

# 'Celebrate Humanity': Reconciling Sport and Human Rights Through Athlete Activism

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Global sport—which encompasses the Olympic Movement—proclaims powerful and universal ideals, including human rights. At the same time, it seeks to govern itself in a special way through a values system committed to the neutrality, autonomy, and specificity of sport. Through a combination of power in the sports market and the twin legal forces of specific enabling legislation and compulsory arbitration, global sport has established a dominant position in its dealings with its major stakeholders. The people who make sport possible—the athletes and those affected by the magnitude of modern sporting events, including local communities, workers, children, journalists, and fans—have all suffered harm. These forces have given rise to three levels of athlete activism: (1) individual activism; (2) collective activism; and, more recently, (3) institutional activism. That activism is guided by its own values system grounded in a deep respect for human rights as well as sport and the dignity of pursuing sport for a living. Its objective is to culturally and legally reconcile sport and human rights. The challenge for global sport is to embrace the opportunity presented by athlete activism and ensure that sport is a genuine force for good.

## I. Introduction

How America fractured in 1968. It was a violent year. Liberals reeled, a war dragged on and protests raged ... Even from the distance of a half-century, the moment feels familiar.<sup>1</sup>

The 50-year period that separates athlete activists Colin Kaepernick, Eric

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<sup>1</sup> NEW YORK TIMES, *50 Years Later, It Feels Familiar. How America Fractured in 1968* (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/us/1968-history.html>

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Reid,<sup>2</sup> Abby Wambach,<sup>3</sup> and Pep Guardiola<sup>4</sup> from Tommie Smith, John Carlos, Peter Norman,<sup>5</sup> and Vera Caslavská<sup>6</sup> appears to have done little to reconcile sport and human rights. The exercise of their right to freedom of opinion and expression and their actions against discrimination resulted in threats, penalties, and ostracism. Yet the same 50-year period has seen the explosive professionalization, globalization, and, even, “giganticism” of sport as a business, political, and legal undertaking.<sup>7</sup> Athlete activism now encompasses the breadth of internationally unrecognized human and labor rights, both within and through sport.<sup>8</sup> Individual athletes demand the right to compete free of discrimination,<sup>9</sup> as well as the right to organize collectively to address abuse,<sup>10</sup> appalling conditions of work,<sup>11</sup> or

<sup>2</sup> In August 2016, National Football League [NFL] players Colin Kaepernick and Eric Reid joined in protests during the playing of the national anthem at NFL matches for reasons including the oppression of people of color in the United States. Both players were not contracted in the NFL in the subsequent season. See generally, NFL MEDIA, *Colin Kaepernick Explains Why He Sat During the National Anthem* (Aug. 27, 2016), <http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-protest-of-national-anthem>, GERAGOS & GERAGOS APC, *Claimant Colin Kaepernick’s Claim for Arbitration* (Oct. 15, 2017), [http://a.espn.com/pdf/2017/1015/KaepernickGrievance\\_r.pdf](http://a.espn.com/pdf/2017/1015/KaepernickGrievance_r.pdf) and NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION [NFLPA], *NFLPA Files Grievance on Behalf of Eric Reid* (May 7, 2018), <https://www.nflpa.com/news/nflpa-files-grievance-on-behalf-of-eric-reid>

<sup>3</sup> See *infra* Section III(B)(2).

<sup>4</sup> In March 2018, Pep Guardiola, the manager of Manchester City Football Club and the former manager and player of FC Barcelona, was fined £20,000 by The Football Association for wearing a small yellow ribbon attached to his clothing during matches. Guardiola was doing so in solidarity with the Catalan politicians imprisoned in relation to the October 2017 referendum on Catalan independence. See, *The Football Association v. Pep Guardiola, Written Reasons of the Regulatory Commission* (Mar. 12, 2018) at para. 18, <http://www.thefa.com/football-rules-governance/discipline/written-reasons>

<sup>5</sup> At the 1968 Mexico Olympic Games, Smith, Carlos, and Norman joined in an iconic protest for the Olympic Project for Human Rights [OPHR]. See generally, Boykoff, J. (2016). *Power Games. A Political History of the Olympics*. VERSO at 103 and 106. Smith and Carlos were expelled from the Games. See generally Goldblatt, D. (2016). *The Games. A Global History of the Olympics*. W. W. NORTON & COMPANY, INC., at 273.

<sup>6</sup> *Power Games, id.*, at 110-111. Also in Mexico in 1968, Caslavská, Czechoslovakia’s most successful gymnast, protested Soviet hegemony in her country during a medal ceremony. It was a move that ended her career. See *The Games, id.*, at 240.

<sup>7</sup> *The Games, id.*, at 437.

<sup>8</sup> See *infra* Section III(B).

<sup>9</sup> COURT OF ARBITRATION FOR SPORT [CAS], CAS 2014/A/3759, *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations*, Interim Award of 24 July 2015.

<sup>10</sup> NEW YORK TIMES, *Michigan State Will Pay \$500 Million to Abuse Victims. What Comes Next?* (May 18, 2018), <https://www.nytimes.com/2018/05/18/opinion/michigan-state-will-pay-500-million-to-abuse-victims-what-comes-next.html>

<sup>11</sup> See generally, FIFPRO, *2016 FIFPro Global Employment Report: Working Conditions in Professional Football*, (Nov. 2016), <https://www.fifpro.org/images/documents-pdf/2016-fifpro-global-employment-report.pdf>



entrenched gender discrimination and pay inequity.<sup>12</sup> Others work institutionally to change the very system that places the enjoyment of fundamental freedoms in conflict with the practice of sport and to hold sport to account for harm caused to the rights of those it impacts and touches.<sup>13</sup>

Taking a predominantly international perspective, this article examines the pressing need to legally reconcile sport and human rights. Its absence has given rise to three levels of athlete activism: (1) individual activism; (2) collective activism; and (3) institutional activism. That activism is guided by a powerful values system—developed by athletes over generations—that is grounded in a deep respect for human rights as well as sport and the dignity of pursuing sport for a living. However, as Section II introduces, there are significant substantive, cultural, and systemic barriers to athlete activism embedded in the governance of global sport.

Section III focuses on the renewal of individual and collective athlete activism in recent years and draws factual, political, and legal parallels between those forms of athlete activism from 50 years ago with today. Section III also posits that to bring about systemic and sustainable change, the fledgling form of institutional athlete activism is also required. Motivated by the desire to prevent and address the widespread abuse of the human rights of many groups engaged in and affected by sport, including athletes, local communities, workers, children, and fans, institutional activism aims to drive the reformation of global sports law by embedding internationally recognized human rights in the governance and legal framework of global sport.

Finally, Section IV explains that the challenge for global sport is to embrace reform and reconcile sport and human rights culturally, legally, and institutionally. This can ensure that sport is a genuine force for good in accordance with the values that purport to guide its governance.

## II. Global Sport and Barriers to Athlete Activism

### A. Global Sport

#### *1. Global Sport and Global Sports Law*

“Global sport,” for the purposes of this article, consists of the Olympic Movement, the three main constituents of which are the International Olympic Committee (“IOC”), the International Sports Federations (“IFs”), and the National Olympic Committees (“NOCs”).<sup>14</sup> It also encompasses “global sports law”—with its

<sup>12</sup> See generally, FIFPRO, *FIFPRO Global Employment Report: Working Conditions in Professional Women’s Football*, (Dec. 2017), <https://www.fifpro.org/attachments/article/6986/2017%20FIFPRO%20Women%20Football%20Global%20Employment%20Report-Final.pdf>

<sup>13</sup> See *infra* Section III(C).

<sup>14</sup> INTERNATIONAL OLYMPIC COMMITTEE [IOC], *Olympic Charter*, (15 Sep. 2017), at 15, <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf>



component parts known variously as *lex sportiva* and ‘Olympic law’—which is, in effect, law made by and imposed at the behest of sports governing bodies (“SGBs”). There “is a body of law created by reiterated decisions regarding sports disputes issued by the Court of Arbitration for Sport [(“CAS”)],” which has created jurisprudence referred to commonly as *lex sportiva*.<sup>15</sup> It also includes “the rules and regulations imposed by the SGBs and their interpretation by the CAS.”<sup>16</sup> ‘Olympic law’ comprises “laws created by a national legislature to satisfy the commercial demands of a private body” in the IOC.<sup>17</sup> The purpose of the law is to provide “the legal framework demanded by the IOC via the Host City Contract [(“HCC”)],”<sup>18</sup> especially in relation to ambush marketing and secondary ticket sales. The law has “an impact across borders” and “demonstrates how private entities can be the drivers of specific, self-interested legislation when operating as a transnational organisation.”<sup>19</sup> ‘Olympic law’ is “a distinctive type of sports law that is effectively forcibly transplanted from the host jurisdiction of one event to the next ... [and] regularly used as a template for similar legal protections to be demanded by, or offered to, the organisers of other sporting mega-events.”<sup>20</sup>

“Global sport” and “global sports law” are deliberately chosen expressions. This is because *lex sportiva* and ‘Olympic law’ are not sourced in international law. “Global sports law is an autonomous legal system, having immunity from national legal systems ... Under this global law paradigm, *lex sportiva* constitutes a separate and self-regulating legal order not subject to review by state authorities”<sup>21</sup> that has the “propensity ... to displace national laws.”<sup>22</sup> Due to the supporting nature of Swiss arbitration law, *lex sportiva* is “a ‘specific global law without the state’ ... 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.”<sup>23</sup> ‘Olympic law’ cannot be considered “international

<sup>15</sup> de Oliveira, L. *Lex sportiva as the Contractual Governing Law*, INT SPORTS LAW J (2017) 17: 101–116, at 101. <https://doi.org/10.1007/s40318-017-0116-5>

<sup>16</sup> *Id.*, at 102.

<sup>17</sup> James, M., & Osborn, G., *The Olympics, Transnational Law and Legal Transplants: The International Olympic Committee, Ambush Marketing and Ticket Touting*, LEGAL STUDIES (2016), 36, THE SOCIETY OF LEGAL SCHOLARS, 93–110, at 93. <https://doi.org/10.1111/lest.12095>

<sup>18</sup> *Id.*, at 94.

<sup>19</sup> *Id.*, at 93.

<sup>20</sup> *Id.*, at 94.

<sup>21</sup> Vaitiekunas, A. (2014), *The Court of Arbitration for Sport: Law Making and the Question of Independence*, STÄMPFLI VERLAG, at 49.

<sup>22</sup> Mitten, M., & Opie, H., “Sports Law”: Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution, 85 TUL. L. REV. 269 (2010), at 274.

<sup>23</sup> Duval, A., *The FIFA Regulations on the Status and Transfer of Players: Trans-national Law Making in the Shadow of Bosman*, ASSESS RESEARCH PAPER 2016-06, at 4, ASSESS INSTITUTE, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2760263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760263)



law [which] is usually created as a result of ... nation-states entering into treaties with each other, or with transnational organisations, *for the benefit of all.*<sup>24</sup> Yet SGBs such as the IOC and the Fédération Internationale de Football Association (“FIFA”) have a responsibility to respect human rights recognized by international law. The framework for doing so exists under the United Nations Guiding Principles on Business and Human Rights (“UNGPs”),<sup>25</sup> the OECD Guidelines for Multinational Enterprises (“OECD Guidelines”),<sup>26</sup> and the International Labour Organization (“ILO”) Tripartite Declaration on Principles Concerning Multinational Enterprises and Social Policy (“MNE Declaration”).<sup>27</sup> The responsibility “is a global standard of expected conduct for all business enterprises wherever they operate,” exists “independently of States’ abilities and/or willingness to fulfil their own human rights obligations,” and “exists over and above compliance with national laws and regulations protecting human rights.”<sup>28</sup> The responsibility refers to, at a minimum, those expressed in The International Bill of Human Rights,<sup>29</sup> the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work and Its Follow-Up (“ILO Declaration”),<sup>30</sup> and additional international standards pertaining to vulnerable groups,<sup>31</sup> including the United Nations Convention on the Rights of the Child (“UNCRC”).<sup>32</sup> Importantly, “[t]he universal nature of these rights and freedoms is beyond question.” The “international community must treat human rights globally in a fair and equal manner,” on the same footing and emphasis.<sup>33</sup>

<sup>24</sup> *The Olympics, Transnational Law and Legal Transplants*, *supra*, note 17 at 94 (emphasis added).

<sup>25</sup> *Guiding Principles on Business and Human Rights*, UNITED NATIONS [UN] HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2011), [http://www.ohchr.org/Documents/Publications/Guiding-PrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/Guiding-PrinciplesBusinessHR_EN.pdf)

<sup>26</sup> *OECD Guidelines for Multinational Enterprises*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD] (2011), <http://www.oecd.org/corporate/mne/48004323.pdf>

<sup>27</sup> *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 5th Edition*, INTERNATIONAL LABOUR ORGANIZATION (2017), <https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>

<sup>28</sup> *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 13.

<sup>29</sup> *The International Bill of Human Rights*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1948–1989), at 1–41, <https://www.ohchr.org/documents/publications/compilation1.en.pdf>

<sup>30</sup> *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up*, INTERNATIONAL LABOUR ORGANIZATION [ILO](1998), [http://www.ilo.org/declaration/info/publications/WCMS\\_467653/lang--en/index.htm](http://www.ilo.org/declaration/info/publications/WCMS_467653/lang--en/index.htm)

<sup>31</sup> *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 13–14.

