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Sporting antinomies and systemic aporia*: the duty to co-operate (and the right to be involved) of Sporting Organisations*

Antinomie sportive e aporia sistemica: il dovere di cooperare (e il diritto a partecipare) delle organizzazioni sportive

Abstract: Sporting organisations are important economic, social and political actors whose activities and rules can conflict with the general political and legal framework, by creating what could be defined as *sporting antinomies.* The attempt by the public authorities to resolve and reconcile these antinomies is confronted with the international and universal vocation of sporting activities and the fragmentation of the international response to the sporting issues, which have determined an evident institutional *aporia*. This study analyses the duty of co-operation between international sporting and public authorities, understood as a prerequisite and essential basis for resolving *sporting antinomies*. By identifying the cardinal responsibilities of sporting and public authorities at the international and regional levels, the aim is to show the fundamental legal implications of the need for co-ordination between different legal systems, and how such co-ordination could be effectively implemented in order to manage and avoid legal conflicts, while preserving the autonomy of sport and its social function.

Abstract: Le organizzazioni sportive sono importanti attori economici, sociali e politici, le cui attività e disposizioni regolamentari possono entrare in conflitto con il contesto politico e giuridico di riferimento, dando luogo a situazioni che possono essere definite come *antinomie sportive*. La soluzione e la ricomposizione di tali antinomie si scontra con la vocazione internazionale e universale delle attività sportive e la frammentarietà della risposta pubblica a livello internazionale alle questioni sportive, che hanno determinato una evidente *aporia* istituzionale. Questo contributo s'interroga sull'obbligo di cooperazione, inteso come prerequisito e base essenziale per affrontare le antinomie sportive. Individuando le responsabilità fondamentali delle autorità sportive e pubbliche a livello internazionale e regionale, l'obiettivo è quello di indicare quali sono le implicazioni giuridiche della necessità coordinamento tra diversi ordinamenti giuridici, e come tale coordinamento possa essere efficacemente attuato per gestire ed evitare conflitti e antinomie, preservando l'autonomia dello sport e la sua funzione sociale.

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Keywords: antinomie sportive, autonomia dello sport, Comitato Olimpico Internazionale, Consiglio d'Europa.

> "modern sport is... always serious. It is organized; it is an industry; it is business; money; vested interests; it is a medium of and for ideology, prestige, status, nationalism, internationalism, diplomacy and war".[1]

1. *Introduction: sporting antinomies, systemic aporia and general need of co-operation*

The pervasive nature of sport phenomena and the multi-dimensional action of sporting organisations (SOs) are widely emphasised by authors and international organisations (IOs). SOs are important players in the so-called sports economy, which has grown and become increasingly complex in recent decades.[2] They play an important role in sport's function as a *medium of and for ideology*, understood as general value systems,[3] as emphasised by the United Nations (UN),[4] the Council of Europe (CoE),[5] and the

[1] C. TATZ, *The corruption of sport*, in G. LAWRENCE and D. ROWE, eds., *Power Play: Essays in the Sociology of Australian Sport*, Sydney, Hale & Iremonger, 1986, p. 46.
[2] J. ZHANG, H. HUANG, J. NAURIGHT, *Sport Business in Leading Economies*, New York, Emerald, 2017; J.P. GAYANT, *L'economie du sport*, Paris, Dunod, 2016; W. ANDREFF, *Mondialisation économique du sport*, Paris, de boeck, 2012; G. SAGE, *Globalizing Sport: How Organizations, Corporations, Media, and Politics are Changing Sports*, London, Routledge, 2011. See also European Commission (EC), *Study on the economic impact of sport through Sport Satellite Accounts*, Luxembourg, Publications Office of the EU, 2018.
[3] S. SALARDI, *Lo sport come diritto umano nell'era del post-umano*, Torino, Giappichelli, 2019; G. BURGHARDT, *Defining and recognizing play*, in P. NATHAN, A. PELLEGRINI, eds., *The Oxford hand-book of the development*, Oxford, Oxford University Press, 2011, pp. 9-10; M.A. HOLOWCHAK, *Philosophy of sport: critical readings, crucial Issues*, London, Pearson, 2002, p. 16.
[4] See, *inter alia*, UN General Assembly (UNGA), *Sport for development and peace: building a peaceful and better world through sport and the Olympic ideal*, 19 December 2019, A/RES/74/18; UNGA, *Sport as a means to promote education, health, development and peace*, 10 November 2014, A/RES/69/6.
[5] See, *ex multis*, CoE, *Principles for a policy of sport for all*, 24 September 1976, CM/Rec(76)41; CoE, *Principles of good governance in sport*, 20 April 2005, CM/Rec (2005)8; CoE, *Promotion of good governance in sport*, 12 December 2018, CM/Rec(2018)12; Parliamentary Assembly of the CoE (PACE), *Sport for all: a bridge to equality, integration and social inclusion*, 12 October 2016, PACE/Res. 2131.

European Union (EU).[6] Their strategic implication in domestic affairs, international relations, *diplomacy and war* has traditionally been investigated,[7] and has recently been confirmed by the positions of the International Olympic Committee (IOC) and the International Sports Federations (ISFs) on the war in Ukraine.[8] SOs are not only responsible for organising, regulating, controlling and promoting sport, but they are also important economic, social and political actors that can have a positive impact on the societies in which they operate. At the same time, sporting activities and regulations can generate negative externalities, which are extremely diverse and can alter the legitimate nature of SOs, as the avalanche of scandals that have hit the sporting world over the years suggests.[9] The actions of SOs intersect, overlap and could come into conflict with the general legal and political framework, by creating what could be defined as *sporting antinomies*.[10]

In addition to the notorious sporting scandals, the theoretical positive social function of sport has been undermined by some practical organisational behaviours and rules within the Olympic Movement that have struggled with the respect of various human rights.[11] While athletes have sometimes been able to bring human rights claims against sporting governing bodies in national courts, the latter have been forced into "an untenable position between two seemingly intractable forces, […] the order of a domestic court and the directive of an international federation, [risking to] jeopardise the ability of

[6] See, for example: EC, *White Paper on Sport*, 11 July, COM(2007) 391 final; European Parliament (EP), *An integrated approach to Sport Policy: good governance, accessibility and integrity*, 2 February 2017, 2016/2143(INI).

[7] M. CRONIN, D. MAYALL, *Sporting Nationalisms: Identity, Ethnicity, Immigration and Assimilation*, London, Frank Cass, 1998; R. LAVERMORE, *Sport's Role in Constructing the Inter-state Worldview*, in R. LAVERMORE, A. BUDD, eds., *Sport and International Relations*, London, Routledge, 2004, pp. 16-21; H.E NÆSS, *The neutrality myth: why international sporting associations and politics cannot be separated*, in 45 "Journal of the Philosophy of Sport", 2018, p. 144.

[8] J. LINDHOLM, *How Russia's invasion of Ukraine shook sports' foundation*, in 22 "The International Sports Law Journal", 2022, pp. 1-4.

[9] R. PIELKE, *How Can FIFA be Held Accountable?*, in 16 "Sport Management Revue", 2013, p. 255; Transparency International, *Global Corruption Report: Sport*, London, Routledge, 2016.

