7. Non-state authority: *FIFA*

### 7.1 CASE BACKGROUND

The tragic deaths of hundreds of construction workers (allegedly) in the course of intensive building work of the stadiums for FIFA's 2022 Qatar World Cup are no doubt an inauspicious starting point for the analysis of the new spaces of normative interaction that are now generally considered to be a feature of the global legal order. The latter offers a complex body of different transnational rules that coexist and conflict, beyond the remit of nation-States – whose collective ‘loss of control’ is by no means accidental or inevitable.¹ The global labour market is perhaps the best example of a new paradigm of non-state (if not private) normativity. While domestic markets become increasingly flexible – take the new trend of zero-hour contracts practised by companies like Uber or Deliveroo – a new arena emerges in which multinational corporations control various industries all over the globe in accordance with their own corporate codes and soft law.

In 2010, the Gulf State of Qatar won the bid to host the 2022 World Cup. Following this, Qatar started carrying out multi-billion construction projects for numerous rail lines, roads, a new international airport, the world’s largest green-field project and, of course, several stadiums that will host the World Cup matches. Qatar relies largely on migrant workers from South Asia (India, Sri Lanka, Nepal or Bangladesh) who according to some estimates comprise more than 90% of the country’s workforce. They are employed under the controversial *kafala* system, that puts employees under near total control of their employers. Working in conditions that are close to a form of modern slavery, these workers are often subject to human rights abuses by their employers (i.e. confiscated passports and long work hours in extreme heat for very little or no pay). In 2013, the first report on the exploitation of migrant workers in Qatar was published in a report called ‘The Case Against Qatar’ by the International Trades Union Confederation. This has led to accusations that over 1,200 FIFA World Cup workers have died because of the harsh working conditions in Qatar, triggering a global wave of criticism against the Qatari Government and FIFA.

While nobody held FIFA directly accountable for the horrendous condition of the foreign workforce in Qatar, its failure to make pressure on the Qatari Government was stigmatised. Indeed, despite the fact that FIFA said it expected compliance with international standards from all host countries, it omitted to take any measures ensuring that Qatar was upholding its commitments in this respect. Arguably, FIFA wielded sufficient private power to impose minimum welfare standards upon non-compliant hosts. In other words, within a global network-like constellation made of public and private actors, FIFA constituted a ‘pressure-point’ through which international norms could be channelled. This seems to concord with a wider pattern in which private actors are entrusted with a duty of care that extends to places where more traditional modes of prescription and enforcement are impotent. Does this mean that a new form of transnational non-state authority is emerging?

7.2 FIFA AND HUMAN RIGHTS IN QATAR

Franck Latty

The question of FIFA’s control on the working conditions of the people building the infrastructures for the 2022 World Cup in Qatar evidences some recent developments in international law. The weaknesses inherent in a global system based on the inter-state distribution of political power, coupled with low-level integration of international society, are offset by actions of global private actors. The deployment of transnational power, through a variety of legal processes, undermines traditional notions of public and private international law.

An overly formalist approach to the case FIFA and the World Cup in Qatar may obscure the underlying issues. Under such an approach, one might say that Qatar, a sovereign State, can freely regulate labour relations in its territory within the limits of its international obligations. If it does not respect those obligations, it must assume the consequences imposed by the international legal order through existing procedures (albeit still limited) of control, sanction and responsibility. By contrast, such responsibility does not apply to FIFA, a mere entity (incidentally far from exemplary) incorporated under Swiss law that cannot interfere with the sovereignty of a State to decide its own laws and modes of implementation.

A more ‘realist’ approach would instead present FIFA for what it is: a leading political and financial power; the organisation responsible for the regulation of the world’s most popular sport and unifying global event, the men’s football World Cup. Qatar has done everything in its power to host the game on its territory in 2022 and will likely be willing to make more concessions to avoid losing this privilege. As a result, the balance of power works favourably for FIFA to impose obligations to

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2 On 1 January 2018, Qatar is party to only six conventions of the International Labor Organization: Convention No. 29 on Forced Labor 1930; Convention No. 81 on the Labor Inspection 1947; Convention No. 105 on the Abolition of Forced Labor 1957; Convention No. 111 concerning Discrimination (Employment and Occupation) 1958; Convention No. 138 on the Minimum Age 1973; Convention No. 182 on the worst forms of child labor 1999. It is not a party to the two 1966 Covenants on civil and political rights and economic, social and cultural rights.