<sup>32</sup> *United Nations Convention on the Rights of the Child*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1989), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>33</sup> *Vienna Declaration and Programme of Action*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1993), at 2-3, <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>



## 2. *The Olympic Ideal: Humanity or Autonomy?*

By showcasing the achievements, performance, and diversity of the world's best athletes, global sport purports to "celebrate humanity."<sup>34</sup> In so doing, it proclaims powerful and universal ideals. According to the fundamental principles of Olympism as contained in the Olympic Charter, "[t]he goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity."<sup>35</sup> The IOC's mission is to "cooperate with the competent public or private organisations and authorities in the endeavour to place sport at the service of humanity and thereby to promote peace" and "oppose any political or commercial abuse of sport and athletes."<sup>36</sup> To this end, the "practice of sport is a human right,"<sup>37</sup> and the "enjoyment of the rights and freedoms set forth in [the] 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."<sup>38</sup>

In 2013, IOC President Thomas Bach told the United Nations General Assembly that the application of the "universal values and goals" shared by the IOC and the UN through a "universal law" depended on "[p]olitics respect[ing] ... sporting autonomy."<sup>39</sup> It also follows, according to Bach, that "sport must remain politically neutral,"<sup>40</sup> which necessitates that the IOC "oppose[s] boycotts of any kind" as they "are a fundamental contradiction to the spirit of sport, depriving it of the means to work for peace, mutual understanding and solidarity."<sup>41</sup>

The Commonwealth Games Federation ("CGF"), in contrast to the IOC, rightly acknowledges that "[t]he dial has shifted over the past several years" and "sports [have] always been political."<sup>42</sup> Its Chief Executive, David Grevemberg, said during the 2018 Commonwealth Games on the Gold Coast, Australia, that "[w]e firmly believe we can be a non-adversarial force for good in this world, that creates a safe space for courageous conversation and even more importantly

<sup>34</sup> IOC, *IOC to "Celebrate Humanity" in its Olympic 2000 Promotional Program*, (Jan. 19, 2000), <https://www.olympic.org/news/ioc-to-celebrate-humanity-in-its-olympic-2000-promotional-program>

<sup>35</sup> *Olympic Charter*, *supra*, note 14, para. 2 at 11.

<sup>36</sup> *Id.*, at 16 and 17.

<sup>37</sup> *Id.*, para. 4 at 11.

<sup>38</sup> *Id.*, para. 6 at 12.

<sup>39</sup> IOC, *IOC President Thomas Bach: Statement on the Occasion of the Adoption of the Resolution "Building a Peaceful and Better World Through Sport and the Olympic Ideal."* 68th Session of the UN General Assembly New York, (Nov. 6, 2013), [https://stillmed.olympic.org/Documents/IOC\\_President/2013-11-6\\_Speech\\_IOC\\_President\\_Bach-Olympic\\_Truce\\_adoption\\_Speech\\_4\\_November.pdf](https://stillmed.olympic.org/Documents/IOC_President/2013-11-6_Speech_IOC_President_Bach-Olympic_Truce_adoption_Speech_4_November.pdf)

<sup>40</sup> *Id.*, at 3.

<sup>41</sup> *Id.*, at 4. The autonomy of sport is recognized as the fifth fundamental principle of Olympism. See, *Olympic Charter*, *supra*, note 14, para. 5 at 11.

<sup>42</sup> A.B.C., *A Sport's Body that Embraces Politics? Welcome to the Commonwealth Games Federation* (Apr. 14, 2018), <http://www.abc.net.au/news/2018-04-08/a-sports-body-that-embraces-politics3f-welcome-to-the-commonwe/9630966>



a safe space for taking brave action.<sup>43</sup> Unfortunately, global sport has not been a safe place; nor has it encouraged the taking of brave action. As a result, it has, on too many occasions, not been a force for good.

On March 23, 2018, the United Nations Human Rights Council (“UNHRC”) had cause to address the Olympic ideals in light of the revelations of widespread athlete abuse in prominent Olympic sports, including gymnastics in the United States.<sup>44</sup> Having recalled the “purposes and principles of the Charter of the [UN],” “the Universal Declaration of Human Rights [(“UDHR”)] and relevant international human rights instruments,”<sup>45</sup> the UNHRC carried a resolution that calls on States to work with the IOC to “use sport as a tool to promote human rights, development, peace, dialogue and reconciliation.”<sup>46</sup> The resolution describes the important shift that global sport must make to reconcile sport and human rights. First, the responsibility of the IOC is shared with other stakeholders. Second, the Olympic Charter sits in the context of internationally recognized human rights standards and principles.<sup>47</sup>

## B. Barriers to Athlete Activism

Athletes are “people first” and athletes a “distant second.”<sup>48</sup> For former National Football League (“NFL”) player and NFL Players Association (“NFLPA”) Executive member Scott Fujita, “[f]ootball is a big part of what we do, but a very small part of who we are.”<sup>49</sup> The relationship athletes have with their sport and profession involves “institutional thinking” and rules “which are deeply woven into the fabric of the people who practice them.”<sup>50</sup> Athletes often have “a deep reverence for those who came before and built up the rules that [they have] temporarily taken delivery of” and “see themselves as debtors who owe something, not creditors to whom something is owed.”<sup>51</sup> The inheritance and legacy understood by players can transcend their own cause. According to Fujita, “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

<sup>43</sup> *Id.*, (emphasis added).

<sup>44</sup> See generally, *Report to USA Gymnastics on Proposed Policy and Procedural Changes for the Protection of Young Athletes* (Jun. 26, 2017), KRIEG DEVAULT, [https://usagym.org/PDFs/About%20USA%20Gymnastics/ddreport\\_062617.pdf](https://usagym.org/PDFs/About%20USA%20Gymnastics/ddreport_062617.pdf)

<sup>45</sup> *Promoting Human Rights through Sport and the Olympic Ideal*, at 1, UNITED NATIONS HUMAN RIGHTS COUNCIL (Mar. 19, 2018), <http://undocs.org/A/HRC/37/L.3>

<sup>46</sup> *Id.*, at 4.

<sup>47</sup> *Id.*, at 2.

<sup>48</sup> NEW YORK TIMES, *Acceptance by Example, on the Field and at Home* (Mar. 23, 2013), <https://www.nytimes.com/2013/03/24/sports/football/scott-fujita-acceptance-by-example-in-locker-room-and-at-home.html>

<sup>49</sup> *Id.*

<sup>50</sup> N.Y. TIMES, *What Life Asks of Us* (Jan. 26, 2009), <https://www.nytimes.com/2009/01/27/opinion/27brooks.html>

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



—including the way they treat others and the words they use—can influence many people, especially children.”<sup>52</sup> But there is a price to be paid, a price that is exacerbated by sport’s reluctance to reconcile itself with the cause of human rights even though it is those who fight “against discrimination and for equality” who “end up on the right side of history.”<sup>53</sup>

In the Preamble to the UDHR, “the peoples of the [UN] ... 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 ... determined to promote social progress and better standards of life in larger freedom.”<sup>54</sup> Whether athletes, globally, are presently entitled to the protection of a legal framework that is consistent with the advancement of internationally recognized human rights for both themselves and others is most uncertain. The seventh fundamental principle of Olympism prescribes that “[b]elonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.”<sup>55</sup> From here begins a deep level of regulation and control of the athlete, which is of “extraordinary and far-reaching complexity.”<sup>56</sup> It brings into focus the irreconcilability between sport and human rights, which starts with the conflict between the detail of the Olympic Charter and the fundamental principles that introduce it. That conflict establishes substantive, cultural, and systematic barriers to athlete activism. To qualify and compete at the Olympic Games, an athlete must satisfy the rules set by the IOC in addition to the requirements of his or her IF, NOC, and national federation (“NF”), making Olympic qualification a “complex process” that “raises important philosophical questions.”<sup>57</sup> NOCs are vested with the power to “decide upon the entry of athletes ... based not only on the sports performance of an athlete, but also on his ability to serve as an example to the sporting youth of his country.”<sup>58</sup> Further, “[n]obody is entitled as of right to participate in the Olympic Games.”<sup>59</sup>

Under the Olympic Charter, “[n]o kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas.”<sup>60</sup> A competitor may not allow “his person, name, picture or sports performances to be used for advertising purposes during the Olympic Games.”<sup>61</sup> Further, “[t]

<sup>52</sup> *Acceptance by Example, on the Field and at Home*, *supra*, note 48.

<sup>53</sup> POLITICO MAGAZINE, *The Arc of History Bends a Knee Toward Kaepernick* (May 27, 2018) <https://www.politico.com/magazine/story/2018/05/27/nfl-national-anthem-protest-colin-kaepernick-trump-administration-218546>

<sup>54</sup> *Universal Declaration of Human Rights [UDHR]*, UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1948), at 1, [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)

<sup>55</sup> *Olympic Charter*, *supra*, note 14, para. 7 at 12.

<sup>56</sup> Schwab, B. *Embedding the Human Rights of Players in World Sport*, INT SPORTS LAW J (2018), at 38. <https://doi.org/10.1007/s40318-018-0128-9>

<sup>57</sup> Teetzel, S. *Charting the Charter. An Analysis of Eligibility Rules and the Olympic Games*, OLYMPIKA XX (2001), 31–54, at 31.

<sup>58</sup> *Olympic Charter*, *supra*, note 14, at 64.

<sup>59</sup> *Id.*, at 80.

<sup>60</sup> *Id.*, at 91.

<sup>61</sup> *Id.*, at 77.



he entry or participation of a competitor in the Olympic Games shall not be conditional on any financial consideration.”<sup>62</sup> Finally, participation in the Olympic Games requires compliance with the Olympic Charter,<sup>63</sup> the World Anti-Doping Code (“WADC”),<sup>64</sup> and for any dispute to be submitted exclusively to the CAS in accordance with the Code for Sports-Related Arbitration (“CAS Code”).<sup>65</sup>

In addition to the express limitations of the Olympic Charter and ‘Olympic law,’ the body of *lex sportiva* in key respects purportedly “protects itself against the intrusion of state law by taking into account the fundamental norms of human rights and claiming that its standards and procedures have been formulated and are applied consistently with them.”<sup>66</sup> However, “[t]hese are not conclusions that would necessarily follow if an external assessment were undertaken,” especially by a “court located outside this values system.”<sup>67</sup> Given the significant difficulties athletes confront accessing effective remedies outside the sporting framework,<sup>68</sup> athletes must primarily rely on the “legal structures that have been adopted [and which] have limited the extent of direct human rights evaluation.”<sup>69</sup>

In evaluating the human rights of athletes, global sports law has primarily drawn on the constitutional objectives and commitments of SGBs, such as the fundamental principles of Olympism. The CAS has considered that “these provisions are higher-ranking rules that prevail” over conflicting regulations of the SGB and render such regulations “invalid as inconsistent.”<sup>70</sup> The CAS would permit constraints on even that limited articulation of rights through any proportionate means that achieves a “legitimate objective” of the SGB. “The requisite standard [for the SGB] to justify discrimination of a fundamental right ... should be to a level higher than that of the balance of probabilities.”<sup>71</sup> According to the CAS, “[s]uch an approach is consistent with the countervailing requirements for sport and is recognised in a wide range of domestic and international laws, including laws directed to the prohibition of discrimination generally.”<sup>72</sup> By assuming that the requirements of sport will conflict with internationally

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<sup>62</sup> *Id.*, at 78.

<sup>63</sup> *Id.*, at 77.

<sup>64</sup> *Id.*, at 50, 65, 77, 79, 81, 83, 85, 99, and 101.

<sup>65</sup> *Id.*, at 103. COURT OF ARBITRATION FOR SPORT [CAS], *Code for Sports-Related Arbitration* (Jan. 1 2017). [http://www.tas-cas.org/fileadmin/user\\_upload/Code\\_2017\\_FINAL\\_en.pdf](http://www.tas-cas.org/fileadmin/user_upload/Code_2017_FINAL_en.pdf)

<sup>66</sup> Byrnes, A. (2016), Human Rights and the Anti-Doping *Lex Sportiva* – The Relationship of Public and Private International Law, ‘Law Beyond the State’ and the Law of Nation States, Chapter 5, in Haas, U. and Healey, D (eds), *Doping in Sport and the Law*, HART PUBLISHING, 81–104, at 104. The author’s comments, made in the context of the anti-doping *lex sportiva*, have relevance to *lex sportiva* more broadly.

<sup>67</sup> *Id.*, at 104.

<sup>68</sup> See, generally, MEGA SPORTING EVENTS PLATFORM FOR HUMAN RIGHTS, *Remedy Mechanisms for Human Rights in the Sports Context. Sporting Chance White Paper 2.4, Version 1* (Jan. 2017), [https://www.ihrb.org/uploads/reports/MSE\\_Platform%2C\\_Remedy\\_Mechanisms\\_for\\_Human\\_Rights\\_in\\_the\\_Sports\\_Context%2C\\_Jan\\_2017.pdf](https://www.ihrb.org/uploads/reports/MSE_Platform%2C_Remedy_Mechanisms_for_Human_Rights_in_the_Sports_Context%2C_Jan_2017.pdf)

<sup>69</sup> *Human Rights and the Anti-Doping Lex Sportiva*, *supra*, note 66, at 104.

<sup>70</sup> *Chand*, *supra*, note 9, at para. 449.

<sup>71</sup> *Id.*, at para. 443.

<sup>72</sup> *Id.*, at para. 450 (emphasis added).



recognized human rights, the CAS creates a risk that the rights of athletes and others will not be protected, respected, and upheld.

### III. Athlete Activism

This Section examines individual, collective, and institutional athlete activism. It does so by considering each level of activism through two key athlete-driven endeavors, the reaction of global sport, and the key legal challenges that confront the activists.

