's career.

B. THE REGULATORY COMMITMENT OF ISOs TO HUMAN RIGHTS

The *Olympic Charter*, as in force from 2 August 2015, “expressly connects sport, human rights and peace and builds on the philosophy that underpinned the adoption of the Universal Declaration of Human Rights in 1948.”³⁸

Similarly, article 3 of the *FIFA Statutes* was amended in February 2016 to provide that “FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.”³⁹

In 2016, both the IOC and FIFA took steps to embed respect for human rights into key aspects of their organisation.⁴⁰ The IOC held meetings with the Sports and Rights Alliance, a coalition of non-governmental organisations and trade unions, and agreed to amend the *IOC Host City Contract* for 2024 by making express provision in relation to human rights.⁴¹ Section 13 now provides:

...the Host City, the Host NOC (National Olympic

38. Olympic Charter, INTERNATIONAL OLYMPIC COMMITTEE (2015), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

39. Fed'n Internationale de Football Ass'n [FIFA], *FIFA Statutes*, at 63 (Effective April 2016), http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutswen_neutral.pdf.

40. *Id.*; Explanatory Notes to Host City Contract 2024 – Principles, INTERNATIONAL OLYMPIC COMMITTEE at 17, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host%20City%20Contract%202024%20-%20Principles.pdf#_ga=1.1431858.2090504467.1478856487.

41. *Requirements for Human Rights, Labour Rights, Anti-Corruption and Stakeholder Involvement for Olympic and Paralympic Games*, SPORT & RIGHTS ALLIANCE, <http://www.sportandhumanrights.org/wordpress/wp-content/uploads/2016/12/SRA-Letter-to-IOC.pdf> (last visited April 7, 2017); *Olympics: Host City Contract Requires Human Rights*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2017/02/28/olympics-host-city-contract-requires-human-rights>.

Committee) and the OCOG (Organising Committee for the Olympic Games) shall, in their activities related to the organisation of the Games:

a. prohibit any form of discrimination with regard to a country or a person on grounds of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status;

b. protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and regulations applicable in the Host Country *and in a manner consistent with all internationally-recognised human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights*, applicable in the Host Country; and

c. refrain from any act involving fraud or corruption, in a manner consistent with any international agreements, laws and regulations applicable in the Host Country and all internationally-recognised anti-corruption standards applicable in the Host Country, including by establishing and maintaining effective reporting and compliance.⁷⁴²

In October 2016, FIFA adopted a new strategy, *FIFA 2.0: The Vision for the Future* which states that FIFA must “champion human rights” to build FIFA into a stronger institution.⁴³ This requires the organisation to “align” its activities with the UNGPs,⁴⁴ and to “use its influence to address these human rights risks as determinedly as it does to pursue its commercial interests.”⁴⁵

The *Olympic Charter* includes seven “fundamental principles of Olympism.”⁴⁶ The fourth principle states that: “The practice of sport is a human right. Every individual must have the possibility of practising

42. *Explanatory Notes to Host City Contract 2024 – Principles*, *supra*, note 40 (emphasis added).

43. *FIFA 2.0: The Vision for the Future*, FIFA at 30 (Oct. 13, 2016), http://resources.fifa.com/mm/document/affederation/generic/02/84/35/01/fifa_2.0_vision_low_neu.17102016_neutral.pdf.

44. *Id.* at 42.

45. *Id.* at 63.

46. *Olympic Charter*, *supra*, note 38.

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sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.”⁴⁷

The general principles of human rights enunciated in the *Olympic Charter* and the *FIFA Statutes*, however, have yet to be entrenched as express legal rights of athletes working within their purview. A further process of regulatory promulgation is needed. Such a process was recently contemplated but not completed by the IOC when it, through the adoption of *Olympic Agenda 2020*, moved to address the concerns of LGBTI athletes in response to crowd behaviour at the 2014 Sochi, Russia Winter Olympic Games.⁴⁸ Specifically, Recommendation 14 of *Olympic Agenda 2020* is to “strengthen the 6th Fundamental Principle of Olympism.”⁴⁹ The sixth principle now reads:

The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.⁵⁰

In June 2017, FIFA released *FIFA’s Human Rights Policy May 2017 edition*.⁵¹ The development of the policy accorded with the first recommendation of Professor Ruggie in his report to FIFA to “Adopt a Clear and Coherent Human Rights Policy” which he described as “the first step for any organization on the path to respecting human rights.”⁵² The policy, which was adopted by the FIFA Council in May 2017,⁵³ provides that: “FIFA is committed to respecting human rights

47. *Id.* at 13.

48. *See generally* Olympic Agenda 2020, THE INTERNATIONAL OLYMPIC COMMITTEE (2017), <https://www.olympic.org/olympic-agenda-2020>; *see also* Olympic Agenda 2020, INTERNATIONAL OLYMPIC COMMITTEE (Dec. 2014), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-20-20-Recommendations.pdf#_ga=1.234177310.1222881834.1489166123.

49. *Id.*

50. *Olympic Charter*, *supra*, note 38.

51. Fed’n Internationale de Football Ass’n [FIFA], *FIFA’s Human Rights Policy May 2017 Edition* http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf

52. *For the Game. For the World.*, *supra*, note 28 at 29.

53. Fed’n Internationale de Football Ass’n [FIFA], *FIFA Activity Update on Human Rights May 2017*, http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/21/activityupdate_humanrights_may2017_neutral.pdf at 2.

in accordance with the UNGPs.”⁵⁴

FIFA’s commitment embraces all internationally recognised human rights, including those contained in the *International Bill of Human Rights* (consisting of the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*) and the ILO’s *Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.⁵⁵

FIFA’s “salient human rights risks” include “[p]layers’ rights”. Accordingly, FIFA “is committed to helping protect the rights of football players and will continually evaluate existing regulations and processes and, if necessary, consider additional measures to address respective risks.”⁵⁶ Further:

FIFA embeds its commitment throughout the organisation and engages in an ongoing due diligence process to identify, address, evaluate and communicate the risks of involvement with adverse human rights impacts. FIFA is committed to providing for or cooperating in remediation where it has caused or contributed to adverse human rights impacts.⁵⁷

Where national laws and regulations and international standards differ or are in conflict with each other, FIFA will follow the higher standard without infringing upon domestic laws and regulations.⁵⁸

Significantly, paragraph 13 of the policy reads: “Human rights commitments are binding on all FIFA bodies and officials when exercising their respective powers and competencies, including when interpreting and enforcing FIFA rules.”⁵⁹

Accordingly, *FIFA’s Human Rights Policy May 2017 edition* makes it clear that not only is FIFA committing to respecting internationally recognised human rights, it is committed to recognising

54. Fed’n Internationale de Football Ass’n [FIFA], *FIFA’s Human Rights Policy May 2017 Edition* http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf, Paragraph 1 at 5.

55. *Id.* paragraph 2 at 5.

56. *Id.* paragraph 5 at 6-7.

57. *Id.* paragraph 6 at 7.

58. *Id.* paragraph 7 at 7.

59. *Id.* paragraph 13 at 10.

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those rights of the players in a proactive manner which is binding and provides for remediation.

II. SPORTS GOVERNANCE: A MONOLITHIC FRONT

A. THE SPECIFICITY AND AUTONOMY OF SPORT

Despite the broad commitment to human rights in the *Olympic Charter*, there are considerable cultural and institutional barriers to the full acceptance of the human rights of players by ISOs and the world of sport. In simple terms, this is due to how sport is governed and the emphasis placed on the autonomy and specificity of sport. These notions only serve to exacerbate the anti-competitive governance structures of ISOs.

The fifth and seventh fundamental principles of Olympism provide:

5. Recognising that sport occurs within the framework of society, sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied...

7. Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.⁶⁰

According to the *Sports Governance Observer 2015*, as prepared by Dr. Arnout Geeraert and published by the October 2015 *Play the Game* conference in Aarhus, Denmark:

Even though they have allowed politics to influence their policies and decisions, autonomy from formal regulatory public interference is an obsession for [International Sporting Federations, or] ISFs. Modern sport's construction is, in essence, rooted in classic liberalism, namely in the concept of freedom of association. Autonomy is therefore a deeply ingrained

⁶⁰ *Olympic Charter*, *supra*, note 38 at 13-14.

and cherished principle in the sports world. It is an essential part of ISFs' belief system; a doctrine that they aim to spread among political institutions and stakeholders in order to keep the governance of international sport strictly private."⁶¹

Unconditional, or poorly defined, autonomy presents a threat to the good governance of sport. The prevalence of corruption within ISOs promoted *Play the Game* to label 2015 the "year that killed the autonomy of sport."⁶² In his report of 2 December 2015, Dr. François Carrard, the independent chair of the 2016 FIFA Reform Committee, wrote:

FIFA is currently going through the worst crisis of its history. The current crisis should also be considered as a unique opportunity for FIFA to renew itself. Thus, in order to restore confidence in FIFA, significant modifications to its institutional structure and operational processes are necessary to prevent corruption, fraud, self-dealing and to make the organisation more transparent and accountable.⁶³

The previous month, the report of the World Anti-Doping Agency ("WADA") independent commission into Russian athletics chaired by Mr. Dick Pound found that "[a]ctual and potential conflicts of interest at the WADA Executive Committee and Foundation Board make decisive actions regarding Code compliance unnecessarily difficult to achieve."⁶⁴ The report also found a deeply rooted culture of cheating at the highest level of Russian athletics involving the governing body and anti-doping agency, the exploitation of athletes and bribery and corruption within the International Association of Athletics Federations ("IAAF").⁶⁵

61: Arnout Geeraert, Sports Governance Observer 2015, *PLAY THE GAME* at 13 (Oct. 2015), http://www.playthegame.org/media/5786679/sgo_report_final_3.pdf.

62: Jens Sejer Andersen, *The Year that Killed the Autonomy of Sport*, *PLAY THE GAME* at 1 (Dec. 23, 2015), http://www.playthegame.org/news/comments/2015/021_the-year-that-killed-the-autonomy-of-sport/.

63: 2016 FIFA Reform Committee Report, FIFA at 1 (December 2, 2015), https://resources.fifa.com/mm/document/affederation/footballgovernance/02/74/17/54/2015.11.27finalreport_forpublication_neutral.pdf.

64: *The Independent Commission Report #1: Final Report*, INDEPENDENT COMMISSION INVESTIGATION at 276 (Nov. 9, 2015), https://www.wada-ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf.

65: *The Independent Commission Report #1: Final Report* (Nov. 9, 2015) <https://www.wada->

Recognition of the “specific nature of sport,” as a notion within the *Treaty on the Functioning of the European Union* (“TFEU”), is, of course, conditional.⁶⁶ It demands good governance, social dialogue and the protection and development of young people, especially through education.⁶⁷ Further, it does not affect sport where it is an economic activity.⁶⁸ Reforms are required for these conditions to be upheld. As sports are structured as cartels, they warrant not special treatment and protection, but enhanced scrutiny and accountability.

A 2010 paper of the European Parliament on the TFEU and European Union (“EU”) sports policy encourages social dialogue as a vehicle for the sports movement to take the lead in resolving tensions over the meaning of the specificity of sport, stating:

Rather than passively relying on the reference to the “specific nature of sport” contained in Article 165 to seek to repel the influence of EU law in sport, *the sports movement should take a lead in defining this contested term. This definition should be built into the relevant sports regulations following an open and transparent method of operation facilitated by the governing bodies but involving affected stakeholders. The definition should be thoroughly reasoned and backed with robust data.*⁶⁹

However, the development of social dialogue within sport has proven to be particularly challenging. The paper also notes:

In this respect, the reference in Article 165(2) to the promotion of cooperation between bodies responsible for sports adds impetus to the (European) Commission’s agenda. *In particular, the Commission*

ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf.

66. Consolidated Version of the *Treaty on the Functioning of the European Union*, OFFICIAL JOURNAL OF THE EUROPEAN UNION at 120 (October, 26, 2012), http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF; *Treaty on the Functioning of the European Union* & Comments, THE LISBON TREATY, <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments.html>.

67. *See generally id.*

68. *See generally id.*; Case C-519/04P David Meca Medina and Igor Majcen v. Commission (2006) ECR I-6991 and Case T-313/02 Meca-Medina and Majcen v Commission (2004) ECR II-3291.

69. Dr. Richard Parrish, et al., *The Lisbon Treaty and EU Sports Policy: Study*, EUROPEAN PARLIAMENT at 8, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cult/dv/esstudyeusportspolicy/esstudyeusportspolicyen.pdf (emphasis added).

*has long promoted dialogue with the sports movement and has been at the forefront of encouraging social dialogue. Article 165 also adds impetus to efforts to move dialogue between the EU and the sports movement onto a more structured footing. However, given the diversity of the sports movement, structuring dialogue on a meaningful and inclusive basis is a significant challenge for the EU.*⁷⁰

The slow development of social dialogue would not seem to be solely a structural issue, as advanced and sophisticated collective bargaining occurs in many parts of the sporting world, including in various sports in North America, Australia, and New Zealand as well as within European and world football.⁷¹ The issue is leverage, with the bargaining position of the athletes and their representatives being undermined by the recognition of sport's apparently special nature without the condition that it be implemented with the requisite knowledge base obtained through social dialogue with the partners most affected and underpinned by the recognition of and respect for the rights of the players.