[10] Conflicts produced by the SOs are regarded as *antinomies* since the 1970s. In this sense see J. BERNARD, *La Contre-Société Sportive et Ses Contradictions*, in 10 "Esprit", 1973, pp. 391-416.

[11] Human Rights Council (HRC), *Intersection of race and gender discrimination in sport*, 15 June 2020, A/HRC/44/26, para 51. This report was submitted under the HRC resolution 40/5, *Elimination of discrimination against women and girls in sport*, 21 March 2019, A/HRC/RES/40/5, 44/26.

athletes to compete internationally".[12] The so-called sporting antinomies lead to contradictions both within and outside the sporting context, revealing how public authorities have inherent difficulties in resolving or reconciling legal conflicts; the international and universal vocation of SOs activities confronts public authorities with a concrete systemic *aporia*. This would be fostered by the fragmentation of the international response to the sporting issues, which could be considered to be detrimental to the function of a coherent international legal system and to the universality of sport.[13]

As in other areas of international law characterised by a high degree of fragmentation, it could be argued that the duty to co-operate would be central to the protection of common interests, such as the integrity of sport and its social function.[14] This duty is enshrined in the International Charter of Physical Education, Physical Activity and Sport (ICPEPA), adopted by the UN Educational, Scientific and Cultural Organisations (UNESCO). This instrument of soft law argues that "co-operation between stakeholders at all levels is the *prerequisite* for protecting the integrity and potential benefits of physical education, physical activity and sport from discrimination, racism, homophobia, bullying, doping, manipulation, excessive training of children, sexual exploitation, trafficking, as well as violence".[15] In similar terms, the European Sport Charter (ESpC) indicates that "public authorities should develop reciprocal co-operation with the sports movement, as the *essential basis* of sport, in order to promote the values and benefits of sport".[16] Public authorities and SOs are invited to enhance their "co-operation in a spirit of mutual respect, and to minimize the risk of conflict by clearly defining their respective

[12] HRC, *Intersection of race and gender discrimination in sport*, cit., para 42.
[13] On the fragmented international response to the sporting antinomies see, *inter alia:* A. GEERAERT, F. VAN EEKEREN, *Good governance in sport: Critical reflections*, London, Taylor & Francis, 2022.
[14] On the central role of the duty to co-operate in the international law area affected by a relevant degree of fragmentation, see, for example: J. DELLAUX, *The duty to cooperate*, in K. DE FEYTER, E.T. GAMZE, S. DE MOERLOOSE, eds., *Encyclopedia of Law and Development*, Cheltenham, Edward Elgar Publishing, 2021; N. CRAIK, *The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect*, in "Yearbook of International Environmental Law", 2019, pp. 22-44.
[15] UNESCO, *International Charter of Physical Education, Physical Activity and Sport*, 18 November 2015, SHS/2015/PI/H/14 REV, Preamble, point 11. Emphasis added by the author.
[16] CoE, *Revised European Sports Charter*, 13 October 2021, CM/Rec(2021)5. Emphasis added by the author.

functions, legal rights and mutual responsibilities in physical education, physical activity and sport".[17]

However, it remains unclear how this fundamental recommendation would be implemented, and how it relates to the principle of the autonomy of sport. As known, according to this fundamental principle SOs have to be free to manage sporting issues and their internal affairs beyond undue State interference.[18] Furthermore, the fragmented international response raises several questions about the public and sporting authorities that should have the primary responsibility to address the sporting antinomies through effective co-operation and co-ordination. In order to answer these questions, this essay examines the legal basis of the need for co-operation (section 2), by identifying the cardinal sporting and public responsibilities of its implementation (sections 3 and 4) and the specific role of the CoE (section 5). The aim is to show the fundamental legal implications of the need for co-ordination between different legal systems, and how such co-ordination could be effectively implemented in order to manage and avoid legal conflicts, while preserving the autonomy of sport and its social function.

2. *Legal basis for the need to co-operate: the transnational nature of the Sport Movement and "responsible autonomy"*

The need to co-operate would be based on the transnational nature of the Sport Movement (SM). It is traditionally regarded as a "universal and compact entanglement of international and national institutions",[19] which defines a legal order that overlaps with national legal orders in a complex network of legal systems.[20] As a legal order, the SM

[17] ICPEPA, Article 10.8, cit.
[18] IOC, Olympic Charter, *Fundamental Principles of Olympism*, in force as from 8 August 2021, point 5. On the autonomy of sport see, *ex multis*: CoE, 11th Conference of European Ministers responsible for Sport, resolution No. 2 on *Autonomy in Sport*, Athens, December 2008; IOC, *The Olympic Movement in Society*, XIII Olympic Congress, 5 October 2009, Copenhagen, at 20; CoE, *The Principle of Autonomy of Sport in Europe*, 2 February 2011, Rec(2011)3; J.-L. CHAPPELET, *Autonomy of Sport in Europe*, Strasbourg, CoE Publishing, 2010.
[19] J.P. KARAQUILLO, *Droit international du sport*, Paris, Dalloz, 2011, p. 28
[20] F. ZATTI, *Ordinamento sportivo e ordinamento giuridico statuale tra autonomia e riserva di giurisdizione. Dal diritto dei privati all'ordinamento settoriale: verso la lex sportiva?*, in "Rassegna di

would have "all the attributes of a legal system with legislative, judicial, administrative and sanctioning elements".[21] The rules created by the IOC (Olympic Charter) and the ISFs (their respective statutes or constitutions) are considered by commentators to be a genuine form of global law, as they are privately created, globally applied and capable of producing direct effects on individuals.[22] These would define the so-called *lex sportiva*, consisting of a set of federal laws of a private nature with an international vocation,[23] on which *global private regimes* would be based.[24] The existence of multiple legal systems within one population and/or geographical area would then imply a coordination with the purpose to avoid conflicts and antinomies.[25]

This need for co-ordination in order to avoid conflicts and antinomies is not clearly affirmed by the Court of Arbitration for Sport (CAS), which states that sport and national legal systems are "two different legal orders – one of public law, the other of private law – which do not intersect and do not come into conflict".[26] However, this position is partly questioned by the heterogeneous legal status of SOs, which depends on the country in

diritto ed economia dello sport", 2007, pp. 316-343, in particular p. 327.

[21] K. FOSTER, *Global Sports Law Revisited*, in 17 "Entertainment and Sports Law Journal", 2019, pp. 1.

[22] K. FACH GÓMEZ, *Enforcing Global Law: International Arbitration and Informal Regulatory Instruments*, in 47 "The Journal of Legal Pluralism and Unofficial Law", 2015, pp. 112-139.

[23] CAS, 92/80 *Fédération Internationale de Basketball* (1993), para. 13, para 10. On this point see, *ex multis*: R.H.C. VAN KLEEF, *The legal status of disciplinary regulations in sport*, in 14 "The International Sports Law Journal", 2014, p. 24; F. LATTY, *La lex sportiva. Recherche sur le droit transnational*, Leiden, Brill, 2007; L. CASINI, *Il diritto globale dello sport*, Milano, Giuffrè, 2010; K. FOSTER, *Is There a Global Sports Law?*, in 2 "Entertainment Law", 2003, p. 1; M. BELOFF, *Is There a Lex Sportiva?*, in 3 "International Sports Law Review", 2005, p. 49; A. RÖTHEL, *Lex mercatoria, lex sportiva, lex technica – Private rechtsetzung jenseits des Nationalstaats?*, in 62 "Juristen Zeitung", 2007, p. 755.