#### A. Individual Athlete Activism

##### 1. *Freedom of Expression and Opinion*

The right to freedom of expression and opinion is referred to in Article 19 of the UDHR and given legal effect under Article 19 of the International Covenant on Civil and Political Rights 1966 (“ICCPR”).<sup>73</sup> It serves as an enabler of all other rights. As the reactions to the activism of Smith, Carlos, Norman, Caslavka, Kaepernick, Wambach, Reid, and Guardiola make clear,<sup>74</sup> in global sport, “the interference with athletes’ freedom of expression is more likely to come from employers or [SGBs]” than State actors.<sup>75</sup> The Olympic Charter’s prohibition of political demonstration is a cornerstone of the IOC’s purported commitment to remain at all times “strictly politically neutral.”<sup>76</sup> However, the IOC’s Technical Manual on Protocol prescribes that medal winners “shall face” their national flag during the playing of their countries national anthems.<sup>77</sup> The combination of the prohibition with a compulsory ceremony is significant, because participation in that ceremony conveys a contrived meaning that may be at odds with how certain individuals wish to express themselves. In the words of a 1943 judgment of the United States Supreme Court delivered by Justice Jackson, which upheld a challenge to an action of a State that made it compulsory for children in public schools to salute the flag and pledge allegiance:

The case is made difficult ... because the flag involved is our own ... To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous, instead of a compulsory routine, is to make an unflattering estimate of the appeal of our institutions to free minds

<sup>73</sup> UDHR, *supra*, note 54, article 19. *International Covenant on Civil and Political Rights [ICCPR]* UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1966), article 19 <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

<sup>74</sup> *Supra*, notes 2, 4, 5, and 6.

<sup>75</sup> Lindholm, J., *From Carlos to Kaepernick and Beyond: Athletes’ Right to Freedom of Expression*, INT SPORTS LAW J (2017) 17: 1–3, at 2.

<sup>76</sup> INSIDE THE GAMES, *Bach Insists Political Neutrality the Secret Behind North Korean Involvement at Pyeongchang 2018* (Mar. 20, 2018), <https://www.insidethegames.biz/articles/1062914/bach-insists-political-neutrality-the-secret-behind-north-korean-involvement-at-pyeongchang-2018>

<sup>77</sup> IOC, *Technical Manual on Protocol* (2001) at 53, [file:///C:/Users/BSC/OneDrive%20-%20UNI%20Global%20Union/1.%20WP%20Pillars/1.%20Voice/IA.%20World%20Players/Stakeholder%20Relations/IOC/IOC%20Gov%20Docs/Technical\\_Manual\\_on\\_Protocol.pdf](file:///C:/Users/BSC/OneDrive%20-%20UNI%20Global%20Union/1.%20WP%20Pillars/1.%20Voice/IA.%20World%20Players/Stakeholder%20Relations/IOC/IOC%20Gov%20Docs/Technical_Manual_on_Protocol.pdf)



... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things which touch the heart of the existing order.<sup>78</sup>

Disciplinary action taken by the IOC against athletes who protest during the Olympic Games would be reviewable by the ad hoc division of the CAS established for the Games and, possibly, in a court of competent jurisdiction including the Swiss Federal Tribunal (“SFT”), the European Court of Justice (“ECJ”), or the European Court of Human Rights (“ECtHR”).<sup>79</sup> According to legal academic Johan Lindholm, the “circumstances of the individual case and the relative weight of the interests of the athlete and the [SGB] must be considered and balanced against each other,”<sup>80</sup> and, “[w]hile this must be determined on a case-by-case basis, a lifetime ban, on the extreme end, would almost certainly be considered as disproportional.”<sup>81</sup> Such review, however, must surely bring into question the lawfulness of the express prohibition, which, the IOC would likely argue, is both valid on its terms and a proportionate means of achieving its legitimate objective of political neutrality. In 2017, the ECJ concluded that “the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate.”<sup>82</sup> Any internal policy that contains a prohibition on workers must be “genuinely pursued in a consistent and systematic manner,”<sup>83</sup> be “limited to that which is strictly necessary,”<sup>84</sup> and be “objectively justified ... [by reference to] means of achieving that aim [that] are appropriate and necessary.”<sup>85</sup>

Whether the objective of political neutrality can now justify the prohibition of political demonstration is questionable. The Olympic Charter purports to impose a blanket prohibition on political demonstration, whereas it could follow the ICCPR, which provides that the right:

... carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>86</sup>

<sup>78</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), at 641–642.

<sup>79</sup> *From Carlos to Kaepernick*, *supra*, note 75, at 1.

<sup>80</sup> *Id.*, at 2.

<sup>81</sup> *Id.*, at 3.

<sup>82</sup> Case C157/15, *Achbita v. G4S Secure Solutions NV*, (2015), at para. 37, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188852&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=529203>

<sup>83</sup> *Id.*, at para. 40.

<sup>84</sup> *Id.*, at para. 42.

<sup>85</sup> *Id.*, at para. 44.

<sup>86</sup> *ICCPR*, *supra*, note 73, at article 19.3.



This would be consistent with the more nuanced approach now being taken by the CGF. Indeed, not only is it questionable whether the IOC would be able to meet the satisfactory evidentiary standard that prohibiting political protest such as that engaged in by Smith, Carlos, Norman, and Caslavka damaged the Games and therefore needs to be curtailed, it is arguable the very same protest in fact positively contributed to the advancement of the Olympic mission by “promoting a peaceful society concerned with the preservation of human dignity.”<sup>87</sup> According to former United States President Barack Obama, the “powerful silent protest [of Smith and Carlos] in the 1968 Games was controversial, but it woke folks up and created greater opportunity for those that followed.”<sup>88</sup> On April 28, 2018, Peter Norman was given a post-humous Order of Merit by the Australian Olympic Committee (“AOC”), with AOC President and IOC Vice President John Coates stating, “[t]his is an overdue award there is no doubt ... The respect for Peter and his actions is still enormous to this day. He believed in human rights throughout his life.”<sup>89</sup> Caslavka, with the rise of Vaclav Havel to the presidency of Czechoslovakia, would become the head of the Czech Olympic Committee and the eighth woman appointed as a member of the IOC.<sup>90</sup>

In any proceedings before the CAS, an athlete seeking to assert his or her fundamental right to freedom of political opinion and expression would need to overcome two preliminary legal hurdles. First, the conflict is not between a regulation of a SGB and the higher-ranking provision of the Olympic Charter, it is between two provisions of the Olympic Charter itself. Second, for there to even be an evidentiary burden for the IOC to satisfy to justify the prohibition, a constructive and expansive interpretation would need to be taken that the fundamental principles of Olympism in relation to peace and human rights entitle athletes to have their fundamental rights protected and respected when practicing sport, including in relation to freedom of expression and opinion. Otherwise, the express prohibitions would apply without context or reference to internationally recognized human rights. This is also because, notwithstanding the UNGPs and the OECD Guidelines, the IOC has yet to take the steps necessary to embed respect for the fundamental rights of athletes into the Olympic Charter or the regulatory framework of global sport.<sup>91</sup>

## 2. *The Right to Work and Access to an Effective Remedy*

Sport has long sought to be immunized from the reach of the law.<sup>92</sup> According to an English court in 1964, this was achieved through the establishment of “an

<sup>87</sup> *Olympic Charter*, *supra*, note 14, at 11.

<sup>88</sup> CNN, *Tommie Smith and John Carlos Join 2016 Olympic Team at the White House*, (Sep. 29, 2016) <https://edition.cnn.com/2016/09/29/sport/tommie-smith-john-carlos-us-olympic-team-white-house/index.html>

<sup>89</sup> CNN, *Australian Peter Norman Honored Over 1968 Black Power Protest*, (Apr. 28, 2018) <https://edition.cnn.com/2018/04/28/asia/peter-norman-australia-honor-intl/index.html>

<sup>90</sup> *Power Games*, *supra*, note 5, at 111.

<sup>91</sup> *Infra* Part III(C)(2).

<sup>92</sup> *Supra* Part II(A)(1).



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."<sup>93</sup> Since that time, players from a variety of sports, including Major League Baseball ("MLB") player Curt Flood, have been willing to risk their careers and livelihoods so that their fellow professionals can enjoy—as players—the same basic rights and freedoms that all citizens enjoy.<sup>94</sup> This has been achieved through the development of a body of case law from 1964 to 1995 in jurisdictions such as the United States, Europe, and Australia that was hard fought for and saw players legally recognized as workers, free to form and join unions and free to move in the exercise of their trade as professional athletes without the imposition of any unreasonable restraint.<sup>95</sup> Fundamental to the success of such individual athlete activism was the determination shown to win the internationally recognized human rights to "work, to free choice of employment, [and] to just and favourable conditions of work,"<sup>96</sup> as well as to "have an effective remedy" including "the possibility of judicial remedy" through a forum operating outside the values system and legal reach of SGBs.<sup>97</sup>

That values system, enveloped as it can be in the "aura and mystique" of sport, can also affect the judgement of the judiciary.<sup>98</sup> Justice Blackmun, a liberal, wrote the majority Supreme Court opinion dismissing Flood's legal challenge to baseball's longstanding reserve clause on the basis of *stare decisis*. Only four of his opinion's 27 pages, described as an "ode to baseball,"<sup>99</sup> provided the reasoning for the decision, with Blackmun concluding that "[w]ith its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly."<sup>100</sup> In *A Well-Paid Slave*, Flood biographer Brad Snyder wrote that Blackmun "enjoyed being viewed as the Court's number

<sup>93</sup> *Eastham v Newcastle United Football Club* [1964] Ch. 413, at 438.

<sup>94</sup> Snyder, B. (2006). *A Well-Paid Slave. Curt Flood's Fight for Free Agency in Professional Sports*, VIKING, at 67–68.

<sup>95</sup> Schwab, B. "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*, 32 MD. J. INT'L L. 4 (2017), at 20–25, <http://digitalcommons.law.umaryland.edu/mjil/vol32/iss1/4>, and *Embedding the Human Rights of Players*, *supra*, note 56, at 3–4. See also generally, *Eastham*, *supra*, note 93; *Buckley v. Tutty* (1971) 125 CLR 353; *Flood v. Kuhn*, 407 U.S. 258 (1972); *Robertson v. National Basketball Association* 389 F.Supp. 867 (1975); *John Mackey et al., v. National Football League et al.*, 543 F.2d 606 (1976); *Greig and others v. Insole and others: World Series Cricket Pty. Ltd. v. same.* [1978] 1 W.L.R. 302; *McNeil v. National Football League* 790 F.Supp. 871 (1992); *Adamson v. New South Wales Rugby League Limited* [1991] FCA 425 and Case C-415/93, *Union Royale Belge Des Societes de Football Association and Others v. Bosman and Others*, 1995 E.C.R. I-4921.

<sup>96</sup> UDHR, *supra*, note 54, at article 23.1. International Covenant on Economic, Social and Cultural Rights [ICESCR], UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1966), article 6.1, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

<sup>97</sup> ICCPR, *supra*, note 73, at article 3(a) and 3(b).

<sup>98</sup> *A Well-Paid Slave*, *supra*, note 94, at 312.

<sup>99</sup> *Id.*, at 296.

<sup>100</sup> *Flood v. Kuhn*, *supra*, note 95, at 282.



one baseball fan.”<sup>101</sup> He “lost himself in the romance of baseball and forgot about the struggles and sacrifices of Curt Flood.”<sup>102</sup>

At the global level, the status, representation, and freedom of athletes are all regulated by SGBs,<sup>103</sup> and, therefore, largely constrained by their values system, which has been entrenched by the “SFT’s benevolence towards the CAS.”<sup>104</sup> Claudia Pechstein, a German speed skater regarded as “one of the most successful champions in the history of the Olympic Games,”<sup>105</sup> has pursued legal channels through the CAS, the SFT, the German courts, and the ECtHR following a two-year suspension imposed by the International Skating Union (“ISU”) for a doping offence “[n]ot as a result of a doping control having detected the presence of prohibited substances in her system, as is customarily the case, but as a result of anomalies which were revealed in her biological passport, suggesting she was doped.”<sup>106</sup> Pechstein challenged the clause in her athlete’s contract mandating arbitration by the CAS, relying on German competition law. The regional Court of Appeal of Munich (the *Oberlandesgericht München*, or “OLG”) found for Pechstein on January 15, 2015, ruling that SGBs are in a dominant position and “[a]s a consequence, it is necessary to ascertain that they do not take advantage of this situation by forcing professional athletes to resort to the CAS in the event of a dispute.”<sup>107</sup> The OLG found, in rendering the CAS arbitration clause between Pechstein and the ISU void, that the structure of the International Council of Arbitration for Sport (“ICAS”), which governs the CAS, gave SGBs “decisive influence” in selecting CAS arbitrators.<sup>108</sup> Accordingly and “[e]ven where the personal integrity of the persons included on the CAS list [of arbitrators] is not affected, there is a potential risk that arbitrators share the worldview of sports associations rather than the one of athletes.”<sup>109</sup>

On June 7, 2016, the German Federal Supreme Court (*Bundesgerichtshof*, or “BGH”) reversed the decision of the OLG. Like Flood’s case, the decision can fairly be seen as one clouded by the mystique of sport, and inattentive to the struggles and sacrifices of Pechstein. The BGH based its decision in a number of important respects on the existence of a fictitious values system in world sport supposedly shared between SGBs and athletes:

A dominant influence of the federation involved in the proceedings in the present case cannot be deduced from the fact that the sports federations and the Olympic Committees globally have an important influence with

<sup>101</sup> *A Well-Paid Slave*, *supra*, note 94, at 311.

<sup>102</sup> *Id.*, at 312.

<sup>103</sup> *Embedding the Human Rights of Players*, *supra*, note 56, at 3–8.

<sup>104</sup> Maisonneuve, M. (2016) *Oberlandesgericht München*, Az. U1110/14 Kart, Claudia Pechstein v International Skating Union (ISU), 15 January 2015, in Duval, A., & Rigozzi, A. (eds) *Yearbook of International Sports Arbitration 2015*, ASSER PRESS SPRINGER, 335–347, at 339.

