

Protect, Respect and Remedy. Global Sport and Access to Justice

Brendan Schwab*

☞ Access to justice; Human rights; Olympic Games; Remedies; Sports governing bodies; Sportspersons

“The 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 ... The practice of sport is a human right ...”
*Fundamental Principles of Olympism, Olympic Charter, 26 June 2019.*¹

“Where there is a right, there must be a remedy ...”
*The Supreme Court of Canada, 28 February 2020.*²

1. An essential question

This article, the second in a series of three, considers the implementation by global sport³ of the third pillar of the *United Nations Guiding Principles on Business and Human Rights* (UNGPs) “Protect, Respect and Remedy Framework”.⁴ The first article explained how respect for internationally recognised human rights—the UNGPs’ second pillar—has become a *minimum standard* of expected conduct by Sports Governing Bodies (SGBs).⁵ Building on this, this article poses an essential question to the leaders of global sport: *should justice be delivered to those whose internationally recognised human rights are violated in the name, business or politics of sport?*

This is essential given the widespread abuse of human rights in and in connection with global sport, global sport’s stated humanitarian values, and the resurgence of “sportswashing” which can see sport linked with human rights abuses not of its own making by states with poor human rights standards and records.⁶

Major global SGBs such as the International Olympic Committee (IOC) and the Fédération Internationale de Football Association (FIFA) are transnational “business enterprises” of considerable scale and reach.⁷ They are also organisations which purport to act autonomously and exercise the power to make a specific “global law without the [S]tate” through legally binding regulations which impact people in far reaching ways.⁸ Over the last decade, SGBs have varied in both their commitment and diligence to respecting the internationally recognised human rights of those they impact, including players and athletes.⁹ FIFA and the Commonwealth Games Federation (CGF), for example, have made important human rights commitments, whereas World Athletics (formerly the International Association of Athletics Federations (IAAF)) continues to deny that it has any responsibility to respect human rights. The IOC, meanwhile, has not extended its commitments to respecting internationally recognised human rights to athletes. The vast majority of global SGBs have yet to address their responsibility.¹⁰

Irrespective of their approach, all SGBs are particularly challenged by the third pillar of the UNGPs Framework: ensuring access to effective remedy. Unquestionably, through their “extraordinary autonomy”,¹¹ SGBs have the capability and power to effectively implement all principles which constitute the third pillar.¹² The question is whether they are willing to do so. Delivering an effective answer to the essential question posited by this article involves more than a rhetorical commitment to justice. It requires the courage to achieve cultural change in the governance of global sport towards individual and

* Brendan Schwab LLB, MBA. Executive Director, World Players Association, UNI Global Union, 8–10 Avenue Reverdil, Nyon, 1260, Switzerland. The author would like to acknowledge the assistance of Florian Kirschner in the preparation of this article. Email brendan.schwab@uniglobalunion.org.

¹ IOC Olympic Charter, 26 June 2019, Fundamental Principles 2 and 4, https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.24084026.1882782950.1587019803-844805120.1580723553 [Accessed 27 June 2020]; in the following referred to as Olympic Charter.

² *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (CanLII) at [120] and [214], <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html> [Accessed 27 June 2020].

³ “Global sport”, for the purposes of this article, consists of the Olympic Movement, the three main constituents of which are the IOC, the International Sports Federations (IFs) and the National Olympic Committees (NOCs). See Olympic Charter, Rule 1.2.

⁴ UNOHCHR, *United Nations Guiding Principles on Business and Human Rights* (2011), HR/PUB/11/04, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [Accessed 27 June 2020]; in the following footnotes referred to as UNGPs.

⁵ B. Schwab “Protect, Respect and Remedy: Global Sport and Human Rights” [2019] I.S.L.R., Issue 3, pp.52–65.

⁶ See, e.g. M. Worden, “Saudi Arabia’s Strategy to ‘Sportswash’ Abuses—Leaders Seek to Sideline Rights Concerns Through Boxing, Dakar Rally”, 6 December 2019, <https://www.hrw.org/news/2019/12/06/saudi-arabias-strategy-sportswash-abuses> [Accessed 27 June 2020]; D. Conn, “How Bahrain Uses Sport to Whitewash a Legacy of Torture and Human Rights Abuses”, 17 July 2017, <https://www.theguardian.com/sport/2017/jul/17/bahrain-accused-sport-whitewash-history-torture-human-rights-abuses> [Accessed 27 June 2020]; J. Doward, “Amnesty Criticises Manchester City Over ‘Sportswashing’”, 11 November 2018, <https://www.theguardian.com/law/2018/nov/11/manchester-city-owners-accused-sportswashing-gulf-image> [Accessed 27 June 2020]; T. Wigmore, “Want to Know How Successful Sportswashing Is? Just Look at Manchester City Fans Who Cheerlead for Abu Dhabi”, 30 November 2018, <https://inews.co.uk/sport/football/manchester-city-abu-dhabi-uae-sports-washing/> [Accessed 27 June 2020].

⁷ J. Ruggie, “For the Game. For the World”, FIFA and Human Rights, Harvard Kennedy School (2016), p.10, <https://www.hks.harvard.edu/centers/mrcbg/programs/crri/research/reports/report68> [Accessed 27 June 2020]; UNGPs, General Principles, p.1 clarifies that the UNGPs apply to “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure”.

⁸ A. Duval, *The FIFA Regulations on the Status and Transfer of Players: Trans-national Law Making in the Shadow of Bosman*, Asser Institute, Asser Research Paper 2016-06, p.25, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760263 [Accessed 27 June 2020].

⁹ The words “players” and “athletes” are used interchangeably in this article.

¹⁰ Schwab (fn.5 above), 59 ff. UN HRC, *Intersection of race and gender discrimination in sport - Report of the United Nations High commissioner for Human Rights* (15 June 2020), A/HRC/44/26, para. 44, <https://undocs.org/en/A/HRC/44/26> [Accessed 27 June 2020].

¹¹ M. Baddeley, “The Extraordinary Autonomy of Sports Bodies Under Swiss Law: Lessons to be Drawn” (2020) 20(1) I.S.L.J. 3–17, <https://doi.org/10.1007/s40318-019-00163-6> [Accessed 27 June 2020].

¹² UNGPs, Principles 29–31.

institutional accountability, and a human-rights-centred approach in the reformation of global sport's justice system.

This article examines the responsibility of and opportunity for SGBs to ensure that victims of human rights abuse can access an effective remedy. Section 2 provides an overview of global sport's mixed response to a longstanding human rights crisis and how addressing that crisis presents a particular challenge to two key institutional players in global sport and global sports law, the IOC and the Court of Arbitration for Sport (CAS).¹³ Section 3 highlights how the difficulty of ensuring effective access to remedy applies to transnational business enterprises as well as global sport, and illustrates the particular justice gaps that exist through selected case studies. Paradoxically, as Section 4 shows, the transnational autonomy which underpins the governance of global sport and the administration of global sports law presents arguably the perfect means by which internationally recognised human rights can be protected, respected and, where violated, remedied. Section 5 explains how remedying human rights abuse can be substantively, culturally and institutionally implemented by global sport. Section 6 concludes this article by reflecting on how ensuring access to effective remedy for human rights disputes will become an essential component of global sport's system of justice.¹⁴

2. Human rights abuse and demands to reform global sport's system of justice

Since at least 1968, there have been widely documented instances of human rights harms occurring in connection with sport and mega-sporting events including the Olympic Games and the FIFA World Cup, including to local communities, workers and vulnerable groups such as women, members of the LGBTI community and children.¹⁵ Sporting norms, governance failures and inadequate reporting and dispute resolution processes have even “rendered athletes inherently vulnerable” to

human rights harms,¹⁶ including racism, gender discrimination, abuse of labour rights, bullying, sexual abuse and child abuse.¹⁷

The abuse of migrant workers in Qatar on construction sites related or connected with the 2022 FIFA World Cup proved to be a tipping point that compelled the international community to demand that global sport addresses its human rights impacts.¹⁸ In December 2015, FIFA asked Professor John Ruggie, the architect of the UNGPs, to “develop recommendations on what it means for FIFA to embed respect for human rights across its global operations”.¹⁹ Professor Ruggie's April 2016 report, “*For the Game. For the World*”: FIFA and Human Rights, noted that “the authoritative standard for doing so is the [UNGP]”, and that embedding human rights would require FIFA to make three material changes: (1) “from constitution to culture”; (2) “from reactive to proactive”; and (3) “from insular to accountable”.²⁰ The report made six key recommendations, which can be considered as being equally applicable to all global SGBs:

1. Adopt a clear and coherent human rights policy.
2. Embed respect for human rights.
3. Identify and evaluate human rights risks.
4. Address human rights risks.
5. Track and report on implementation.
6. Enable access to remedy.²¹

These steps are therefore essential steps for all global SGBs to take in order to legitimise global sport and global sports law. In other words, global sport and global sports law cannot be considered legitimate if either is connected with or related to human rights abuse.²² Importantly, global sport and global sports law have evolved without formally respecting internationally recognised human rights or including the people participating in, affected by, or involved with the delivery of sport—“athletes, fans, communities, workers, children, volunteers, journalists, human rights defenders and potentially marginalised groups”²³—in the governance of global sport. This has left those individuals and groups without protection of global sports law. They are now demanding inclusion,

¹³ For the purposes of this article, “global sports law” includes its component parts known variously as *lex sportiva* and “Olympic law”—which is, in effect, law made by and imposed at the behest of SGBs. Refer B. Schwab, “Celebrate Humanity: Reconciling Sport and Human Rights through Athlete Activism” (2018) 28(2) J.L.A.S. 170–207 at 172 ff., <https://doi.org/10.18060/22570> [Accessed 27 June 2020].

¹⁴ It is not within the scope of this article to consider the important questions of what constitutes an effective remedy and what remedies should be made available by global sport and under global sports law.