[24] G. TEUBNER, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?*, in K.H. LADEUR, ed., *Public Governance of the Age of Globalization*, Farnham, Ashgate, 2004, p. 71; H. SCHEPEL, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Oxford, Hart publishing, 2005.

[25] This is essentially argued by the legal pluralism theory. See, for instance: A. VON BOGDANDY, *Common principles for a plurality of orders: a study on public authority in the European legal area*, in "International journal of constitutional law", 2014, pp. 980-1007; J. KLABBERS, T. PIIPARINEN, *Normative pluralism and international law: exploring global governance*, New York, Cambridge University Press, 2013; J. VANDERLINDEN, *Les pluralismes juridiques*, Bruxelles, Bruylant, 2013; G. ITZCOVICH, *Legal order, legal pluralism, fundamental principles: Europe and its law in three concepts*, in "European law journal", 2012, pp. 358-385; G. OTIS, *Méthodologie du pluralisme juridique*, Paris, Karthala, 2012; F. FONTANELLI, *Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations*, in "Transnational Legal Theory", 2011, pp. 67-117; E. MELISSARIS, *Ubiquitous law: legal theory and the space for legal pluralism*, London, Routledge, 2009.

[26] CAS, 92/80 *Fédération Internationale de Basketball* (1993), para. 13.

which they are legally registered although; the most important one are set up as non-profit organisations (e.g. the IOC or the main ISFs, governed by Swiss national law),[27] while others are considered as public organisations (e.g. some National Olympic Committees, which perform a public function),[28] or as simple private or even hybrid associations that carry out activities of public interest (e.g. national federations).[29] There are also other legal systems, such as the EU, where national federations and leagues, although registered as non-profit organisations, are in fact considered as corporations operating in a monopoly situation.[30] The relationship of interdependence between sport and national legal orders, and their obvious need to co-operate and interact in many areas, has clearly emerged in the practice. It could be argued that the legal orders established by the SOs are *hybrid public-private regimes*, based on heterogeneous norms and practices.[31] On the other hand, this suggests that the SOs should be *open* to the public dialogue in order to ensure the legal consistency with the context in which the sporting activities are carried out.

In this perspective, it should be noted that the need for *openness* to co-ordination and co-operation is indeed recognised by the IOC. The Basic Universal Principles of Good Governance of the Olympic and Sports Movement (BUP), which are binding on all

[27] Some authors have underlined how Swiss law guarantees a special treatment and important tax and property privileges, defining for this very reason Switzerland as a "legal paradise" for SOs. See: F. BUY ET AL., *Law of Sport*, Paris, LGDJ, 2015, p. 44.

[28] This is the case, for example, of the Italian National Olympic Committees (CONI). See: R. MORZENTI PELLEGRINI, *L'evoluzione dei rapporti tra fenomeno sportivo e ordinamento statale*, Milano, Giuffrè, 2007, p. 78; S. CHERUBINI, C. FRANCHINI, eds., *La riforma del CONI*, Milano, Franco Angeli, 2004.

[29] On the uncertain juridical status of national sports federations, see, *ex multis*, J. SCHEERDER, A. WILLEM, E. CLAES, *Sport policy systems and sport federations: a cross-national perspective*, London, Palgrave, 2018; K. VIEWEG, ed., *Lex sportiva*, Berlin, Duncker & Humblot, 2016, p. 189.

[30] L. MISSION, G. DUJARDIN, *L'influence du droit européen sur les réglementations sportives*, in J.P. DEPREZ, L. DERWA, eds., *Le droit du sport*, Bruxelles, Anthemis, 2018, p. 63; S. WEATHERILL, *Principles and Practices in EU Sports Law*, Oxford, Oxford University Press, 2017; M. MATAIJA, *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law*, Oxford, Oxford University Press, 2016; A. DUVAL, B. VAN ROMPUY, *The Legacy of Bosman: Revisiting the Relationship between EE Law and Sport*, Berlin, Springer, 2016; A. DI MARCO, *Amateur sport and Union citizenship in the Biffi case: towards a European sporting citizenship*, in 27 "Maastricht Journal of European and Comparative Law", 2020, p. 598.

[31] L. CASINI, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, in 12 "German Law Journal", 2011, p. 1317.

Olympic constituents,[32] consider co-operation and co-ordination to be an essential element in the framework of sporting activities.[33] It would be a general obligation for all sporting authorities justified by the fact that "governments, constituents of the Olympic Movement, other sports organisations and stakeholders have a complementary mission and should work together towards the same goals".[34] It could be assumed as an element of the legitimacy for SOs, considering that, according to the IOC, "co-operation, co-ordination and consultation are the best way for SOs to preserve their autonomy".[35]

The IOC would have explicitly recognised the duty of co-operation enshrined in the ICPEPA and the ESpC, by implicitly admitting that SOs and national legal orders *overlap, intersect and may come into conflict*. Indeed, the general duty of co-operation is part of the provisions on the duty to maintain harmonious relations with the public authorities, which are explicitly aimed at preserving the autonomy of SOs. In the Fundamental Principles enshrined in the IOC Code of Ethics, this duty is reaffirmed in the context of the principle of autonomy.[36] In the version of the BUP annexed to the IOC Code of Ethics, the title of the principle 7 has been integrated with the preliminary reference to the autonomy of the Olympic Movement,[37] and it essentially consists of two paragraphs dedicated to "the autonomy of the Olympic Movement" (7.1) and to "co-operation and co-ordination with government authorities and external partners" (7.2). These tenets would form a dyad in which the implementation of the duty of co-operation and co-ordination could be regarded as complementary to, and a condition of, the autonomy of SOs. It would limit the traditional autonomy of sport by confirming its

[32] IOC, *Code of Ethics*, February 2023, Point D, Good Governance and resources, Article 11.
[33] IOC, *Basic Universal Principles of Good Governance of the Olympic and Sports Movement* (BUP), Seminar on Autonomy of Olympic and Sport Movement, 11-12 February 2008, Principle 7, Harmonious relations with governments while preserving autonomy, point 7.1, p. 12.
[34] IOC, BUP, point 7.2, cit., p. 12.
[35] Ibid., point 7.1.
[36] Pursuant to the Article 1.3, the universal fundamental ethical principles of the Olympism include "maintaining harmonious relations with state authorities, while respecting the principle of autonomy as set out in the Olympic Charter".
[37] The previous title foreseen in 2008 reciting "Harmonious relations with governments while preserving autonomy" has been replaced by "Autonomy of the Olympic Movement – Harmonious relations with government authorities and external partners" (IOC, *Code of Ethics*, BUP, principle 7, cit.).

interpretation as "conditional autonomy",[38] "negotiated autonomy",[39] "pragmatic autonomy"[40] or "responsible autonomy" according to the IOC definition.[41] The autonomy would be "responsible" in the sense that

> The principle of autonomy implies rights (freedom of association, power of self-regulation and definition of sporting and internal governance rules by sports organisations without undue external interference, etc.) but also duties (respect of the general legal framework applicable in the country, the rules and statutes of the international sports organisations concerned, the basic principles of good governance for the proper functioning of the organisation, its credibility and reputation, etc.).[42]

In light of this *responsible autonomy*, the duty to co-operate would therefore be of general application for all members of the Olympic Movement, in accordance with the responsibilities defined by the pyramidal and decentralised structure of SM.