B. "AN EMPLOYERS' SYSTEM..."

Underpinning the dominant position of ISOs is the fact that they are structured as cartels and often enjoy a monopoly position in the labour market for players. According to Braham Dabscheck, Australia's leading academic on the industrial relations aspects of sport:

The major reason why clubs act, or more correctly have acted, collectively is due to 'the peculiar economics of professional team sports.' Unlike other areas of economic life, sporting contests require the cooperation of competitors to create a product - namely, a game, or a series of games in a 'regular' competition...

In addition to this, however, it has been argued that if a league is to generate interest, and enhance its income-

⁷⁰ *Id.* at 7-8.

⁷¹ See generally, Brendan Schwab, *Collective Bargaining in Australian Professional Team Sports*, ASSH Bulletin No. 29 (Dec. 1998); see also Daniel Pannett, *Collective Bargaining in Sport: Challenges and Benefits*, 4 UCL Journal of Law and Jurisprudence 189 (2015); see also Ryan T. Dryer, Comment: *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. Disp. Resol. 267 (2008).

earning potential, it needs to maximise the uncertainty of the sporting competition...

The major way in which clubs traditionally colluded was in the labour market. Various leagues, and their constituent clubs, developed employment rules which tied a player to the club he or she originally signed with and/or placed limits on their income ... Economists describe this situation, where a player can only negotiate with a single buyer, as a monopsony.⁷²

In simple terms, sporting organisations are structured so as to exercise great power in their dealings with athletes. In professional team sports, a wide range of controls over the movement of players have been employed from time to time, including: the retain and transfer system; the reserve clause; player drafts; zoning; permit rules; training compensation; home grown player rules; and salary caps.⁷³

These rules all place restrictions on the economic and sporting freedom of the players. Accordingly, they may be in conflict with the common law doctrine of restraint of trade. In 1894 in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition*,⁷⁴ Lord Macnaughten defined the restraint of trade doctrine as follows:

The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore, void. But there are exceptions. Restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it

⁷² Braham Dabscheck, *Industrial Relations in Australasian Professional Team Sports*, 4, 30 Otemon J. of Australian Studies 3 (2004) available at <https://www.otemon.ac.jp/research/labo/cas/publication/pdf/30/2.pdf>.

⁷³ *Id.* at 11.

⁷⁴ *See generally* [1894] AC 535.

is in no way injurious to the public.⁷⁵

The test under competition law is similar in the major sporting jurisdictions of the United States and Europe.⁷⁶ Freedom of movement and contract are rights, but not absolute ones. Restrictions can be justified if they are designed to advance a legitimate interest, and go no further than is reasonably necessary in order to do so.

The first major legal victory for free agency came over fifty years ago – in 1963 – when England international George Eastham and the Professional Footballers' Association (“PFA”) challenged football's retain and transfer system as being an unreasonable restraint of trade.⁷⁷ Eastham wanted to move from Newcastle United to Arsenal, and was out of contract. He refused to sign a new contract with Newcastle, but was “retained” by the club.

Eastham learned this officially on 30 June 1960, the last day of his contract. He was not a playing, contracted, or paid member of Newcastle United; but he was ineligible to play for anyone else. On 13 October 1960, he, with the backing of the PFA, began legal proceedings. Some five weeks later, his requested transfer was granted, for a fee of £47,000 (players could then earn a maximum of £20/week). By this stage, the whole affair had grown into a test case involving the basic rights of all professional footballers. Eastham allowed his case to be pressed to its conclusion.

Mr. Justice Wilberforce declared that the retain and transfer system was an unreasonable restraint of trade and therefore was not binding on Eastham. He referred to the administrators as “reasonable men whose attitude to their players was as much paternal as proprietary.” He said the retain and transfer system was:

...an employers' system, set up in an industry where the employers have succeeded in establishing a monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organized than the employees. No doubt the employers all over the world consider the system a

⁷⁵ *Id.* at 565.

⁷⁶ Sherman Anti-Trust Act 1890, 5 U.S.C. sections 1-7 and amended by the Clayton Act in 1914 (15 U.S.C. sections 12-27).

⁷⁷ *Eastham v Newcastle United [1964] Ch. 413*. See DAVID MCARDLE, FROM BOOT MONEY TO BOSMAN, FOOTBALL, SOCIETY, AND THE LAW (2000); Steve Tongue, *Heart of the Union: Why the Modern Game Should Be Grateful to George Eastham*, Independent (Jan. 14, 2007) <http://www.independent.co.uk/sport/football/news-and-comment/heart-of-the-union-why-the-modern-game-should-be-grateful-to-george-eastham-432060.html>

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good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interests.⁷⁸

Although fought as a question of competition law, the historic words of the athletes at the centre of these struggles resonate strongly with the language of human rights. For example, St. Louis Cardinals baseball player, Curt Flood, on 24 December 1969, wrote to Major League Baseball (“MLB”) Commissioner Bowie Kuhn:

Dear Mr. Kuhn,

After twelve years in the major leagues I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system that produces that result violates my rights as a citizen and is inconsistent with the laws of the United States and the several states.

It is my desire to play baseball in 1970 and I am capable of playing. I have received a contract from the Philadelphia club, but I believe I have the right to consider offers from other clubs before making any decisions. I, therefore, request that you make known to all the major league clubs my feelings in this matter, and advise them of my availability for the 1970 season.⁷⁹

In reply, Mr. Kuhn wrote:

Dear Curt,

. . . You have entered into a current playing contract with the St. Louis club, which has the same assignment provision as those in your annual major league contracts since 1956.

I do not see what action I can take and I cannot comply with the request contained in . . . your letter.⁸⁰

Kuhn’s rejection of Flood, expected as it was, came in the midst

78: *Eastham v Newcastle United* [1964] Ch. 413, at 438.

79: National Archives Catalog, *Letter to Bowie K. Kuhn*, <https://research.archives.gov/id/278312> (stating he had the right to consider offers from other baseball clubs before signing a contract) (DEC. 24, 1969).

80. *Id.*

of an era of athletes fighting for the freedom to pursue their careers. While Flood was to lose his battle for free agency before the United States Supreme Court due to a combination of *stare decisis* and anomalous precedent from the 1920s,⁸¹ MLB players would ultimately win free agency in the 1970s.⁸² In jurisdictions as spread as the United States, the United Kingdom, Australia, and the European Union, the fundamental right of players to pursue their profession with liberty and freedom would be judicially recognised.⁸³

Balmain and Australian rugby league international Dennis Tutty challenged the New South Wales Rugby League's equivalent of football's retain and transfer system in *Buckley v Tutty*.⁸⁴ Like Eastham, Tutty's contract with Balmain had expired and he could not play anywhere else unless Balmain gave him permission to do so.⁸⁵

The High Court of Australia extended the *Eastham* decision by looking beyond the retention aspect of the system and at the impact of transfer fees, stating that:

In our opinion the rules now under consideration go beyond what is reasonable in two main respects. In the first place, they enable a club to prevent any professional who has played in one of its teams from playing with another club, notwithstanding that he has ceased to play for the club which retains him and no longer receives any remuneration from that club.

...A second objection to the rules in their present form is in relation to the question of transfer fees. Although a club does not wish to retain a player, and is prepared to see him go to another club, it may fix a transfer fee,

81. *Flood v. Kuhn*, 407 U.S. 282, 258 (1972); *id.* at 290.

82. *Kansas City Royals Baseball Corporation, Plaintiff, v. Major League Baseball Players Association, Defendant, Golden West Baseball Company et al., Plaintiff-Intervenors*, 409 F.Supp. 233 (1976).

83. See *supra* notes 77 to 82; see *infra* notes 84 to 95; see generally *Robertson v. National Basketball Association* 389 F.Supp. 867 (1975); *Greig and others v. Insole and others: World Series Cricket Pty. Ltd. v. same.* [1977 G. No. 2246] 1977 J. No. 4876; *John Mackey et al., v. National Football League et al.*, 543 F.2d 606; *McNeil v. National Football League* 790 F.Supp. 871 (1992).

84. [1971] HCA 71 363.

85. Braham Dabscheck, *Righting a Wrong: Dennis Tutty and His Struggle Against the New South Wales Rugby League*, 4 Australian & New Zealand Sports L.J. 145, 151-52 (2009), available at <http://www.austlii.edu.au/au/journals/ANZSportsLawJl/2009/7.pdf>; Braham Dabscheck, *Industrial Relations in Australasian Professional Team Sports*, 30 *Otemon J. of Australian Studies* 3, 4 (2004), available at <https://www.otemon.ac.jp/research/laboc/cas/publication/pdf/30/2.pdf>.

most of which goes to the club itself, although it may be quite unrelated to any benefit which the player has received from his membership of or association with the club... It is no answer to say that the transfer fee may be fixed by reference to what it would cost the club to obtain another player equally skillful, for this is only another way of saying that an employer may restrain an employee from working elsewhere unless he is compensated for the loss of his services. In this respect also the restraint imposed by the rules goes further than is necessary to protect the reasonable interests of the League and its members.⁸⁶

Sport's employment rules returned to the High Court of Australia again in the early 1990s because of a labour dispute in the New South Wales Rugby League.⁸⁷ Unlike *Tutty*, the *Adamson* case was a class action coordinated by the Association of Rugby League Professionals and its former player and barrister President, Kevin Ryan. At question, rugby league's newly introduced internal draft. At first instance, Mr. Justice Hill found the restraint to be reasonable.⁸⁸ The Full Court of the Federal Court allowed the players' appeal and dealt with the matter succinctly; in the words of Mr. Justice Wilcox: "...the right to choose between prospective employers is a fundamental element of a free society. It is the existence of this right which separates the free person from the serf."⁸⁹

In 1995 in the European Court of Justice came arguably the most important sports law decision of all time. The *Bosman* ruling has revolutionised football.⁹⁰ The case, funded by FIFPro,⁹¹ challenged football's training compensation and transfer system and the imposition of quotas on foreign players within European professional leagues.⁹² The legal case was based on the then Article 39 of the *Treaty*

86. *Buckley v Tutty* (1971) 125 CLR 353 at 378

87. *See Adamson v. New South Wales Rugby League Limited* [1991] FCA 8.

88. *Id.*

89. *Adamson v. New South Wales Rugby League Limited* [1991] FCA 425, paragraph 60 per Wilcox J..

90. *See Case C-415/93, Union Royale Belge Des Societes de Football Ass'n and Others v. Bosman and Others*, 1995 E.C.R. I-4921. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0415>.

91. FIFPro World Players' Union, <https://www.fifpro.org/en/about-fifpro/about-fifpro>. (Noting FIFPro is short for the Federation Internationale des Associations de Footballeurs Professionnels. According to FIFPro's website, "FIFPro is the worldwide representative organisation for all professional footballers").

92. Dr. Geoff Pearson, *Fact-Sheet One: The Bosman Case*,

Establishing the European Community:

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.⁹³

Advocate General Lenz, on the quota system, stated in *Bosman*:

No deep cogitation is required to reach the conclusion that the rules on foreign players are of a discriminatory nature. They represent an absolutely classic case of discrimination on the ground of nationality. Those rules limit the number of players from other Member States whom a club in a particular Member State can play in a match. Those players are thereby placed at a disadvantage with access to employment, compared with players who are nationals of that Member State.⁹⁴

<http://fru.merseyside.org/bosman.htm>.

⁹³ *Treaty on the Functioning of the European Union*, *supra*, note 66 and the *Treaty Establishing the European Community*, Dec. 24, 2002 (C 325/01) 51. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT>.

⁹⁴ Case C-415/93, *Union Royale Belge des Sociétés de Football Association and others*

On the compensation system, Lenz stated:

...that presupposes precisely that a player can be regarded as a sort of merchandise for which a price is to be paid. Such an attitude may correspond to today's reality, as characterized by the transfer rules, in which the 'buying' and 'selling' of players is indeed spoken of. That reality must not blind us to the fact that this is an attitude which has no legal basis and is not compatible with the right to freedom of movement ... I also have considerable doubt as to whether a system which ultimately amounts to treating players as merchandise is liable to promote the sporting ethos...⁹⁵

C. INTERNATIONAL SPORTS ARBITRATION AND 'LEX SPORTIVA'

The modern legal and political recognition of the notions of the specificity and autonomy of sport⁹⁶ have enabled ISOs to establish a legally binding institutional framework that upholds rules that the sport regards as important even where they may be counter to recognised rights under international and domestic law. This has been made possible through the use of arbitration clauses in the contracts signed by athletes as a condition of their participation in sport, coupled with an institutional condemnation of sporting participants who seek access to judicial remedies. This has allowed, for example, for the continuation and growth of a market based player transfer system and its expansion to third party interests despite the ruling of the European Court of Justice in *Bosman*.⁹⁷

Those participating in sport under the auspices of the IOC or another ISO are almost always required to ultimately have sports or labour related disputes determined by the Court of Arbitration for

v. *Bosman and others*, ECLI:EU:C:1995:293.

⁹⁵ *Id.*

⁹⁶ See Int'l Olympic Comm., *Historic Milestone: United Nations Recognises Autonomy of Sport*, (Nov. 3, 2014), <https://www.olympic.org/news/historic-milestone-united-nations-recognises-autonomy-of-sport>. See generally, Consolidated Version of the *Treaty on the Functioning of the European Union*, *supra*, note 66.

⁹⁷ See generally, Bundesgericht [BGer] [Federal Supreme Court] March 27, 2012, 4A_558/2011, <http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202012%204A%20558.pdf>. See also *Matuzalem Case: CAS Decision Fully Backs FIFA Regulations*, FIFA.com (May 20, 2009) <http://www.fifa.com/about-fifa/news/y=2009/m=5/news=matuzalem-case-cas-decision-fully-backs-fifa-regulations-1060323.html>.