¹⁵ Schwab (fn.5 above), 53 ff.

¹⁶ Schwab (fn.5 above), 56 referring to J. McPhee and J. Dowden, “Report of the Independent Investigation—The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes”, 10 December 2018, <https://www.nassarinvestigation.com/en> [Accessed 27 June 2020].

¹⁷ Schwab (fn.5 above), 55 f.

¹⁸ National Contact Point of Switzerland, *Initial Assessment: Specific Instance Regarding the Fédération Internationale de Football Association (FIFA) Submitted by the Building and Woodworkers' International (BWI)*, 13 October 2015, p.6, https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP/Statements_zu_konkreten_Faellen.html [Accessed 27 June 2020]. See generally, Amnesty International, *Qatar: No Extra Time: How Qatar is Still Failing on Workers' Rights Ahead of the World Cup*, 12 November 2014, <https://www.amnesty.org/en/documents/mde22/010/2014/en/> [Accessed 27 June 2020].

¹⁹ Ruggie (fn.7 above), p.4.

²⁰ Ruggie (fn.7 above), p.4.

²¹ Ruggie (fn.7 above), p.29 ff.

²² Schwab (fn.5 above), 53.

²³ CSHR, *Championing Human Rights in the Governance of Sport Bodies* (2018), p.5, https://www.ihrb.org/uploads/reports/Championing_Human_Rights_in_the_Governance_of_Sport_Bodies%2C_MSE_Platform.pdf [Accessed 27 June 2020].

and organising for that outcome. The Sport and Rights Alliance (SRA) brings together leading NGOs and trade unions to embed human and athlete rights in global sport.²⁴ Renascent athlete activism has encompassed organising, demands for collective bargaining rights, gender equality and equal pay, and targeted challenges to SGB restrictions on athlete commercial rights and freedom of political expression.²⁵

The IOC is in a unique position to secure respect for human rights in global sport. Not only is it the organiser of the world's largest mega-sporting event, the Olympic Games, and a substantial business enterprise in its own right, it also acts as the "supreme authority" of the Olympic Movement.²⁶ This three-part role gives the IOC significant leverage over International Federations (IFs), National Olympic Committees (NOCs) and other SGBs with which it has business relationships and, in turn, many governments. In March 2020, the IOC, in accepting recommendations from the former United Nations (UN) High Commissioner for Human Rights HRH Prince Zeid Ra'ad Al Hussein and Ms Rachel Davis, Vice President of Shift, "confirmed its commitment to develop a comprehensive and cohesive human rights strategy for the IOC".²⁷ As "immediate next steps", the IOC agreed to:

- "develop and adopt a detailed overarching strategy on human rights, encompassing the IOC's human rights responsibilities in its own operations (including the activities of the IOC administration as well as the IOC's role as organiser of the Olympic Games), and setting out its role to advance respect for human rights as the leader of the Olympic Movement, in cooperation with the [NOCs] and the [IFs]...
- continue to strengthen human rights due diligence, the use of leverage and engagement with affected stakeholders in existing areas of work, including the IOC's efforts on the prevention of harassment and abuse in sport...
- establish the previously announced IOC Human Rights Advisory Committee."²⁸

This positive and important development followed earlier engagement with the SRA as part of a general commitment to "collective and proactive action on human rights protection",²⁹ which saw the IOC make "specific changes to the Host City Contract [(HCC)] 2024 with regard to human rights, anti-corruption and sustainable development standards".³⁰ With effect from the 2024 Paris Olympics, the HCC obliges the host city, host NOC and the organising committee to "protect and respect human rights and ensure any violation of human rights is remedied", including in a manner consistent with the UNGPs.³¹ Further, under the IOC Supplier Code 2018,³² the IOC expects its suppliers to comply with a number of standards including the UNGPs. However, the sustainability plan released for the 2022 Beijing Olympics fails to mention human rights.³³ In addition, the IOC's tentative steps towards embedding human rights involve the very different treatment of athletes and have yet to enable access to effective remedy for the victims of human rights abuse.

The successful development of a human rights strategy by the IOC will require it embark upon making the three great changes identified by Professor Ruggie in his 2016 report to FIFA.³⁴ The IOC is still to make a constitutional commitment to human rights in the Olympic Charter, even though this has been called for by the SRA and athlete groups for some time.³⁵ The IOC continues to resist efforts to make any commitments in relation to the internationally recognised human rights of athletes. The

²⁴ World Players Association, *Sport and Rights Alliance*, <https://www.uniglobalunion.org/sectors/world-players/humanity> [Accessed 27 June 2020].

²⁵ Schwab (fn.13 above); J. Boykoff, *The Olympics are Political. The IOC Ban Denies Reality—and Athletes Their Voice*, 16 January 2020, <https://www.nbcnews.com/think/opinion/olympics-are-political-IOC-ban-denies-reality-athletes-their-voice-ncna1117306> [Accessed 27 June 2020]; Global Athlete, *Global Athlete Statement in Response to IOC President Thomas Bach's New Year's Message*, 3 January 2020, <https://globalathlete.org/our-word/global-athlete-statement-in-response-to-rule-50> [Accessed 27 June 2020]; B. Nelson, *IOC's Haddad Rejects Global Athlete's Collective Bargaining Call, Backs Solidarity Model*, 18 May 2020, <https://www.sportbusiness.com/news/iocs-haddad-rejects-collective-bargaining-says-solidarity-model-more-important-than-ever> [Accessed 27 June 2020]; L. Morgan, *Athletes Urge NOCS to "Follow Germany's Lead" and Relax Restrictions of IOC's Rule 40*, 5 June 2019, <https://www.insidethegames.biz/articles/1080114/athletes-urge-nocs-to-follow-germanys-lead-and-relax-restrictions-of-iocs-rule-40> [Accessed 27 June 2020]; R. Harris, *Analysis: Soccer Out of Touch in Suppressing On-field Activism*, 31 May 2020, <https://www.seattletimes.com/nation-world/analysis-soccer-out-of-touch-suppressing-on-field-activism/> [web page not found].

²⁶ Olympic Charter, Rule 1.1.

²⁷ IOC, *IOC Continues Working on Human Rights and Takes First Steps on a Strategy*, 3 March 2020, <https://www.olympic.org/news/ioc-continues-working-on-human-rights-and-takes-first-steps-on-a-strategy> [Accessed 27 June 2020].

²⁸ See fn.27 above.

²⁹ IOC, *The IOC Committed to Collective and Proactive Action on Human Rights Protection*, 30 November 2017, <https://www.olympic.org/news/the-IOC-committed-to-collective-and-proactive-action-on-human-rights-protection> [Accessed 27 June 2020].

³⁰ IOC, *IOC Strengthens its Stance in Favour of Human Rights and Against Corruption in new Host City Contract*, 28 February 2017, <https://www.olympic.org/news/ioc-strengthens-its-stance-in-favour-of-human-rights-and-against-corruption-in-new-host-city-contract> [Accessed 27 June 2020].

³¹ IOC, *Host City Contract Principles* (2017), Section 13.2(b), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Contract-2024-Principles.pdf#_ga=2.234594526.118546868.1560675144-277412905.1557328691 [Accessed 27 June 2020].

³² IOC, *IOC Supplier Code* (September 2018), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/celebrate-olympic-games/Sustainability/Spheres/IOC-Supplier-Code-Final.pdf> [Accessed 27 June 2020].

³³ IOC, *Beijing 2022 Releases Sustainability Plan*, 15 May 2020, <https://www.olympic.org/news/beijing-2022-releases-sustainability-plan> [Accessed 27 June 2020].

³⁴ Ruggie (fn.7 above); FIFA Human Rights Advisory Board, *Third Report by the FIFA Human Rights Advisory Board including the Board's Recommendations from October 2018-April 2019* (May 2019), 13 f., <https://resources.fifa.com/image/upload/third-report-by-the-fifa-human-rights-advisory-board.pdf?cloudid=sxdtbmx6wczrmw1k9rcr> [Accessed 27 June 2020].

³⁵ SRA, *Open Letter to IOC President Dr. Thomas Bach—Athlete Rights are Human Rights*, 2 October 2018, https://www.uniglobalunion.org/sites/default/files/files/news/sra_letter_to_ioc_bach_oct_2018_final.pdf [Accessed 27 June 2020]; Schwab (fn.5 above), 62; assessing the application of Fundamental Principles of Olympism before the CAS, A. Duval, *The Olympic Charter: A Transnational Constitution Without a State?* (2018) 45(1) *Journal of Law and Society* 245–269 at 256.