3. *Sporting responsibilities: the decentralised pyramid structure of the Sport Movement and the role of the International Olympic Committee*

SM are commonly represented as decentralised pyramidal structures, in which the main groups federate and relate to each other according to vertical relationships, from the top to the bottom and vice-versa.[43] Within this pyramid-shaped federal structure, each group

[38] M. MATAIJA, *Conditional Autonomy: EU Internal Market Law and the Private Regulation of Sport*, in Idem, ed., *Private Regulation and the Internal Market: Sports, Legal Services, and Standard Setting in EU Economic Law*, Oxford, Oxford Academic, 2016, pp. 157-188; S. WEATHERILL, *On Overlapping Legal Orders: What is the "Purely Sporting" Rule?*, in B. BOGUSZ, A. CYGAN, E. SZYSZCZAK, eds., *The Regulation of Sport in the European Union*, Cheltenham, Elgar Edward, 2007, at 48.
[39] J.-L. CHAPPELET, *Autonomy of Sport in Europe*, cit.
[40] A. GEERAERT, M. MRKONJIC, J.-L. CHAPPELET, *A Rationalist Perspective on the Autonomy of International Sport Governing Bodies: Towards a Pragmatic Autonomy in the Steering of Sports*, in 7 "International Journal of Sport Policy and Politics", 2014, p. 473.
[41] IOC, *Olympic Agenda 2020*, Midway Report, Recommendation 28, Support autonomy, September 2017, p. 72.
[42] Ibid., point 5.
[43] For an in-depth analysis on the pyramid and decentralised structure of the SM, in addition to the authors mentioned in the notes 19-23, see: J. NAFZIGER, *International sports law*, New York, Ardsley, 2004; R. SIEKMANN, C.R. SOEK, *Lex sportiva: what is sports law?*, The Hague, TMC Asser Press, 2012; E. GREPPI, M. VELLANO, S. BASTIANON, *Diritto internazionale dello sport*, Torino, Giappichelli, 2010; C. ROMBOLÀ, ET AL., *Profili di diritto internazionale dello sport*, Soveria Mannelli, Rubbettino, 2017.

associates and recognises itself in *sporting communities* and entrusts the sporting authorities with the task of defining the rules of the game and organising the competitions.[44] As is well known, the IOC and the ISFs are at the top of this structure: the IOC, acting as a catalyst for collaboration between all parts of the Olympic family, ensures the promotion of the values of the Olympic Charter, which defines the fundamental principles for the organisation of SOs;[45] the ISFs have exclusive competence for the regulation, control, and promotion of the specific sport within their competence.[46] While being a duty for all members of the Olympic Movement, it could therefore be argued that the IOC should have the primary responsibility for legal co-ordination, to be pursued through a *responsible co-operation*; in turn, it should act as a catalyst for the co-ordination of the various ISFs in order to resolve and reconcile the several sporting antinomies.

The involvement of the IOC in the public debate and regulation of the sporting antinomies would be the first and essential condition for overcoming the systemic *aporia* in the resolution and reconciliation of legal conflicts in the sporting context. Indeed, the IOC, by virtue of its leading position in the SM, is the only institution able to satisfy the need for co-ordination without *jeopardising* the universal and pyramidal nature of the sport's transnational legal order. In addition to the sporting regulations, the role of the IOC as a *legitimate legislator* for international sport is suggested by its observer status at the UN General Assembly (UNGA).[47] As argued by some authors, "the status of observer at the UNGA creates expectations and normative pressure on the IOC … [and] … it represents an important move on the part of the IOC to keep its place as the norm

[44] See, for example, the following ISFs' statutes: Union Cycliste Internationale (UCI), Constitution (2019) Article 2; IAAF, Constitution (2019) Article 4.1; FIFA, Statutes (2019) Article 2; Fédération internationale de basketball (FIBA), General Statutes (2021) Article 4.

[45] R. GAUTHIER, *The International Olympic Committee, Law, and Accountability*, London, Routledge, 2017; F. LATTY, *Le statut juridique du Comité international olympique – brève incursion dans les lois de la physique juridique*, in M. MAISONNEUVE, ed., *Droit & Olympisme. Contribution à l'étude juridique d'un phénomène transnational*, Aix-Marseille, Presses Universitaire Aix-Marseille, 2015, p. 15.

[46] F. ALAPHILIPPE, *Légitimité et légalités des structures internationales du sport: une toile de fond*, in 15 "Revue juridique et économique du sport", 1993, p. 3.

[47] IOC has the observer status since 2009 in UN, with which it enshrines the principles of the Resolution of the UNGA, *Sport as a Means to Promote Education, Health, Development and Peace*, cit.

entrepreneur for sport on the international stage. This willingness to 'stay at the centre' of sport standards is a characteristic attitude of the IOC choices since the nineteenth century".[48]

The central role of the IOC is also confirmed by its close co-operation with various anti-doping organisations in the implementation of effective anti-doping measures and the maintenance of fair play in sport. As known, the IOC works closely with the World Anti-Doping Agency (WADA),[49] the global organisation responsible for promoting, coordinating and monitoring the fight against doping in sport.[50] It adopts and enforces the World Anti-Doping Code established by WADA by coordinating and directing the implementation of the general and specific anti-doping rules with the National Anti-Doping Organizations (NADOs) and ISFs.[51] It could be argued that the IOC would be an institutional actor of the WADA, which, as a *founding member*, would also guarantee the 50% of its.[52] This would be a case of a *global hybrid public-private* organisation, where the international need for co-ordination between public and sporting authorities would be framed within an institutional legal framework.[53]

The International Anti-Doping Convention establishes a general obligation to co-operate to ensure the integrity of sport, by identifying specific areas in which all sports authorities should co-operate.[54] However, the IOC would be the principal sporting authority charged with (and able) to ensure co-ordination within the Olympic Movement.

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[48] D. BOUSFIELD, J.-M. MONTSION, *Transforming an International Organization: Norm Confusion and the International Olympic Committee*, in 15 "Sport in Society", 2012, pp. 823-838.
[49] UNESCO, *International Convention against doping in sport* (WADA Convention), 19 October 2005, ED.2005/CONVENTION ANTI-DOPING Rev.
[50] See, *inter alia*: J.R SCOTT, T.M. HUNT, *The international anti-doping movement and UNESCO: A historical case study*, in 30 "The international journal of the history of sport", 2013, pp. 1523-1535; I. WADDINGTON, V. MØLLER, *WADA at twenty: old problems and old thinking?*, in "International journal of sport policy and politics", 2019, pp. 219-231; B. HOULIHAN, ET AL., *The World Anti-Doping Agency at 20: progress and challenges*, in "International Journal of Sport Policy and Politics", 2019, pp. 193-201.
[51] U. WAGNER, P.K. MØLLER, *The IOC and the doping issue—An institutional discursive approach to organizational identity construction*, in "Sport management review", 2014, pp. 160-173; T. HUNT, *Drug games: The International Olympic Committee and the politics of doping, 1960–2008*, Austin, University of Texas Press, 2011.
[52] Conference of Parties to the International Convention against Doping in Sport, *Review of the World Anti-doping Agency's funding formula*, 26-28 October 2021, ICDS/8CP/Doc.18.
[53] L. CASINI, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)*, in "International Organizations Law Review", 2009, pp. 421-446.
[54] WADA Convention, cit., Article 13.