Sport (“CAS”), which is headquartered in Lausanne, Switzerland.⁹⁸

Chapter 6 of the *Olympic Charter* deals with “Measures and Sanctions, Disciplinary Procedures and Dispute Resolution.”⁹⁹ It provides for a wide range of measures and sanctions where the *Olympic Charter* and regulations promulgated by the IOC and recognised bodies in advancement of the Charter have been breached.¹⁰⁰ Measures and sanctions may be taken against members of the Olympic Movement including IOC members, international sporting federations, national Olympic committees, host cities, Olympic organising committees, candidate cities, and other recognised associations and organisations.¹⁰¹ The sanctions include withdrawal from the Olympic Games (including from a sport, event or a discipline), suspensions, withdrawal of recognition, and reprimands.¹⁰² Further, the right to host the Olympic Games can be withdrawn.¹⁰³

Rule 61 deals with the resolution of any disputes arising from the *Olympic Charter* in clear terms:

1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).
2. Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.¹⁰⁴

FIFA similarly recognises CAS, including in relation to disputes “between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.”¹⁰⁵ The

98. See generally COURT OF ARBITRATION FOR SPORT, <http://www.tas-cas.org/en/index.html> (last visited Apr. 14, 2017).

99. Int’l Olympic Comm. [IOC], *Olympic Charter* at 101–105 https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

100. See generally *Id.*

101. *Id.*

102. *Id.*

103. Int’l Olympic Comm. [IOC], *Olympic Charter* Rule 59.1.6 at 102 (effective Aug. 2, 2015), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

104. Int’l Olympic Comm. [IOC], *Olympic Charter* Rule 61 at 105 (effective Aug. 2, 2015), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

105. *FIFA Statutes*, *supra* note 39, Article 57.1 at 54.

FIFA Statutes, as amended in February 2016, provide that “CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.”¹⁰⁶ Article 59 of the *FIFA Statutes* further provides that: confederations, member associations, and leagues shall recognise CAS; recourse to ordinary courts is prohibited unless specifically provided for in FIFA regulations; and member associations must insert a clause in their statutes or regulations that it is prohibited for disputes including between clubs and players to be resolved in the ordinary courts of law.¹⁰⁷

On the issue of arbitration at the regional or national level, article 59.3 of the *FIFA Statutes* provides that, “[i]nstead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal under the rules of the association or confederation or to CAS.”¹⁰⁸

Likewise, the 2015 *WADA Code* provides that “in cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision *may be exclusively appealed to CAS*.”¹⁰⁹

The legal effect of sports arbitration has been profound and allowed ISOs to once again unilaterally regulate the global labour markets for players. In a 2016 paper on the development of football’s labour market regulations following the *Bosman* decision, legal academic Antoine Duval wrote:

Thanks to the accommodating stance of Swiss arbitration law towards the use of transnational private rules in international arbitration, the CAS is in practice disregarding national law when adjudicating on disputes based on the FIFA Regulations for the Status and Transfer of Players (FIFA RSTP). Consequently, the FIFA RSTP is very much the only source of law applying to disputes linked with international transfers and contracts of football players (and coaches).¹¹⁰

106. *Id.* Article 57.2 at 54.

107. *Id.* Article 59 at 55.

108. *Id.* Article 59.3 at 55.

109. World Anti-Doping Agency [WADA] *World Anti-Doping Code*, Article 13.2.1 at 82 (Effective Jan. 1, 2015), <http://www.usada.org/wp-content/uploads/wada-2015-world-anti-doping-code.pdf>. (emphasis added).

110. Antoine Duval, *The FIFA Regulations on the Status and Transfer of Players: Trans-*

The consequence is the emergence of *lex sportiva*, a transnational law of sport produced by ISOs and the CAS that is now attracting considerable academic interest.¹¹¹ Duval argues that:

...this new legal theoretical perspective must be taken into account when analysing the Bosman ruling of the Court of Justice of the European Union and its aftermath. In other words, the legal and political effects of the Bosman ruling must be understood as a specific move in a complex transnational political and legal game.¹¹²

An important question is whether *lex sportiva* is a legitimate source of law. Duval identifies the problem:

In the absence of international rules imposed conjointly by national states, the football world has developed, in the shadow of Bosman and Swiss arbitration law, a specific ‘global law without the state’. A global law which is not the product of a global democracy but of a messy, invisible, political process involving a plurality of actors representing a conflicting set of interests. This obviously raises burning questions of legitimacy, which go way beyond the scope of the present article. To point out the prevalence of this peculiar and influential set of private rules is already an important step in critically engaging with this particular dimension of the problem.¹¹³

For *lex sportiva* to be legitimate as a system of law, it must, at a minimum, respect and fulfil the fundamental human rights of the people who are the subject of that law – the players.¹¹⁴ The CAS, however, was specifically established to deal with sports related disputes, not matters of human rights.¹¹⁵ As Professor Ruggie noted in

National Law Making in the Shadow of Bosman, ASSER INST. (Apr. 8, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760263.

111: *Id.*

112: *Id.*

113: *Id.*

114. *See generally* Dimitrios P. Panagiotopoulos, *Lex Sportiva and International Legitimacy Governing: Protection of Professional Players*, 8 U.S. China L. Rev. 121 (2011). *See also supra* note 110.

115. *See generally* COURT OF ARBITRATION FOR SPORT <http://www.tas-cas.org/en/general-information/frequently-asked-questions.html>.

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his report to FIFA:

If an arbitration system is going to deal effectively with human rights-related complaints, it needs certain procedural and substantive protections to be able to deliver on that promise. While the FIFA dispute resolution system and the CAS' 300-plus arbitrators who sit at the peak of the system may be well equipped to resolve a great variety of football-related disputes, they generally lack human rights expertise.¹¹⁶

Further, should the arbitral system fail to respect the human rights of the players, there are considerable barriers to them accessing a judicial remedy. In addition to the legal constraints already noted, there are substantial political and practical ones.¹¹⁷ Professor Ruggie referred to these when reporting to FIFA on a case involving alleged gender discrimination:

While FIFA's regulations contain formal exceptions to the prohibition of legal claims, in practice the system seems more like a closed loop. For example, players from several countries participating in the 2015 Women's World Cup in Canada filed a complaint with the Human Rights Tribunal of Ontario on grounds of gender discrimination. Clearly, they were not prevented from accessing a public tribunal. But when they did so, they were allegedly threatened with suspension from their teams and from participating in the Cup...(I)n cases that raise significant human rights issues, the ability for players to access effective remedy—including, where they so choose, through domestic courts or tribunals—must be a real and not merely a theoretical possibility.¹¹⁸

Duval also commented on this, stating: "Even if de jure players ... have the possibility to bring their disputes in front of national courts, de facto their careers are too short to be wasted on intricate and uncertain legal battles."¹¹⁹

116: *For the Game. For the World. FIFA and Human Rights*, supra note 28 at 26.

117: *Id.*

118: *Id.*

119: *The FIFA Regulations on the Status and Transfer of Players: Trans-National Law Making in the Shadow of Bosman*, supra, note 110.

III. THE VOICE AND CIRCUMSTANCES OF THE PLAYERS

A. *NORMALISATION OF THE RIGHT OF PLAYERS TO ORGANISE*

The effort on the part of professional athletes to exercise their fundamental rights under international labour standards to organise and form unions for the protection of their interests is now becoming common place. On one “imperfect”¹²⁰ but well researched estimate:

...in 1973 there were eleven sports which had formed player bodies, spread across 25 nations with the majority of both concentrated in Europe and North America. Since then, there has been a dramatic increase in player associations in numerous sports. As of November 2016, there are 226 player organisations (174 player associations and 52 independent contractors) operating in 35 sports and 86 countries/national groupings. Five associations emerged in 2016 alone...In terms of player bodies as a whole, this is an increase of 461 percent; for player associations, an increase of exactly 600 per cent, and 260 per cent for independent contractors.¹²¹

International sport is continuing to see the emergence of global player associations, including in sports which conduct some of the world’s most prestigious and lucrative MSEs. For example, FIFPro, the world footballers’ association, represents approximately 65,000 professional footballers through national player associations in over sixty countries, whilst the International Rugby Players’ Association (“IRPA”) and the Federation of International Cricketers’ Associations (“FICA”) respectively represent the vast majority of the world’s professional rugby players and cricketers in the same manner.¹²² The World Players Association (“World Players”), established in December 2014 as an autonomous sector of the UNI Global Union, represents over 85,000 professional athletes through FIFPro, FICA, IRPA, EU Athletes, the NFLPA, the National Hockey League Players

120. Braham Dabscheck, *Forming Teams of their Own: the Dramatic Emergence of Player Associations Across the Globe*, 26 January 2017, LawInSport, <https://www.lawinsport.com/articles/item/forming-teams-of-their-own-the-dramatic-emergence-of-player-associations-across-the-globe>

121. *Id.*

122. FIFPRO WORLD PLAYERS’ UNION <https://www.fifpro.org/en/about-fifpro/about-fifpro>; IRPA <http://irpa-rugby.com/>; FICA FED’N OF INT’L CRICKETERS’ ASS’NS <http://www.thefica.com/about/> (last visited May 11, 2017).

Association (“NHLPA”), the National Basketball Players Association (“NBPA”), the Japanese Professional Baseball Players Association (“JPBPA”), and the Australian Athletes’ Alliance (“AAA”).¹²³ Together, these bodies comprise more than 100 national player associations in over sixty countries.¹²⁴

The growth in player unionism at the national, regional and global levels clearly has important implications for world sport. It will have to develop the capacity to deal with rising unionisation density with its most valuable workforce at a time when unionisation around the world is in decline. According to Dabscheck:

...the growth in both the number of player associations and their coalescing into federations/confederations is interesting from a sports perspective, but is of more significance for industrial relations scholars. Both of these developments are in the opposite direction to that which has occurred in traditional or mainstream industrial relations. The ability of traditional unions to organise and represent workers has been in decline in response to the forces of neo-liberalism as enshrined in aggressive stances by employers, governments and state institutions. Between 1975, a year after Scoville made his observation and 2014, the percentage of workers who are members of unions in Organisation for Economic Co-operation and Development (“OECD”) countries has fallen from 47 to 16.7 per cent. And neo-liberalism has made it difficult, if not impossible for unions to organise globally to defend the wages and working conditions of members. Unions have been in decline; but not in the increasingly varied world of sports.¹²⁵

The player unions are also express in their commitment to ensuring the application of internationally recognised human rights to the work of their members, and emphasise that they operate independently and democratically. The *Nyon Declaration* of November 2011, which was made following a meeting of global, regional, national and individual player associations held in the offices

123. UNI Global Union, THE WORLD PLAYERS’ ASS’N, <http://uniglobalunion.org/sectors/sport/worldplayersassociation> (last visited May 2017).

124: *Id.*

125: *Forming Teams of their Own: the Dramatic Emergence of Player Associations Across the Globe*, *supra*, note 120.

of UNI Global Union, reads:

We, the independent and democratically elected representatives of (thousands of) top athletes from around the world, today establish a federation of world player associations.

We take this action based on certain core principles and to address a crisis in the governance of world sport organisations that have removed the athlete from the center of sport. There is no sport without athletes...

We declare that world sport organisations, and governments, must respect national and international law as well as the fundamental rights of athletes as citizens and workers, including the right to organise collectively in player associations and unions...

We stand for the equal treatment of all athletes regardless of their ethnic background, religion, gender or sexual orientation...¹²⁶

B. *OVERVIEW OF THE CIRCUMSTANCES CONFRONTING PLAYERS*

Players, like everyone, need government and business to act to ensure that their human rights are protected and respected. Even with the UNGPs applying to ISOs as multi-national enterprises of considerable scale and scope,¹²⁷ the present circumstances confronting players identify at least three broad areas of human rights risk which this paper will consider.

(1) The Right to Organise and Collectively Bargain

Despite the central role of the players in the delivery of sport and the normalisation of unionisation, they are commonly denied the right to organise and collectively bargain. Most notably, there is an institutional preference on the part of many ISOs, including the IOC, to regulate the mode of athlete representation within the sporting framework without regard to ILO standards.¹²⁸

¹²⁶ Nyon Declaration (Nov. 15, 2011) http://www.uniglobalunion.org/sites/default/files/imce/world_players_2011_nyon_declaration.pdf.

¹²⁷ *Guiding Principles on Business and Human Rights*, *supra* note 9.

¹²⁸ Mega-Sporting Events Platform for Human Rights, *Athletes' Rights and Mega-*

There are two broad models of athlete representation in relation to ISOs and MSEs: (1) the mode of athlete consultation is regulated by the ISO;¹²⁹ and (2) the ISO recognises and negotiates with a players' association which operates at the global level, and facilitates and encourages negotiations between employers and player unions as well as other interested stakeholders, both under the regulations of the sport and relevant labour law.¹³⁰ This may even see a MSE being conducted as a joint venture between employers and the players' association.