2018 IOC Athletes' Rights and Responsibilities Declaration (ARRD),³⁶ for example, sets out 12 "rights" which are not sourced by reference to internationally recognised human rights and made subject to 10 "responsibilities" which include mandated compliance with the rules of SGBs and the Olympic Charter. Additionally, accountability for the human rights impacts the IOC causes contributes to or is directly linked with can only exist if affected groups can access an effective remedy. Creating that access will not be without challenge. Shortly after commissioning HRH Prince Zeid and Shift, the IOC was successfully arguing before the CAS that a group of women athletes, seeking to rely on the Olympic Charter's prohibition of gender discrimination, lacked standing.³⁷ In accepting the IOC's position, the CAS Panel said that the athletes merely had a "sporting interest" in the matter and "[did] not have any enforceable right".³⁸ Moreover, even though the Olympic Charter expressly includes athletes within the "Olympic Movement"³⁹ and provides that "[a]ny person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter",⁴⁰ "it is not enough to be part of the Olympic Movement in order to benefit from ... the [Olympic Charter]".⁴¹

Now in its fourth decade of operation, the CAS has "evolved from a relatively marginal arbitration institution [established in 1984] to the international 'supreme court' for sports that decides many of the most important cases in sports and in doing so has a profound effect on sports more generally".⁴² The motives for the establishment of the CAS were primarily two-fold: (1) dissatisfaction with the inadequacy of sport's internal dispute resolution mechanisms;⁴³ and (2) a desire on the part of the IOC and SGBs to avoid the courts, with those of "civil law jurisdictions having customarily accepted jurisdiction over the validity of sports bodies' decisions, in particular when they affected athletes' rights".⁴⁴ The cultural

antipathy of the IOC and SGBs was well stated by Judge Kéba Mbaye, the inaugural President of the CAS, who spoke of "court action taken against the IOC by one of its members and the anger this engendered amongst certain leaders of the Olympic Movement".⁴⁵

Professor Ruggie considered the CAS in his 2016 report to FIFA, and wrote that "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".⁴⁶ He recommended that FIFA "review its existing dispute resolution system for football-related issues to ensure that it does not lead in practice to a lack of access to effective remedy for human rights harms". In addition, FIFA "should ensure that its own dispute resolution bodies have adequate human rights expertise and procedures to address human rights claims", and "urge ... the [CAS] to do the same".⁴⁷ In September 2018, the FIFA Human Rights Advisory Board (HRAB)⁴⁸ made a similar recommendation, calling on FIFA "to engage with the [CAS] in making players' human rights a permanent issue on the agenda of CAS seminars to help build the capacity of CAS arbitrators to take into account internationally recognized human right standards".⁴⁹ In April 2020, FIFA released a comprehensive report on the implementation of the recommendations of the FIFA HRAB.⁵⁰ In relation to the CAS, FIFA reported that it "has not yet taken concrete action upon this recommendation. However, it is committed to raise the topic of human rights in its exchanges with CAS at an appropriate moment in the coming months".⁵¹

³⁶ IOC, The Athletes' Rights and Responsibilities Declaration (ARRD) (October 2018), https://d2g8uwgn11fjh.cloudfront.net/wp-content/uploads/2018/10/09134729/Athletes-Rights-and-Responsibilities-Declaration_2018.10.07.pdf?utm_source=hootsuite&utm_medium=social&utm_campaign=entourage [Accessed 27 June 2020].

³⁷ Olympic Charter, Fundamental Principle 6.

³⁸ CAS 2019/A/6274 *Inês Henriques et al. v IOC*, para.73.

³⁹ Olympic Charter, Rules 1.1 and 1.3.

⁴⁰ Olympic Charter, Rule 1.4.

⁴¹ CAS (fn.38 above), para.71. The full paragraph reads as "The Panel is of the view that it is not enough to be part of the Olympic Movement in order to benefit from the arbitration clause contained in Rule 61.2 of the OC, as was confirmed by other CAS awards (CAS 2000/A/288; CAS 2000/A/297; CAS (OG Nagano) 98/001; CAS 2011/A/2474)."

⁴² J. Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence—An Empirical Inquiry into Lex Sportiva* (T.M.C. Asser Press, 2019), p.3, <https://doi.org/10.1007/978-94-6265-285-9> [Accessed 27 June 2020].

⁴³ A. Vaitiekunas, *The Court of Arbitration for Sport: Law Making and the Question of Independence* (Stämpfli Verlag, 2014), p.28.

⁴⁴ Vaitiekunas (fn.43 above), p.31.

⁴⁵ Vaitiekunas (fn.43 above), p.34.

⁴⁶ Ruggie (fn.7 above), p.26.

⁴⁷ Ruggie (fn.7 above), p.26.

⁴⁸ The FIFA Human Rights Advisory Board was established in November 2016 as an independent body of experts to provide "FIFA with guidance on the implementation of its human rights-related responsibilities, including with regards to its policy commitments, due diligence processes, and processes for remediation." FIFA, *FIFA Human Rights Advisory Board Terms of Reference* (January 2019), p.4, https://resources.fifa.com/mm/document/affederation/footballgovernance/02/87/54/89/advisoryboard_tor_final_neutral.pdf [Accessed 27 June 2020].

⁴⁹ FIFA Human Rights Advisory Board, *Second Report by the FIFA Human Rights Advisory Board including the Board's Recommendations and FIFA's Responses* (September 2018), p.22, <https://resources.fifa.com/image/upload/fifa-second-human-rights-advisory-board-report.pdf?cloudid=hw134aljosubxevkwvh> [Accessed 27 June 2020].

⁵⁰ FIFA, *Update from FIFA on the Recommendations of the FIFA Human Rights Advisory Board Covering the Period of September 2018 to November 2019* (January 2020), p.30, <https://img.fifa.com/image/upload/ot4pzfavdz5vjxbopxzq.pdf> [Accessed 27 June 2020].

⁵¹ FIFA (fn.50 above), p.31.

3. Access to remedy in global sport—key challenges

3.1 Remedy: the “forgotten pillar”

In the broader context of business and human rights, the third pillar of the UNGPs—ensuring access to effective remedy—is receiving increased attention.⁵² In 2017, the UN Forum on Business and Human Rights devoted its agenda to “realizing access to effective remedy”.⁵³ The rationale for the focus was clear:

“Since the endorsement of the [UNGP], access to remedy has been regularly described as the ‘forgotten pillar’. Yet, unless victims of adverse business-related human rights impacts have access to effective remedies, the [S]tate duty to protect human rights and the corporate responsibility to respect human rights become meaningless in practice. The need to make progress in translating the third pillar of the [UNGP] from paper to practice is perhaps the most burning issue in the current business and human rights agenda.”⁵⁴

Concentrated effort on remedy has seen some breakthrough practices emerge, including the filing and settlement of arbitration proceedings under the *Accord on Fire and Building Safety in Bangladesh* being described as a model for business and human rights arbitration.⁵⁵ The Hague International Business and Human Rights Arbitration Rules⁵⁶ were developed by a panel of experts following an extensive process of stakeholder engagement over a number of years.⁵⁷

Established in June 2018 after more than two years of multi-stakeholder dialogue in response to the tipping point of Qatar, the Centre for Sport and Human Rights (CSHR) has a three point mission which includes to “[s]upport access to effective remedy where harms have occurred”.⁵⁸ On 31 January 2017, a white paper published by the MSE Platform—the forum which developed the independent CSHR—identified “three major gaps” to remedy in global sport:

- “1. There is presently an absence of a binding and standing human rights policy and capacity across international sport within major [SGBs] and, as a consequence, no recourse to dispute resolution through such channels can be had for cases related to human rights.
2. Notwithstanding the capacity of [SGBs] to protect, promote and enforce human rights through a sports-based grievance mechanism, such a mechanism has not been created.
3. There is a lack of recognition and promotion by [SGBs] of external dispute resolution mechanisms.”⁵⁹

The white paper triggered a meaningful body of work on the part of the CSHR, including a strategic dialogue on remedy held at The Peace Palace at The Hague on 15 October 2018.⁶⁰ On 29 January 2019, Mary Harvey, the CEO of the CSHR, maintained that the [c]urrent structures in sport for grievance and remedy are not sufficient” because they:

“... don’t address risks to children, sexual harassment and assault, those that are without union representation, and protection of athletes with refugee status, among other gaps. A key area of focus in the Centre’s work moving forward will be how to support the creation or improvement of credible and effective mechanisms to address these critical gaps.”⁶¹

The CSHR’s annual Sporting Chance Forum, held in Geneva on 21 and 22 November 2019,⁶² devoted a session to remedy, noting that “[e]nsuring access to remedy in the context of sport-related human rights abuses remains a challenging issue for all actors”.⁶³ Building on the CSHR’s earlier work, “concrete examples”, “gaps” and “challenges” make it apparent that, “[i]n many cases, remedy mechanisms are either not available at all, not accessible to those affected, or not effective”.⁶⁴ The existence of the same gaps some three years after they

⁵² C. Dunmore, *International Arbitration of Business and Human Rights Disputes: Part 1—Introducing the Proposal*, 7 December 2017, <https://www.asser.nl/DoingBusinessRight/Blog/post/international-arbitration-of-business-and-human-rights-disputes-part-1-introducing-the-proposal> [Accessed 27 June 2020].

⁵³ OHCHR, *2017 Forum on Business and Human Rights*, <https://www.ohchr.org/EN/Issues/Business/Forum/Pages/2017ForumBHR.aspx> [Accessed 27 June 2020].

⁵⁴ UN Working Group on Business and Human Rights, *Reflections on the Theme of the 2017 Forum on Business and Human Rights*, <https://www.ohchr.org/Documents/Issues/Business/ForumSession6/ExplainingThemeLaunchingBlog.pdf> [Accessed 27 June 2020].

⁵⁵ D. Desierto, *A Model for Business and Human Rights through International Arbitration Under the Bangladesh Accord: The 2017 Decision on Admissibility Objection in Industrial Global Union and Uni Global Union*, 28 November 2017, <http://arbitrationblog.kluwerarbitration.com/2017/11/28/model-business-human-rights-international-arbitration-bangladesh-accord-2017-decision-admissibility-objection-industrial-global-union-uni-global-union/> [Accessed 27 June 2020].

⁵⁶ Center for International Cooperation (CILC), *The Hague International Business and Human Rights Arbitration Rules* (December 2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [Accessed 27 June 2020].

⁵⁷ The Hague Institute for Global Justice, *Press Release—Business and Human Rights International Arbitration Project Launched*, 7 November 2017, <http://www.i4bb.org/news/ProjectPressRelease1711.pdf> [Accessed 27 June 2020].

⁵⁸ CSHR, *Mission*, <https://www.sporhumanrights.org/en/about/overview> [Accessed 27 June 2020].

⁵⁹ Mega Sporting Events Platform for Human Rights, *Remedy Mechanisms for Human Rights in the Sports Context. Sporting Chance White Paper 2.4* (Version 1—January 2017), p.5 f., https://www.ihrb.org/uploads/reports/MSE_Platform%2C_Remedy_Mechanisms_for_Human_Rights_in_the_Sports_Context%2C_Jan_2017.pdf [Accessed 27 June 2020].