In addition to adopting the WADA code and to coordinating its enforcement within the ISFs, it should be noted that the IOC also ensures a central role in the Doping Control Process (DCP) and in the Results Management and Sanctions (RMS).[55]

In light of its role as *norm entrepreneur for sport*, the IOC is indeed working with States and IOs to address the sporting antinomies that affect the general legal framework, such as corruption or violations of athletes' rights. This is the case of the International Partnership Against Corruption in Sport (IPACS), established in 2017 within the framework of the CoE, an informal network that brings together IOs, SOs and the main governments concerned by the sport economy's globalization, in order to combine the efforts of the different stakeholders in the fight against corruption in the governance of sport.[56] In this context, for example, the IOC, with the support of the Organisation for Economic Co-operation and Development (OECD), has published a new set of practical recommendations on procurement for host cities and organising committees of major international sports events.[57] In this case, the regulatory autonomy of SOs seems to be reconciled with the sovereign power of public orders to fight corruption, according to the idea of *responsible autonomy*, which implies a "concerted, coordinated, negotiated and consensual approach aimed at achieving efficient co-operation […], and at the same time avoid undue interference and conflict situations".[58]

In the same vein, one could mention the recent "Legal Approaches to Tackling the Manipulation of Sports Competitions", prepared jointly by the UN Office on Drugs and Crime (UNODC) and the IOC.[59] It would be an act of soft law that would orient

[55] V. IVANOVA, ET AL., *Harmonization of anti-doping rules in a global context*, in "Bioanalysis", 2012, pp. 1603-1611.
[56] The IPACS was launched at the IOC's International Forum for Sport Integrity (IFSI) in February 2017, and its central body is the Steering Committee that involves governmental representatives (from Argentina, China, France, Germany, Japan, South Africa, Switzerland, United Kingdom and United States of America), IOs (Organisation for Economic Co-operation and Development - OECD -, CoE, UN Office on Drugs and Crime - UNODC -, the Commonwealth) and international SOs (Association of National Olympic Committees – ANOC -, Association of Summer Olympic International Federations – ASOIF - , IOC and Global Association of International Sports Federations - GAISF -). On the general activities of the IPACS see: https://www.coe.int/en/web/sport/ipacs, visited 23 May 2023.
[57] IOC, *Procurement of Major International Sport-Events-Related Infrastructure and Services – Good Practices and Guidelines for the Olympic Movement*, May 2020.
[58] IOC, *Olympic Agenda 2020*, Recommendation 28, cit., point 3.
[59] UNODC/IOC, *Legal Approaches to Tackling the Manipulation of Sports Competitions. A Resource*

approaches and solutions to a specific sporting antinomy for all actors involved in the sporting context. Officially, its purpose is to support the States Parties to the UN Convention against Corruption[60] by implementing paragraph 15 of Resolution 8/4 on safeguarding sport against corruption through a strategic involvement of the IOC in its *law-making process*.[61] It could be argued that the sporting authorities have acted as *equal partners with the public authorities*, orienting the evolution of the sporting legal orders according to "a system of reflexive law based on dialogue between social partners".[62]

While essentially resulting in guidelines or recommendations, the interactions with States and IOs would partly determine the general approach, and the *essential basis* for co-ordination on specific issues "in a regulatory space that States share with private orders".[63] The IOC could therefore be regarded as a *non-State legislator actor*, which has also been considered from the perspective of global constitutionalist scholars.[64] This would suggest that the sporting responsibility to co-operate, aimed at preserving the autonomy of sport, should be integrated by the public responsibility to involve the SOs in the legal framework addressing sporting antinomies, as the following discussion will illustrate.

4. *International responsibilities: the duty to involve the Sporting organisations playing the role of non-State Treaty-Makers*

A duty for the involvement of SOs in the legal framework addressing sporting antinomies is suggested by the increasing number of cases in which non-State actors are involved in

Guide, Vienna, UN Publishing and Library Section, 2021.

[60] UNODC, *United Nations Convention against Corruption*, 31 October 2003, Doc. A/58/422.

[61] Conference of the States Parties to the UN Convention against Corruption, *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its eighth session, held in Abu Dhabi from 16 to 20 December 2019*, CAC/COSP/2019/17, p. 16.

[62] For an interpretation of the relationship between sporting and public authorities in these terms, see: S. GARDINER, R. WELCH, *The Contractual Dynamics of Team Stability Versus Player Mobility: Who Rules the Beautiful Game?*, in 5 "Entertain Sports Law Journal", 2007, p 1.

[63] In these terms see: H. BRANISLAV HOCK, G. SUREN, *Private Order Building: The State in the Role of the Civil Society and the Case of FIFA*, in 17 "The International Sports Law Journal*"*, 2018, p. 193.

[64] B. GÜRCÜOĞLU, *To what extent is the law of the Olympics constitutionalised? A global constitutionalist reading of the International Olympic Committee*, in 23 "International Sports Law Journal", 2023, pp. 3-16.

treaty negotiations. This practice would essentially underpin the idea of *Non-State treaty makers*, in respect of which public authorities would have specific co-operation obligations.[65] As Professor Elena Pribytkova has pointed out, the co-operation of non-State actors would also be required in practice to achieve the realisation of the rights that underpin the obligation of States to co-operate with each other.[66] By also granting to them consultative status, their contribution is relevant in several areas of international law, such as environmental law, human rights law, or international humanitarian law.[67]

Although the IOC is not a subject of international law in the traditional sense,[68] as *non-State legislator actor* it could clearly be regarded as a *non-State Treaty-Makers*. Accordingly, it would theoretically be involved in the realisation of treaty objectives in various areas of international law.[69] This idea has been partially supported by the UN since its decision to grant the IOC observer status at the UNGA.[70] The main justification for this was the instrumental role of the IOC in achieving the UN's objectives,[71] with particular reference to its potential contribution to the promotion of "peace and human understanding through sport".[72] In the practice, the IOC contribution has been framed in