<sup>105</sup> *Id.*, at 336.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*, at 336 and 338.

<sup>108</sup> *Id.*, at 340.

<sup>109</sup> *Id.*, at 342 (emphasis added).



respect to the composition of the list of arbitrators. *A predominant position of the federation involved in the present proceedings vis-à-vis the athlete when determining the arbitrators could only be deduced from this if “federations” and “athletes” were seen as two “camps” confronting each other and motivated by opposing interests, as may be the case in other areas, e.g. in disputes involving employers and employees. However, “federations” and “athletes” do not represent such opposing camps.*<sup>110</sup>

In forming this view, the BGH stated that, “[t]he fact that the fight against doping is of paramount importance worldwide has never been denied by either party and is undisputed. Against this background, a uniform system of arbitration is intended to implement the anti-doping rules of the [WADC] in an effective manner and in accordance with uniform case law.”<sup>111</sup> The BGH also stated that “it may be assumed that [Pechstein] would not have been admitted for participation in the competition if she had refused to also sign the arbitration agreement” and that, accordingly, the arbitration agreement was “imposed on her.”<sup>112</sup>

In weighing Pechstein’s fundamental rights “to access to the courts” and to “a free exercise of one’s profession [which] includes not only the right to choose and take up one’s profession freely, but also the right to exercise that profession as one sees fit,”<sup>113</sup> the BGH deferred to the ISU’s “autonomy as an association, which is equally guaranteed as a fundamental right,”<sup>114</sup> and the “specialist knowledge of the arbitrators.”<sup>115</sup> Moreover, in balancing the interests of Pechstein and the ISU, the BGH had regard to the obligation of the ISU to comply with its obligations regarding the CAS and the WADC under the Olympic Charter in order to be recognized by the IOC, again demonstrating how the imposition of a legal obligation by a SGB on an athlete at the behest of another SGB (the IOC) is used in world sport as a balancing consideration to help justify a constraint on an athlete’s fundamental rights.<sup>116</sup>

The analysis of the BGH demonstrates how individual athlete activism can only succeed if the prevailing values system that informs dispute resolution in a sports-related context is objectively challenged together with the substantive aspects of the matter. The successful line of legal authorities between 1964 and 1995 recognized that the players were employees or workers,<sup>117</sup> a fundamental point not pressed by Pechstein despite the controlled and highly regulated environment in which many Olympic athletes are engaged.<sup>118</sup> These courts established that not

<sup>110</sup> *Bundesgerichtshof [BGH]*, Az. KZR 6/15, *Pechstein v. International Skating Union*, (2016) at para. 32 (emphasis added).

<sup>111</sup> *Id.*, at para. 50.

<sup>112</sup> *Id.*, at para. 56.

<sup>113</sup> *Id.*, at para. 58.

<sup>114</sup> *Id.*, at para. 59.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, at para. 60.

<sup>117</sup> *Supra*, note 95.

<sup>118</sup> *Embedding the Human Rights of Players*, *supra*, note 56, at 4 and “*When We Know Better*,” *supra*, note 95, at 39.



only were the fundamental rights of players to pursue their profession being unreasonably and, therefore, unlawfully restrained, the same restraints were not in the best interests of sport. In the matter of doping, for example, serious questions remain about the effectiveness of the WADC.<sup>119</sup> Furthermore, the deference to the apparent specialist expertise of the CAS can exacerbate rather than address concerns for the human rights of athletes because the capacity of the CAS to deal with human rights-related matters is a highly pertinent and legitimate question. According to the seminal report prepared by Professor John Ruggie—the architect of the UNGPs—titled, “For the Game. For the World. FIFA and Human Rights” published in April 2016 (“FIFA Ruggie Report”):<sup>120</sup>

... 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.<sup>121</sup>

The analysis of the BGH also demonstrates the importance for individual athlete activists in articulating how the combination between the IOC and a SGB—as reinforced through the CAS—not only heightens the dominant position of the SGB over the athlete, but is more correctly considered a business relationship that obliges both parties to act to prevent and mitigate adverse human rights impacts, including impacts to which they have not contributed.<sup>122</sup> This approach was correctly adopted by the European Commission (“EC”) on December 8, 2017, when analyzing the anti-competitive impacts of the ISU’s eligibility rules permitting the imposition of severe sanctions on athletes appearing in events not authorized by or under the auspices of the ISU. The EC concluded that the appeals procedure to the CAS—which, like Pechstein, the athletes had no choice but to accept—reinforced the restriction of their commercial freedom.<sup>123</sup>

Under the UNGPs, “‘business relationships’ are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.”<sup>124</sup> One of the strongest features of the relationship between the IOC and SGBs is the broad condemnation of athletes seeking access to judicial remedies, despite that being a fundamental right, including through express regulation and the making of threats to exclude athletes from major international

<sup>119</sup> SYDNEY MORNING HERALD, *Why Australian Sport Must Cut Ties with WADA* (Jun. 15, 2014), <https://www.smh.com.au/sport/why-australian-sports-must-cut-ties-with-wada-20140615-zs8k1.html>

<sup>120</sup> Ruggie, John G. *For the Game. For the World*. HARVARD UNIVERSITY (2016), <https://www.hks.harvard.edu/centers/mrcbg/programs/crj/research/reports/report68>

<sup>121</sup> *Id.*, at 26.

<sup>122</sup> *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 14.

<sup>123</sup> *Case AT.40208 – International Skating Union’s Eligibility Rules* (2018) at 6, para. (5) and (6), EUROPEAN COMMISSION DG COMPETITION ANTITRUST PROCEDURE COUNCIL REGULATION EC (1/2003) [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40208/40208\\_1384\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/40208/40208_1384_5.pdf)

<sup>124</sup> *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 15.



competitions.<sup>125</sup> This relationship can, in practice, be an insurmountable barrier to the practice of individual athlete activism.

## B. Collective Athlete Activism

### *1. Freedom of Association and Effective Recognition of the Right to Collective Bargaining*

The ILO's Decent Work Agenda involves "freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men."<sup>126</sup> In this way, it expresses the aspirations of modern athletes. The ever-increasing demands of professionalism—driven by the combined forces of economic growth and the increased prestige of sport for governments and business as well as SGBs—mean that just pay and conditions of work are now simply essential for both male and female athletes.<sup>127</sup> Coupled with increasing concerns over the negative human rights impacts of the activity of sport and SGBs on athletes, world sport is seeing the "normalisation of the right of players to organise"<sup>128</sup> and, as shown in Figure 1,<sup>129</sup> the "dramatic emergence of player associations across the globe."<sup>130</sup> This includes the establishment of the World Players Association ("WPA") in December 2014 as an autonomous sector of UNI Global Union, a global union federation. The WPA is an international federation of global, regional, and national player

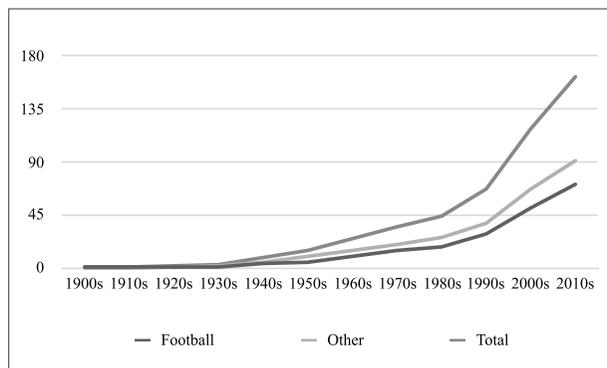


Figure 1. Growth in Player Associations, 1900s to 2010s.

<sup>125</sup> *For the Game. For the World*, *supra*, note 120, at 26. *See, infra*, Section III(B)(2).

<sup>126</sup> ILO, *Decent Work*. (Retrieved Jul. 23, 2018) <http://www.ilo.org/global/topics/decent-work/lang--en/index.htm>

<sup>127</sup> *Supra*, notes 9–12.

<sup>128</sup> "When We Know Better," *supra*, note 95, at 30–32, and Dabscheck, B. *Forming Teams of Their Own: The Dramatic Emergence of Player Associations Across the Globe* (Jan. 26, 2017), LAW IN SPORT, <https://www.lawinsport.com/articles/item/forming-teams-of-their-own-the-dramatic-emergence-of-player-associations-across-the-globe>

<sup>129</sup> Adapted from *Forming Teams of Their Own*, *id.* Figure 1 excludes 17 unions where the official establishment date is unknown and associations of independent contractors (e.g., Professional Golfers' Associations).

<sup>130</sup> *Id.*



associations that represents approximately 85,000 professional players through more than 100 player associations based in more than 60 countries.<sup>131</sup>

“Internationally recognized human rights” include, according to the UNGPs,<sup>132</sup> the ILO Declaration.<sup>133</sup> It sets out the obligations of all “members” of the ILO to “respect, promote and realize, in good faith ... freedom of association and the effective recognition of the right to collective bargaining; ... [and] the elimination of discrimination in respect of employment and occupation.”<sup>134</sup> Eight fundamental Conventions of the ILO embody these principles, including the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (“ILO C87”),<sup>135</sup> Right to Organise and Collective Bargaining Convention, 1949 (No. 98) (“ILO C98”),<sup>136</sup> Equal Remuneration Convention, 1951 (No. 100) (“ILO C100”),<sup>137</sup> and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).<sup>138</sup> The ILO Declaration “is universally recognized as essential for realizing the objective of decent work for all.”<sup>139</sup>

The ILO Declaration recognizes that economic growth “must be accompanied by a certain number of social ground rules founded on common values.”<sup>140</sup> It understands that:

... 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.<sup>141</sup>

To achieve a position of relative equality in which players can share fairly in the wealth that they contribute to the creation of, a deep commitment to collective activism and the fundamental principles articulated in the ILO Declaration is essential, especially the enabling rights articulated in ILO C87 and ILO 98. Marvin Miller, who served as Executive Director of the MLB Players Association from

<sup>131</sup> *Embedding the Human Rights of Players*, *supra*, note 56, at 8 and 10. From December 2014 to March 2016, the WPA was known as UNI World Athletes.

<sup>132</sup> *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 13–14.

<sup>133</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, *supra*, note 30.

<sup>134</sup> *Id.*, at 7.

<sup>135</sup> ILO, *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)* [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312232](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232)

<sup>136</sup> ILO, *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::no::P12100\\_Ilo\\_Code:C098](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::no::P12100_Ilo_Code:C098)

<sup>137</sup> ILO, *Equal Remuneration Convention, 1951 (No. 100)*, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C100](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100)

<sup>138</sup> ILO, *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111)

<sup>139</sup> *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, *supra*, note 27 at v.

<sup>140</sup> *ILO Declaration on Fundamental Principles and Rights at Work*, *supra*, note 30, at 1 (emphasis added).

<sup>141</sup> *Id.*, at 5–6 (emphasis added).



1966 to 1982, described this as a “union consciousness” and something that was, prior to his appointment, lacking among players.<sup>142</sup> In Miller’s words, players:

... didn’t know what a union was, but they knew they didn’t want one. There was a reason for this attitude. From time immemorial, the baseball powers-that-be force-fed the players propaganda: The commissioner (although appointed and paid by the owners) represented the players; players were privileged to get paid to play a kid’s game; and (the biggest fairy tale of all) baseball was not a business and, in any event, was unprofitable to the owners.<sup>143</sup>

Miller, with a background in the steelworkers union, was “shocked” by the workplace conditions facing the players.<sup>144</sup> “[S]teelworkers had a union mentality, while there was virtually no one in [MLB] who had ever associated with a union of any kind.”<sup>145</sup> “[B]allplayers simply did not know how to voice [their] complaints—they had no place to go.”<sup>146</sup>

ILO C87 relevantly sets out the right for workers to “establish and ... join organizations of their own choosing without previous authorisation,”<sup>147</sup> “exercise freely the right to organise,”<sup>148</sup> and “establish and join federations and confederations,”<sup>149</sup> which “shall have the right to affiliate with international organisations of workers.”<sup>150</sup> Under ILO C98, “[w]orkers shall enjoy adequate protections against acts of anti-union discrimination in respect of their employment.”<sup>151</sup> Workers’ organizations “shall enjoy adequate protection against any acts of interference” from employers,<sup>152</sup> including, “[i]n particular, acts which are designed to promote the establishment of workers’ organisations under the domination of employers or employer organizations, 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.”<sup>153</sup> ILO C98 also enshrines the right to collective bargaining, which encourages and promotes “the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.”<sup>154</sup>

<sup>142</sup> Miller, M. (1991). *A Whole Different Ball Game. The Sport and Business of Baseball*. A BIRCH LANE PRESS BOOK, at 39.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*, at 107.

<sup>146</sup> *Id.*, at 39.

<sup>147</sup> *Freedom of Association and Protection of the Right to Organise Convention, supra*, note 135, article 2.

<sup>148</sup> *Id.*, article 11.

<sup>149</sup> *Id.*, article 5.

<sup>150</sup> *Id.*

<sup>151</sup> *Right to Organise and Collective Bargaining Convention, supra*, note 136, article 1.

<sup>152</sup> *Id.*, article 2.1.

<sup>153</sup> *Id.*, article 2.2.

<sup>154</sup> *Id.*, article 4.