⁶⁰ D. Heerdt, *Meeting Report: Strategic Dialogue on Remedy*, 7 December 2018, <https://www.sporhumanrights.org/en/resources/meeting-report-strategic-dialogue-on-remedy> [Accessed 27 June 2020].

⁶¹ M. Harvey, *Three Priorities for the Future of Sport*, 28 January 2019, <https://www.sporhumanrights.org/en/resources/three-priorities-for-the-future-of-sport> [Accessed 27 June 2020].

⁶² CSHR, *Sporting Chance Forum 2019*, <https://www.sporhumanrights.org/en/news-events/events-the-2019-sporting-chance-forum> [Accessed 27 June 2020].

⁶³ CSHR 2019, *Sporting Chance Forum: Remediating Human Rights Abuses in Sport*, 28 January 2020, <https://www.youtube.com/watch?v=YIVUM4cMbtU&t=55s> [Accessed 27 June 2020].

⁶⁴ CSHR 2019 (fn.63 above).

were first reported in the language of the UNGPs by the MSE Platform illustrates the challenges and barriers that exist to implementing the requisite substantive, cultural and institutional change.

3.2 Barriers to effective remedy in global sport

Of the “three major gaps” to remedy identified by the MSE Platform in 2017,⁶⁵ progress has only been made by global sport in relation to the first—developing a “binding and standing human rights policy and capacity”—and then only by some SGBs.⁶⁶ Global sport has yet to develop a sports and human rights grievance mechanism and continues to not only fail to promote external grievance mechanisms, but condemn their use in favour of dispute resolution systems such as the CAS which are built on sporting norms.⁶⁷ As the following case studies illustrate, the common effect of this is to deny the victims of human rights abuse access to effective remedy, even where strong and binding human rights policy commitments have been made, and the SGB is causing or contributing to the abuse. Without being exhaustive, remedy is systematically denied in one of three ways. There is also a fourth important element—the responsibility of SGBs to exercise leverage in relation to abuse with which they are directly linked, a responsibility which SGBs are powerfully positioned to exercise and which can prevent harm, obviating the need for remediation.

(a) Situations in which there is an acknowledged human rights commitment and violation, but no remedy mechanism is available or accessible

Article 4(1) of the FIFA Statutes provides that “[d]iscrimination of any kind against a ... group of people on account of ... gender ... or any other reason is strictly prohibited and punishable by suspension or expulsion”. FIFA’s Human Rights Policy acknowledges that “discrimination is an issue in the world of football both on and off the pitch”, and states that “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”.⁶⁸

Despite this explicit regulatory framework, Iranian women have been banned from purchasing tickets and entering stadia to watch men’s football matches in Iran since 1981.⁶⁹ Women are also banned from watching matches in public spaces, cafes or restaurants that may also be attended by men.⁷⁰ A petition in support of lifting the ban signed by more than 201,000 people, was given to FIFA Secretary General Ms Fatma Samoura at the FIFA Headquarters in November 2018 by equality and human rights activists, including Ms Maryam Qashqaei Shojaei and Open Stadiums, representatives of Iranian women advocating for the lifting of the ban. In April 2019, the activists submitted a complaint to the investigatory chamber of the Ethics Committee of the FIFA against Mr Mehdi Taj, the President of the Football Federation Islamic Republic of Iran (FFIRI) in respect of the continuation of the ban.

In its September 2018 report to FIFA, the FIFA HRAB stated that the ban on women attending sporting events in Iran “violates both Articles 3 and 4 of the FIFA Statutes” and noted that “FIFA’s Ethics Code specifically prohibits discrimination including on the basis of gender”.⁷¹ The FIFA HRAB further recommended that “FIFA should be explicit about the timeframe in which it expects the FFIRI to align with FIFA’s human rights expectations and the anticipated sanctions if it does not, including under the FIFA Statutes, Disciplinary Code and Ethics Code”.⁷² In May 2019, the FIFA HRAB reiterated its earlier recommendations, called on FIFA to exercise leverage over the FFIRI and wrote that the HRAB’s members:

“... remain very concerned about the personal safety and security risks that the individual women who are protesting this discriminatory ban continue to face, and we urge FIFA to implement our recommendation in an effort to resolve this long-standing situation and prevent further harm.”⁷³

In September 2019, an Iranian football fan and human rights activist, Ms Sahar Khodayari, fatally set herself on fire outside a Tehran courthouse where she was awaiting trial and a likely six-month prison term for seeking to enter Azadi Stadium for an Asian Champions League football match in March 2019.⁷⁴ She became known as the “Blue Girl” in recognition of her support for her favourite football team, Esteghlal Football Club, and the colour she was wearing at the time of her self-immolation.⁷⁵

⁶⁵ Mega Sporting Events Platform for Human Rights (fn.59 above), p.5.

⁶⁶ *Supra* sections 1 and 2, p.57-60.

⁶⁷ Ruggie (fn.7 above), UN HRC (fn.10 above), para.39.

⁶⁸ FIFA, *FIFA’s Human Rights Policy* (May 2017 edition), p.6, <https://img.fifa.com/image/upload/kr05dqyhwr1uhqy2lh6r.pdf> [Accessed 27 June 2020].

⁶⁹ Human Rights Watch, *Banned from Watching Soccer, the Women of Iran are Being Failed by FIFA*, 8 March 2018, <https://www.hrw.org/news/2018/03/08/banned-watching-soccer-women-iran-are-being-failed-fifa> [Accessed 27 June 2020].

⁷⁰ SBS News, *Iranian Women Watch World Cup in Stadium after 37-Year Ban*, 21 June 2018, <https://www.sbs.com.au/news/iranian-women-watch-world-cup-in-stadium-after-37-year-ban> [Accessed 27 June 2020].

⁷¹ FIFA Human Rights Advisory Board (fn.49 above), p.24.

⁷² FIFA Human Rights Advisory Board (fn.49 above), p.25.

⁷³ FIFA Human Rights Advisory Board (fn.34 above), p.15 (emphasis added).

⁷⁴ IranWire.com, *The “Blue Girl” Who Set Herself on Fire and the Angry Backlash*, 9 September 2019, <https://iranwire.com/en/features/6287/> [Accessed 27 June 2020].

⁷⁵ IranWire.com (fn.74 above).

Despite the reference of FIFA's HRAB towards the applicability of FIFA Code of Ethics,⁷⁶ FIFA did not formally acknowledge the ethics complaint filed against Mr Taj, the only avenue of complaint open to persons not bound by the FIFA Statutes.⁷⁷ Despite the clarity of arts 3 and 4 of the FIFA Statutes and the expressly "binding" terms of FIFA's Human Rights Policy,⁷⁸ Ms Shojaei, Open Stadiums and, indeed, Ms Khodayari all lacked standing to access a grievance mechanism in order to pursue an effective remedy and hold FIFA and the FFIRI to account for football's human rights commitments. They could and should have had standing to access a tailored mechanism and seek an effective remedy by being recognised as belonging to the game of football and within the reach of the global law that governs it.⁷⁹

(b) Situations in which there is an existing mechanism, but it is not fully human rights compliant

Accessibility to effective remedy in global sport cannot be analysed without considering the central role of the CAS, both in relation to the governance of global sport and the substantive and procedural content and administration of global sports law. There is "uncertainty and disagreement regarding the extent and nature of CAS's normative contribution" to global sports law.⁸⁰ Despite this, as the awards of the CAS can be challenged before the Swiss Federal Tribunal (SFT), "the concept of the *ordre public* has had far-reaching normative consequences in CAS jurisprudence".⁸¹ This exacerbates the risk that global sport will fail to respect and fulfil internationally recognised human rights:

"The *ordre public*-exception intends to protect against the most egregious outcomes and the bar for what constitutes *ordre public* is therefore intentionally set very high. If that bar, which is intended to function as a basic protection for human rights and other fundamental values, is used as a benchmark for evaluating the appropriateness of sports rules there is a clear risk for the development of a *de facto* standard that balance competing interests in a less than optimal way."⁸²

The CAS, therefore, sits at the centre of the paradoxical challenge to ensure access to effective remedy in global sport. The reluctance on the part of the CAS and SGBs to embrace human rights norms remains evident in CAS practice and jurisprudence even where clear human issues rights are involved, especially regarding athletes. CAS panels continue to frame claims in sporting terms. The earlier mentioned proceedings recently instituted against the IOC with the "aim at bringing an end to on-going gender discrimination"⁸³ are formally regarded as "requesting in substance ... the inclusion of a new event in the meaning of [the Olympic Charter]".⁸⁴ In the same way, and even though "[t]his does not mean that, in the Panel's view, the issue of gender discrimination in sports, in general, is neither relevant nor essential" and "a substantive law issue of utmost importance",⁸⁵ the corporate responsibility of the IOC to enable access to remedy for human rights harms it is causing or contributing to is not procedurally relevant. In the words of the CAS Panel:

"Such issue of substantive law—however fundamental it may be—cannot, however, exempt from nor alleviate the Panel's examination of the procedural issues of a preliminary nature, such as its jurisdiction, *on the basis of the CAS Code and the applicable regulations*."⁸⁶

The CAS has also "established the applicability of the principle of legality in sports law". Formal legality simply means that rules "emanate from duly authorised bodies" and "are adopted in constitutionally proper ways".⁸⁷ As straightforward as this may sound, the legal effect is "limitative".⁸⁸ The substantive rights of people affected by a SGB's activities are limited in at least three important ways: (1) people's rights are restricted to what can be found in the governing documents and applicable regulations of SGBs, which, save for art.3 of the FIFA Statutes, identify and define rights more narrowly than internationally recognised human rights; (2) SGBs often use tailored language which does not have any precise meaning under international law. The only "right", for example, which the IAAF aims to preserve is that "of every individual to participate in Athletics as a sport, *without unlawful discrimination* of any kind",⁸⁹ and (3)

⁷⁶ FIFA Human Rights Advisory Board (fn.49 above), p.24.