[65] J. SUMMERS, A. GOUGH, *Non-State Actors and International Obligations. Creation, evolution, and enforcement*, Leiden, Brill | Nijhoff, 2018.
[66] E. PRIBYTKOVA, *What Global Human Rights Obligations Do We Have?*, in "Chicago Journal of International Law", 2020, p. 410.
[67] On the involvement of the non-State actors in the international making law process see, in addition to the authors mentioned in the previous notes: K. SCOTT, ET AL., eds., *Changing Actors in International Law*, Leiden, Brill | Nijhoff, 2020; P. WEBB, *The Participation of Non-state Actors in the Multilateral Treaty Process*, in S. CHESTERMAN, D.M. MALONE, S. VILLALPANDO, eds., *The Oxford Handbook of United Nations Treaties*, Oxford Handbooks, 2019; P.S. BERMAN, *Non-State Law Making through the Lens of Global Legal Pluralism*, in M.A. HELFAND, ed., *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, Cambridge, Cambridge University Press, 2015, pp. 15-40.
[68] In addition to the authors mentioned in the note 45, see: D.J. ETTINGER, *The Legal Status of the International Olympic Committee*, in "Pace International Law Review", 1992, pp. 97-121.
[69] The involvement of the non-State actors is regarded as essential element of the duty to co-operate for the realization of treaty objectives in the UN resolution: HRC, *The duty to co-operate and non-State actors*, 20 March 2023, A/HRC/EM/RTD/7/CRP.
[70] See the note 47.
[71] On this point, in addition to the several UN acts on sport mentioned in the previous discussion, see: UN Office on Sport for Development and Peace, *Achieving the Objectives of the United Nations through Sport*, (2011) UN 1, 4 <https://perma.cc/7GMG-JWXY> visited 8 June 2023.
[72] UNGA, *Building a peaceful and better world through sport and the Olympic ideal*, 13 November 2015, UN Doc A/RES/70/4. On this point see also, *inter alia*: HRC, *Promoting human rights through sport and the Olympic ideal*, 17 June 2020, HRC/43/L.24/Rev.1; UNGA, *Building a peaceful and better world through sport and the Olympic ideal*, 13 December 2019, A/RES/74/16; UNGA, *Sport as an enabler of sustainable development*, 6 December 2018, A/RES/73/24, para 15.

in partnership agreements and Memoranda of Understanding (MoUs) with several UN agencies, such as the World Health Organization (WHO),[73] the UN-HABITAT,[74] the UN Refugee Agency (UNHCR)[75] and the aforementioned UNODC. It should be noted that the IOC has also signed MoUs with the OECD[76] and the EUROPOL.[77] Other important ISFs, such as UEFA and FIFA, have signed such agreements with the UE[78] and the CoE.[79]

The use of MoUs would be part of a global trend in which formal treaties are giving way to *informal law*,[80] used in particular to integrate non-State actors into global governance and to address global challenges.[81] These *softer* forms of international arrangements would circumvent the uncertain nature of non-State actors as subjects of international law by providing a framework for co-operation capable of defining the areas of co-operation, roles and responsibilities of each party.[82] In light of this emerging important association in the work of several IOs, some authors have recently proposed a new conceptualisation of membership, the so-called, the so-called "memberness".[83]

It should be noted that this kind of legal instrument for framing the co-operation is recommended by the IOC for all SOs. In defining the limits of sport's autonomy, it is

[73] See https://www.unmultimedia.org/avlibrary/asset/2545/2545213/, visited 7 June 2023.
[74] See https://www.sportanddev.org/latest/news/ioc-and-un-habitat-sign-mou, visited 7 June 2023.
[75] See https://www.unhcr.org/us/news/news-releases/benefit-refugees-through-sports-unhcr-signs-partnership-olympic-movement, visited 7 June 2023.
[76] See https://olympics.com/ioc/news/ioc-joins-forces-with-oecd-under-new-agreement, visited 7 June 2023.
[77] See https://www.europol.europa.eu/media-press/newsroom/news/integrity-in-sports-europol-and-international-olympic-committee-join-forces-against-match-fixing, visited 7 June 2023.
[78] EC, *decision adopting the Arrangement for Co-operation between the European Commission and the Union of European Football Associations (UEFA)*, 14 October 2014, C(2014) 7378 final.
[79] See: MoU between CoE and UEFA, 9 May 2018, SG/Inf(2018)13-final (https://www.coe.int/en/web/portal/-/council-of-europe-and-uefa-sign-memorandum-of-understanding, visited 29 May 2023); MoU between CoE and FIFA, 5 October 2018, SG/Inf(2018)12-final (https://www.coe.int/en/web/sport/-/council-of-europe-and-fifa-sign-memorandum-of-understanding, visited 29 May 2023).
[80] On this point see, for example: D. THURER, *Soft Law*, in *Max Planck Encyclopedia of Public International Law*, Oxford, Oxford University Press, 2009.
[81] J. PAUWELYN, R.A. WESSEL, J. WOUTERS, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, in "European Journal of International Law", 2014, pp. 733-763.
[82] See, *ex multis*, J. MCNEILL, *International Agreements: Recent U.S.-UK Practice Concerning the Memorandum of Understanding*, in "American Journal of International Law", 1994, pp. 821-826.
[83] S.C. HOFMANN ET AL., *Porous organizational boundaries and associated states: introducing memberness in international organizations*, in 29 "European Journal of International Relations", 2023, pp. 929-959.

indicated to "create a template to facilitate co-operation between public authorities"[84] by establishing, where appropriate, "a MoU, a co-operation agreement and/or a partnership agreement (in general terms and/or in specific areas) on the basis of the principles and rules which govern the Olympic Movement, in particular the principle of the responsible autonomy".[85] It could therefore be argued that the involvement of the IOC and the ISFs in the role of non-State Treaty-Makers would be a specific application of a *principle of inclusion* of all relevant SOs, understood as an underlying principle of the general duty to co-operate.

This general principle has largely been put forward by the CoE. In this sense, the Parliamentary Assembly of the CoE (PACE) has stressed the importance of creating an appropriate legal framework to penalise "abuses that are against the law [and to ensure] effective co-operation with the governing bodies of the sports movement to combat any abuses contrary to the ethics of sport and to the fundamental values of which sport should be a vehicle".[86] Generally, the need (and the duty) to involve the SOs in a co-operative approach is essentially enshrined in the main strategic CoE documents on sport. This is the case of the Convention on Spectator Violence,[87] which will gradually be replaced by the St. Denis Convention,[88] the Anti-Doping Convention,[89] the Convention on the Manipulation of Sports Competitions,[90] the Code of Sports Ethics,[91] the aforementioned

[84] IOC, *Olympic Agenda 2020*, Recommendation 28, cit., p. 21.
[85] Ibid., p. 72.
[86] PACE, *Good governance and Ethics in sport*, 5 April 2012, Report 12889, point 110. In the same terms see also: See: PACE, *The reform of football governance*, 25 March 2015, Report 13738, points 15.2 and 128; PACE, *Good governance and Ethics in sport*, 25 April 2012, Res. 1875, appendix point 6; PACE, *The need to preserve the European sport model*, 17 December 2008, Report 11467, points 21, 22, 25, 28, 37.
[87] *Convention on Spectator Violence and Misbehaviour at Sports Events*, 19 August 1985, CETS No. 120.
[88] *Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events* (St. Denis Convention), 3 July 2016, CETS No. 218.
[89] *Anti-Doping Convention*, 16 November 1989, CETS No. 125. This CoE Convention was followed by an additional protocol, CETS No. 188, adopted in Warsaw on 12 September 2002. It should be noted that this Convention and its Additional Protocol are the public international law tools which are at the origin of national anti-doping policies and of intergovernmental co-operation at international level. See J.R SCOTT., T.M. HUNT, *The international anti-doping movement and UNESCO: A historical case study*, cit.
[90] CoE, *Convention on the Manipulation of Sports Competitions* (Macolin Convention), 18 September 2014, CETS No. 215.
[91] CoE, *Code of Sports Ethics*, 24 September 1992, Rec. NO. R (92) 14 REV.