3 In 2014, the delegates to the 103rd Session of the International Labor Conference lodged a complaint against Qatar concerning the non-observance of Conventions 29 and 81 by that State as a result of the kafala system and conditions of work on the World Cup construction sites. In light of the legislative and other measures taken by Qatar and the initiation of the ILO technical cooperation program in Qatar, the ILO Governing Body closed the complaint process in November 2017 (ILO, Document GB.331/INS/13, § 5).

4 See Anne Brasseur’s report on good football governance to the Committee on Culture, Science, Education and Media at the Parliamentary Assembly of the Council of Europe, Doc. 14452, 15 December 2017 (specifically §§ 1–13, recalling the latest scandals around FIFA).

5 The Swiss, French, American and Brazilian courts are investing the conditions of the FIFA award on the 2022 World Cup, due to serious suspicions of electoral fraud (‘Mondial 2022: les charges s’accumulent contre le Qatar’, Le Monde (1 December 2017)). The Parliamentary Assembly of the Council of Europe, in Resolution 2053 (2015) on the reform of football governance, considering that the decision to award the organisation of the 2022 World Cup in Qatar was ‘radically flawed’ (see Resolution 2053 (2015)).
improve the conditions of the workers who are building the infrastructures for the event and thereby to further advance human rights in Qatar.

As a compromise between the two approaches, FIFA, in its position as a global actor, should no longer be a passive player regarding the respect of human rights in the football industry. Clearly, as one observes the emerging role of non-State actors in global regulation, there is a need in order to attain such an end (1) for adequate legal means to do so (2).

1. THE END: FIFA’S OBLIGATION TO RESPECT AND ENSURE RESPECT FOR HUMAN RIGHTS

FIFA’s status as an association under Swiss law does not prevent it from having an international dimension: FIFA is invested with power that is not confined within Swiss borders. FIFA unites national football associations from 211 ‘countries’ (some of which do not correspond, for various historical or political reasons, to sovereign States). These national associations, subject to FIFA’s jurisdiction, govern football on their respective territories. Footballers and their associated clubs constitute therefore the base of a global pyramid of which FIFA is the summit. As a result, a ‘lex fifa’ – which is the football version of the general lex sportiva – is produced, along the lines of the concept of lex mercatoria as a body of transnational norms created by private organisations. There is, however, much debate over lex mercatoria’s status as a legal system, particularly owing to the archipelagic nature of transnational commercial standards. On the other hand, institutional rules created by international sports organisations, such as the Olympic Charter as the ‘constitution’ of the global sports events; the harmonisation of anti-doping laws through the World Anti-Doping Agency (WADA); and the establishment of an independent dispute resolution mechanism for sports, the Court of Arbitration for Sport (CAS), shape an authentic global legal order for sport.

Notably, the lex fifa does not simply lay down the ‘rules of the game,’ or discipline, organisation of competitions, technical characteristics of the equipment, etc. It also is concerned with the status of its players (i.e. nationality of players as opposed to the nationality of the State) and their activities in the field of sport. Thus, FIFA has adopted a Regulation on the Status and Transfer of Players, whose global reach is likely to supplant the application of domestic law. As an example, in the unilateral termination dispute between a Brazilian football player and the Qatari club Al Khor


8 Franck Latty, La lex sportiva – Recherche sur le droit transnational (Leiden, Martinus Nijhoff Publishers 2007) 41s.

SC, the CAS did not apply Qatari law, to which the employment contract referred. The CAS considered that

the principle of universal application of FIFA rules ... meets the requirements of rationality, security, and legal predictability. All members of the global football family are subject to the same rules ... the resulting uniformity ensures equality of treatment for all recipients of these standards, irrespective of the country in which they are located.10