⁷⁷ FIFA, *FIFA Code of Ethics* (2019 edition), p.37, <https://resources.fifa.com/image/upload/fifa-code-of-ethics-2019-version.pdf?cloudid=la3f5yqsox5cns9oypkg> [Accessed 27 June 2020]. Article 58(1) provides: "Any person may file a complaint regarding potential breaches of this Code with the secretariat of the investigatory chamber ..."

⁷⁸ FIFA (fn.68 above), p.10.

⁷⁹ For the exclusion of athletes from the Olympic Movement, see CAS (fn.38 above); in contrast the extensive standing granted to WADA see fn.142 below.

⁸⁰ Lindholm (fn.42 above), p.187.

⁸¹ Lindholm (fn.42 above), p.193.

⁸² Lindholm (fn.42 above), p.193 f.

⁸³ CAS (fn.38 above), para.52.

⁸⁴ CAS (fn.38 above), para.56.

⁸⁵ CAS (fn.38 above), para.57.

⁸⁶ CAS (fn.38 above), para.57 (emphasis added).

⁸⁷ Lindholm (fn.42 above), p.194.

⁸⁸ Duval (fn.35 above), 256 f.

⁸⁹ World Athletics (formerly IAAF), 2019 Constitution (in force from 1 November 2019), art.4.1(j), <https://www.worldathletics.org/about-iaaf/documents/book-of-rules> [Accessed 27 June 2020] (emphasis added).

rights, howsoever identified and defined, compete with other language based on sporting norms, such as “fair play”.⁹⁰

This results in CAS approaching cases at the intersection of sport and human rights in a very narrow way and with deference to sporting norms. In dismissing the landmark 2019 requests for arbitration filed by Caster Semenya and Athletics South Africa (ASA) against the IAAF concerning the IAAF Eligibility Regulations for Female Classification (Athletes with Differences of Sex Development) (DSD Regulations), the CAS pointed out that the “CAS Panel was restrained in its task, due to the strict framework of the arbitration”.⁹¹ There was “no reason to deviate from the law agreed upon by the parties”, being “the IAAF’s Constitution and Rules in conjunction with the Olympic Charter and in subsidiary, where necessary, Monegasque law”.⁹² The Panel approached the legal issue of whether the identified discrimination was justified as an exclusive balancing act between the athlete’s interests and the right of other athletes to fair competition, thereby setting aside broader human rights considerations.⁹³

(c) Situations in which there are sports-related human rights violations, but no human rights commitments or mechanisms can be identified

A ban on the wearing of a hijab playing sport, the abuse of workers on construction sites connected with mega-sporting events and the appalling sexual abuse of athletes are but three examples where SGBs have caused or contributed to human rights harms in the absence of any human rights commitments or due diligence, let alone remedy.⁹⁴ Access to remedy in these cases can only begin if SGBs increasingly recognise their responsibility to

respect internationally recognised human rights,⁹⁵ affected individuals and groups are empowered and legitimately represented,⁹⁶ the state is harnessed, and effective mechanisms are established which have legitimacy, including possibly by being certified by credible bodies such as the CSHR.⁹⁷

(d) Additional opportunities to advance human rights in sport, including the question of SGBs and the exercise of leverage

Following the October 2018 strategic dialogue on remedy at The Hague,⁹⁸ the CSHR developed a comprehensive background paper entitled *Mapping Accountability and Remedy Mechanisms for Sport*.⁹⁹ Importantly, the paper seeks to articulate what effective remedy means in the sports and human rights context. It asks:

“The UNGPs, and their effectiveness criteria, apply to the world of sport, in particular in the context of commercial activities, and should therefore inform evaluation of the various existing mechanisms in sport. *However, sport presents a unique challenge due to its unique governance structures and commitment to maintaining autonomy.*

Therefore, the question of whether the UNGPs criteria are sufficient for assessing remedy mechanisms in the context of sport-related human rights abuses or if additional or more nuanced criteria might be necessary, should be considered.”¹⁰⁰

One of the unique powers that some SGBs possess and which arises from the autonomy and economic dimension of sport is the capacity to exercise leverage over both states and business enterprises. Both, the IOC and FIFA have a track record of imposing sanctions, ranging from

⁹⁰ World Athletics (fn.89 above); Olympic Charter, Fundamental Principle 4; Duval (fn.35 above), 256 f.

⁹¹ CAS, *Media Release CAS Arbitration: Caster Semenya, Athletics South Africa (ASA) and International Association of Athletics Federations (IAAF): Decision*, 1 May 2019, p.2, https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf [Accessed 27 June 2020].

⁹² CAS 2018/O/5794, *Mokgadi Caster Semenya v International Association of Athletics Federations*; and CAS 2018/O/5798, *Athletics South Africa v International Association of Athletics Federations*, para.424.

⁹³ CAS 2018/O/5798 (fn.92 above), concerning the impact of the DSD regulations on the enjoyment of human rights UN HRC (fn.10 above), para.24 ff.

⁹⁴ CSHR, “Meeting Report: Strategic Dialogue on Remedy” held at the Peace Palace, The Hague, 15 October 2018, December 2018, p.7, https://www.sporhumanrights.org/uploads/resources/CSHR%2C_Meeting_Report_-_Remedy_Sport_and_Human_Rights%2C_Oct._18_.pdf [Accessed 27 June 2020].

⁹⁵ See *supra* sections 1 and 2, pp. 57-60.

⁹⁶ On freedom of association in the context of sport see ILO, *Decent Work in the World of Sport, Issues Paper for Discussion at the Global Dialogue Forum on Decent Work in the World of Sport* (Geneva, 20–22 January 2020) (International Labour Office, Sectoral Policies Department, 2019), para.7; McPhee and Dowden (fn.16 above), p.146 ff.

⁹⁷ CSHR, (fn.94 above), p.8.

⁹⁸ Heerd (fn.60 above).

⁹⁹ CSHR, *Mapping Accountability and Remedy Mechanisms for Sports-Related Human Rights Grievances—Background paper for Strategic Dialogue on Remedy*, The Hague, 15 October 2018 (April 2019), https://www.sporhumanrights.org/uploads/resources/Mapping_Accountability_Remedies_Mechanisms_CSHR_April_2019.pdf [Accessed 27 June 2020].

¹⁰⁰ CSHR (fn.99 above), p.7 (emphasis added).

exclusion from international competitions to the withdrawal of development funding, to stop government interference in national SGBs.¹⁰¹

In the context of human rights, the UNGPs, together with the *OECD Guidelines for Multinational Enterprises* (OECD Guidelines),¹⁰² make it clear that the responsibility of SGBs is not confined to adverse human rights impacts the SGB is causing or contributing to, but includes those which are directly linked to the SGB's operations, products or services by a business relationship.¹⁰³ In this instance, the SGB should “use leverage to influence the entity causing the adverse impact to prevent or mitigate the impact”.¹⁰⁴ While the responsibility may be clear, the challenge can be on how the SGB can best exercise leverage in a given set of circumstances. The role of the FIFA HRAB in giving clear and concise recommendations to FIFA in January 2019 on how to exercise leverage to help secure the release from detention in Thailand of Bahraini refugee, human rights defender and football player Hakeem Al-Araibi was critical.¹⁰⁵ Its work also provided civil society and other social partners with guidance on how to press FIFA to exercise its diplomatic powers. In all, the word “leverage” appears 25 times in FIFA's report on the implementation of the recommendations of the FIFA HRAB and in a number of contexts, including the abolition of the kafala system in Qatar,¹⁰⁶ workers' welfare reforms including protection of unpaid salaries,¹⁰⁷ the obligations of the hosts of mega-sporting events,¹⁰⁸ the release of Hakeem Al-Araibi,¹⁰⁹ and the Iran stadia ban.¹¹⁰

The work of the FIFA HRAB is still in its first term. With the IOC making a commitment to establish a similar body,¹¹¹ independent and transparent advice based on the UNGPs and human rights norms will be important to embedding human rights in sport. However, not all SGBs will have the scope and resources nor attract the same level of public interest as FIFA and the IOC. A systematic

solution to this challenge will be required. Otherwise, another gap will exist whenever people suffering human rights harms caused by, contributed to, or directly linked with global sport seek access to an effective remedy.