In addition, the Workers' Representatives Convention, 1971 (No. 135) provides that "[w]orkers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them,"<sup>155</sup> with "workers' representatives" defined to include "trade union representatives," or "elected representatives ... who are freely elected by the workers ... and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions."<sup>156</sup> Where both trade union and elected representatives exist, "appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned ... and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned."<sup>157</sup>

According to the ILO Committee on Freedom of Association ("ILO FOA Committee"), there is no doubt that athletes are workers for the purposes of ILO C87, even where an employment relationship does not exist. In 2005, in response to a complaint brought by a football players' union in Mexico where players were denied the right to register their association as a trade union on the basis, among others, that they had to firstly prove they had working relationships with clubs, the ILO FOA Committee concluded that "the criterion for determining the persons covered by the right to establish and join organisations of their own choosing is not dependent on the existence of an employment relationship ... [S]elf-employed workers in general or those who practice liberal professions nevertheless enjoy the right to organize."<sup>158</sup>

The freedoms to associate and to bargain collectively are "enabling rights [which] make it possible to promote and realize decent conditions at work."<sup>159</sup> They depend on a "conducive and enabling environment,"<sup>160</sup> which can be absent from the governance of SGBs, especially at the global level. The shocking conditions that today confront many athletes, as evinced by the widespread abuse of their human and labor rights,<sup>161</sup> are commonly accompanied by an institutionalized environment that regulates and controls rather than enables the voice of the athletes and a lack of union consciousness among nominated athlete representatives. This includes the systems of work promoted by key actors in global sport.

The IOC Athletes' Commission, for example, is constituted pursuant to Rule 21.1 of the Olympic Charter, to be elected by "athletes participating in the Olympic Games ... in accordance with regulations adopted by the IOC Executive

<sup>155</sup> ILO *Workers' Representatives Convention, 1971 (No. 135)*, article 1, [https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100\\_INSTRUMENT\\_ID:312280](https://www.ilo.org/dyn/normlex/en/f?p=1000:12100::NO:12100:P12100_INSTRUMENT_ID:312280)

<sup>156</sup> *Id.*, article 3.

<sup>157</sup> *Id.* article 5.

<sup>158</sup> ILO, *Report in Which the Committee Requests to be Kept Informed of Development - Report No 336. The Trade Union of Associated Football Players of Mexico (FAM)*, (Mar. 2005) [http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002\\_COMPLAINT\\_TEXT\\_ID:2908718](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2908718) (emphasis added)

<sup>159</sup> ILO, *Freedom of Association and the Effective Recognition of the Right to Collective Bargaining*. (Retrieved Jul. 23, 2018). <http://www.ilo.org/declaration/principles/freedomofassociation/lang--en/index.htm>

<sup>160</sup> *Id.*

<sup>161</sup> *Supra*, notes 2, 4, 5, and 6.



Board, in consultation with the Athletes' Commission."<sup>162</sup> The IOC President has decisive influence in relation to all IOC commissions, and "establishes their terms of reference, designates all their members and decides their dissolution once he considers that they have fulfilled their mandates."<sup>163</sup> Members of the IOC Athletes' Commission must be nominated by their NOC.<sup>164</sup> Other members can also be appointed by the IOC President.<sup>165</sup> The ICAS recognizes the "athlete commissions of the IOC, IFs and NOCs" to bring to its attention the names and qualifications of "personalities [for appointment] to the list of CAS arbitrators."<sup>166</sup> The IOC also encourages the establishment of athlete commissions within IFs and NOCs. At a national level, the Athletes' Commission Charter of the AOC, for instance, 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."<sup>167</sup> According to Nick Butler, a senior reporter with *Inside the Games*, the "IOC Athletes' Commission is elected and is in theory independent, although it is staffed by members of the IOC administration and, in recent years, invariably follows the whims of the IOC leadership."<sup>168</sup>

The World Anti-Doping Agency ("WADA") has also established an athlete committee, which it funds and supports. The committee's stated role is to "serve as the voice of clean athletes, encouraging integrity and fairness for sport and athletes."<sup>169</sup> It is appointed by the Committee's chair and the President of WADA in consultation with WADA's Director General.<sup>170</sup> The committee's terms of reference require all Committee members to comply with WADA's media relations policy.<sup>171</sup> The response by WADA to the initial moves to establish the WPA in 2011 is an example of the concerns SGBs express with the organization of athletes into trade unions. Former WADA Chairman John Fahey told the WADA Foundation Board on November 20, 2011, that "it was incumbent on all who believed that sport was a very different and separate operation to other workplaces to make that clear" and that, "under no circumstance would [WADA] recognise them [the player associations] as representatives of the sportsmen and women

<sup>162</sup> *Olympic Charter*, *supra*, note 14, Rule 21.1 at 49.

<sup>163</sup> *Id.*

<sup>164</sup> IOC, *Technical Manual on the Organisation of the Election to the IOC Athletes' Commission*, (Nov. 2005), at 26, [http://www.gamesmonitor.org.uk/files/Technical\\_Manual\\_on\\_Organisation\\_of\\_Election\\_to\\_IOC\\_Athletes\\_Commission.pdf](http://www.gamesmonitor.org.uk/files/Technical_Manual_on_Organisation_of_Election_to_IOC_Athletes_Commission.pdf)

<sup>165</sup> *Id.*

<sup>166</sup> *Code for Sports-Related Arbitration*, *supra*, note 65, at para. S14.

<sup>167</sup> AUSTRALIAN OLYMPIC COMMITTEE [AOC], *Athletes' Commission Charter*, (Aug. 6 2015), [http://aoc-cdn.s3.amazonaws.com/corporate/live/files/dmfile/Athletes%20Commission%20Charter\\_6%20August%202015.pdf](http://aoc-cdn.s3.amazonaws.com/corporate/live/files/dmfile/Athletes%20Commission%20Charter_6%20August%202015.pdf) (emphasis added)

<sup>168</sup> INSIDE THE GAMES, *German Athlete Group to Receive Funding to Ensure Independence from DOSB* (Jun. 8, 2018), <https://www.insidethegames.biz/articles/1066036/german-athlete-group-to-receive-government-funding-to-ensure-independence-from-dosb>

<sup>169</sup> WORLD ANTI-DOPING AGENCY [WADA], *Athlete Committee Terms of Reference*, (Dec. 2014), <https://www.wada-ama.org/sites/default/files/resources/files/wada-athlete-committee-terms-of-reference-2014.pdf>

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*



of the world.”<sup>172</sup> On November 16, 2017, Dick Pound, who served as inaugural WADA President from 1999 to 2007, told the WADA Foundation Board that, with respect to the WADA Athlete Committee, “WADA’s experience had been fantastic with the appointment of the athlete members.”<sup>173</sup>

Accordingly, on three matters that crucially impact the human rights of athletes (including their labor and economic rights)—the Olympic Charter, and arbitration by the CAS and the WADC—the representation of athletes is regulated and controlled by SGBs. The outcomes of that representation are then compulsorily incorporated into the employment contracts signed by players such as professional footballers, cricketers, and rugby players even where they are members of unions that are authorized to negotiate employment-related matters. It is estimated, for example, that some 80,000 professional team athletes are so bound by the WADC but excluded from the processes by which the WADC is developed, promulgated, and implemented.<sup>174</sup> However, the IOC’s responsibilities under the UNGPs, together with the IOC’s position of “supreme authority and leadership” of the Olympic Movement,<sup>175</sup> mean that the IOC is both obliged and has the leverage to ensure that the rights of players to organize and bargain collectively in accordance with the ILO Declaration are not only respected by the IOC itself but also by IFs, NOCs, SGBs, and those that employ or otherwise engage athletes.<sup>176</sup>

The German Athletes’ Commission (“GAC”) has been understandably apprehensive to embrace and build a union consciousness in its determined efforts to establish an independent representative voice for athletes, an effort described as an “athlete revolution of German sport.”<sup>177</sup> The fledgling body, which subsequently secured €225,000 in startup funding from the German government,<sup>178</sup> avoided being structured and described as a trade union.<sup>179</sup> “The [chosen] wording indicates that this endeavor could have trade union traits, even if such a vocabulary is avoided. The new initiative, which was once actually discussed as an athlete union, will formally become an association supporting the athletes commission.”<sup>180</sup>

<sup>172</sup> WADA, *Minutes of the WADA Foundation Board Meeting*, at 48 (Nov. 20, 2011), [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_foundation\\_board\\_meeting\\_minutes\\_20nov2011\\_eng\\_final.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_foundation_board_meeting_minutes_20nov2011_eng_final.pdf) (emphasis added).

<sup>173</sup> WADA, *Minutes of the WADA Foundation Board Meeting*, at 13 (Nov. 16, 2017), [https://www.wada-ama.org/sites/default/files/resources/files/fbnovember2017minutes\\_final\\_published.pdf](https://www.wada-ama.org/sites/default/files/resources/files/fbnovember2017minutes_final_published.pdf)

<sup>174</sup> “When We Know Better,” *supra*, note 95, at 49.

<sup>175</sup> *Olympic Charter*, *supra*, note 14, Rule 1 at 15.

<sup>176</sup> *Supra*, note, 124.

<sup>177</sup> SÜDDEUTSCHEZEITUNG, *Athleten Starten Revolution im Deutschen Sport* (Oct. 16, 2017), <http://www.sueddeutsche.de/sport/sportpolitik-athleten-starten-revolution-im-deutschen-sport-1.3709777>

<sup>178</sup> *German Athlete Group to Receive Funding*, *supra*, note 168.

<sup>179</sup> *Athleten Starten Revolution im Deutschen Sport*, *supra*, note 177.

<sup>180</sup> *Id.*. The translation the author’s.



The GAC has quickly sought to address an issue at the heart of the player and broader trade union movements and recognized by the ILO Declaration—the right to share in the wealth created by the efforts of one’s labor. By letter dated May 25, 2018, the body—which presently exists “inside the German NOC”<sup>181</sup>—wrote to Bach noting that “[a]thletes worldwide, with various socio-economic conditions prepare for almost a lifetime to participate at the Olympic Games,” but that, due to Rule 40.3 of the Olympic Charter, “it is only marginally possible for athletes worldwide to advertise with partners and sponsors in the economically most important phase of their sporting career.” Given that the “IOC monopolizes the marketing of the Olympic Games,” the GAC has demanded “a distribution of 25 percent of the total profit from the marketing and transmission revenues of the IOC to athletes.”<sup>182</sup> The response of Bach to the demand has been to agree to meet with German athletes “so that he can ‘discuss and explain’ the ways in which they support and finance Olympians.”<sup>183</sup> He maintains that “the IOC distributes 90 per cent of its income to sport and to supporting the athletes,”<sup>184</sup> a position supported by Kirsty Coventry, the chair of the IOC Athletes’ Commission, who said that:

[T]he first priority of the IOC is to organise the Olympic Games ... All other revenue distribution by the IOC is in the interests of the athletes through the [IFs] which allow the [NFs] to organise competitions for the athletes and to support the athletes, and also to the [NOCs] ... to give them the opportunity to prepare their athletes for the Olympic Games and to support their athletes in the way they deem appropriate.<sup>185</sup>

The right of athletes to legally share in the revenue created by the work of athletes is one that presently *only* exists because of collective bargaining. Collective bargaining agreements (“CBAs”) in countries including the United States, Canada, Australia, and New Zealand in sports and leagues as diverse as the NFL,<sup>186</sup> the National Basketball Association,<sup>187</sup> the National Hockey League,<sup>188</sup> New Zealand

<sup>181</sup> DOSB Athleten Commission, *Open Letter – Athletes Position in the German Cartel Office Proceedings (Rule 40 § 3)* (May 23, 2018) at 1 (Retrieved Jul. 23, 2018), <https://derballuegtnicht.com/2018/05/23/athletes-rights/>

<sup>182</sup> *Id.*, at 1–2.

<sup>183</sup> *German Athlete Group to Receive Funding, supra*, note 168.

<sup>184</sup> INSIDE THE GAMES, *Bach Invites German Athletes to Lausanne to Explain Funding Model*, (May 24, 2018), <https://www.insidethegames.biz/articles/1065428/bach-invites-german-athletes-to-lausanne-to-explain-funding-model>

<sup>185</sup> *Id.*

<sup>186</sup> 2011 National Football League Collective Bargaining Agreement, *Revenue Accounting and Calculation of the Salary Cap*, at article 12

<sup>187</sup> 2017 National Basketball Association Collective Bargaining Agreement, *Basketball Related Income, Salary Cap, Minimum Team Salary, and Escrow Arrangement*, at article VII.

<sup>188</sup> 2012 National Hockey League Collective Bargaining Agreement, *Team Payroll System*, at article 50.



Rugby,<sup>189</sup> the Australian Football League,<sup>190</sup> and Australian cricket,<sup>191</sup> have revenue-sharing mechanisms that define the revenue to be shared with players and how the agreed percentage is to be distributed, including through a wage-fixing structure underpinned by a negotiated set of minimum wages and conditions of employment. The CBAs see percentages of defined revenues between 27.5% and 36.56% shared with players, where the SGB is a not-for-profit body with broad responsibilities for the development of the relevant sport, and 47% to 50% shared by the privately owned profit-driven professional sports leagues. Accordingly, they illustrate how collective bargaining can shape the development of financial models that address the broad objectives stated by the IOC.

Global sport now sees two distinct systems of work. The first, institutionalized and promoted by the IOC and reinforced by requirements of global sports law such as Rules 21 and 40 of the Olympic Charter, is one that is implemented without assessing the impact of that system on the status of the athletes as workers, the rights of the athletes to organize and share in the wealth they create including through decent work and, moreover, the negative human rights impacts of that system of work on athletes. It differs markedly from that promoted by FIFA due, in the main, to the long history of collective activism by players in the professional football industry. FIFA expressly recognizes professional footballers as employees under labor contracts and the role of collective bargaining within its regulatory framework.<sup>192</sup> In May 2017, in reporting on its human rights record in accordance with the FIFA Ruggie Report, FIFA 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,”<sup>193</sup> and a “significantly increased engagement with relevant stakeholders, in particular with organisations representing the interests of professional footballers.”<sup>194</sup>

## 2. Gender Equality

In 1973, Billie Jean King led “the movement to create the Women’s Tennis Association – the last word being a euphemism for ‘union.’”<sup>195</sup> The United States

<sup>189</sup> 2016 New Zealand Rugby Collective Employment Agreement, *NZRU Player Generated Revenue and the Player Payment Pool*, at Part 2.