(a) *ISO Regulated Athlete Consultation*

Made up of sixteen current and former Olympic athletes, the IOC Athletes' Commission is established pursuant to Rule 21 of the *Olympic Charter* and provides the vehicle for consultation with athletes within the Olympic Movement.¹³¹ Administratively supported by the IOC sports department, the Athletes' Commission's mission:

is to ensure that the athletes' viewpoint remains at the heart of the Olympic Movement decisions. To that effect, the Commission is invited by the IOC President to submit proposals, recommendations and/or reports to the IOC Executive Board or the IOC Session. In a next step, the Commission develops toolkits, guidelines and projects to support athletes on and off the field of play. The Commission members have representation (on) all relevant IOC commissions, including the IOC Executive Board, subject to the applicable rules of the Olympic Charter.¹³²

Significantly, the responsibilities of the IOC Athletes' Commission include, within the IOC, to "(r)epresent athletes throughout the Olympic Movement and give input on activities related to the implementation of *Olympic Agenda 2020*, specifically focusing on protecting and supporting clean athletes, both on and off the field of play..."¹³³ Further, within the Olympic Movement the Athletes'

Sporting Events, SPORTING CHANCE WHITE PAPER 4.2 (Jan. 2017), https://www.ihrb.org/uploads/reports/MSE_Platform%2C_Athletes_Rights_and_Mega-Sporting_Events%2C_Jan._2017.pdf.

129. *Id.*

130. *Id.*

131. See Int'l Olympic Comm. [IOC], *Olympic Charter* Rule 21 at 51 (effective Aug. 2, 2016), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf. See also *Athletes' Commission*, OLYMPICS, <https://www.olympic.org/athletes-commission>.

132. *Athletes' Commission*, OLYMPICS, <https://www.olympic.org/athletes-commission>.

133. *Id.*

Commission is responsible for “[l]ead[ing] the Athletes’ Engagement Strategy to liaise, communicate and engage with athletes worldwide . . . include[ing] developing the Olympic Athletes’ Hub, and being present at the Olympic Games and Youth Olympic Games to interact with athletes, as well as liaising with relevant IOC Recognised Organisations such as International Federations, WADA, the IPC, WOA, ANOC, Continental Associations, CAS and others...”¹³⁴

The *Olympic Charter* encourages the development of athlete commissions throughout the Olympic Movement. For example, the existence of an athletes’ commission within an ISO or National Olympic Committee is relevant to the question of IOC membership.¹³⁵ The Athletes’ Commission Charter of the Australian Olympic Committee (“AOC”), for example, provides that the commission’s role is to “advise” the executive of the AOC and obliges each member of the commission not to act in the best interests of the athletes or even sport, but “*solely* in the best interests of the Committee (i.e. the AOC) and its members as a whole.”¹³⁶

WADA similarly, has established an athletes’ committee. The stated role of the seventeen person body is to “serve as the voice of clean athletes, encouraging integrity and fairness for sport and athletes.”¹³⁷ The objectives and key activities of the committee include providing “insight to and feedback on the World Anti-Doping Program including the Code, testing standards, ADAMS etc.” and acting as “ambassadors and spokespersons for WADA and doping-free sport.”¹³⁸ It is appointed by the Committee’s chair and the President of WADA in consultation with WADA’s Director General.¹³⁹ The committee’s terms of reference further provide:

Confidentiality. All Committee members are required to sign a confidentiality agreement upon appointment.

Communications and Media. All members must read and agree to comply with WADA’s Media Relations

134. *Id.*

135. Int’l Olympic Comm. [IOC], *Olympic Charter* Rule 2.3.4 at 41 (effective Aug. 2, 2016), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

136. Austl. Olympic Comm., *Athletes’ Commission Charter*, (Aug. 6, 2015), http://aoc-cdn.s3.amazonaws.com/corporate/live/files/dmfile/Athletes%20Commission%20Charter_6%20August%202015.pdf (emphasis added).

137. World Anti-Doping Agency, *Athlete Committee*, (Dec., 2014), <https://www.wada-ama.org/sites/default/files/resources/files/wada-athlete-committee-terms-of-reference-2014.pdf>.

138. *Id.*

139. *Id.*

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policy (as attached). If a member should receive a request for an interview in relation to their role in WADA or WADA's work in the fight against doping in sport, they should consult first with the WADA Media Relations Senior Manager or (if absent), with the WADA Communications Director.

Funding Support. WADA shall provide the necessary administration and operational resources for Committee meetings.¹⁴⁰

(b) *World Player Associations*

Established in 1965, FIFPro is the most developed world players' union. Under the terms of a memorandum of understanding signed in 2006, it is exclusively recognised by FIFA as the representative body of the world's professional footballers.¹⁴¹ Similarly, FIFPro recognises FIFA as football's international governing body.¹⁴² The cooperation between FIFA and FIFPro includes:

- FIFA committing to negotiate all changes to international regulations that affect player transfers, contracts and registrations FIFA RSTP, and agreeing not to implement any changes without FIFPro's agreement.¹⁴³
- An international dispute resolution mechanism (the *FIFA Dispute Resolution Chamber*) to resolve employment related disputes between clubs and players, with FIFPro nominating 50% of the arbitrators.¹⁴⁴
- FIFPro representation within key committees, such as the FIFA Players' Status Committee and the FIFA Stakeholders Committee.¹⁴⁵
- FIFPro working with FIFA's confederations, including the Union of European Football Associations ("UEFA"), where a formal European social dialogue has been established under the

¹⁴⁰ *Id.*

¹⁴¹ *Memorandum of Understanding*, FIFPRO (Nov. 2, 2006), http://www.asser.nl/upload/sportslaw-webroot/cms/documents/cms_sports_id78_1_FIFPro-MOU-FinalSig2-E-20061102%5b1%5d.pdf.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See generally* *Players' Status Committee*, FIFA.COM, <http://www.fifa.com/about-fifa/committees/committee=1882032/index.html> (last visited).

auspices of the European Commission to address matters such as minimum contract requirements for players.¹⁴⁶ A four party autonomous agreement was concluded in 2012 on this subject between FIFPro's European division, the European Club Association ("ECA"), the European Professional Football Leagues ("EPFL") and UEFA.¹⁴⁷

As this paper will consider, the relationship between FIFPro and FIFA is not without its challenges, especially on the key issues of the player transfer system, the protection of player wages and dispute resolution. For example, FIFPro has supported efforts by athletes to access remedies through litigation and formal processes. It is supporting German speed skater Claudia Pechstein's legal challenge to the CAS,¹⁴⁸ and in 2015 filed a complaint in the European Commission against the anti-competitive effect of the operation of the FIFA RSTP.¹⁴⁹

World Rugby also recognises IRPA, the International Rugby Players' Association.¹⁵⁰ The admission of Rugby Sevens into the Olympic Games resulted in the establishment of a rugby athletes' commission in accordance with IOC requirements through an agreement between World Rugby and IRPA.¹⁵¹ Among the commission's highest priorities is the advancement of the relationship

146. *Memorandum of Understanding*, FIFPRO (Nov. 2, 2006), http://www.asser.nl/upload/sportslaw-webroot/cms/documents/cms_sports_id78_1_FIFPro-MOU-FinalSig2-E-20061102%5b1%5d.pdf.

147. *See* Press Release, FIFPro, FIFPRO, UEFA, ECA, EPFL Sign Minimum Requirements (April 19, 2012) <https://www.fifpro.org/news/fifpro-uefa-eca-epfl-sign-minimum-requirements/en/>. *See also* Press Release, European Commission, Andor and Platini Welcome New Agreement on Contract Rights for Footballers (April 19, 2012) http://europa.eu/rapid/press-release_MEMO-12-267_en.htm?locale=en. *See also* Press Release, European Commission, New Agreement on Contract Rights for Footballers (April 19, 2012) <http://ec.europa.eu/social/main.jsp?langId=fr&catId=329&newsId=1279&furtherNews=yes>.

148. *FIFPro Backs Claudia Pechstein's Legal Battle*, FIFPRO (July 14, 2015) <https://www.fifpro.org/news/fifpro-backs-claudia-pechstein-s-legal-battle/en/>.

149. *See FIFPro's EU competition law complaint – executive summary*, FIFPRO (Sept. 18, 2015), <https://www.fifpro.org/attachments/article/6156/FIFPro%20Complaint%20Executive%20Summary.pdf>. Juan de Dios Crespo Perez & Paolo Torchetti, *A Legal and Policy Analysis of FIFPro's Proposal to Reform the Regulation of Professional Football Contracts*, WHO'S WHOLEGAL (Nov. 2015) <http://whoswholegal.com/news/features/article/32715/a-legal-policy-analysis-fifpros-proposal-reform-regulation-professional-football-contracts>.

150. Daniel Etchells, *World Rugby and IRPA Strengthen Ties at Athletes' Commission*, INSIDE THE GAMES (Nov. 21, 2015), <http://www.insidethegames.biz/articles/1031850/world-rugby-and-irpa-strengthen-ties-at-athletes-commission>.

151. *IRPA Player Representatives Follow up on 2015 Rugby Athletes' Commission*, IRPA (2015), <http://irpa-rugby.com/news/>.

between World Rugby and IRPA through a “joint commitment to developing (a) revised memorandum of understanding between World Rugby and IRPA to provide a stronger blueprint of collaboration on international issues affecting players and the game as a whole.”¹⁵²

The World Cup of Hockey 2016 in Toronto, Canada, featured eight teams competing for a best-on-best international hockey championship: Team Canada, Team Czech Republic, Team Finland, Team Russia, Team Sweden, Team USA, Team Europe and Team North America.¹⁵³ More than 150 of the best players in the National Hockey League (“NHL”) participated in this tournament.¹⁵⁴ The tournament was a joint effort of the NHLPA and NHL, in cooperation with the International Ice Hockey Federation (“IIHF”).¹⁵⁵ The tournament was played on NHL-sized rinks using NHL rules and officiated by NHL officials.¹⁵⁶ Other competition matters – such as the anti-doping policy governing the tournament, the framework and procedure for supplementary discipline, the medical protocols, media and broadcasting policies and access, etc. – were the responsibility of the NHL and NHLPA in consultation with third parties, including the IIHF, where appropriate.¹⁵⁷

Article 24 of the 2012 – 2022 Collective Bargaining Agreement (“CBA”) between the NHL and NHLPA deals with international hockey under the auspices of a joint “international committee.”¹⁵⁸ The CBA relevantly provides in Article 24.5:

The NHL and the NHLPA shall continue to work together to jointly create and exploit other international projects and initiatives involving NHL Players other than International Hockey Games, including games, series, events or contests (e.g., the World Cup of Hockey, European Champions’ League, Victoria Cup Competition, Olympic participation, etc.). All revenues from such projects and initiatives (net of expenses

152. *Id.*

153. WORLD CUP OF HOCKEY 2016, <https://www.wch2016.com/info/teams>.

154. *World Cup of Hockey 2016 Rosters Finalized*, NHLPA (May 27, 2016), <http://www.nhlpa.com/news/world-cup-of-hockey-2016-rosters-finalized>.

155. *2016 World Cup: Frequently Asked Questions*, WORLD CUP OF HOCKEY 2016, <https://www.wch2016.com/info/world-cup-of-hockey-faq>.

156. *Id.*

157. *Id.*

158. Collective Bargaining Agreement between National Hockey League and National Hockey League Players’ Association, Feb. 15, 2013, http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

incurred pursuant to budgets approved by the International Committee, including without limiting the generality of the foregoing, Direct Costs and NHL and NHLPA staffing costs) shall be excluded from [Hockey Related Revenues] pursuant to Section 50.1(b)(xviii) and divided equally between the NHL and NHLPA.¹⁵⁹

Similar to Hockey, the CBA between the MLB and the Major League Baseball Players Association (“MLBPA”) deals with “international play.”¹⁶⁰ Article XXV(K)(4) of the CBA provides that all international play is subject to joint cooperation between MLB, the MLBPA, and the MLB clubs.¹⁶¹ The World Baseball Classic, baseball’s world championship of nations, is conducted by the World Baseball Classic, Inc. (“WBCI”), a company created at the direction of MLB and the MLBPA to operate the World Baseball Classic tournament.¹⁶² The tournament, which is sanctioned by the World Baseball Softball Confederation (“WBSC”), is supported by MLB, the MLBPA, Nippon Professional Baseball (“NPB”), the Korea Baseball Organization (“KBO”), their respective players’ associations and other leagues and players from around the world.¹⁶³

(2) The Regulation of Player and Athlete Rights

The prevalence given by ISOs to notions such as the autonomy and specificity of sport when addressing the rights of athletes and players across sport should be measured in the light of the extraordinary and far-reaching complexity of athlete regulation as developed by ISOs, and the difficulties athletes confront in having their rights upheld, and in accessing an effective remedy where they are breached. The extent of athlete regulation is illustrated by the *Index of Athletes Rights & Rules* published by the United States Olympic Committee (“USOC”) Athlete Ombudsman.¹⁶⁴ The twelve page index cites U.S. sports specific legislation, the USOC Bylaws, the *Olympic Charter*, the *WADA Code* (and related documents), the requirements

159. *Id.*

160. *2012-2016 Basic Agreement*, MLB, http://mlb.mlb.com/pa/pdf/cba_english.pdf (last visited May 11, 2017).

161. *Id.*

162. *About the 2017 World Baseball Classic*, WORLDBASEBALLCLASSIC, <https://www.worldbaseballclassic.com/info/about> (last visited May 11, 2016).