4. Opportunities to ensure effective remedy in global sport

For global sport, access to remedy represents a paradoxical challenge. On the one hand, the transnational autonomy which underpins the governance of global sport and the promulgation and administration of global sports law present arguably the perfect means by which internationally recognised human rights can be protected, respected and, where violated, remedied. On the other, sporting norms are—in the absence of substantive, cultural and institutional change—likely to prevail.¹¹² While the CAS can be criticised “for only being available to insiders and having no human rights capacity”, a number of factors “speak in favour of using CAS as a remedy mechanism for sports-related human rights cases”.¹¹³ According to leading scholar Mr Antoine Duval, “the CAS is a crucial actor in the sports world ... all [SGBs] are subject to it”, a “recent decision of the European Court of Human Rights [(ECtHR)] ... clarified that the CAS has to comply with human rights standards”, and bodies such as “the [CSHR] can work on creating more space for human rights at the CAS”.¹¹⁴

Understanding this paradoxical challenge requires not only an appreciation of the human rights harms global sport is connected with or related to, but also the three-part legal mechanism through which global sports law is promulgated and administered: namely: (1) the making of rules and regulations by SGBs; (2) the mandatory incorporation by reference of those rules and regulations into private contracts; and (3) the enforcement of both through compulsory arbitration, principally by

¹⁰¹ In 2013, the Indian Olympic Association was suspended by the IOC for planning to stage an internal election, CNN *Indian Olympic Association Suspended by IOC*, 5 December 2012, <https://edition.cnn.com/2012/12/05/sport/olympics-india-ioc/index.html> [Accessed 29 May 2020]; at the time, Sri Lanka was also threatened with suspension, Butler N *Sri Lanka Warned by IOC They Risk Suspension unless Sports Legislation Amended by End of Year*, 14 October 2015, <https://www.insidethegames.biz/articles/1030940/sri-lanka-warned-by-ioc-they-risk-suspension-unless-sports-legislation-amended-by-end-of-year> [Accessed 29 May 2020]; Ghana as well as Panama and Kuwait have all been suspended in the last decade, BBC Sport *Ghana Suspended by International Olympic Committee*, 13 January 2011, http://news.bbc.co.uk/sport2/hi/olympic_games/9360774.stm [Accessed 29 May 2020], Hula E and Grayson M *Suspension Struggles for Kuwait, Panama; New Look for Table Tennis*, 18 October 2011, http://aroundtherings.com/site/A_35986/Title__Suspension-Struggles-for-Kuwait-Panama-New-Look-for-Table-Tennis/292/Articles [Accessed 29 May 2020]; in the last six years, FIFA has suspended a number of football associations for this reason, including: Pakistan, Nigeria, Guatemala, Kuwait, Sudan, Malia and Sierra Leone: FIFA *FIFA Suspends the Pakistan Football Federation*, 11 October 2017, <https://www.fifa.com/who-we-are/news/fifa-suspends-the-pakistan-football-federation-2913299> [Accessed 31 May 2020]; Independent *FIFA Suspends Nigeria from all International Football after Allegations of Government Interference*, 9 July 2014, <https://www.independent.co.uk/sport/football/international/fifa-suspends-nigeria-from-all-international-football-after-allegations-of-government-interference-9595910.html> [Accessed 31 May 2020]; FIFA *Suspension of the Guatemala Football Association*, 28 October 2016, <https://www.fifa.com/who-we-are/news/suspension-of-the-guatemala-football-association-2847078> [Accessed 31 May 2020]; FIFA *Suspension of the Kuwait Football Association*, 16 October 2015, <https://www.fifa.com/who-we-are/news/suspension-of-the-kuwait-football-association-2717726> [Accessed 31 May 2020]; FIFA *FIFA Suspends Sudan Football Association*, 7 July 2017, <https://www.fifa.com/who-we-are/news/fifa-suspends-sudan-football-association-2900598> [Accessed 31 May 2020]; FIFA *FIFA Suspends Malian Football Association (FEMAFoot)*, 17 March 2017, <https://www.fifa.com/who-we-are/news/fifa-suspends-malian-football-association-femafoot-2876348> [Accessed 31 May 2020]; FIFA *FIFA Suspends the Sierra Leone Football Association*, 5 October 2018, <https://www.fifa.com/who-we-are/news/fifa-suspends-the-sierra-leone-football-association> [Accessed 31 May 2020].

¹⁰² OECD *OECD Guidelines for Multinational Enterprises* (2011), <http://www.oecd.org/corporate/mne/48004323.pdf> [Accessed 29 May 2020].

¹⁰³ UNGPs, Commentary Principle 19.

¹⁰⁴ OECD, note 102, para 43.

¹⁰⁵ FIFA, note 50, p. 31 ff.

¹⁰⁶ *Ibid.*, p. 13.

¹⁰⁷ *Ibid.*, p. 18.

¹⁰⁸ *Ibid.*, p. 25.

¹⁰⁹ *Ibid.*, p. 31 ff.

¹¹⁰ *Ibid.*, p. 35.

¹¹¹ See IOC, note 27.

¹¹² See Schwab (fn.13 above), 199.

¹¹³ Summary of Duval's statements CSHR (fn.94 above), p.11.

¹¹⁴ See fn.113 above; acknowledging the applicability of Art.6 ECHR, as originally stated in the footnote to CAS procedures, *Mutu and Pechstein v Switzerland App. Nos 40575/10 and 67474/10* (ECtHR, 2 October 2018), para.97 ff.

the CAS. This mechanism—each part of which is legally contentious—has created a legal order based on sporting norms that is transnational, compulsory, hegemonic, and enforceable. Due to “the extraordinary autonomy that [SGBs] enjoy under Swiss law”, the decisions of SGBs and subsequent decisions of the CAS will “generally be upheld on court appeal”, including by the including by the SFT and the ECtHR.¹¹⁵ SGBs have taken:

“... full advantage of the large autonomy granted to them under Swiss law. Over the years and in virtually all sports, rules of the organization of the federations and their subordinate bodies ... have grown tremendously into *elaborate and intricate regulations* ... By these means, a tightly woven network of rules is applicable from the top to the bottom of the pyramid of the sports organizations and, of course, to the athletes.”¹¹⁶

Indeed, the rules and regulations of SGBs themselves are “very much the only source of law applying” as “the CAS is in practice disregarding national law when adjudicating on disputes”.¹¹⁷ This is reinforced by article R58 of the Code of Sports-related Arbitration of the CAS dated 1 January 2019,¹¹⁸ which provides that:

“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate ...”¹¹⁹

While “[a]rbitration must be *agreed upon by the parties*”,¹²⁰ in “sports arbitration, the SFT holds a very liberal position both as concerns the form of the agreement and the proof of valid consent by all parties”.¹²¹ Together, the CAS and the SFT “have been instrumental in nurturing the consensual myth surrounding CAS arbitration”.¹²² The fundamental question that arises is: “why does the Court (ECtHR) confirm that arbitration in sports is ‘forced arbitration’ and nevertheless uphold the

validity of such arbitration?”¹²³ This may help ensure that “conflicts in sports are dealt with efficiently and largely in a uniform manner”.¹²⁴ However:

“... like all self-regulation, the rules of [SGBs] serve primarily the purposes of their issuers, while the legitimate interests and rights of the persons or other entities subject to these rules and impacted by them is not always being taken adequately into consideration.”¹²⁵

There is opportunity, as well as risk, when the future adaptation of this system is contemplated through the norm of the corporate responsibility of SGBs to respect internationally recognised human rights, instead of or, perhaps, in addition to the norms of sport. Two examples, illustrated by case studies, show how the prevailing use of arbitration demonstrates global sports law already possesses the means to provide effective remediation of human rights-related abuses: (1) the global enforcement of the FIFA Regulations for the Status and Transfer of Football Players (RSTP),¹²⁶ and (2) the enforcement of the World Anti-Doping Code (WADC).¹²⁷

FIFA’s RSTP main objective is to “protect contractual stability” between players and clubs. A major threat to the stated objective of the FIFA RSTP lies with those contracts being unilaterally terminated.¹²⁸ Moreover, that termination, even where it is on terms more favourable to one party, could accord with national law, the regulations of national leagues or associations, or even the terms of individual player contracts. To overcome these obstacles, the FIFA RSTP work in conjunction with Swiss arbitration law to ensure that the prevailing governing law is that of the FIFA RSTP (as interpreted by the FIFA Dispute Resolution Chamber (DRC) and the CAS),¹²⁹ and that compliance with the decisions of the FIFA DRC and the CAS is an essential obligation of clubs and players, backed by strict enforcement and disciplinary measures.¹³⁰ As a result:

“FIFA’s regulations prevail over any national law chosen by the parties ... [I]t is in the interest of football that the termination of a contract is based

¹¹⁵ Baddeley (fn.11 above).

¹¹⁶ Baddeley (fn.11 above), 5 (emphasis in original).

¹¹⁷ Duval (fn.8 above), 24.

¹¹⁸ CAS, Code of Sports-related Arbitration (1 January 2019), https://www.tas-cas.org/fileadmin/user_upload/Code_2019_en.pdf [Accessed 27 June 2020].

¹¹⁹ CAS (fn.118 above), p.26 (emphasis added).

¹²⁰ Baddeley (fn.11 above), 13 (emphasis in original).

¹²¹ Baddeley (fn.11 above), 13 (emphasis added).

¹²² A. Duval and B. van Rompuy, *The Compatibility of Forced CAS Arbitration with EU Competition Law: Pechstein Reloaded* (2015), 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621983 [Accessed 27 June 2020].

¹²³ Baddeley (fn.11 above), 3 (emphasis in original).

¹²⁴ Baddeley (fn.11 above), 16.

¹²⁵ Baddeley (fn.11 above), 16.

¹²⁶ FIFA, FIFA Regulations on the Status and Transfer of Players (March 2020 edition), <https://resources.fifa.com/image/upload/regulations-on-the-status-and-transfer-of-players-march-2020.pdf?cloudid=pljykaliyao8b1hv3mnp> [Accessed 27 June 2020]; in the following referred to as FIFA RSTP.

¹²⁷ WADA, World Anti-Doping Code 2021, https://www.wada-ama.org/sites/default/files/resources/files/2021_code.pdf [Accessed 27 June 2020]; in the following referred to as WADC.

¹²⁸ FIFA RSTP art.1(3)(b) and Chapter IV (arts 13–18).

¹²⁹ FIFA RSTP art.24(1) and (2).