<sup>190</sup> THE GUARDIAN, *AFL’s Revenue-Sharing Deal Draws Envious Looks from NRL and Cricket Players*, (Jun. 21, 2017), <https://www.theguardian.com/sport/2017/jun/21/afls-revenue-sharing-deal-draws-envious-looks-from-nrl-and-cricket-players>

<sup>191</sup> Dabscheck, B. *An In Depth Analysis of 2017 Australian Cricket Pay Dispute*, LAW IN SPORT, (Aug. 18, 2017), <https://www.lawinsport.com/articles/item/an-in-depth-analysis-of-the-2017-australian-cricket-pay-dispute>

<sup>192</sup> FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION [FIFA] *Regulations for the Status and Transfer of Players* (2018), at article 22(b), <http://www.fifa.com/about-fifa/official-documents/law-regulations/index.html#doctransfersreg>

<sup>193</sup> FIFA, *FIFA Activity Update on Human Rights, May 2017*, at 2, [https://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/21/activityupdate\\_humanrights\\_may2017\\_neutral.pdf](https://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/21/activityupdate_humanrights_may2017_neutral.pdf)

<sup>194</sup> *Id.*, at 16.

<sup>195</sup> King, B. J. (1982). *The Autobiography of Billie Jean King*, GRANADA PUBLISHING, at 73.



Open would agree to equal prize money for women's singles players that year, with the three other tennis Grand Slam tournaments following suit only after a 34-year struggle that encompassed the Australian Open (2001), the French Open (2006), and, finally, Wimbledon in 2007.<sup>196</sup> The modern champions of women's tennis understand their inheritance and the responsibility that comes with it.<sup>197</sup> However, according to King herself on the narrowing of the "great gender gap," "women's sports will have arrived *only* when women's team sports are accepted."<sup>198</sup>

In 2015, FIFA paid the United States Soccer Federation ("USSF") US \$2 million for winning the FIFA Women's World Cup in Canada only a year after paying the German Football Association US\$35 million for winning the 2014 FIFA World Cup (for men).<sup>199</sup> In the months leading up to the tournament, FIFA was required to respond to the matter of *Wambach v. Canadian Soccer Association and Fédération Internationale de Football Association*,<sup>200</sup> a class action suit involving more than 60 players from 13 countries brought before the Human Rights Tribunal of Ontario ("HRTO") on October 1, 2014. In their claim, the players collectively alleged that the Canadian Soccer Association ("CSA") and FIFA had discriminated against them because of sex contrary to the Human Rights Code, R.S.O. 1990, c. H.19, as amended ("the HRC"), by forcing the players to play World Cup games on artificial turf. This, the players asserted, constituted unlawful discrimination in three significant ways:

... (1) by forcing them to compete on a surface that fundamentally alters the way the game is played, (2) by subjecting them to unique and serious risks of injury, and (3) by devaluing their dignity, state of mind, and self-respect as a result of requiring them to play on a second-class surface before tens of thousands of stadium spectators and a global broadcast audience.<sup>201</sup>

In 1986, the HRTO held in *Blainey v. Ontario Hockey Association* that the right to participate "in athletic activity without discrimination is guaranteed by s. 1 of the [HRC]."<sup>202</sup>

<sup>196</sup> THE GUARDIAN, *How Women in Tennis Achieved Equal Pay* (Sep. 11, 2015), <https://www.theguardian.com/sport/2015/sep/11/how-women-in-tennis-achieved-equal-pay-us-open>

<sup>197</sup> 23 times singles Grand Slam champion Serena Williams says: "We owe the tour to Billie Jean King...and everyone who made all those sacrifices to make this tour we play on...It wouldn't exist if it weren't for those amazing people." Five-time Grand Slam singles champion Maria Sharapova understands "the importance of doing good for the next generation..." See WOMEN'S TENNIS ASSOCIATION [WTA] (Retrieved Jul. 24, 2018), [https://www.youtube.com/watch?v=-Ojr6mJD8\\_Y](https://www.youtube.com/watch?v=-Ojr6mJD8_Y)

<sup>198</sup> *The Autobiography of Billie Jean King*, *supra*, note 195, at 188 (emphasis in original).

<sup>199</sup> *How Women in Tennis Achieved Equal Pay*, *supra*, note 196.

<sup>200</sup> HUMAN RIGHTS TRIBUNAL OF ONTARIO [HRTO] File Number: 2014-18923-I *Wambach et. al. v. Canadian Soccer Association [CSA]* Interim Decision (Nov. 7, 2014), at 3.

<sup>201</sup> HRTO File Number: 2014-18923-I *Wambach et. al. v. CSA* Request for Interim Remedy (Oct. 27, 2014), at 1.

<sup>202</sup> *Id.*, at 2, citing *Blainey v. Ontario Hockey Association* (1986) 54 Or. (2d) 513.



On October 27, 2014, the lawyers for the players filed a request for an interim remedy, in which it was asserted that “the CSA and FIFA—aided by national federations—[had] threatened a coalition of the world’s best female soccer players for bringing the sex discrimination action.”<sup>203</sup> The request asked the HRTO “to order the respondents and their affiliates to cease all attempts to engage in or threaten reprisals against players who have joined or who are considering joining this action.”<sup>204</sup> The reprisals allegedly included “not be[ing] invited to participate as a member of the Mexican national team,”<sup>205</sup> “retaliation by FIFA in the awarding of the 2019 women’s World Cup,”<sup>206</sup> being “told by Costa Rican Federation Officials that their participation put their positions on the team in jeopardy as a result of pressure from CSA and FIFA,”<sup>207</sup> and that involvement in the action may be contrary to bylaws of the USSF, which include “the claim that: ‘For a violation of this bylaw, the offending party shall be subject to suspension ...’”<sup>208</sup> The request for interim relief referred to two Canadian court authorities involving the CSA. The first “detailed how the possibility of missing a major soccer tournament was a patently irreparable harm,”<sup>209</sup> the second declared that “express threats to harm someone for going to court or ... punishing him for having done so ... was contrary to ‘public policy.’”<sup>210</sup>

On November 7, 2014, the HRTO denied an application by the players for an expedited hearing.<sup>211</sup> The following January, the players withdrew their application. Wambach, the public face of the action, a leading member of the United States team, and the 2012 FIFA Women’s Footballer of the Year, said:

On behalf of the players, I want to thank all who aided our fight for natural grass fields at the 2015 World Cup including our volunteer lawyers from Canada and the United States ... Our legal action has ended. But I am hopeful that the players’ willingness to contest the unequal playing fields—and the tremendous public support we received during the effort—marks the start of even greater activism to ensure fair treatment when it comes to women’s sports.<sup>212</sup>

<sup>203</sup> HRTO File Number: 2014-18923-1 *Wambach v CSA*, Players’ Amended Application, Declaration in Support of Request for Interim Remedy by Dellinger, H. (Oct. 27, 2014), at 1.

<sup>204</sup> *Wambach et. al. v. CSA Request for Interim Remedy*, *supra*, note 201, at 1.

<sup>205</sup> *Id.*, at .3.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*, at 4.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*, at 5, citing *Oz Optics LTD. V. Canadian Soccer Association.*, 2001 CaswellOnt 4955 ONTARIO COURT OF JUSTICE.

<sup>210</sup> *Id.*, at 5, citing *Voorhoorst v. Canadian Soccer Association.*, 2011 ABCA 74 THE COURT OF APPEAL OF ALBERTA.

<sup>211</sup> *Wambach et. al. v. CSA Interim Decision*, *supra*, note 200, at 3.

<sup>212</sup> THINK PROGRESS, *Women’s World Cup Players Withdraw Gender Discrimination Claim Against FIFA* (Jan. 21, 2015), <https://thinkprogress.org/womens-world-cup-players-withdraw-gender-discrimination-claim-against-fifa-512788ba5elf/> (emphasis added).



The FIFA Ruggie Report noted the important questions raised by the action, describing the system as a “closed loop.”<sup>213</sup> It recommended that “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 [CAS] to do the same.”<sup>214</sup>

Despite the threats of reprisal and the withdrawal of the action, the period since has witnessed a powerful wave of collective action by women footballers, including players in Ireland,<sup>215</sup> Denmark,<sup>216</sup> The Netherlands,<sup>217</sup> Finland,<sup>218</sup> Chile,<sup>219</sup> Argentina,<sup>220</sup> Brazil,<sup>221</sup> the United States,<sup>222</sup> Norway,<sup>223</sup> and Australia.<sup>224</sup> The actions sought to address a lack of opportunity or decent pay and conditions. The United States action aimed to address unequal pay between players in the men’s and women’s national teams, which are both employed by the USSF. In many ways, equal pay is at the heart of the matter. A recommendation of the 2018 IOC Gender Equality Review Project<sup>225</sup> calls for “NOCs and IFs to establish mechanisms to address inequalities between genders in prize money and other athlete payments,” with “transition plans to close the gender pay gap” to be actioned by December 2020.<sup>226</sup>

FIFA, given its status as an IF, the collective activism of women players, and its human rights commitments,<sup>227</sup> is almost certain to have to address the question of equal prize money for the FIFA Women’s World Cup France 2019,<sup>228</sup> an event to which FIFA aims to attract a global television audience of one billion viewers.<sup>229</sup> As amended by the FIFA Congress in February 2016, the statutory objectives of FIFA now include “to use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless

<sup>213</sup> *For the Game. For the World*, *supra*, note 120, at 26 (emphasis in original).

<sup>214</sup> *Id.*, recommendation 6.2, at 35.

<sup>215</sup> McCallum, L. *Gender Inequality in the Football Industry* (Mar. 31, 2018), EPFL LEGAL NEWS-LETTER, at 4–5.

<sup>216</sup> *Id.*, at 5.

<sup>217</sup> *Id.*, at 5–6.

<sup>218</sup> *Id.*, at 6.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*, at 6–7.

<sup>221</sup> *Id.*, at 7.

<sup>222</sup> *Id.*, at 8–9.

<sup>223</sup> *Id.*, at 18.

<sup>224</sup> *Id.*, at 24.

<sup>225</sup> IOC, *IOC Gender Equality Review Project* (Mar. 2018), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/2018/03/IOC-Gender-Equality-Report-March-2018.pdf>

<sup>226</sup> *Id.*, at 21.

<sup>227</sup> *Infra*, note 232.

<sup>228</sup> See, generally, FIFA, *FIFA Women’s World Cup 2019*, <https://www.fifa.com/womensworldcup/index.html>

<sup>229</sup> USA TODAY, *FIFA Hopes for Big Increase in TV Viewers at Women’s World Cup* (Sep. 19, 2017), <https://eu.usatoday.com/story/sports/soccer/2017/09/19/fifa-hopes-for-big-increase-in-tv-viewers-at-womens-wcup/105776648/>



of gender or age,<sup>230</sup> and “to promote the development of women’s football and the full participation of women at all levels of football governance.”<sup>231</sup> At the same time, the FIFA Congress included the words “gender equality” into the heading of Article 4 of the FIFA Statutes, which prohibits discrimination. The “internationally recognised human rights” referred to in Article 3 of the FIFA Statutes encompass gender discrimination, with it being identified by the FIFA Human Rights Policy, May 2017 edition (“FIFA Human Rights Policy”) as a “salient human rights risk.”<sup>232</sup> Accordingly, “FIFA places particular emphasis on identifying and addressing differential impacts based on gender and on promoting gender equality and preventing all forms of harassment, including sexual harassment.”<sup>233</sup>

The UDHR provides that, “[e]veryone, without any discrimination, has the right to equal pay for equal work.”<sup>234</sup> Article 11 of the 1981 UN Convention on the Elimination of All Forms of Discrimination Against Women,<sup>235</sup> calls on States parties to “eliminate discrimination against women in the field of employment” acknowledging the right “to work as an inalienable right of all human beings,”<sup>236</sup> and “to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as *equality of treatment in the evaluation of the quality of work*.”<sup>237</sup> The principle of “equal remuneration for men and women workers for work of equal value” is also enshrined in Article 2 of ILO C100.<sup>238</sup>

Equal prize money for women players, therefore, sits clearly as not only an objective of FIFA, but also a commitment and responsibility. A central question is the relative value of work provided by men and women players. To give effect to equal pay in 2019, FIFA would be required to invest US\$336 million, a little under 6% of its reported budgeted revenue for the 2015–2018 period. FIFA will pay just over 7% of its revenue for that period as prize money for the 2018 FIFA World Cup Russia, a very low percentage given the importance of the tournament to FIFA’s overall financial model. Revenue from the 2014 FIFA World Cup Brazil totaled US\$4.826 billion, 85% of FIFA revenue for the four-year cycle between 2011 and 2014.<sup>239</sup> As US\$358 million was paid as prize money to the

<sup>230</sup> FIFA, *FIFA Statutes* (Apr. 2016), article 2(e), at 6, [http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/generic/02/78/29/07/fifastatutsweben_neutral.pdf)

<sup>231</sup> *Id.*, article 2(f), at 6.

<sup>232</sup> FIFA, *FIFA Human Rights Policy May 2017 Edition* (May 2017), para. 5, at 6. [http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy\\_neutral.pdf](http://resources.fifa.com/mm/document/affederation/footballgovernance/02/89/33/12/fifashumanrightspolicy_neutral.pdf)

<sup>233</sup> *Id.*

<sup>234</sup> UDHR, *supra*, note 54, article 23.2. See ICESCR, *supra*, note 96, article 7(a)(i).

<sup>235</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* (1981) UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

<sup>236</sup> *Id.*, article 11(a).