163. *Id.*

164. USOC Athlete Ombudsman, *Index of Athletes’ Rights & Rules*, U.S. OLYMPIC COMM., <http://www.teamusa.org/~media/TeamUSA/Documents/Athlete-Ombudsman/Athlete-Rights/Index-of-Athletes-Rights-2.pdf?la=en> (last visited May 11, 2017).

of the United States Anti-Doping Agency (“USADA”), USOC policies (which address matters such as the commercial rights and obligations of athletes, and what performance apparel they may wear), selection procedures, dispute resolution, arbitration, athlete participation in governance matters and political matters, among other things.¹⁶⁵

Similarly, to participate in the 2016 Rio Olympics, Australian athletes were required to sign a sixty page “partnership agreement” with the AOC.¹⁶⁶ The agreement is legally controversial. It denies the existence of an employment relationship between the athletes and the AOC,¹⁶⁷ contains onerous provisions regarding the disclosure of information, denies the athlete recourse to the courts, imposes restraints on how the athlete may conduct commercial activities and requires the athlete to release and indemnify the AOC on broad terms.¹⁶⁸ Payment to the athlete is not provided, although some athletes may access funding through various sport and government programs.¹⁶⁹ The agreement incorporates by reference eight external documents (themselves legally complex), including the *AOC Constitution*, AOC guidelines and bylaws on funding, commercial activities and selection, the *Olympic Charter*, the *WADA Code* and the *IOC Code of Ethics*, the latter of which effectively requires all athletes to waive their data protection rights as a condition of participation in the Olympics.¹⁷⁰ The front page of the agreement reads:

Your selection to participate in the 2016 Olympic Games as a member of the 2016 Australian Olympic Team is conditional on you entering into this

165. *Id.*

166. *Team Membership Agreement – Athletes*, AUSTL. OLYMPIC COMM., http://aoc-rio2016.s3.amazonaws.com/files/dmfile/ATHLETES%20-%202016%20Australian%20Olympic%20Team%20Membership%20Agreement%20-%20FINAL%20w%20Schedules_201015.pdf (last visited May 11, 2016).

167. See generally, *Sahinovic v. Wiener Gebietskrankenkasse*, Das Bundesverwaltungsgericht [Magistrates’ Court of Appeal, Vienna, Austria] March 10, 2017 <http://www.ris.bka.gv.at/> (last visited July 1, 2017).

168. *Team Membership Agreement – Athletes*, AUSTL. OLYMPIC COMM., http://aoc-rio2016.s3.amazonaws.com/files/dmfile/ATHLETES%20-%202016%20Australian%20Olympic%20Team%20Membership%20Agreement%20-%20FINAL%20w%20Schedules_201015.pdf (last visited May 11, 2016).

169. See generally Dr. Rhonda Jolly, *Sports Funding: Federal Balancing Act*, Parliament of Austl. (June 27, 2013), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/SportFunding.

170. *Team Membership Agreement – Athletes*, AUSTL. OLYMPIC COMM., http://aoc-rio2016.s3.amazonaws.com/files/dmfile/ATHLETES%20-%202016%20Australian%20Olympic%20Team%20Membership%20Agreement%20-%20FINAL%20w%20Schedules_201015.pdf (last visited May 11, 2016).

Agreement and observing its terms.

You should carefully read this Agreement so as to understand its terms and the consequences flowing from any breach of its terms.¹⁷¹

(3) The Widespread Failure to Respect Player Rights

In the FIFA Dispute Resolution Chamber, football has a grievance mechanism for the resolution of international labour disputes between clubs and players.¹⁷² However, professional footballers still have great difficulty in having their labour rights upheld throughout the world. FIFPro has undertaken extensive research into the systematic violation of the fundamental rights of players. For example, in November 2016, FIFPro published the results of a survey of the working conditions of 14,000 professional athletes.¹⁷³ It has uncovered many troubling realities faced by players below the narrow summit of world football. The survey findings show that: 21% of players are making less than \$300 a month, 45% of players make less than \$1,000 a month and 74% of players less than \$4,000 a month; 32% of players experience very significant delays in the payment of their salaries; 14% are forced into bogus self-employment; 8% experienced discrimination in the workplace based on ethnicity, religion, sexual orientation or other reasons; 14% experience threats by fans, club management or other people associated with their employer; and 10% of players have not completed education beyond the primary school level.¹⁷⁴

Similar findings were revealed in two earlier research reports, the 2012 *FIFPro Black Book, Eastern Europe*¹⁷⁵ and the 2015 *FIFPro Asia Buku Hitam*, an unpublished study into issues confronting professional footballers in Asia and Oceania, including Australia, Hong Kong, India, Indonesia, Japan, Malaysia, New Zealand, Palestine, Singapore and South Korea.¹⁷⁶ Both pieces of research involved extensive player

171: *Id.*

172. See generally *Governance. Players' status and transfers. Dispute resolution chamber*, FIFA, <http://www.fifa.com/governance/dispute-resolution-system/index.html> (last visited June 25, 2017).

173. See generally *2016 FIFPRO Global Employment Report Working Conditions in Professional Football*, FIFPRO WORLD PLAYERS' UNION, <https://fifpro.org/images/documents-pdf/2016-fifpro-global-employment-report.pdf> (2016).

174: *Id.*

175. See generally *FIFPro Black Book Eastern Europe the Problems Professional Footballers Encounter: Research*, FIFPRO (2012), <https://www.fifpro.org/images/documents-pdf/BLACK-BOOK.pdf>.

176: Dr. Jady Hassim, *Buku Hitam*, working paper.

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surveying and highlight the serious problems confronting professional footballers, including:

- Approximately one in ten players having their contracts unjustly terminated, including for reasons such as injury.¹⁷⁷
- Players not being paid in accordance with their contracts. Specifically, in eastern Europe, over 40%, whilst in Asia one in four players were not paid on time.¹⁷⁸
- Players being forced by their employers to work in isolation, or train alone, on threat of having to agree to employment related demands of the employer such as a transfer or early contract termination.¹⁷⁹
- Over 10% of players being subjected to capricious sanctions and financial penalties by their employers.¹⁸⁰
- Around 10% of players being subjected to violence by fans and club management.¹⁸¹
- Around 10% of players being subjected to bullying and harassment.¹⁸²
- Widespread racism. Specifically, over 10% of players complained of being subjected to a racist act in eastern Europe.¹⁸³
- Almost 12% of players in eastern Europe and 7% in Asia and Oceania being approached to fix the result of a match, often in circumstances of duress.¹⁸⁴

As Professor Ruggie noted in his report to FIFA, “[w]hile the immediate cause (of such abuse) is typically clubs, players seeking transfers out of such abusive situations appear to have limited options

177. See generally *FIFPro Black Book Eastern Europe the Problems Professional Footballers Encounter: Research*, *supra*, note 175; see also *Buku Hitam*, *supra*, note 176.

178. *Id.*

179. *Id.*

180. *Buku Hitam*, *supra*, note 176.

181. See generally *FIFPro Black Book Eastern Europe the Problems Professional Footballers Encounter: Research*, *supra*, note 175; see also *Buku Hitam*, *supra*, note 176.

182. *Id.*

183. *Id.*

184. *Id.*

in practice.”¹⁸⁵ Accordingly, the problems players confront with the transfer system are interconnected with the lack of protection of their wages and their incapacity to access an effective remedy.

With effect from 1 May 2015, FIFA imposed a regulatory ban on third parties such as agents from owning the “economic rights” arising from the transfer of employment of players due to the widespread nature of the practice, indicating the existence of a significant market for such activities.¹⁸⁶ Indeed, Professor Ruggie also wrote:

...if large numbers of reports are to be believed, human trafficking in football continues at significant rates. The sources of trafficked players are most likely to be in West Africa and parts of Latin America. Their typical destination is lower-tier European and Asian clubs, although many trafficked players end up in the streets rather than on pitches. The vast majority of trafficked players are said to be minors. FIFA has been proactive in establishing rules to combat trafficking through the legal transfer system. But neither the rules nor the available resources extend to cover rogue recruiters and agents, unsanctioned football academies, and the known trafficking routes by which players are sent to clubs on other continents operating within FIFA’s ambit. This means that there are likely to be players in the FIFA governed world of football who have been trafficked—and that they include minors.¹⁸⁷

These facts, concerning as they are, certainly do not completely set out the human rights risks confronting players in football and beyond. For example, some ISOs impose rules that prevent Muslim women from playing sport wearing a hijab.¹⁸⁸ Additionally, 2016 saw the widespread failure on the part of WADA to secure the confidential data of athletes uploaded to its anti-doping data base, including confidential medical records,¹⁸⁹ rising concerns in many sports about

185: *For the Game. For the World*, *supra*, note 28, at 25.

186: *Regulations on the Status and Transfer of Players*, FIFA at 21, http://resources.fifa.com/mm/document/affederation/administration/02/70/95/52/regulationsoonthestatusandtransferofplayersnov2016weben_neutral.pdf (last visited Apr. 8, 2017).

187: *For the Game. For the World*, *supra* note 28, at 25.

188: See Shireen Ahmed, *Will Basketball Do the Right Thing and Lift its Ban on the Hijab?*, THE GUARDIAN (Jan. 26, 2017, 6:00 AM), <https://www.theguardian.com/sport/2017/jan/26/basketball-governing-body-fiba-hijab>.

189: See *Cyber Hack Update: Data leak concerning 41 athletes from 13 countries and 17 sports*, WORLD ANTI-DOPING AGENCY (Sept. 23, 2016), <https://www.wada->

the long term health impacts of concussion,¹⁹⁰ and the revelation of widespread abuse of child athletes by English football clubs, now being thoroughly reviewed with the assistance of UNICEF.¹⁹¹ These developments all point to a systemic failure on the part of sport to embed the rights of the players within their governance framework.

IV. EMBEDDING PLAYER RIGHTS

A. INTERNATIONALLY RECOGNISED HUMAN RIGHTS AND LEX SPORTIVA

The challenge and opportunity for all ISOs, including the IOC and FIFA, is to uphold their constitutional commitments to human rights and legitimize *lex sportiva* by embedding the fundamental human rights of the people at the centre of sport – the players. The UNGPs provide the framework for sport to do so in a manner which is now consistent with the policy decisions made by the IOC and FIFA in 2016 and 2017. Whilst considerable substantive and procedural reform and negotiation would be required, the realistic outcome is a global sports law that complies with internationally recognised human rights and is enforceable through a properly designed and agreed grievance mechanism, thereby ensuring access to an effective remedy for those who have not had their human rights respected and upheld.

The development of *lex sportiva* in this way would present the third great development in the law as it applies to players. The first, running from Eastham through to Bosman and reviewed in Part II(B) of this paper, recognised the rights of players under the law of the land including as employees. The second, as explained in Part II(C), has

ama.org/en/media/news/2016-09/cyber-hack-update-data-leak-concerning-41-athletes-from-13-countries-and-17; *Cyber Hack Update: Data leak concerning 20 athletes from 14 countries and 13 sports*, WORLD ANTI-DOPING AGENCY (Oct. 3, 2016), <https://www.wada-ama.org/en/media/news/2016-10/cyber-hack-update-data-leak-concerning-20-athletes-from-14-countries-and-13>.

190. See *FIFA helps concussion issue move forward*, FIFA (Nov. 2, 2016), <http://www.fifa.com/development/news/y=2016/m=11/news=fifa-helps-concussion-issue-move-forward-2847636.html>; Sy Mukherjee, *The NFL's Concussion Problem Isn't Getting Much Better*, FORTUNE (Jan. 29, 2017), <http://fortune.com/2017/01/29/nfl-concussions-2016/>; Henry Young, *Australian Rugby Union tackles concussion problem with blue card*, CNN (Mar. 24, 2017, 1:38 PM), <http://edition.cnn.com/2017/03/23/sport/blue-card-arugby-concussion-warren-mcdonald-australia/>.

191. See Katrin Benhold, *Child Sexual Abuse Scandal Rocks U.K. Soccer*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/world/europe/soccer-uk-sexual-abuse-andy-woodward.html?_r=0; Sarfraz Manzoor, *Britain's Soccer Sex Abuse Scandal*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/opinion/britains-soccer-sex-abuse-scandal.html?_r=0.

been the development of *lex sportiva* after the Bosman decision by ISOs coupling the notions of specificity and autonomy of sport with compulsory arbitration. This is defeating the capacity of players to enjoy their rights under national law, and subjecting players to a specific legal framework rooted in the interests of the ISOs and the employers and which is operating without the State.

By being based on the dominant position that ISOs have in their dealings with players, *lex sportiva* lacks legitimacy. The lack of legitimacy is rooted in four main features: (1) the acknowledged failures and conflicts of interest within the governance of ISOs;¹⁹² (2) the lack of involvement of the people bound by the law in the making of it – the players;¹⁹³ (3) the ongoing violation of the rights of players especially vulnerable players who are, naturally, the ones most in need of the protection of the law;¹⁹⁴ and (4) the law's lack of recognition and compliance with internationally recognised human rights.¹⁹⁵ While outside the scope of this paper, there are also grounds to suggest a fifth – *lex sportiva*'s ineffectiveness in dealing with the sporting objectives that theoretically underpin it.¹⁹⁶

B. THE APPLICATION OF THE UNGPs to ISOs

The UNGPs are “grounded in recognition” of:

- (a) States' existing obligations to respect, protect and

192. See *supra* notes 61 to 70.

193. See generally Lisa A. Kihl & Lucie Thibault, *Athletes, Athletes' Commissions, and the Governance of International Sport Organisations*, U. OF MINN., BROCK U. (Sept. 21, 2012), <https://www.easm.net/download/2012/d2d32ec712763d5589028c28cb94b2d0.pdf>.