IPACS and several acts adopted by of the Enlarged Partial Agreement on Sport (EPAS).[92]

For instance, the European Convention on Spectator Violence, which represents the first mandatory acts on sporting activities at international level, establishes a general obligation to co-operate in the organisation of sporting events and the planning of sporting facilities.[93] The establishment of effective multi-agency co-ordination arrangements is considered to be "crucial in providing a forum in which the [sporting] authorities and partner agencies can share perspectives and operating imperatives in order to develop a joint partnership ethos and complementary operating strategies".[94] In a complementary way, SOs' authorities are called upon to "co-operate in seeking to ensure that individuals committing offences abroad receive appropriate sanctions, either in the country where the offence is committed or in their country of residence or citizenship".[95] In the same vein, the Anti-Doping Convention establishes an obligation to co-operate in order to safeguard the integrity of sport, and identifies specific areas in which such co-operation should take place.[96] The Convention on the manipulation of sports competitions, on the other hand, stipulates that co-operation should concern prevention, awareness-raising of stakeholders, detection or the exchange of information.[97]

The duty to involve the SOs would be of general application to all members of the Olympic Movement, as is the general duty to co-operate. Similarly, it should be implemented in accordance with the responsibilities defined by the pyramidal and decentralised structure of SM. The apical SOs, such as the IOC and the ISFs, should then be integrated into the international and regional legal framework, as is partly the case for the UN and the CoE.

5. *Regional responsibilities: the Council of Europe's jurisdiction on the* lex sportiva *and*

[92] CoE, *Confirming the Establishment of the Enlarged Partial Agreement on Sport* (EPAS), 13 October 2010, CM/Res(2010)11, Article 1.
[93] *Convention on Spectator Violence*, cit., Articles 4 and 6.
[94] CoE, Standing Committee on Safety, Security and Service at Football Matches and other Sports Events, 4 August 2015, Rec (2015)1, point 39.
[95] St. Denis Convention, cit., Article 10.
[96] *Anti-Doping Convention*, cit., Article 7 – Co-operation with sports organisations on measures to be taken by them -.
[97] Macolin Convention, cit., Article 28 - International co-operation with international sports organisations -.

its prominent role in the international co-ordination

As has partly emerged from the previous discussion, the ISFs and the IOC are increasingly involved in the regional legal framework, with particular reference to the CoE. Although they do not have an observer status similar to that of the IOC at the UNGA, some of them have signed MoUs (UEFA and FIFA) and the IOC works closely with CoE bodies on several issues.[98] In the addition to the SOs' relevance in achieving the objectives of the CoE treaties, which has been partly underlined in the previous discussion,[99] this involvement in CoE activities would be clearly supported by the legal status of the IOC and the main ISFs, i.e. non-profit organisations under Swiss national law.[100] As organisations registered in Switzerland, a Member State of the European Convention on Human Rights (ECHR), their activities would fall within the legal framework of the CoE. This would be an essential part of the general legal framework in respect of which the duty of co-operation and co-ordination should then be applied and implemented.

The jurisdiction of the CoE over SOs' activities, and in particular over the *lex sportiva*, has been partially admitted by the recent case-law of the European Court of Human Rights (ECtHR) on sports issues.[101] The ECtHR would have accepted the idea of human rights as an indirect legal source of the *lex sportiva*, which is supported by some authors.[102] This would have been allowed in part under the construct of the *indirect horizontal effect*: while the State remains directly and internationally responsible for the conduct of non-

[98] For an overview of the project on which the IOC and the CoE collaborate, see https://www.coe.int/en/web/sport/partners#{%2232242849%22:[4]}, visited 8 June 2023.
[99] In addition to the acts mentioned in the note 5 see, for example: CoE, *Diversity and Cohesion: New Challenges for the Integration of Immigrants and Minorities*, Strasbourg, CoE Publishing, 2000; I. BERG-SORENSEN, Final report - *European Crossroads - Sport, Front Door to Democracy*, Strasbourg, 13-14 May 2004.
[100] F. BUY ET AL., *Law of Sport*, cit., p. 44.
[101] For an analysis of the relevant ECtHR case-law on sports issues see, *inter alia*, A. DI MARCO, *Human Rights in Olympic Movement: the Application of European Standards to the Lex Sportiva*, in "Netherland Quarterly of Human Rights", 2022, pp. 244-268.
[102] F. FAUT, *The prohibition of political statements by athletes and its consistency with Article 10 of the European Convention on Human Rights: speech is silver, silence is gold?*, in 14 "The International Sports Law Journal", 2014, p. 253; A. DI MARCO, *Athletes' Freedom of Expression: the Relative Political Neutrality of Sport*, in "Human Rights Law Review", 2021, pp. 620-640.

State actors that interfere with the enjoyment of human rights, indirect obligations derived from international law are imposed on non-State actors. The State's positive obligation to protect the individual would have a diagonal indirect effect in the horizontal relationship between private parties.[103] European human rights standards would therefore be a source of law on the basis of which sporting regulations, adopted by the SOs based in a Member State of the ECHR, would have to be assessed.

In this perspective, respect for human rights would constitute a relevant limit to the autonomy of sport, in relation to which the SOs would be obliged to co-operate in order to achieve the necessary co-ordination, avoiding conflicts and antinomies. Indeed, it should be noted that the several restrictive interpretations of the notion of the autonomy of sport, mentioned in the previous discussion, have moved away from the legal limits on the SOs' activities that have been identified by various authors in recent decades.[104] In light of the obligation to respect the general legal framework, the duty of co-operation and co-ordination should then be applied to the implementation of these limits.

In support of such an interpretation, the International Declaration on Human Rights elaborated within the CoE stated that SOs "have a responsibility to respect and protect human rights, including the right to remedy human rights violations".[105] This would also appear to be entirely consistent with the fundamental principles of Olympism, whose primary objective is to "place sport at the service of the harmonious development of humanity, in order to promote a peaceful society interested in the safeguarding of human dignity".[106]

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[103] L. LANE, *The Horizontal Effect of International Human Rights Law in Practice*, in "European journal of comparative law and governance", 2018, p. 5; J.F. KRAHÉ, *The Impact of Public Norms on Private Law Relationships: Horizontal Effect in German, English, ECHR and EU Law*, in 2 "European Journal of Comparative Law and Governance", 2015, p. 124; K. ZIEGLER, ed., *Human Rights and Private Law: Privacy as Autonomy*, Oxford, Hart publishing, 2007.

[104] On these limits, in addition to the authors mentioned in the notes 38-40, see: R. HELEEN, C. VAN KLEEF, *Liability of Football Clubs for Supporters' Misconduct: A Study into the Interaction Between Disciplinary Regulations of Sports Organisations and Civil Law*, The Hague, Eleven International Publishing, 2016; D. DOUKAS, *The Sky is Not the (Only) Limit: Sports Broadcasting Without Frontiers and the Court of Justice: Comment on Murphy*, in 37 "European Law Review", 2012, p. 605; E. SZYSZCZAK, *Is Sport Special?*, in B. BOGUSZ, A. CYGAN, E. SZYSZCZAK, eds., *The Regulation of Sport in the European Union*, cit., pp. 3-32.

[105] CoE, 15th Conference of European Ministers responsible for Sport, Resolution 1: *International Declaration on Human Rights and Sport* (Tbilisi Declaration), 16 October 2018, point 5.

[106] IOC, Olympic Charter, *Fundamental Principles of Olympism*, cit., point 2.