Quite evidently, the employment contracts of workers building the stadiums in Qatar are not regulated by FIFA regulations. The latter are thereby unable to challenge Qatari law. Moreover, neither Qatar nor the World Cup infrastructure construction companies, those outside of the ‘global football family,’11 come within the remit of FIFA’s labour law. However, in accordance with its own statutes, FIFA aims to ‘improve the game of football constantly and promote it globally in the light of its unifying educational, cultural and humanitarian values.’12 As a member of the Olympic Movement, FIFA is obliged to respect the Olympic Charter, establishing as a ‘Fundamental Principle’ the goal of Olympism 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.’13 These principles are integral to the transnational public sports policy, building on the fundamental values that animate the sports movement. Additionally, the CAS contributes to these goals by borrowing from both national and international law and applying the resulting principles to international sports organisations.14

In this regard, the kafala system and undignified conditions of Qatari construction workers undoubtedly conflict with the public policy of the lex sportiva. FIFA, therefore, has an obligation to ensure that preparations for its main competition (the men’s World Cup) do not give rise to any serious breach of the principles relevant to the humanistic foundations supposedly at the core of the international sports movement.

The same obligation is likely to stem from international human rights law, which not only imposes obligations on States but also on private actors. Notwithstanding the question of direct horizontal effect of international conventions for the protection of human rights15 (i.e. applicability to private interpersonal relations), various international instruments have been adopted to address corporations directly,16 such as the

11 Ibid.
12 Art. 2, litt. a, FIFA Statutes, the FIFA Statutes and all documents from this organisation are available on <www.fifa.com>.
14 Latty (n 8) 341s.
OECD Guidelines and those of the United Nations.\textsuperscript{17} Though formally considered as soft law, these instruments contribute to the formation of customary corporate duties.\textsuperscript{18} These principles are therefore equally applicable to FIFA, despite its status as an association, by reason of its transnational economic activities. The companies FIFA owns, their subsidiaries, and the profits it generates parallel those of a leading multinational firm.\textsuperscript{19}

FIFA amended its statutes in 2016 to include Article 3, which stipulates ‘FIFA is committed to respect all internationally recognised human rights and shall strive to promote the protection of these rights.’ This clause does not seemingly codify a pre-existing obligation drawn from the sports legal order or from the international legal order. It is phrased as a voluntary commitment by FIFA (‘FIFA is committed to …’).

Nevertheless, the obligation exists regardless of its origins (i.e. from a statutory commitment, codification of a pre-existing obligation) and motives (i.e. sincere commitment to human rights, desire to improve its image or preserve the reputation and the future of the goose that lays the golden eggs: FIFA World Cup). In the ‘specific instance’ before the Swiss National Contact Point, FIFA has acknowledged that it follows guidance from the OECD Guidelines and the UN Guiding Principles on Business and Human Rights and accepts responsibility in terms of contributing to ensure, including through the use of its leverage, a due diligence process in the FIFA World Cup\textsuperscript{20}-related construction sites and in collaboration with the relevant and competent actors …\textsuperscript{20}

In doing so, FIFA contributes to reinforcing customary corporate guidelines.\textsuperscript{21}

This raises the question of the extent to which FIFA can fulfil such obligations, given that FIFA’s normative power is limited to the persons under its \textit{jurisdiction}. FIFA can impose its human rights standards on football players, clubs, national or continental


\textsuperscript{19} See the initial assessment by the Swiss National Contact Point (NCP) following referral by Building and Woodworkers’ International (BWI) on violations of the \textit{OECD Guidelines for Multinational Enterprises} related to the construction of the infrastructure for the 2022 World Cup in Qatar. The NCP noted that FIFA conducts international operations at a multinational level; and that FIFA’s involvement in the organization of the 2022 World Cup could be considered a commercial activity, resulting in the applicability of FIFA to the OECD Guidelines (Initial assessment in the specific circumstance of FIFA submitted by BWI, 13 October 2015, 6). See also John Ruggie, \textit{For the Game. For the World. FIFA and Human Rights} (Corporate Responsibility Initiative Report, No 68, Cambridge, MA, Harvard Kennedy School, 2016) 10.

\textsuperscript{20} Swiss National Contact Point Final Communiqué in the specific instance on FIFA submitted by BWI, 2 May 2017, § 6, 4.