<sup>237</sup> *Id.*, article 11(d) (emphasis added).

<sup>238</sup> See, *Equal Remuneration Convention*, *supra*, note 137.

<sup>239</sup> BUSINESS INSIDER, *FIFA Brazil World Cup Revenue* (Mar. 2015), <http://uk.businessinsider.com/fifa-brazil-world-cup-revenue-2015-3?r=US&IR=T>



men's teams, who are understood to share no more than 50% with the players, the men's share of revenue cannot be more than about 2.5% of revenue and therefore not reflective of the value of the work provided.<sup>240</sup> According to the World Players Association Gender Equality Principles as published by the WPA in April 2016, "any disparity in the revenue generated by the sporting sector in which men are performing equivalent work can only be taken into account if the men are receiving a fair and equitable share of that revenue, usually measured in the form of a collective bargaining agreement."<sup>241</sup>

If FIFA's Member Associations were obliged to share 50% of equal prize money with their women players, the outcome would be one that would transform the careers of 552 of the world's best players. According to the FIFPro Global Employment Report for Women's Professional Football, 50% of players are not paid by their clubs, 35% are not paid by their national teams, 66% of national team players are not satisfied with tournament prize money, and, consequently, 87% consider quitting the game early.<sup>242</sup> However, as the experience of the more than 60 players who sought to achieve equality of on-field playing conditions in Canada in 2015 shows, a powerful claim backed by collective activism may not be enough. The "jurisdictional complexity" of a case transnational in nature,<sup>243</sup> the alleged threats of reprisal, the irreparable harm that would follow missing the tournament, and the fact that time can be of the essence, could again conspire to prevent the players from attaining the effective remedy they seek—equal prize money. At the global level, individual and collective activism are not enough. Institutional activism is also essential.

## C. Institutional Athlete Activism

### *1. Addressing the Human and Athlete Rights Impacts of Global Sport*

Institutional athlete activism is anchored in the same powerful values system that has informed individual and collective activism, but involves sharing that system of values across a multi-stakeholder platform of like-minded organizations, key stakeholders of global sport, and the international human rights community. Its emergence lies in global sport's failure to embed internationally recognized human rights into its governance framework, and the devastating human and athlete rights impacts to which that failure has caused or contributed. The organization of the Olympic Games and other mega-sporting events "have come under repeated scrutiny from human rights experts and campaigners over a gamut of concerns."<sup>244</sup> According to DeMaurice Smith, the Executive Director of

<sup>240</sup> See, generally, Schwab, B. The Role of Athletes in Delivering the Good Governance of Sport, *2015 FIFPro Sports Law Conference: Legal Legends in Sport and the Future of Sports Law* (Dec. 15, 2015) at 5, [http://www.uniglobalunion.org/sites/default/files/imcce/brendan\\_schwab\\_fifpro\\_legal\\_conference\\_paper\\_15\\_dec\\_15.pdf](http://www.uniglobalunion.org/sites/default/files/imcce/brendan_schwab_fifpro_legal_conference_paper_15_dec_15.pdf)

<sup>241</sup> WORLD PLAYERS ASSOCIATION [WPA], *Gender Equality Principles*, (Apr. 26, 2015) principle 5(3), [http://www.uniglobalunion.org/sites/default/files/imcce/wp\\_gender\\_equality\\_principles\\_0.pdf](http://www.uniglobalunion.org/sites/default/files/imcce/wp_gender_equality_principles_0.pdf)

<sup>242</sup> See, generally, *Global Employment Report for Women's Professional Football*, *supra*, note 12.

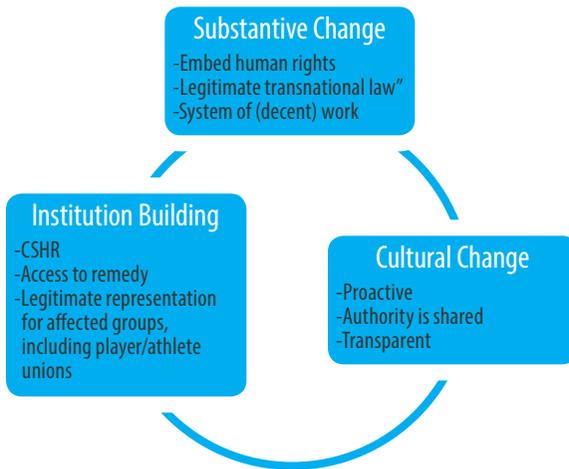
<sup>243</sup> *Wambach et. al. v. CSA Interim Decision*, *supra*, note 200, at 6.

<sup>244</sup> INSTITUTE OF HUMAN RIGHTS AND BUSINESS [IHRB], *Striving for Excellence: Mega-Sporting Events and Human Rights*, *Occasional Paper Series: Paper No. 2* (October 2012), at 2.



the NFLPA and a member of the Executive Committee of the WPA, the athletes “need to take back the beauty and the humanity of sport. We need to move to a world where the integrity of sport does not tolerate migrant workers in Qatar who die building stadiums.”<sup>245</sup>

The theory of change driving institutional athlete activism is summarized in Figure 2. Two impactful endeavors of institutional athlete activism—the Sport and Rights Alliance (“SRA”) and the Centre for Sport and Human Rights (“CSHR”)—have been instrumental in seeing major SGBs make a series of important human rights commitments since 2016 and start to ensure that adverse human and athlete rights impacts are prevented and addressed by global sport.



**Figure 2. Institutional Athlete Activism: The Theory of Change.**

*2. Endeavors of Institutional Athlete Activism*

*(a) The SRA*

The SRA “is an unprecedented global coalition of leading Non-Governmental Organisations (“NGOs”) and trade unions”—including Amnesty International, the Committee to Protect Journalists, Football Supporters Europe, Human Rights Watch, the International Trade Union Confederation, Terre des Hommes, Transparency International Germany, and the WPA—“working together to embed human rights and anti-corruption across world sport and to promote the rights and well-being of those most affected by human rights risks associated with the delivery of sport ... including children, women, activists, minorities, fans, athletes, and other workers.”<sup>246</sup> Founded in early 2015 to pressure SGBs to ensure their decision-making and operations respect international standards for human rights, labor rights, and anti-corruption, in accordance with the UNGPs,

<sup>245</sup> WPA, *Voice*. (Retrieved Jul. 23, 2018), <http://www.uniglobalunion.org/sectors/uni-world-athletes/voice>

<sup>246</sup> WPA, *Humanity*. (Retrieved Jul. 23, 2018), <http://www.uniglobalunion.org/sectors/world-players/humanity>



the SRA has played “pivotal roles in landmark decisions by [SGBs] to adopt new policies, bidding criteria for mega-events, and [HCC] clauses that embed their responsibilities to respect human rights, labour standards, and anti-corruption measures,” including the IOC, FIFA, the CGF, and the Union of European Football Associations (“UEFA”).<sup>247</sup>

FIFA has taken steps to give effect to its responsibility to respect human rights in accordance with the UNGPs. The most significant step is arguably the adoption and publication of the FIFA Human Rights Policy.<sup>248</sup> That policy adheres to the framework of the UNGPs “through a four-pillar approach”:<sup>249</sup> (1) commit and embed;<sup>250</sup> (2) identify and address;<sup>251</sup> (3) protect and remedy;<sup>252</sup> and (4) engage and communicate.<sup>253</sup> The clear and binding nature of these commitments are potentially consequential.<sup>254</sup> They provide a framework that “embraces all internationally recognised human rights” in which athletes have the opportunity—through strategic activism—to advance matters of concern and hasten the reconciliation of sport and human rights.<sup>255</sup> FIFA’s progress in implementing the two most consequential elements of the UNGPs framework—a proactive and ongoing human rights due diligence process and ensuring access to an effective remedy—remain in their prescient stages.<sup>256</sup>

The IOC has engaged with the SRA to make “specific changes to the [HCC] 2024 with regard to human rights, anti-corruption and sustainable development standards,”<sup>257</sup> and to commit to “collective and proactive action on human rights protection.”<sup>258</sup> §13.2(b) of the IOC HCC now provides:

Pursuant to their obligations under §13.1, the Host City, the Host NOC and the [Organising Committee for the Olympic Games (“OCOG”)] shall, in their activities related to the organisation of the Games ... protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and

<sup>247</sup> *Id.*, See, generally, *Embedding the Human Rights of Players*, *supra*, note 56, at 13–14 and “*When We Know Better*,” *supra*, note 95, at 11–15.

<sup>248</sup> *FIFA Human Rights Policy*, *supra*, note 232.

<sup>249</sup> *Id.*, para. 8 at 8.

<sup>250</sup> *Id.*, para. 9 at 8.

<sup>251</sup> *Id.*, para. 10 at 8.

<sup>252</sup> *Id.*, para. 11 at 9.

<sup>253</sup> *Id.*, para. 12 at 9.

<sup>254</sup> *Id.*, para. 13 at 10.

<sup>255</sup> *Id.*, para. 2 at 5.

<sup>256</sup> *FIFA Activity Update on Human Rights*, *supra*, note 193, at 21.

<sup>257</sup> IOC, *IOC Strengthens its Stance in Favour of Human Rights and Against Corruption in New Host City Contract* (Feb. 28, 2017), <https://www.olympic.org/news/ioc-strengthens-its-stance-in-favour-of-human-rights-and-against-corruption-in-new-host-city-contract>

<sup>258</sup> IOC, *The IOC Committed to Collective and Proactive Action on Human Rights Protection* (Nov. 30, 2017), <https://www.olympic.org/news/the-ioc-committed-to-collective-and-proactive-action-on-human-rights-protection>



regulations applicable in the Host Country and in a manner consistent with all internationally-recognised human rights standards and principles, including the [UNGPs], applicable in the Host Country ...

According to legal scholar Tomas Grell, the chosen wording “fails to specify which human rights the Host City, the Host NOC and the OCOG should protect and respect.”<sup>259</sup> While the contractual reference to the UNGPs makes them binding on the parties to the HCC,<sup>260</sup> confusion arises over the broad reference to “internationally recognised human rights” in the UNGPs and the inclusion of the phrase “applicable in the Host Country” in the IOC HCC.<sup>261</sup> The United States, for example, which will be the host country for the 2028 Summer Olympic Games in Los Angeles, has not ratified the UNCRC or the United Nations Convention on the Rights of Persons with Disabilities.<sup>262</sup> If the provision is to be narrowly construed, “the level of human rights protection will vary from one edition of the Games to another.”<sup>263</sup> This contrasts starkly with the IOC’s approach to the protection of its commercial interests, where the IOC’s demands for commercial certainty are not affected by any concerns for the national sovereignty of the host country.<sup>264</sup>

Accordingly and “[p]recisely to avoid such double standards,” Grell correctly suggests that “the IOC clarify the scope of applicable human rights in a way that the HCC explicitly refer to the minimum standard of human rights protection as defined in the [UNGPs].”<sup>265</sup> He commends the approach taken in the UEFA Euro 2024 Tournament Requirements,<sup>266</sup> also developed in consultation with the SRA.<sup>267</sup> He also recommends “the creation of a separate, truly independent monitoring body that would oversee the human rights compliance of the IOC’s agents.”<sup>268</sup> In “the longer run, it is certainly not inconceivable that there will be an overarching expert body responsible for monitoring human rights abuses that may arise in connection with the *execution* of any mega-sporting event ... [It]

<sup>259</sup> Grell, T. *The International Olympic Committee and Human Rights Reforms: Game Changer or Mere Window Dressing?* INT SPORTS LAW J (2018), at 6. <https://doi.org/10.1007/s40318-0127-x>

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*, at 7. *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 13–14.

<sup>262</sup> *United Nations Convention on the Rights of Persons with Disabilities* UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2006), <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

<sup>263</sup> *The International Olympic Committee and Human Rights Reforms*, *supra*, note 259, at 7.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*, and UNION DES ASSOCIATIONS EUROPÉENNES DE FOOTBALL [UEFA], *UEFA Euro 2024 Tournament Requirements*, at 5, [https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Regulations/02/46/30/61/2463061\\_DOWNLOAD.pdf](https://www.uefa.com/MultimediaFiles/Download/OfficialDocument/uefaorg/Regulations/02/46/30/61/2463061_DOWNLOAD.pdf)

<sup>267</sup> *The International Olympic Committee and Human Rights Reforms*, *supra*, note 259, at 7, and IHRB, *UEFA Announces New Human Rights Requirements for 2024* (May 1, 2017), <https://www.ihrb.org/news-events/news-events/uefa-announces-new-human-rights-requirements-for-2024>

<sup>268</sup> *The International Olympic Committee and Human Rights Reforms*, *supra*, note 259, at 8.



could also include the power to directly impose sanctions in cases where human rights abuses occur.”<sup>269</sup>

Sanctions, however, are not remedial. The other glaring weakness of the human rights protections of the HCC (as welcome as they are) is that, without the incorporation of internationally recognized human rights into ‘Olympic law,’ the protections are confined to the parties to the HCC—the IOC, the host city, the host NOC, and the OCOG. The victims of human rights abuse lack the privity to enforce the HCC in order to access an effective remedy, even though the “right to effective remedy is a foundational human rights principle.”<sup>270</sup> The HCC, therefore, needs to sit as part of a larger institutional framework of transnational law, a framework that, by being shared with key stakeholders and affected groups, can enjoy a level of legitimacy presently lacking with *lex sportiva* and ‘Olympic law.’<sup>271</sup> Emerging global systems of private law are not unique to sport. “[P]rivate actors—including corporations, civil society, the media, and individuals—separately and together can create a system of rule-making and rule-enforcement that may be more effective than public lawmaking standing alone.”<sup>272</sup> Unlike public law, it is not based on the monopolistic power to make and enforce behavioral rules.<sup>273</sup> Unlike *lex sportiva*, it does not depend on mandatory arbitration enforced through a lack of consent that is indisputable. Unlike ‘Olympic law,’ it is not imposed at the behest of a private entity seeking to exert its commercial interests. Instead, “[m]ultinational corporations may have authority and power as never before to legislate, but legislation is not made in a vacuum. *Authority must be shared*. Authority is shared with other emerging powers: the great institutions of civil society and the great institutions of information diffusion.”<sup>274</sup>

### (b) The CSHR

The need for collective action through an independent institution drove the significant multi-stakeholder commitment that on June 26, 2018, culminated with the announcement of the formal establishment of the CSHR by its chair, Mary Robinson, the former President of Ireland and UN High Commissioner for Human Rights.<sup>275</sup> The establishment of the CSHR is the work of an “unprecedented alliance [which] includes intergovernmental organisations, governments, sports bodies, athletes, hosts, sponsors, broadcasters, civil society

<sup>269</sup> *Id.*, at 9 (emphasis in original).