¹³⁰ See, e.g. FIFA RSTP art.24bis.

on uniform criteria rather than the provisions of national law that may vary considerably from country to country.”¹³¹

In the *Spiranovic* case,¹³² an illustrative example for the practical application of the prevalence of FIFA’s RSTP, a Qatari football club’s decision of 6 May 2013 to unilaterally terminate the playing contract of a migrant football player at the end of the first year of a two-year contract obligated that club to pay—which it did—compensation in the amount of US\$1,381,592 despite such termination being contemplated by the express terms of the contract and not being in contravention of Qatari law, the stated governing law in the contract.¹³³ This was made possible because the FIFA RSTP gave the player the right to elect to refer the dispute to the FIFA DRC, “without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes”.¹³⁴ The player chose football’s dispute resolution system due to its efficacy, governing law and transnational application. Both the FIFA DRC and the CAS found for him, holding that the governing law was, in effect, that of that of “the [FIFA RSTP], general principles of law and, where existing, the [DRC’s] well-established jurisprudence”.¹³⁵ Under that law, the “reciprocal obligations deriving from [termination by the club under] Article 10(3) of the Contract [were] so unbalanced and clearly contrary to the general principles of contractual stability that said article [was] null and void”.¹³⁶ Accordingly, the player had “the right to [the remedy of] compensation to be determined under the provisions of Article 17 of the [FIFA RSTP], in light of the principle of the ‘positive interest’ ... and with due consideration to the duty to mitigate damages according to Swiss law which is consistent with CAS

jurisprudence”.¹³⁷ The principle of positive interest requires that “compensation for breach must be aimed at reinstating the injured party to the position it would have been, had the contract been fulfilled to its end”.¹³⁸

Global sport has shown similar creativity to “ensure the continuation and strengthening of harmonious anti-doping programs worldwide”,¹³⁹ under the authority equally and jointly vested by states and SGBs in the World Anti-Doping Agency (WADA).¹⁴⁰ Arbitration, including appeals from national and sport-based anti-doping tribunals to the CAS, is an integral part of the institutional framework established to enforce the WADC.¹⁴¹ Accordingly, whenever WADA is of the opinion that athletes have been inappropriately exonerated or inadequately punished at first instance in matters to which it is not a party, WADA has standing to appeal such matters throughout global sport to the CAS,¹⁴² and prosecute them on a de novo basis.¹⁴³ This has proven to be particularly relevant on cases of precedential value, including important cases that entrench the use of new investigative powers to prosecute employee athletes in professional team sports,¹⁴⁴ addressing decisions sympathetic to notions of proportionality over mandatory sentencing regarding substances of abuse,¹⁴⁵ and the hegemony of anti-doping norms despite the introduction of public hearings at the behest of the ECtHR.¹⁴⁶ The privileged legal standing given to WADA by its constituents provides a salient example on how global sport can address affected groups whose human rights its impacts but who “do not have any enforceable right”.¹⁴⁷

In the same manner as SGBs have done for WADA, they could facilitate access to remedy in sports-related human rights matters by granting standing to affected groups and their legitimate representatives, including

¹³¹ FIFA DRC, Case Ref.13-03341/boa *Matthew Spiranovic against Al-Arabi Sports Club*, Decision 28 January 2016, p.8 (emphasis added); the prevalence therefore is based on sporting norms.

¹³² FIFA DRC (fn.131 above).

¹³³ FIFA DRC (fn.131 above), p.2 f.

¹³⁴ FIFA RSTP art.22; in this way the FIFA RSTP do not prevent the parties from accessing other available remedy mechanisms, which is an important requirement of the third pillar of the UNGPs Framework.

¹³⁵ FIFA DRC (fn.132 above), p.8.

¹³⁶ CAS 2016/A/4605, *Al-Arabi Sports Club Co for Football v Matthew Spiranovic*, para.7.16.

¹³⁷ CAS 2016/A/4605 (fn.136 above), para.7.24.

¹³⁸ CAS 2016/A/4605 (fn.136 above), para.7.22.

¹³⁹ WADA, *Governments, Sports Adopt Resolution at World Conference to Strengthen Fight against Doping in Sport*, 15 November 2013, <https://www.wada-ama.org/en/media/news/2013-11/governments-sports-adopt-resolution-at-world-conference-to-strengthen-fight> [Accessed 27 June 2020].

¹⁴⁰ WADA, *Who We Are*, <https://www.wada-ama.org/en/who-we-are> [Accessed 27 June 2020].

¹⁴¹ WADC art.13.2.3.

¹⁴² See, e.g. art.58 Abs. 6 FIFA-Statutes 2019 grants WADA standing in appealing internal anti-doping decisions in accordance with art.75 Abs. 3 FIFA Anti-Doping Regulations 2019 (which is identical to art.13.1.2 WADC); Rule 12.2.2(e) IOC Anti-Doping Rules applicable to the Games of the XXXII Olympiad; art.13.3.2(f) CGF Anti-Doping Standard; art.13.2.5(f) IAAF Anti-Doping Rules 2019; art.13.2.3(f) ISU Anti-Doping Rules, Communication No.2212, 22.11.2018; art.13.2.3(f) FIS Anti-Doping Rules August 2019; art.13.2.3(f) FINA Doping Control Rules 19.07.2019; art.20.02(b) UEFA Anti-Doping Regulations, Edition 2018; art.13.2.2(f) FIBA Internal Regulations Book 4 Anti-Doping, August 2019; Bylaw 23.3.3 of the IIHF 2018–2020 Statutes grant WADA the right to appeal in accordance with the WADC.

¹⁴³ WADC art.13.1.2.

¹⁴⁴ CAS 2015/A/4059, *World Anti-Doping Agency (WADA) v Thomas Bellchambers et al., Australian Football League (AFL) and Australian Sports Anti-Doping Authority (ASADA)*, para.112.

¹⁴⁵ CAS 2018/A/5546, *José Paolo Guerrero v Fédération Internationale de Football Association (FIFA) and CAS 2018/A/5571, World Anti-Doping Agency (WADA) v FIFA and José Paolo Guerrero*, para.85.

¹⁴⁶ CAS, *Media Release—Sun Yang is Found Guilty of a Doping Offense and Sanctioned with an 8-year Period of Ineligibility*, 28 February 2020, 1 https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6148_decision.pdf [Accessed 27 June 2020].

¹⁴⁷ CAS (fn.38 above).

NGOs, trade unions and, possibly, the CSHR.¹⁴⁸ In this way, an essential step to safeguard the human rights of those affected by sport could be achieved, and the fairness and legitimacy of existing mechanisms strengthened. The standing of the legitimate representatives of affected groups including trade unions and civil society to access remedial mechanisms would also serve as measure to overcome power imbalances between the affected rights holders and SGBs.¹⁴⁹

5. Developing human rights compliant grievance mechanisms for global sport

5.1 Effectively enacting the third pillar of the UNGPs

Effectively enacting the third pillar of the UNGPs in global sport requires SGBs—as business enterprises—to have in place “[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute”.¹⁵⁰ Where SGBs “have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”.¹⁵¹ The third pillar acknowledges that, even “with the best policies and practices, a business enterprise may cause or contribute to adverse human rights impacts that it has not foreseen or been able to prevent”.¹⁵²

Most pertinently, given the paradoxical challenge that ensuring access to effective remedy presents to SGBs,¹⁵³ this responsibility:

- (1) requires “active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms [(OGMs)] for those potentially impacted by the [SGBs] activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31 [of the UNGPs]”;¹⁵⁴
- (2) means SGBs should “seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements”;¹⁵⁵

- (3) necessitates the prioritisation of actions “to address actual and potential adverse human rights impacts ... that are most severe or where delayed response would make them irremediable”;¹⁵⁶
- (4) requires SGBs to understand that “[e]ffective judicial mechanisms are at the core of ensuring access to remedy”;¹⁵⁷
- (5) means SGBs, to make it “possible for grievances to be addressed early and remediated directly ... should establish or participate in effective [OGMs] for individuals and communities who may be adversely impacted”.¹⁵⁸ OGMs should meet the criteria in Principle 31, can complement but not substitute for collective bargaining, not undermine the legitimate role of trade unions, nor preclude access to judicial and non-judicial grievance mechanisms,¹⁵⁹ and means “[i]ndustry, multi-stakeholder and other collaborative initiatives [involving SGBs] that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available”.¹⁶⁰ Accordingly, this should be a key part of the involvement of SGBs such as FIFA, UEFA and the CGF in the CSHR.
- (6)

Principle 31 of the UNGPs sets out some criteria to measure the effectiveness of non-judicial grievance mechanisms, as summarised in Table 1.

Table 1

Principle 31 of the UNGPs	
Legitimate	Transparent
Accessible	Rights-compatible
Predictable	Source of continuous learning
Equitable	Based on engagement and dialogue

A grievance mechanism:

¹⁴⁸ To grant standing to trade unions and interested third parties was also demanded by ETUC in their call for a European directive on mandatory human rights due diligence, ETUC, *Position for a European Directive on Mandatory Human Rights Due Diligence and Responsible Business Conduct*, adopted at the Executive Committee Meeting of 17–18.12.2019, <https://www.etuc.org/en/document/etuc-position-european-directive-mandatory-human-rights-due-diligence-and-responsible> [Accessed 27 June 2020]; in a more general way on the role and relevance of trade unions in access to remedy, A. McQuade, *Grievance Mechanisms, Remedies and Trade Unions: a Discussion Document*, December 2017, 6 f, https://www.ethicaltrade.org/sites/default/files/shared_resources/grievance_mechanisms_remedies_and_trades_unions_eti_aidan_mcquade_dec_2017_final.pdf [Accessed 27 June 2020]; the possibility of appeal for trade unions is also included in the Audit Questionnaire provided by Shift, *Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights*, Shift Workshop Report No.5, May 2014, p.21, https://www.shiftproject.org/media/resources/docs/Shift_remediationUNGPs_2014.pdf

¹⁴⁹ On the potential to overcome power imbalances by relying on third parties, see UN General Assembly, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises* (18 July 2017) A/72/162, para.23, <https://undocs.org/A/72/162> [Accessed 27 June 2020].

¹⁵⁰ UNGPs, Principle 15(c).

¹⁵¹ UNGPs, Principle 22.

¹⁵² UNGPs, Commentary to Principle 22.

¹⁵³ *Supra* p.20. See *supra* section 4, p.65.

¹⁵⁴ UNGPs, Commentary to Principle 22.

¹⁵⁵ UNGPs, Principle 23(b).