\textsuperscript{21} See above.
football associations, all of which directly or indirectly operate under its umbrella of authority. However, the lex fifa does not extend beyond those who are specifically affiliated. While FIFA cannot impose its transnational regulatory power on states or public works companies, FIFA can resort to original legal procedures to promote the respect for human rights obligations in international competitions.

2. THE MEANS: FIFA'S LEGAL SCHEMES TO ENSURE RESPECT FOR HUMAN RIGHTS

The construction site scandals in Qatar have led FIFA to present itself – ostentatiously – as an agent promoting respect for internationally recognised human rights. Following the introduction of Article 3 on the respect of human rights in its statutes, based on recommendations from John Ruggie, FIFA created an Advisory Council on Human Rights that met for the first time in March 2017. FIFA also adopted the ‘FIFA's Human Rights Policy’ in May 2017, which ‘specifies FIFA’s statutory human rights commitment and outlines FIFA’s approach to its implementation in accordance with the UN Guiding Principles on Business and Human Rights.’ Laying aside the ‘advertising’ dimension of such document, the policy includes a number of FIFA commitments that could be binding on it. These include, in tandem with its statutes, an obligation to make every effort in the promotion of human rights, notably that:

FIFA will strive to go beyond its responsibility to respect human rights, as enshrined in the UNGPs, by taking measures to promote the protection of human rights and positively contribute to their enjoyment, especially where it is able to apply effective leverage to help increase said enjoyment or where this relates to strengthening human rights in or through football.

What then are the legal means available for FIFA to fulfil its obligations to prevent or remedy situations such as those experienced by the Qatari construction workers? First, FIFA can make sure that its affiliates handle the issue directly. The organisation of the World Cup is not directly managed by FIFA, but rather entrusted to a member association (namely the Russian Federation in 2018 and Qatari Federation for 2022) which has to create a local organising committee. As outlined in the FIFA Regulations for the 2018 World Cup in Russia, ‘the Organising Association shall be subject to the supervision and control of FIFA, which has the last word on all matters relevant to

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22 See for example Article 3 of the FIFA Statutes, ‘Non-discrimination and stance against racism.’
23 Ruggie (n 19).
24 See Human Rights Advisory Board Terms of Reference, November 2016. The Advisory Council issued its first report in September 2017 with a number of recommendations to FIFA. FIFA is also among the initiators of the establishment of the Centre for Sport and Human Rights (See the joint statement made by the committee director of the Mega-Sporting Events Platform for Human Rights, ‘Diverse Coalition Commits to Establishing Centre for Sport and Human Rights in 2018’, 30 November 2017).
the … World Cup …’ (Article 1§4). Moreover, ‘[the] Organising Association undertakes to observe the FIFA Statutes, regulations, directives, decisions, guidelines, circulars as well as the HA [Hosting agreement, including the Biding Agreement]’ (Article 1§5). The obligation to respect human rights, including the fundamental rights of workers, can be exercised in the name of FIFA’s normative power through the national host association, particularly when it subcontracts infrastructure projects. The organising association should be obliged to use contractors who respect human rights standards (a clause to this effect should be included in the contracts). Thus, FIFA could indirectly impose obligations on companies outside of its direct control.26

However, not all responsibility falls under the World Cup organising association. Often, the host State of the competition pays questionable respect to human rights. With regards to the 2018 and 2022 World Cups, the limits of fundamental freedoms in Russia and Qatar are exemplary here. As one of several issues (freedom of expression, or freedom of press), associations promoting the defence of homosexual rights fear the penal sanctions that gays and lesbians participating or attending the 2018 or 2022 World Cups may face;27 indeed, homosexuality remains a criminal offence under Qatari law while Russian law represses the ‘promotion’ of it to minors.

In this case, the legal mechanisms available to FIFA to impose upon on host states the respect of human rights obligations are at stake. While there is no contractual obligation between FIFA and the host state, FIFA has instead opted to integrate the human rights dimension within its application process. The alternative, which is to sanction countries with an unsatisfactory human rights situation, is politically complicated and likely to limit the organisation of the competition to democracies without furthering the cause of human rights. Thus, among the criteria for the bid, candidate associations are now assessed on this risk of adverse impact on human rights.28 Additionally, the application of the football federations and the organisation contract concluded between FIFA and the selected national association must be supported with government guarantees so as to ensure that FIFA’s various legal requirements are met.