<sup>270</sup> *For the Game. For the World*, *supra*, note 120, at 35.

<sup>271</sup> “*When We Know Better*,” *supra*, note 95, at 44, and *supra*, note 24.

<sup>272</sup> Quinn, P., *Sponsoring Corruption*, 32 MD. J. INT’L L. 221 (2017), at 226, <http://digitalcommons.law.umaryland.edu/mjil/vol32/iss1/9>

<sup>273</sup> Backer, L., *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39(4) UNIVERSITY OF CONNECTICUT LAW REVIEW (2007), at 31–32.

<sup>274</sup> *Id.*, at 32 (emphasis added).

<sup>275</sup> CENTRE FOR SPORT AND HUMAN RIGHTS [CSHR], *Launch of the Centre for Sport and Human Rights* (Jun. 26, 2018), <https://www.sporhumanrights.org/en/news/launch-of-the-centre-for-sport-and-human-rights>



representatives, trade unions, employers and their associations, and national human rights institutions.”<sup>276</sup>

The vision of the CSHR is “[a] world of sport that fully respects human rights.”<sup>277</sup> The CSHR’s functions centre on “the promotion of effective approaches to prevention, mitigation, and remedy of adverse human rights impacts.”<sup>278</sup> It will be governed by a board of independent trustees who will be elected by an advisory council in which six key stakeholders are given equal status: (1) intergovernmental organizations; (2) governments; (3) trade unions (including the WPA); (4) NGOs and National Human Rights Institutes; (5) sponsors, broadcasters, and commercial partners; and (6) sports bodies and organizing committees, including the IOC, FIFA, UEFA, and the CGF.<sup>279</sup> The trustees, therefore, will be accountable for the attainment of the CSHR’s statutory objectives, which enshrine the Sporting Chance Principles committed to by all members of the advisory council.<sup>280</sup> They demand that “human rights are taken account of at all times,”<sup>281</sup> “affected groups have a voice in decision-making ... including athletes, fans, communities, workers, children, volunteers, journalists, human rights defenders, and potentially marginalised groups,”<sup>282</sup> “access to remedy is available,”<sup>283</sup> and “collective action is harnessed to realise human rights.”<sup>284</sup>

According to *Championing Human Rights in the Governance of Sports Bodies*, a guide published on March 31, 2018, by the Mega-Sporting Events Platform for Human Rights—the forerunner to the CSHR—with input from the IOC, FIFA, UEFA, and the CGF (“Championing Human Rights”),<sup>285</sup> aligning sporting values with human rights requires “[a]rticulating a mission and values and how this is *reconciled* with an organisation’s purpose and activities.”<sup>286</sup> SGBs, for example, “typically have policies, systems and processes to address integrity issues and should ensure that respect for human rights are integrated within these,” as “[r]espect for human rights is a key part of the integrity of sport.”<sup>287</sup> In order

<sup>276</sup> CSHR, *Diverse Coalition Commits to Establishing Centre for Sport and Human Rights in 2018* (Nov. 30, 2017), <https://www.sporhumanrights.org/en/news/diverse-coalition-commits-to-establishing-centre-for-sport-human-rights-in->

<sup>277</sup> CSHR, *Overview - Mission*, (Retrieved Jul. 24, 2018), <https://www.sporhumanrights.org/en/about/overview>

<sup>278</sup> CSHR, *Overview – Governance*, (Retrieved Jul. 24, 2018), <https://www.sporhumanrights.org/en/about/overview>

<sup>279</sup> CSHR, *Who We Are – Advisory Council*, (Retrieved Jul. 24, 2018), <https://www.sporhumanrights.org/en/about/who-we-are>

<sup>280</sup> CSHR, *Sporting Chance Principles*, (Retrieved Jul. 24, 2018), <https://www.sporhumanrights.org/en/about/principles>

<sup>281</sup> *Id.*, at para. 4.

<sup>282</sup> *Id.*, at para. 5.

<sup>283</sup> *Id.*, at para. 6.

<sup>284</sup> *Id.*, at para. 9.

<sup>285</sup> CSHR, *Championing Human Rights in the Governance of Sports Bodies* (Mar. 31, 2018), <https://www.ihrb.org/megasportingevents/resource-view/championing-human-rights-governance-sports-bodies>

<sup>286</sup> *Id.*, at 6 (emphasis added).

<sup>287</sup> *Id.*



to implement human rights in the governance of SGBs, Championing Human Rights sets out four steps that SGBs “should follow . . . to demonstrate they are promoting the values of sport and showing respect for human rights in line with best practice and international norms, notably the [UNGPs].”<sup>288</sup> They are: (1) commit and embed including by making a public commitment to respect human rights; (2) identify any actual and potential risks to human rights and prioritize action; (3) take action to address risks and provide access to remedy where necessary; and (4) report and communicate how the organization is addressing risks to human rights.<sup>289</sup> In this way, the four key recommendations follow the four pillars of the FIFA Human Rights Policy and set a clear standard of expected behavior for global sport.<sup>290</sup>

### 3. Institutional Athlete Activism and Reforming Global Sport

Institutional activism aims to change the very system that places the enjoyment of fundamental freedoms in conflict with the practice of sport and to hold sport to account for any human rights harms that it has caused or to which it has contributed. Accordingly, if successful, institutional activism will involve a number of profound yet positive changes to the governance of SGBs and the human and athlete rights impacts of global sport.

The first will be to the substantive content of global sports law, including *lex sportiva* and ‘Olympic law.’ The policy commitment required as an initial step will require SGBs to define and embed within global sports law including in key constitutional documents such as the Olympic Charter and the FIFA Statutes those “higher-ranking rules that prevail” over conflicting regulations of the SGB and to render such regulations “invalid as inconsistent.”<sup>291</sup> For the first time, the higher-ranking rules must respect international human rights instruments, principles, and standards, including the UNGPs, the OECD Guidelines, the ILO Declaration, and the MNE Declaration. As the history and renewal of athlete activism makes clear, this is presently not the case on vital human rights matters. The outcomes will include the establishment of a system of decent work for athletes, and the enhanced legitimacy of global sports law. Further, by respecting the enabling rights of freedom of expression and the right to organize, the rights of athletes to champion human rights both within and through global sport will be respected.

A second profound change will be to the manner in which global sports law is developed, promulgated, and implemented. The second and fourth key recommendations of Championing Human Rights demand that a proactive, inclusive, and transparent approach be taken to identifying actual and potential human rights risks. These recommendations build on the framework of the UNGPs and key aspects of the OECD Guidelines and the MNE Declaration, especially the process of human rights due diligence, a process that is presently absent from the governance of almost all SGBs. According to the OECD Guidelines, human

<sup>288</sup> *Id.*, at 7.

<sup>289</sup> *Id.*

<sup>290</sup> *Supra*, notes 232 and 248.

<sup>291</sup> *Chand, supra*, note 9, at para. 449.



rights due diligence “entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed ... It is an on-going exercise, recognising that human rights risks may change over time ...”<sup>292</sup> An essential aspect of due diligence is that “it is informed by engagement with stakeholders ... who are persons or groups who have interests that could be affected by an enterprise’s activities.”<sup>293</sup> Stakeholder engagement “is characterized by two-way communication ... involves the timely sharing of the relevant information stakeholders need to make informed decisions,” and, “to be meaningful, engagement involves the good faith of all parties.”<sup>294</sup> Due diligence also essentially entails “[c]ommunicating information on due diligence processes, findings and plans. It enables the enterprise to build trust in its actions and decision-making, and demonstrate good faith. An enterprise should account for how it identifies and addresses actual or potential adverse impacts and should communicate accordingly.”<sup>295</sup> Similarly, the MNE Declaration provides that the “process should take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process.”<sup>296</sup>

A third profound change demands that those who suffer an adverse human rights impact can access an effective remedy. Without this step, sport and human rights cannot be reconciled. Access to an effective remedy is required to address the situation where SGBs “identify through their human rights due diligence process or other means that they have caused or contributed to an adverse impact.”<sup>297</sup> Following the “protect, respect, remedy” framework of the UNGPs and, in particular, Principle 31 of the UNGPs,<sup>298</sup> the OECD Guidelines:

... recommend that enterprises have processes in place to enable remediation. Some situations require cooperation with judicial or State-based non-judicial mechanisms. In others, operational-level grievance mechanisms for those potentially impacted by enterprises’ activities can be an effective means of providing for such processes when they meet the core criteria of: legitimacy, accessibility, predictability, equitability, compatibility with the [OECD] Guidelines and transparency, and are based on dialogue and engagement with a view to seeking agreed solutions.<sup>299</sup>

Apologies, restitution, reinstatement of dismissed workers, recognition of trade unions for the purposes of collective bargaining, financial or non-financial

<sup>292</sup> *OECD Guidelines*, *supra*, note 26, at 34.

<sup>293</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), at 18, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*, at 19.

<sup>296</sup> *MNE Declaration*, *supra*, note 27, para. 10(e) at 5.

<sup>297</sup> *OECD Guidelines*, *supra*, note 26 at 34.

<sup>298</sup> *Guiding Principles on Business and Human Rights*, *supra*, note 25, at 33–35.

<sup>299</sup> *OECD Guidelines*, *supra*, note 26, at 34.



compensation (such as establishing compensation funds for victims, or for future outreach and educational programs), or punitive sanctions are among the available remedies that may be appropriate based on the circumstances and nature of the human rights impacts.<sup>300</sup>

Meeting these recommendations is well within the capability of preeminent SGBs, such as the IOC, FIFA, UEFA, and the CGF. The human and athlete rights impacts considered in this article reveal that, where affected groups are unable to access an effective remedy, there are three main gaps: (1) where, such as with the IOC HCC, human rights commitments have been made by a SGB, but are not accessible to affected groups;<sup>301</sup> (2) where a grievance mechanism has been established—such as the CAS—but does not meet the core requirements of the UNGPs or the OECD Guidelines;<sup>302</sup> and (3) where neither the human rights commitments have been made nor the requisite grievance mechanisms established. Further, if the filling of these gaps is approached through the paradigm of business and human rights law instead of global sports law, new opportunities to address adverse human rights impacts in sport will emerge. The Permanent Court of Arbitration is the seat of arbitration under the landmark Bangladesh Accord.<sup>303</sup> Much work is being undertaken to establish global rules for business and human rights arbitration.<sup>304</sup> Should SGBs be unwilling to adapt, affected groups, including athletes, will be certain to assert their fundamental human right to access an effective remedy outside of the institutional framework of sport.

## IV. Conclusion

Three great movements—global sport, the cause of universal human rights, and athlete activism—are each driven by their own powerful values systems. These values, which have been passed down from generation to generation, also have much in common. They stand for human dignity and the social power of sport, demonstrating how sport provides both the occasions to celebrate humanity and, due to its intensity, scale, and reach, the circumstances to impact people negatively. Sport is, by its nature, a shared experience. Yet the institutions that govern it are, all too often, exclusive in their approach.

The generational learnings of these three great movements are finally coalescing to create the opportunity to reconcile sport and human rights. Just as sport is a shared experience, the transnational legal framework that governs it

<sup>300</sup> See *OECD Due Diligence Guidance for Responsible Business Conduct*, *supra*, note 293, para. 6.1(b) at 34.

<sup>301</sup> See, *supra*, notes 259–269.

<sup>302</sup> See, *supra*, note 214.

<sup>303</sup> BANGLADESH ACCORD, *2018 Accord on Fire and Building Safety in Bangladesh: May 2018* (Jun. 21, 2017), article 3 at 2–3, <http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf>

<sup>304</sup> See, *generally*, Cronstedt, C, Eijsbouts, J, Margolis, A., Ratner, S., Scheltema, M., and Thompson, R (Working Group on International Arbitration of Business and Human Rights), *International Arbitration of Business and Human Rights: A Step Forward* (Nov. 16, 2017), KLUWER ARBITRATION BLOG, <http://arbitrationblog.kluwerarbitration.com/2017/11/16/international-arbitration-business-human-rights-step-forward/>



must now also be shared. A commitment to embedding internationally recognized human rights in global sport has now been made by six key stakeholder groups: SGBs; governments; leading intergovernmental agencies such as the UN and the ILO; business and the brands; NGOs; and the trade union movement, including the organized voice of athletes. Much work remains to be done to convert that commitment into genuine reconciliation. Substantive, cultural, and institutional change is demanded. Without it, adverse human and athlete rights impacts will not be prevented when they should, and those whose rights are violated will continue to be denied a remedy.

For this work to be completed, athlete activism will remain essential—individually, collectively, and institutionally. Moreover, the three levels of athlete activism will need to engage strategically with each other, not only for the benefit of athletes, but for everyone touched by sport. If global sport is to be a true force for good and celebrate humanity throughout the world, it must first protect, respect, and uphold the human rights of those who make it possible.