194. See generally David Paulo, HUMAN RIGHTS IN YOUTH SPORT (2005); See also *Additionally vulnerable*, SPORT AND DEV, <https://www.sportanddev.org/en/learn-more/child-protection-and-safeguarding/ additionally-vulnerable-0> (last visited Apr. 8, 2017).

195. See generally *Sport and Human Rights*, AMNESTY INT'L, <http://www.sportandhumanrights.org/wordpress/> (last visited May 11, 2017); Sarah Joseph, *Sport and the Law: Sport and Human Rights: Closer than you think*, 35 ALTERNATIVE L. J. 235 (2010).

196. See *WADA ineffective on doping too – Moynihan*, BBC SPORT (July 25, 2016), <http://www.bbc.com/sport/athletics/36888420>; *WADA testing “ineffective”, says Australian Olympic chief*, REUTERS (Feb. 28, 2013, 11:41 PM), <http://www.reuters.com/article/us-doping-australia-idUSBRE92005R20130301>; Katrin Bennhold, *Child Sexual Abuse Scandal Rocks U.K. Soccer*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/world/europe/soccer-uk-sexual-abuse-andy-woodward.html?_r=0; Sarfraz Manzoor, *Britain's Soccer Sex Abuse Scandal*, N.Y. TIMES (Jan. 19, 2017), <https://www.nytimes.com/2017/01/19/opinion/britains-soccer-sex-abuse-scandal.html>; Brendan Schwab, *Why Australian sport must cut ties with WADA*, SYDNEY MORNING HERALD (June 15, 2014), <http://www.smh.com.au/sport/why-australian-sports-must-cut-ties-with-wada-20140615-zs8k1.html>

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fulfil human rights and fundamental freedoms;

(b) 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;

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.¹⁹⁷

The UNGPs apply “...to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”¹⁹⁸ Accordingly, it can be safely said that the UNGPs apply to ISOs and all sporting organisations within the world of professional sport, including leagues, clubs, national associations, academies, dispute resolution services, regulatory and enforcement agencies, and other enterprises such as player agencies. It can also be safely said that the UNGPs include the human rights of the players within their purview.

In his report to FIFA, Professor Ruggie wrote:

FIFA acts vigorously to develop and enforce regulations related to its institutional and commercial interests. But when it comes to many other matters, even where the rules are robust, FIFA’s capacity to ensure their implementation is often lacking, and FIFA relies heavily on self-regulation by the parties to which the rules are addressed.¹⁹⁹

This point is equally applicable to all ISOs and particularly relevant in the context of *lex sportiva*, its construction without the State and the capacity of ISOs to ensure its enforcement without regard to national law. Having promulgated such a special law in respect of players, the ISOs have an increased responsibility to ensure its compliance with internationally recognised human rights in accordance with the UNGPs.²⁰⁰ The “Foundational Principles” of the corporate responsibility to respect human rights include: “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address any

197: *Guiding Principles on Business and Human Rights*, *supra* note 9 at 1.

198: *Id.*

199: *For the Game. For the World*, *supra* note 28 at 27. See generally *FIFA’s Human Rights Policy May 2017 Edition*, *supra*, note 51.

200: *Id.*

adverse human rights impacts with which they are involved.”²⁰¹

By respecting human rights, ISOs would be meeting a “global standard of expected conduct for all business enterprises wherever they operate.”²⁰² The standard exists “independently of States’ abilities and / or willingness to fulfil their own human rights obligations” and “over and above national laws and regulations protecting human rights.”²⁰³ Moreover, “enterprises should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.”²⁰⁴ The impact of *lex sportiva*, coupled with the power of ISOs, can defeat local judicial processes by denying players access to judicial remedies or subjecting them to an arbitral process which gives paramountcy to the regulations of ISOs over national law.

C. IMPLEMENTING THE UNGPs

The implementation of the UNGPs “protect, respect and remedy” framework would enable ISOs to proactively address the human rights concerns of players in their decision-making processes.²⁰⁵ The starting point for ISOs to effectively implement the UNGPs is to make three key commitments:

- (1) The constitutional commitments made by ISOs such as the IOC and FIFA should be replicated by other ISOs, and translated into daily actions and decisions. This includes the effort to implement the UNGPs being reflected in and supported by the decision-making of the leadership of the ISO and its governing bodies. Clear expectations should be set and resources allocated throughout the administration and operations of the ISO.
- (2) A proactive approach must be taken, including the assessment of human rights risks across the activities and relationships of the ISO and building and using leverage.
- (3) Human rights risks should be managed transparently including by ensuring access to an

201. *Guiding Principles on Business and Human Rights*, *supra* note 9 at 13.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at i.v.

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effective remedy for human rights harm. This involves routinely discussing human rights risks with external stakeholders.²⁰⁶

(1) A Clear Policy Commitment to Player Rights

Business enterprises “need to know and show they respect human rights.”²⁰⁷ The Foundational Principles of the UNGPs require business enterprises to have in place “policies and processes appropriate to their size and circumstances,” including, under Principle 15(a), a “policy commitment to meet their responsibility to respect human rights...”²⁰⁸ Further, the responsibility to respect human rights requires that business enterprises “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”²⁰⁹ As discussed at Part I(A), the responsibility to respect human rights refers to all “internationally recognized human rights.”²¹⁰

With the exception of *FIFA’s Human Rights Policy May 2017 Edition*,²¹¹ such a policy commitment is presently absent from the world of sport. There is also the absence of a clear policy that is incorporated within the regulatory regime of ISOs that comprehensively documents the fundamental human rights of players that are internationally recognised. The Appendix to this paper sets out the *Universal Declaration of Player Rights* (“UDPR”), as adopted by the Executive Committee of World Players.²¹² A commitment to the UDPR by ISOs would provide “the basis for embedding [the ISOs] responsibility to respect [the] human rights [of the players].”²¹³ This requires the policy to be approved at “the most senior level of the business enterprise.”²¹⁴ The UDPR articulates how internationally recognised human rights apply to the work and circumstances of the players.²¹⁵

Article 6(1) of the UDPR provides that every player “has the right

206: *For the Game. For the World.*, *supra* note 28, at 28 to 35.

207: *Guiding Principles on Business and Human Rights*, *supra* note 9, at 16.

208: *Id.* at 15–16.

209: *Id.* at 14.

210: *Id.* at 13-14.

211: *FIFA’s Human Rights Policy*, *supra* note 51.

212: *Infra* Appendix.

213: *Guiding Principles on Business and Human Rights*, *supra* note 9, at 16.

214: *Id.*

215: *Infra* Appendix.

to organise and collectively bargain,” a right recognised under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*²¹⁶ and referred to in Principle 12 of the UNGPs.²¹⁷ However, ISOs are far from embedding a policy commitment to this fundamental right, even though it should, through appropriate policy, “be embedded from the top of the business enterprise through all its functions, which otherwise act without awareness or regard for human rights.”²¹⁸ Indeed, ISOs commonly remain concerned by any effort on the part of players to organise.

The response by WADA to the initial moves to establish World Players in 2011 is an example of the concerns ISOs express with the organisation of athletes into trade unions. Former WADA Chairman John Fahey’s minuted remarks to the WADA Foundation Board on 20 November 2011 read:

[The player] associations... were based along the lines of a union and took their authority from membership, which involved receiving paid fees to have people look at what were described as the conditions under which they operated. Those conditions were of course relevant to the pay received to play sport. *He thought that it was incumbent on all who believed that sport was a very different and separate operation to other workplaces to make that clear.* In his opinion, the least amount of credibility given to these people (the athlete unions), the better. They must be seen for what they were: a union, and if individual sportsmen and women wanted that, it was their choice. But WADA should make this clear at every opportunity possible and *under no circumstance* would it recognise them as representatives of the sportsmen and women of the world.²¹⁹

However, some 80,000 players, represented through legitimate trade unions and player associations, are bound by the *WADA Code*, which forms a fundamental term of their employment or involvement

216. *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*, *supra*, note 34.

217. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 13.

218. *Id.* at 17.

219. *Minutes of the WADA Foundation Board Meeting*, WORLD ANTI-DOPING AGENCY, at 48 (Nov. 20, 2011), https://www.wada-ama.org/sites/default/files/resources/files/wada_foundation_board_meeting_minutes_20nov2011_eng_final.pdf (emphasis added).

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in sport.²²⁰ These players and their organisations constitute World Players, as shown in Table 1:

Table 1²²¹

Affiliate	Country	Player associations	Players	WADA jurisdiction
AAA	AUS	5	2,529	Yes
EU Athletes	NED	27	7,467	Yes
FICA	ENG	7	1,618	Yes
FIFPro	NED	60	65,000	Yes
IRPA	NZL	10	3,000	Yes
JPBPA	JPN	1	735	No
NBPA	USA	1	400	No
NFLPA	USA	1	1,800	No
NHLPA	CAN	1	750	No
TOTAL		113	83,299	79,622

Concerns over athlete unionisation extend across the Olympic Movement. Mr. John Coates, the Vice President of the IOC, the President of the AOC and the President of both the CAS and the International Council of Arbitration for Sport (“ICAS”), the body responsible for financing and administering the CAS, told Australian radio in late 2015 that: “[t]hese are the unions who are not elected representatives of the athletes. I know who they are.”²²² When asked whether he thought players or athletes should not have union bodies representing them, he said:

I think our position is that all bodies should have athletes representatives on their board who are elected by the athletes themselves. That is the case with the Athletes Commissions in the national federations and the Australian Olympic Committee. It is not some other self-appointed body that goes out and negotiates wages and other matters for them.²²³

220. See generally *Code Signatories*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/code-signatories> (last visited Apr. 8, 2017).

221. *Athletes’ Rights and Mega-Sporting Events*, *supra*, note 128 at 21.

222. Tracey Holmes, *Olympic boss John Coates ‘embarrassed’ by Rowing Australia ‘right to silence’ provision oversight*, ABC NEWS (Dec. 3, 2015, 8:45 AM), <http://www.abc.net.au/news/2015-12-04/john-coates-embarrassed-by-rowing-australia-oversight/7000102>.

223. *Id.*

At the 2017 Sport Accord Convention, Sport Accord's President Mr. Patrick Baumann, criticized the apparent political role of Athlete Commissions despite their regulated power.²²⁴ Mr. Baumann, who holds various positions in sport including IOC member, Secretary General of the Fédération Internationale de Basketball ("FIBA"), Council Member of the Association of Summer Olympic International Federations ("ASOIF"), Board Member of ICAS and IOC representative on the Foundation Board of WADA,²²⁵ stated to the convention:

Athletes' Commission(s) are starting to become political. They have opinions on everything and this can be a particular problem... The expansion of the role, I think, should be somehow a little bit controlled. We are absolutely there to help, to work, and create the best environment for them to compete. *But if it becomes unionised, we are creating more harm than benefits.*²²⁶

The right to organise and collectively bargain, as enshrined in article 20 of the 1948 *Universal Declaration of Human Rights* and ILO Conventions 87 and 98 is, of course, a fundamental international labour standard.²²⁷ Recognition and respect for the right to organise and collectively bargain involves an obligation on the part of employers and their representatives not to interfere with the independent pursuit and exercise of that right.²²⁸ Article 2 of the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* of the ILO provides:

1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
2. In particular, acts which are designed to promote the

224. See *supra* notes 131 to 140.

225. Mr. Patrick Baumann, INTERNATIONAL OLYMPIC COMMITTEE, <https://www.olympic.org/mr-patrick-baumann>

226. See Nick Butler, *Baumann criticizes political role of sporting Athletes' Commissions*, INSIDE THE GAMES, (Apr. 4, 2017), <http://www.insidethegames.biz/index.php/articles/1048883/sportaccord-convention-day-two> (emphasis added).

227. See *Universal Declaration of Human Rights*, *supra*, note 8; *ILO Convention 87, Freedom of Association and Protection of the Right to Organise Convention*, INT'L LAB. ORGANIZATION (1948), http://blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_87.pdf; *ILO Convention 98, Right to Organise and Collective Bargaining Convention*, INT'L LAB. ORG. (1949), http://blue.lim.ilo.org/cariblex/pdfs/ILO_Convention_98.pdf.

228. *ILO Convention 98*, Art. 2 (1949).

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establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.²²⁹

In May 2017, FIFA, in reporting on its human rights record in accordance with Professor Ruggie's recommendations of April 2016, noted that "[s]ome of the main achievements" included "the broadening of engagement with football stakeholders, including with the international union of professional football players FIFPro, towards enhancing the protection of players' rights,"²³⁰ the "establishment of a pilot project for the implementation and development of national dispute resolution chambers, and a significantly increased engagement with relevant stakeholders, in particular with organisations representing the interests of professional footballers."²³¹

(2) A Player Rights Due Diligence Process

The Foundational Principles of the UNGPs require business enterprises, in order to meet their responsibility to respect human rights, to carry out "[a] human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights..."²³²

Principle 17 sets out the principles of an effective human rights due diligence:

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. Human rights due diligence...should be ongoing.²³³

229. *Id.*

230. *FIFA Activity Update on Human Rights May 2017, supra*, note 53 at 2.

231. *Id.*, 16.

232. *Guiding Principles on Business and Human Rights, supra* note 9, at 16.

233. *Id.* at 17-18.