These requirements typically concern a number of issues (i.e. access to the territory, security, currency exchange, FIFA commercial rights, use of national anthems and flags, telecommunications, import of necessary equipment for the organisation of the competition, broad tax exemptions). The State carries the responsibility to ensure that necessary legislative or regulatory changes are made. Recently, FIFA has decided that among the government guarantees, a declaration on the respect for human rights must

26 We can draw a comparison with the ban on Third Party Ownership (TPO) in the FIFA Regulations. Since FIFA is unable to directly regulate the activity of investment funds specialized in the purchase and resale of players, FIFA has prohibited clubs from using this type of financing to recruit players. See TAS, 2016/A/4490, RFC Seraing v. FIFA, arbitral award of 9 March 2017, § 117.

27 Associated Press, 14 December 2010; ‘Gay fans warned holding hands at Russia World Cup will be dangerous’, The Guardian (19 December 2017).

28 See Article 3.6 of the FIFA Regulations for the selection of the venue for the final competition of the 2026 FIFA World Cup™ that indicates the following selection criteria, ‘The risk of adverse impacts on human rights, including workers’ rights in the Host Country … , in connection with hosting and staging the Competition over the life cycle thereof, including the Member Association’s … strategy and commitment to prevent or mitigate such risks.’
be included. The Guide to the Bidding Process for the 2026 FIFA World Cup includes a standard government declaration in which:

(iii) The Government will fully support FIFA and the Hosting Association in their efforts to ensure that the hosting and staging of the Competition and any legacy and post-event related activities do not involve adverse impacts on internationally recognised human rights, including labour rights.

(iv) The Government is committed to respecting, protecting and fulfilling human rights, including labour rights, in connection with the hosting and staging of the Competition and any legacy and post-event related activities, with particular attention to the provision of security, potential resettlement and eviction, labour rights (including those of migrant workers), rights of children, gender and other forms of discrimination and freedom of expression and peaceful assembly, and will ensure that access to effective remedies is available where such adverse impacts do occur, including judicial and non-judicial complaint mechanisms with the power to investigate, punish and redress human rights violations.

The legal value of such a declaration, even as a part of the organisation contract, may be questioned either under international law, under the domestic law of the host state, and/or under the governing law of the contract, Swiss law. But in practice, governments observe the commitments made during the application process. Examples include the amendment to Section 15A of the Merchandise Marks Act, No. 17 of 1941 by the South African government to ensure the 2010 FIFA World Cup is legally protected against ambush marketing. In the 2014 World Cup, Brazil voted in Parliament a ‘World Cup’ exception to its law prohibiting the sale of alcohol in stadiums.

Therefore, this type of instrument will hopefully be useful in making host states in future World Cups attentive to internationally recognised human rights. It remains, however, the responsibility of FIFA to verify that the respect for human rights is effectively part of the selection process and to evaluate the implementation of these commitments by governments, given that gaps (maybe too large even for football diplomacy) exist between texts and practice. Outside this legal framework, which is applicable only as from the 2026 World Cup, denunciation of the appalling work