¹⁵⁶ UNGPs, Principle 24.

¹⁵⁷ UNGPs, Commentary to Principle 26.

¹⁵⁸ UNGPs, Principle 29.

¹⁵⁹ UNGPs, Commentary to Principle 29; see in contrast the current perception and representation of athletes and their representatives in sports’ judicial systems, B. Schwab, “When We Know Better, We Do Better”. Embedding the Human Rights of Players as Prerequisite to the Legitimacy of Lex Sportiva and Sport’s Justice System (2017) 32(4) M.J.I.L. 4–67 at 49 and 59, <http://digitalcommons.law.umaryland.edu/mjil/vol32/iss1/4> [Accessed 27 June 2020].

¹⁶⁰ UNGPs, Principle 30.

“can only serve its purpose if *the people it is intended to serve* know about it, trust it and are able to use it ... (W)here outcomes have implications for human rights, care should be taken to ensure they are in line with internationally recognized human rights.”¹⁶¹

The people the mechanism “is intended to serve” refers not to the business (or the SGB), but the affected individuals and groups.¹⁶²

5.2 Accountability and remedy—three key questions

Despite the clarity of the UNGPs on the matter of remedy, in 2014 the Office of the High Commissioner for Human Rights (OHCHR)—with multiple mandates from the UN Human Rights Council (UN HRC)¹⁶³—launched the Accountability and Remedy Project (ARP) because “extensive research has shown that in cases where business enterprises are involved in human rights abuses, victims often struggle to access remedy”.¹⁶⁴ As the “challenges that victims face are both practical and legal in nature”,¹⁶⁵ the purpose of the ARP is to contribute to “a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses”.¹⁶⁶ The third phase of ARP examines non-state-based grievance mechanisms in cases of business-related human rights abuse.¹⁶⁷ Three key questions are brought into particular focus:

- (a) the role of the state in facilitating access to non-state-based grievance mechanisms (see UNGP 28 and commentary);
- (b) aspects of the “effectiveness criteria” for non-judicial mechanisms (see UNGP 31 and commentary); and
- (c) cooperation between businesses and/or industry, multi-stakeholder and other collaborative initiatives to enhance access to remedy through non-state-based grievance mechanisms, including in a cross-border context.¹⁶⁸

These three questions provide a clear and poignant basis upon which to identify critical requirements for access to effective remedy in global sport.

(a) The role of the state, including Switzerland

It is necessary to define and identify the role that all states—especially Switzerland—play in immunising SGBs from the reach of national legal systems, and what they should do instead.¹⁶⁹ The *Swiss National Action Plan 2020–23* dated 15 January 2020 (Swiss NAP) acknowledges that “progress on human rights due diligence and on the introduction of grievance mechanisms has been slow” and aims to set out a “series of concrete measures to advance the implementation of the [UNGPs] by the federal government and companies”.¹⁷⁰ The Swiss NAP encourages multi-stakeholder initiatives on business and human rights, including in relation to the IOC and IFs, and commits the Swiss government’s ongoing support for the CSHR.¹⁷¹ On the question of remedy, the Swiss “Federal Council considers the promotion of grievance mechanisms through multi-stakeholder initiatives as an important means of guaranteeing access to remedy”.¹⁷² In addition:

“Dealing with such [human rights abuses and] claims internally, for example through mediation, often produces satisfactory outcomes for all affected parties. When a constructive solution cannot be found, the State must provide non-judicial and judicial mechanisms which give those affected by human rights abuses access to effective remedy.”¹⁷³

(b) Objectively assess global sport’s system of justice through human rights norms including the effectiveness criteria of Principle 31 of the UNGPs

The substantive and procedural effectiveness of global sport’s existing legal institutions and any new sport and human rights grievance mechanisms should now be considered through the clear application of objective rights-based criteria, and not just sporting norms. Of the effectiveness criteria set out under Principle 31 of the

¹⁶¹ UNGPs, Commentary to Principle 31 (emphasis added).

¹⁶² Compare Baddeley (fn.11 above), 16.

¹⁶³ UN HRC Resolutions 26/22, 32/10 and 38/13.

¹⁶⁴ OHCHR, *OHCHR Accountability and Remedy Project: Improving Accountability and Access to Remedy in Cases of Business Involvement in Human Rights Abuses*, 2014, <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx> [Accessed 27 June 2020].

¹⁶⁵ OHCHR (fn.164 above).

¹⁶⁶ OHCHR (fn.164 above).

¹⁶⁷ OHCHR, *OHCHR Accountability and Remedy Project III: Enhancing Effectiveness of Non-State-Based Grievance Mechanisms in Cases of Business-Related Human Rights Abuse*, https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx [Accessed 27 June 2020].

¹⁶⁸ UN HRC, *Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms - Report of the United Nations High Commissioner for Human Rights, A/HRC/44/32, para 13*, <https://undocs.org/A/HRC/44/32> [Accessed 27 June 2020], https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII_Consultation_Draft_Recommendations_Feb2020.docx [Accessed 27 June 2020].

¹⁶⁹ In this regard see also UN HRC (fn.10 above), para.40 ff.

¹⁷⁰ SECO and FDFA, *UN Guiding Principles on Business and Human Rights—Swiss National Action Plan 2020-23* (15 January 2020), p.3, <https://www.nap-bhr.admin.ch/napbhr/en/home.html> [Accessed 27 June 2020].

¹⁷¹ SECO and FDFA (fn.169 above), p.10 f.

¹⁷² SECO and FDFA (fn.169 above), p.30.

¹⁷³ SECO and FDFA (fn.169 above), p.27.

UNGPs, legitimacy, accessibility, predictability and rights-compatibility are particularly pertinent if remediation is to be realised in relation to the adverse human rights impacts of global sport. Legitimacy requires the mechanism to be developed in “meaningful consultation with relevant rights holders and other stakeholders as to the optimal design of the mechanism and its processes.”¹⁷⁴ “[I]mbalances of power should be addressed”,¹⁷⁵ with procedures such as referral and appeals in place “to enable parties to challenge the manner in which the mechanism has responded to a grievance or the outcomes of grievance processes”.¹⁷⁶ “[C]lear and minimal eligibility criteria” are needed to ensure accessibility,¹⁷⁷ together with “uncomplicated and user-friendly” procedures which do not demand access fees or the waiver of the right to use alternative judicial and non-judicial grievance mechanisms.¹⁷⁸

Equity demands that “to the extent appropriate ... the mechanism seeks to ensure that parties to a grievance can obtain, in a timely fashion copies of information submitted to or obtained by the mechanism... and information concerning the outcomes of any investigation.” as well as “a proper record of the process, outcomes, and reasons for any decisions made ... [and] information concerning (i) the steps to be taken, and the time limits that apply should a party wish to seek to review or challenge a grievance process or its outcomes, and (ii) options for further action”.¹⁷⁹ Ultimately, the mechanism must ensure that “human rights implications of outcomes and remedies [...] are properly assessed and that risks of any adverse human rights impacts arising [...] are fully addressed”, “be an empowering experience” for users, and have “appropriate arrangements to address non-implementation”.¹⁸⁰ Equity also demands that sport’s system and institutions of justice—including the CAS—be assessed and reformed by reference to these requirements.

(c) Include and cooperate with the people most affected, including athletes

Ensuring accountability and access to effective remedy demands cooperation and collaboration with the very people who may suffer sport-related human rights abuse. At a minimum, it can and should be enough for affected groups including athletes to be “part of the Olympic Movement in order to benefit from ... the [Olympic Charter]”.¹⁸¹ Further, the three main constituent parts of

the Olympic Movement—the IOC, IFs and NOCs—can and should embrace by formally including within the Olympic Movement all affected groups and individuals whose internationally recognised human rights are impacted by the activities and business relationships of global sport. Heavily impacted workers, local communities, journalists, and fans, among others, are simply essential to the organisation of mega-sporting events such as the Olympic Games and the FIFA World Cup. Not only do these people fall within the corporate responsibility of SGBs to respect internationally recognised human rights, they play an essential role in the delivery of global sport.

6. Conclusion—human rights and the future of global sport’s system of justice

The failure of global sport to ensure access to effective remedy is having harmful and even fatal impacts on people and continues to threaten sport’s social licence. This is despite the corporate responsibility to respect human rights now being a well-established social norm that sits even above national laws and regulations, including global sports law.

The governance and making of global sports law are still being largely shaped by the power of SGBs to compel norm observance through private contract, forced arbitration and the strength of their monopolistic positions. That same power to compel norm compliance creates an opportunity for global sport to be reformed through the paradigm of business and human rights. This requires more than substantive change to global sports law. Global sport’s system of justice must also be reformed. SGBs must be willing to be accountable to judicial and non-judicial grievance mechanisms to ensure any victims of human rights abuse can access an effective remedy.

These reforms plainly present cultural as well as governance and institutional challenges. The CAS has resisted efforts to be reformed in line with the UNGPs for over four years. Those who govern and lead SGBs remain reluctant to genuinely include those affected and even harmed by their decisions, activities and business relationships. The state, therefore, has an important role to play.

Remedy may well be the forgotten pillar. But, if there is to be justice in sport, there cannot be any more forgotten people.

¹⁷⁴ UN HRC (fn.168 above), Annex para 7.2.

¹⁷⁵ UN HRC (fn.168 above), Annex para 7.6(c).

¹⁷⁶ UN HRC (fn.168 above), Annex para 10.6.

¹⁷⁷ UN HRC (fn.168 above), Annex para 8.2.

¹⁷⁸ UN HRC (fn.168 above), Annex para 8.3(a), 8.4, 8.7.

¹⁷⁹ UN HRC (fn.168 above), Annex para 10.2 and 10.4.

¹⁸⁰ UN HRC (fn.168 above), Annex para 12.2(b),(c), and 12.3.

¹⁸¹ CAS (fn.38 above).