Principles 20 and 21 require business enterprises to “track the effectiveness of their response” and “be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders.”²³⁴

Human rights due diligence is presently absent from key decisions made by ISOs that affect players. For example, a human rights due diligence is not undertaken in relation to the making of the myriad of regulations that affect players. However, according to the UNGPs, “(h)uman rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements.”²³⁵ Further, “in order to gauge human rights risks,” the process of human rights due diligence should draw on “internal and / or independent external human rights expertise” and “involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.”²³⁶

The undertaking of human rights due diligence involves a fundamental reversal in the assessment of the player rights impacts of the decisions of ISOs. As Part II(B) of this paper illustrated, certain players over time have been willing to sacrifice their short term and precarious careers to advance the collective interests of the players through expensive and time consuming litigation.²³⁷ The onus – in terms of the practical burden even if not legally – has been great. Human rights due diligence reverses this. By proactively undertaking the process in the policy making and legislative phase, ISOs can properly engage with players and their chosen representatives together with other relevant experts to ensure that any potential adverse human rights impacts are prevented, minimised, mitigated and accounted for.

WADA’s approach in 2013 and 2014 to addressing the human rights impacts on players of the proposed revision of the *WADA Code* to take effect in 2015 did not involve this fundamental reversal. WADA engaged Jean-Paul Costa to write a legal opinion to confirm the compatibility of several provisions of the draft revision of the *WADA Code* with the accepted principles of international law and

234. *Id.* at 22-23.

235. *Id.* at 18.

236. *Id.* at 19.

237. *See supra* notes 77 to 108.

human rights.²³⁸ Mr. Costa, who served as a judge in the European Court of Human Rights for thirteen years,²³⁹ did not refer to the UNGPs in his opinion nor the responsibilities of States to protect human rights and business to respect them.²⁴⁰ The opinion did not include any human rights risk assessment or due diligence, nor did it refer to the importance of “meaningful consultation with potentially affected groups” in accordance with the UNGPs.²⁴¹ The opinion did note, however, that the United Nations Human Rights Committee, which monitors the implementation of the *International Covenant on Civil and Political Rights*, has a “universal mandate but is a quasi-jurisdiction without the authority to enforce its decisions.”²⁴²

The *Official Basketball Rules 2014* as promulgated by FIBA provide a straightforward example of the benefits that would flow from ISOs proactively incorporating human rights due diligence into their decision-making processes.²⁴³ Rule 4.4.2 has long provided that “[p]layers shall not wear equipment (objects) that may cause injury to other players. The following **are not** permitted . . . Headgear, hair accessories and jewellery.”²⁴⁴

This rule, ostensibly created to promote player safety, has the impact of discriminating against, for example, Muslim women whose faith requires them to play in a headscarf.²⁴⁵ The impact of the rule has been to deny a player such as Bilqis Abdul-Qadir the right to play basketball and pursue it as a profession.²⁴⁶ Through the application of the UNGPs, FIBA is obliged to remove that impact and ensure that the Rule’s stated purpose of player safety is advanced in a way that furthers the growth and development of the sport and is consistent with

238. WADA, *Legal opinion on the 2015 Code (June 2013)*, <https://www.wada-ama.org/sites/default/files/resources/files/WADC-Legal-Opinion-on-Draft-2015-Code-3.0-EN.pdf>.

239. *Id.*

240. *See supra* notes 9 to 10, Part I.

241. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 19.

242. *Legal opinion on the 2015 Code*, *supra* note 238; *International Covenant on Civil and Political Rights*, *supra*, note 32.

243. *See generally Official Basketball Rules 2014*, FIBA CENT. BOARD (Oct. 1, 2014), https://www.fiba.com/downloads/rules/2014/official_basketball_rules_2014_y.pdf.

244. *Id.* at 12 (emphasis in original).

245. *See* Stephanie Kline, *FIBA’s ‘hijab ban’ still the rule in women’s basketball*, LIMA CHARLIE NEWS (Feb. 3, 2017), <https://www.limacharlieneews.com/op-ed/fiba-hijab-ban-womens-basketball/>.

246. *See* Danny Davis, *For Muslim woman, ban on hijab ended basketball career*, MY STATESMAN (Mar. 11, 2017, 6:37 PM), <http://www.mystatesman.com/sports/for-muslim-woman-ban-hijab-ended-basketball-career/5s4qW6xE5z03ielj7EKYYI/>.

the human rights of players.

In 2014, football addressed an identical situation following a two-year trial period.²⁴⁷ FIFPro worked in conjunction with FIFA and representatives of the game and players in Western Asia to amend the *Laws of the Game* so that players could play in a headscarf.²⁴⁸ Apparel and equipment manufacturers were extensively involved in that process to ensure that all player health and safety concerns were addressed.²⁴⁹ The wearing of headscarves by Muslim players is now common place and in 2016, Jordan hosted the FIFA Under 17 Women's World Cup.²⁵⁰

The human rights due diligence process mandated by the UNGPs would have identified the discriminatory impact of FIBA's Rule 4.2.2 in relation to Muslim women, allowing FIBA to mitigate the impact of the Rule by permitting headgear that is safe. For instance, the *Laws of the Game* of football now provide that "[n]on-dangerous protective equipment, for example headgear, facemasks and knee and arm protectors made of soft, lightweight padded material is permitted..."²⁵¹

(3) Access to an Effective Remedy

The third key commitment of ISOs in order to meet their responsibility to respect human rights is to have in place "[p]rocesses to enable the remediation of any adverse human rights impacts they

247. See *FIFA lifts ban on head covers*, AL JAZEERA (Mar. 1, 2014), <http://www.aljazeera.com/sport/football/2014/03/fifa-allows-hijab-turban-players-20143113053667394.html>.

248. See *Laws of the Game 2016/2017*, THE INT'L FOOTBALL ASS'N BOARD, at 42 (June 1, 2016), http://www.fifa.com/mm/document/footballdevelopment/refereeing/02/79/92/44/laws.of.the.game.2016.2017_neutral.pdf; see also *Jordanian legacy bodes well for future of women's football*, FIFA.COM (Oct. 24, 2016), <http://www.fifa.com/u17womensworldcup/news/y=2016/m=10/news=jordanian-legacy-bodes-well-for-future-of-women-s-football-2845723.html>; see also *Fifa allows wearing of head covers for religious reasons*, BBC SPORT (Mar. 1, 2014), <http://www.bbc.com/sport/football/26398297>.

249. See Scott Rafferty, *Nike Developing 'Pro Hijab' for Muslim Athletes*, ROLLING STONE (Mar. 8, 2017), <http://www.rollingstone.com/sports/nikes-pro-hijab-being-developed-for-muslim-athletes-w470970>.

250. See Shireen Ahmed, *Inclusion, excitement and a series of firsts in Jordan at U17 Women's World Cup*, EXCELLE SPORTS (Sept. 30, 2016), <http://www.excellesports.com/news/inclusion-excitement-series-firsts-jordan-u17-womens-world-cup/>; see also *Jordanian legacy bodes well for future of women's football*, FIFA.COM (Oct. 24, 2016), <http://www.fifa.com/u17womensworldcup/news/y=2016/m=10/news=jordanian-legacy-bodes-well-for-future-of-women-s-football-2845723.html>.

251. See *Laws of the Game 2016/2017*, *supra* note 248, at 42.

cause or to which they contribute.”²⁵² Where ISOs “have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”²⁵³ This third commitment acknowledges that, even “with the best policies and practices, a business enterprise may cause or contribute to adverse human rights impacts that it has not foreseen or been able to prevent.”²⁵⁴

As this paper has considered at Part II(C), ISOs including the IOC, FIFA and WADA operate a sophisticated arbitration system through the ICAS and the CAS. However, as Professor Ruggie noted in his report to FIFA, “[i]f an arbitration system is going to deal effectively with human rights-related complaints, it needs certain procedural and substantive protections to be able to deliver on that promise” and for such an arbitration system to deal effectively with human rights-related complaints.²⁵⁵ Specifically, Recommendation 6.2 of Professor Ruggie’s report reads:

FIFA should review its existing dispute resolution system for football-related issues to ensure that it does not lead in practice to a lack of access to effective remedy for human rights harms.

FIFA should ensure that its own dispute resolution bodies have adequate human rights expertise and procedures to address human rights claims, and urge member associations, Confederations and the Court of Arbitration for Sport to do the same;

The review should involve independent experts as well as representatives of players and other users of the system.²⁵⁶

Principle 31 of the UNGPs sets out some criteria to measure the effectiveness of non-judicial grievance mechanisms.²⁵⁷ A mechanism “can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it...(W)here outcomes have implications for human rights, care should be taken to ensure they are

252. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 15–16.

253. *Id.* at 24.

254. *Id.*

255. *For the Game. For the World*, *supra* note 28, at 26.

256. *Id.* at 35.

257. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 33–35.

in line with internationally recognized human rights.”²⁵⁸ Accordingly, grievance mechanisms should be: legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; and based on engagement and dialogue.²⁵⁹

The international standard for the conduct and international recognition of arbitral awards is the *1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*.²⁶⁰ Among many procedural safeguards, it requires the composition of the arbitral panel to be “in accordance with the agreement of the parties.”²⁶¹ This is a challenge to sport’s global governance framework which gives sporting interests, including those of the IOC and ISOs, substantial perceived control and influence over sports arbitration, including the CAS. The ICAS is presently dominated by representatives of ISOs, with the only athlete representatives being appointed by the IOC Athletes Commission.²⁶² The structure of the ICAS highlights the burning questions over the legitimacy of *lex sportiva*.²⁶³ Similarly, the UNGPs make it clear that: “Since a business enterprise cannot, with legitimacy, both be the subjects 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.”²⁶⁴

The UNGPs therefore recommend “collaborative initiatives” to ensure:

...the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the (human rights) commitments in question have not been met. The legitimacy of such measures may be put at risk if they do not provide for such

258. *Id.*

259. *Id.*

260. See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. (2015), <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>.

261. *Id.* at 10.

262. See generally *Members*, CT. OF ARB. FOR SPORT, <http://www.tas-cas.org/en/icas/members.html> (last visited Apr. 8, 2017); *Code of Sports-related Arbitration*, CT. OF ARB. FOR SPORT (Jan. 1, 2017), http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL_en.pdf.

263. See *Code of Sports-related Arbitration*, *Id.*

264. *Guiding Principles on Business and Human Rights*, *supra* note 9, at 35.

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mechanisms...These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.²⁶⁵

In May 2017, FIBA announced that Rule 4.2.2 of the *Official Basketball Rules 2014* was to be amended with effect from 1 October 2017 to allow the wearing of hijabs. FIBA's announcement read:

FIBA initiated a revision process of its headgear rule in September 2014, with exceptions being granted at national level as part of a two-year testing period. This past January, the (FIBA) Central Board received a report and, upon reviewing it, approved for the rule to be modified. It issued a mandate to its Technical Commission to come up with a proposal and this was approved by the Central Board on Wednesday (3 May 2017).²⁶⁶

The presence within FIBA of an effective grievance mechanism would have ensured that Muslim basketball player Bilqis Abdul-Qaadir could have pursued her rights to access and play basketball without losing three years of her career due to having been discriminated because of her gender and religion. Her inability to do so demonstrates the importance of FIBA ensuring that affected players can access an effective remedy in a timely manner.

VI. CONCLUSION

The continued revelations of wide-spread and systemic corruption, cheating, and human rights abuse in world sport have rightly created a crisis of confidence in the governance of ISOs. This paper highlights how ISOs are also failing to protect, respect, and fulfil the fundamental human rights of the players whose careers and livelihoods depend on sport's legal framework and system of justice.

The precarious position of the player at law and at work has been exacerbated by the development of a special sports law – *lex sportiva* – which lacks legitimacy. Imposed through dominant, albeit questionable governance structures, the law's lack of legitimacy is rooted in four main features: (1) the acknowledged failures and conflicts of interest within the governance of ISOs;²⁶⁷ (2) the lack of

²⁶⁵ *Id.* at 33.

²⁶⁶ FIBA, *FIBA's Mid-Term Congress unanimously ratifies new headgear rule*, (May 4, 2017), <http://www.fiba.com/news/fibas-mid-term-congress-ratifies-new-headgear-rule>

²⁶⁷ *See supra* IV(A).

involvement of the people bound by the law in the making of it – the players;²⁶⁸ (3) the ongoing violation of the rights of players (especially vulnerable players who are, naturally, the ones most in need of the protection of the law);²⁶⁹ and (4) the law’s lack of recognition and compliance with internationally recognised human rights.²⁷⁰ While outside the scope of this paper, there are also grounds to suggest a fifth – *lex sportiva*’s ineffectiveness in dealing with the sporting objectives that theoretically underpin it.²⁷¹

The challenge and opportunity for all ISOs, including the IOC and FIFA, is to uphold their constitutional commitments to human rights and legitimize *lex sportiva* by embedding the fundamental human rights of the players. The UNGPs provide the framework for sport to do so in a manner which is now consistent with key policy decisions made in 2016 and 2017. Whilst considerable substantive and procedural reform and negotiation would be required, the realistic outcome is a global sports law that complies with internationally recognised human rights and which is enforceable through a properly designed and agreed grievance mechanism, thereby ensuring access to an effective remedy for those who have not had their human rights respected and upheld.

The lack of legitimacy of *lex sportiva* and its adverse human rights impacts on players are both known to the ISOs. It is time for them to use that knowledge to do better.

The development of *lex sportiva* in this way would present the third great development in the law as it applies to players since the early 1960s. It would not only legitimize *lex sportiva*, it would play a vital role in restoring confidence in the governance of ISOs. Sport would be a force for good by setting a global benchmark for the respect and fulfilment of human rights by business.