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29 See Latty (n 8) 591s.
30 Concerning the 2024 Olympic Games, the French parliament adopted in the beginning of 2018 an ‘Olympic law’ derogating from the common law, in accordance with the commitments in the French candidature file (as of 6 February 2018, the bill was expedited by two assemblies, due to the slight modifications made by the Senate, the text is submitted to a mixed joint commission).
31 General Notice No.683 of 25 May 2006 adopted by the Minister of Industry and Commerce (see Annex 2 of the publication FIFA Public Information Sheet (a guide to FIFA’s Official Marks)).
32 ‘La loi alcool adoptée’ L’Equipe (29 March 2012). FIFA, having a partnership with Budweiser, has yet to obtain a similar waiver for the World Cup in Qatar. (‘Mondial 2022: l’alcool aussi interdit dans les stades?’ L’Equipe (9 November 2016)).
conditions in Qatar have already led to a significant improvement in that respect.\footnote{See Document GB.331/INS/13 in which the Governing Body of the International Labor Office records the measures taken by Qatar, particularly to put an end to the kafala system and improve working conditions immediately. See also the communiqué released by Amnesty International, ‘FIFA under pressure over handling of World Cup construction abuse’ (9 November 2017) <www.amnesty.org> accessed 23 April 2018.} Various construction site inspection measures have been implemented on the initiative of FIFA.\footnote{Concerning the 2018 World Cup, see \textit{Decent Work Monitoring System} launched by FIFA and the Russian organizing committee, outlining an inspection process executed by NGOs on infrastructure construction sites. On these measures, see Thomas Grell, ‘FIFA’s Human Rights Agenda: Is the Game Beautiful Again?’, 4 September 2017 <www.asser.nl/SportsLaw/blog> accessed 23 April 2018.} It would even be possible, in efforts to substantiate the legal scope of the government’s commitment, for FIFA and the host state to conclude an ‘internationalised’ contract (modelled after state contracts) setting out the rights and obligations of both parties in view of the World Cup, including respect for human rights.\footnote{Since 2014, the Olympic Charter states that national authorities, ‘at the discretion of the IOC’, may be required to co-sign the host city contract. See Article 3.3 under the bye-law to Rule 33 of the Olympic Charter, amended in accordance with the Olympic Agenda 2020 recommendations, ‘The IOC enters into a written agreement with the host city and the NOC of its country. At the discretion of the IOC, other local, regional or national authorities … may also be a party to such agreement. Such agreement, which is commonly referred to as the Host City Contract, is executed by all parties immediately upon the election of the host city.’}

Another issue that arises is the long-term sustainability for human rights in host States. The preparation and hosting of the World Cup cannot be reduced to an exceptional circumstance with regard to human rights. Could FIFA use its political and legal power to maintain and uphold these standards, specifically implemented for the event? Non-governmental organisations and the Parliamentary Assembly of the Council of Europe advocate this.\footnote{See Resolution 2200 (2018) adopted 24 January 2018 by the Parliamentary Assembly in the Council of Europe, § 11.2.2, where the Assembly recommends FIFA and the UEFA to ‘insist with the governments of the host countries on the necessity of protecting the fundamental civil and political rights, and in particular the freedom of expression – including the freedom of the media – and freedom of peaceful assembly, and not only in connection with their competitions but beyond’ (emphasis added).} FIFA’s statutes allow it to suspend those national associations whose independence is interfered with by their government.\footnote{See Articles 14, 16 and 19 of the Statutes.} The implementation of these provisions is usually sufficient to encourage States to change their behaviour. The participation of the national team to international football competitions being a too big issue, FIFA can thus act indirectly on States.\footnote{See for example ‘La FIFA lève la suspension du Koweït’ \textit{L’Equipe} (6 December 2017).} Could FIFA suspend national associations whose government exhibit manifest violations of internationally recognised human rights, at least when such violations affect football?

Evidently, the global actor FIFA is not deprived of legal mechanisms to contribute to the improvement of human rights at a global level. The UEFA and the International...
Olympic Committee have taken a similar path, which should soon be followed by other international sports organisations. While the profits gained in this sector often place considerations for human rights on a backseat, the core of the Olympic movement lies in humanist values that the aforementioned legal tools seek to address.

The activities of FIFA and other sports organisations are no longer limited to the regulation of their sports and to the organisation of competitions. The ‘contractual’ dimension of sports has been largely overaken by practice. Through its (still simmering) action in favour of human rights, FIFA may play an important role in global regulation and may even be more efficient in this field than public international organisations. The implementation by FIFA of these new functions through unorthodox legal means which may have effects on the behaviours of sovereign states blurs the classical boundaries of international law.

But taking into account the repeated scandals involving these organisations (and FIFA at first place), their legitimacy to address such issues may be challenged. Before wearing the gloves of virtue, should not one have clean hands?

39 See the 2024 Olympic Games Host City Contract Principles (available on <www.olympic.org> accessed 23 April 2018), of which Article 13.2 obligates the host city, national Olympic Committee, and the organisation committee to ‘protect and respect human rights and ensure any violation of human rights is remedied in a manner consistent with international agreements, laws and regulations applicable in the Host Country and in a manner consistent with all internationally-recognised human rights standards and principles, including the United Nations Guiding Principles on Business and Human Rights, applicable in the Host Country …’