268. *Id.*

269. *Id.*

270. *Id.*

271. *See supra* note 196.

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APPENDIX –THE UNIVERSAL DECLARATION OF PLAYER

RIGHTS

PREAMBLE

CONSIDERING THAT:

I. The organised players of the world have a proud history of championing the dignity of the player and the humanity of sport. That history demonstrates that where the fundamental human rights of the player have been protected, respected and guaranteed, sport has grown as both a social institution and as an economic activity and business.

II. In adopting the Universal Declaration of Human Rights in 1948, the peoples of the United Nations “*reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.*”ⁱ

III. A universal commitment by the whole of sport is now essential for sport to maintain its meaningful place in world culture, retain its social licence, make social progress and achieve better standards of life for everyone involved with or touched by it.

IV. Sport is controlled by international sporting federations, national sporting organisations, professional sports leagues, employers, business and governments. Players are the public face of sport, and athletic performance is fundamental to the prestige, popularity and viability of sport.

V. The mega scale, politicisation and commercialisation of sport today sees a widespread failure to uphold the humanity of sport and the dignity of the player.ⁱⁱ This also sees the violation by sport of internationally recognised human rights – which are, at a minimum, those expressed in *The International Bill of Human Rights*, the *International Labour Organization’s Declaration on Fundamental Principles and Rights at Work and Its Follow-Up* and the *United Nations Convention on the Rights of the Child*.ⁱⁱⁱ

CONSEQUENTLY:

VI. Every sport must:

- A. work in partnership with the players to develop a strategic vision for their sport;^{iv}
- B. respect, protect and guarantee the fundamental human rights of everyone involved with or affected by sport including the player;^v
- C. avoid infringing on the human rights of others and eliminate all adverse human rights impacts with which they are involved;^{vi}
- D. embrace and promote the responsibility of their sport to respect human rights;^{vii}
- E. recognise that the player is, first, a human person and, then, an athlete;^{viii}
- F. acknowledge the acute impact any failure to respect the fundamental human rights of the player given the highly skilled and inherently short-term nature of the athletic career;
- G. acknowledge that any reliance on or application of the “autonomy” or “specificity” of sport or any restraint or limitation imposed on a player in the exercise of his or her profession does not override the fundamental human rights of the player and can only be given legal effect if necessary and through collective bargaining and social dialogue;^{ix} and
- H. ensure that the internationally recognised human rights of the player including as contained in this *Universal Declaration of Player Rights* are legally adopted within the constituent documents of their sport or pursuant to a collective bargaining agreement.^x

NOW, THEREFORE, THE ORGANISED PLAYERS OF THE WORLD DECLARE THAT:

Article 1. *Protect, respect, remedy.*

Every player has the right to a sporting environment that is well governed, free of corruption, manipulation and cheating and protects, respects and guarantees the fundamental human rights of everyone involved in or affected by sport, including the player.^{xi}

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Article 2. Access to sport.

Every player has the right to access and pursue sport^{xii} as a career and profession^{xiii} based solely on merit.^{xiv}

Article 3. Equality of opportunity.

(1) Every player is entitled to equality of opportunity in the pursuit of sport without distinction of any kind and free of discrimination, harassment and violence.^{xv}

(2) A player's right to pursue sport cannot be limited because of his or her race, colour, birth, age, language, sexual orientation, gender, pregnancy, religion, political or other opinion, responsibilities as a carer, property or other status.^{xvi}

Article 4. Rights of the child.

Every player who is a minor is entitled to the opportunity to freely pursue sport in an inclusive, adapted and safe manner, and to have his or her rights as a child protected, respected and guaranteed.^{xvii}

Article 5. Right to work.

Every player has the right to work and the free choice of employment as an athlete,^{xviii} and to move freely in pursuit of that work and employment.^{xix}

Article 6. Right to organise and collectively bargain.

(1) Every player has the right to organise and collectively bargain.^{xx}

(2) Every player has the right to form and join player and athlete associations and unions for the protection of his or her interests.^{xxi}

Article 7. Right to share in economic activity and wealth.

Every player has the right to share fairly in the economic activity and wealth of his or her sport which players have helped generate.^{xxii}

Article 8. Fair and just working conditions.

(1) Every player has the right to just and favourable remuneration and conditions of work, including a minimum wage, fair hours of work, rest, leisure, the protection of wages, the certainty of a secure contract and the protection of his or her status as a worker within the employment relationship.^{xxiii}

(2) Every player, without any discrimination, has the right to equal pay for equal work.^{xxiv}

(3) A player has the right to negotiate the terms and conditions upon which he or she is involved in sport and to be represented by persons and organisations of his or her choosing in those negotiations.^{xxv}

(4) A player must only be bound by terms and conditions which are legitimately made and administered through collective bargaining or to which he or she has freely and genuinely consented.^{xxvi}

Article 9. *Promotion of physical health, mental health and social wellbeing.*

(1) Every player must be provided with a safe and secure workplace and sporting environment, which promotes the player's safety, physical and mental health and his or her social wellbeing.^{xxvii}

(2) A player must be treated and supported with utmost integrity by healthcare professionals when injured or ill, and have direction and control over that treatment and support.^{xxviii}

(3) A player's workplace and sporting environment must be protected from both internal and external risks to his or her safety, health and wellbeing. A player is entitled to decide on the measures necessary to ensure the safety and security of the workplace and sporting environment and to take any action reasonably necessary to avoid those risks or prevent them from materialising.^{xxix}

Article 10. *Right to education.*

To achieve fully his or her human potential and personality, every player has the right to an education and the pursuit of work and life beyond sport supplemented by the resources of the sport.^{xxx}

Article 11. *Right to privacy and the protection of personal data.*

Every player has the right to a private life, privacy and protection in relation to the collection, storage and transfer of personal data.^{xxxi}

Article 12. *Protection of name, image and performance.*

Every player is entitled to have his or her name, image and performance protected. A player's name, image and performance may only be commercially utilised with his or her consent, voluntarily given.^{xxxii}

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Article 13. *Freedom of opinion and expression.*

Every player has the right to freedom of opinion and expression.^{xxxiii}

Article 14. *Protection of and equality before the law.*

Every player has the right to the protection of the law and equality before it.^{xxxiv}

Article 15. *Right to due process.*

Every player is entitled to due process including, where charged, to the presumption of innocence. Any penalty must be lawful, proportionate and just.^{xxxv}

Article 16. *Right to an effective remedy.*

Every player is entitled to have any dispute resolved through an impartial and expeditious grievance mechanism in which the player has an equal say in the appointment of the grievance panel, arbitrator or other decision-making person or body. His or her sport must ensure he or she is provided with access to an effective remedy where his or her rights under this Declaration have not been protected or respected.^{xxxvi}

Article 17. *Duty to respect the rights of others.*

Every player has a duty to respect the rights of his or her fellow players under this Declaration, and to respect the fundamental human rights of everyone involved with or affected by sport.^{xxxvii}

THIS DECLARATION IS ADOPTED BY THE EXECUTIVE COMMITTEE OF THE **WORLD PLAYERS ASSOCIATION** MEETING IN PARIS, FRANCE ON THE 7TH DAY OF APRIL 2017.

UNIVERSAL DECLARATION OF PLAYER RIGHTS**SOURCES**

REFERENCES

Charter of Fundamental Rights of the European Union, 2012
("CFREU")

International Bill of Human Rights, consisting of:

Universal Declaration of Human Rights 1948 ("UDHR")

International Covenant on Economic, Social and Cultural Rights
1966 ("ICESCR")

International Covenant on Civil and Political Rights 1966
("ICCPR")

International Labour Organization ("ILO") Conventions and
Recommendations:

Forced Labour Convention, 1930 (No. 29) ("ILO C29")

Freedom of Association and Protection of the Right to Organise
Convention, 1949 (No. 87) ("ILO C87")

Protection of Wages Convention, 1949 (No. 95) ("ILO C95")

Right to Organise and Collective Bargaining Convention, 1949
(No. 98) ("ILO C98")

Abolition of Forced Labour Convention, 1957 (No. 105) ("ILO
C105")

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2002 ("ILO C155")

Employment Relationship Recommendation, 2006 (No. 198)
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International Labour Organization Declaration on Fundamental
Principles and Rights at Work and Its Follow-Up 1998 ("ILO FD")

Treaty on the Functioning of the European Union 2007 ("TFEU")

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Foreign Arbitral Awards, New York 1958 ("NYC")

United Nations Convention on the Rights of the Child 1989

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("UNCRC")

United Nations Economic, Scientific and Cultural Organization ("UNESCO") Revised Charter on Physical Education, Physical Activity and Sport 2015 ("UNESCO Charter")

United Nations Guiding Principles on Business and Human Rights 2011 ("UNGPs")

ENDNOTES

ⁱ UDHR, Preamble.

ⁱⁱ See, for example, at 7 of the report of the meeting "Human Rights and Mega Sporting Events" co-hosted by the Institute of Human Rights and Business, Wilton Park and the Government of Switzerland in Glion, Switzerland from 18 – 20 November 2015 https://www.ihrb.org/uploads/meeting-reports/2016-1-12_Wilton_Park_Conference_on_MSEs_and_Human_Rights.pdf (accessed 17 June 2017)

ⁱⁱⁱ UNGPs, Principle 12 at 13.

^{iv} UNESCO Charter, Article 3 including Articles 3.1 and 3.2.

^v UNGPs "*Protect, Respect and Remedy*" Framework.

^{vi} UNGPs, Principle 11 at 13.

^{vii} See, for example, UNGPs, Principle 6 at 8 and 11.

^{viii} UDHR, Preamble and Article 26.2. ICESCR, including Article 13.

^{ix} ILO FD, including ILO C87 and ILO C98. CFREU, Article 28. UNGPs, including Principle 11 at 13, which states that the corporate "*responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.*"

^x Article 28 of the UDHR, which provides that, "*Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.*"

^{xi} UNESCO Charter, including the Preamble and Article 10. UDHR, Article 27.1. ICESCR, Article 15.1(a).

^{xii} UNESCO Charter, including the Preamble and Article 1.1.

^{xiii} UDHR, Article 23.1. ICESCR, Article 6.1.

^{xiv} UNESCO Charter, Article 1.6. ICESCR, Article 7(c).

^{xv} UDHR, Article 2. Also see, for example, Article 1.4 of the UNESCO Charter in relation to women and girls.

^{xvi} UDHR, Article 2. ICCPR, Article 26.

^{xvii} ICCPR, Article 24.1. Also refer to the UNCRC in its entirety, as well as the Preamble and Article 9.2 of the UNESCO Charter which identifies the problem of the excessive training of children. ICESCR, Article 10.3.

^{xviii} UNESCO Charter, Preamble, Article 9.2 and Article 10.5. UDHR, Article 23.1. ICESCR, Article 6.1. ICCPR, Article 8.3(a). ILO FD, including ILO C29 and ILO C105. Note C29, Article 2.1 and the definition of the term “*forced or compulsory labour*” which the ILO regards as including the threatening of workers with severe deprivations such as the withholding of wages and the restriction of peoples’ movements (see, for example, p. 23 of the ILO’s policy guide on the ILO FD at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_095895.pdf (accessed 17 June 2017)).

^{xix} UDHR, Articles 13 and 23.1. ICCPR, Article 12. TFEU, Article 45.1.

^{xx} ILO FD, ILO C87 and ILO C98. ICCPR, Article 22.

^{xxi} UDHR, Article 24.4. ICESCR, Article 8.1 (which also refers to the right of trade unions to form and join national and international trade union organizations). ILO FD including ILO C87 and ILO C98. ICCPR, Article 22.

^{xxii} ILO FD, Preamble, which states that “*in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential...*” (emphasis added).

^{xxiii} UDHR, Articles 23.1, 23.3 and 24. ICESCR, Articles 7(a)(i) and (d). ILO C95. ILO R198.

^{xxiv} UDHR, Article 23.2. ICESCR, Article 7(a)(i).

^{xxv} UDHR, Articles 23.1, 23.3 and 23.4. ICCPR, Article 25(a).

^{xxvi} ILO FD, including ILO C29, ILO C87, ILO C98 and ILO C105. UDHR Articles 23.1 and 23.3. ICESCR, Articles 6.1, 7 and 8.

^{xxvii} ICESCR, Article 12. ILO C155. UNESCO Charter, Article 10.5.

^{xxviii} ILO C155. ICESCR, Article 12 including Articles 12.2(b),(c) and (d). UNESCO Charter, including the Preamble and Article 10.

^{xxix} ILO C155. UNESCO Charter, including Article 10.5. UDHR, Article 3. ICCPR, Articles 7 (in particular, the second sentence) and 9.

^{xxx} UNESCO Charter. UDHR, Articles 22, 26.1 and 26.2. ICESCR, Articles 6.2 and 13.

^{xxxi} UDHR, Articles 3 and 12. ICCPR, Article 17. CFREU, Articles 7 and 8.

^{xxxii} UDHR, Articles 12, 17 and 27.2. ICCPR, Article 17.

^{xxxiii} UDHR, Articles 18, 19 and 20. ICCPR, Articles 19 and 21.

^{xxxiv} UDHR, Articles 6 and 7. ICCPR, Articles 14, 16 and 26.

^{xxxv} UDHR, Article 10. ICCPR, Article 14. CFREU, Articles 47 and 48.

^{xxxvi} UNGPs. NYC. UDHR, Articles 8 and 11.1. ICCPR, Article 14. CFREU, Article 47.

^{xxxvii} UDHR, Article 29.1.