The CoE would therefore be not only a potential international forum for co-operation, but also one of the main legal frameworks for co-ordination between the public and sporting legal orders. It could be argued that human rights should be part of the transnational legal order of sport, thereby helping to *unify* the different legal orders concerning the same population and/or geographical area. The sharing of fundamental principles would in fact determine the transition from a *pluralism of orders* to a *pluralism of principles*, as claimed by the neo-constitutionalism theorists.[107]

In recent years, the integration of human rights into the *lex sportiva* has been strongly promoted by the CoE, with particular reference to the statutes of the IOC and the ISFs. For instance, the PACE has recommended that FIFA and UEFA integrate "human rights into their system of governance, including criteria relating to the protection of human rights in the selection processes of Countries that will host major sports events and in the procurement procedures for the selection of commercial partners".[108] More generally, the PACE has on several occasions suggested that all SOs "must give due consideration to the effective protection of the fundamental rights enshrined in binding international instruments and, in Europe, in the ECHR".[109] Much more explicit were the Ministers responsible for sport who, meeting in Tbilisi for their 15th Conference within the CoE, invited SOs "to introduce respect of human rights and fundamental freedoms as an integral part of their statutory objectives, internal regulations and codes of conduct, policies, plans, projects and other strategic documents to further strengthen their ability to prevent and respond to human rights violations".[110]

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[107] G. MARTINICO, *Constitutionalism, resistance, and openness: comparative law reflections on constitutionalism in post-national governance*, in 35 "Yearbook of European law", 2016, p. 318; N. KRISCH, *Beyond constitutionalism: the pluralist structure of post-national law*, Oxford, Oxford University Press 2012; C. JOERGES, I.J. SAND, G. TEUBNER, *Transnational governance and constitutionalism*, Oxford, Hart publishing, 2014; J. DUNOFF, J. TRACHTMAN, *Ruling the world? constitutionalism, international law, and global governance*, Cambridge, Cambridge University Press, 2009.

[108] PACE, *Good football governance*, 24 January 2018, Res. 2200 (2018), para 6.

[109] PACE, *Good governance and Ethics in sport*, cit.; PACE, *The reform of football governance*, 23 April 2015, Res. 2053 (2015); PACE, *Towards a framework for modern sports governance*, 24 January 2018, Res. 2199(2018).

[110] CoE, Tbilisi Declaration, cit., para 28.

The remarkable development and acceleration that the process of integrating human rights into the *lex sportiva* has undergone in recent years seems to confirm this perspective: the IOC, for example, has not only developed a comprehensive strategy on human rights, but has also established a Human Rights Unit and a Human Rights Advisory Committee.[111] For their part, some ISFs, such as FIFA, have included the principles of respect and promotion of human rights among their statutory objectives[112] and have created specific Human Rights Units, strategies and policies.[113] FIFA, UEFA and the IOC have also introduced new human rights clauses in contracts with cities hosting the Olympic Games and new binding requirements for the protection of human rights and risk management in international football competitions,[114] not to mention the adoption of the "Sporting Chance Principles on Human Rights in Mega-Sporting Events", which clearly refer to the UNGPs as standards to be followed.[115]

Due to the specific legal status of the IOC and the main ISFs – non-profit organisations established under the provisions of Swiss law –, the transnational sports legal order therefore seems destined to be drawn into the orbit of the CoE. These SOs would thus be obliged to co-operate with the CoE bodies in order to develop the necessary co-ordination between their legal orders and that established by the ECHR. The CoE, in turn, would be obliged to involve them in all actions and debates on sporting issues, including by granting them an observer status similar to that guaranteed within the UN. The legal framework of the CoE would thus potentially play a prominent role in the international co-operation, catalysing public efforts to address the sporting antinomies at the

[111] T. GRELL, *The International Olympic Committee and human rights reforms: game changer or mere window dressing?*, in 17 "International Sports Law Journal", 2018, p. 160.
[112] FIFA has integrated human rights in its rules with an amendment to Article 3 of its Statute, which states that "FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights".
[113] Since 2017, FIFA has elaborated a comprehensive and articulated Human Rights Policy adopted and periodically revisited by the Council with the support of the independent FIFA Human Rights Advisory Board (HRAB). See, for instance, the fourth report published in January 2020 by the HRAB https://img.fifa.com/image/upload/pyume2cahuue2szxgjwq.pdf, visited 20 June 2023.
[114] D. HEERDT, *Tapping the potential of human rights provisions in mega-sporting events' bidding and hosting agreements*, in 17 "The International Sports Law Journal", 2018, p. 170.
[115] Reference is made here to the Mega Sporting Events Platform for Human Rights, available for consultation at https://www.ihrb.org/megasportingevents/sporting-chanceprinciples, visited 20 June 2023.

international level and thus overcoming the systemic *aporia* mentioned at the beginning of this discussion. Its capacity to play a catalytic and driving role at international level would be confirmed by its practice of concluding so-called partial enlarged agreements, which, like the EPAS, are not limited to the Member States of the CoE.

6. *Conclusions*

This contribution has pointed out that the duty to co-operate of SOs is a general principle founded on the transnational nature of the SM, which is explicitly recognised by the IOC as a fundamental element of the principle of the sport autonomy. It would imply an obligation to co-ordinate in order to avoid conflicts with the general legal and political framework in which the sporting activities are carried out, but also a right to be included in the institutional legal and political framework where the sporting antinomies are addressed. In this perspective, the public efforts to reconcile and resolve the antinomies produced by SOs' regulations and actions should necessarily take place at the international level, with the *procedural* involvement of the IOC.

Indeed, it has been underlined that some of the basic operational and organisational requirements of SOs have international sources and transnational effects. SOs operate in a transnational context governed by international authorities, and it is clearly not possible to recompose the conflicts and contradictions generated by sporting regulations and activities within a single legal order (national or regional) without jeopardising the unity and the universality of the global private regimes of sport. Any uncoordinated and isolated national or regional initiative to combat sporting antinomies runs the risk of affecting part of these global private regimes of sport, producing effects limited to a single country or a small group, as opposed to the totality of jurisdictions affected by sporting regulations. Accordingly, countries would be called upon to co-operate in order to develop a coherent international legal system. In turn, the authorities of the SOs that play an apical role in the SM, such as the IOC and the ISFs, would be called upon to co-ordinate their actions with the IOs in order to guarantee their universal function, which would clearly be compromised by conflicts and antinomies.

While generally applicable to all members of the Olympic Movement, it was therefore emphasised that the IOC, as the *legitimate legislator* and *norm entrepreneur* for global private regimes of sport, should have the primary responsibility for legal co-ordination and co-operation. A breach of this fundamental duty by the IOC would pave the way for direct and widespread public interferences, as the overall legitimacy of the SM's autonomy would potentially be undermined. As it has been argued in the previous discussion, the implementation of the duty of co-operation and co-ordination would be complementary to and a condition of the SOs' autonomy, and it would depend in part on a constructive co-operation of the IOC. By analogy with the international law, some of these scenarios could occur in the following cases: manifest failure to negotiate and address in good faith on a specific sporting antinomy; no implementation of agreed-upon measures; non-co-operation with IOs, considering that States have a duty to co-operate with IOs such as the UN, regional organizations, or specialized agencies; refusal to provide necessary information, obstruction of the work of these organisations or disregard of their decisions.[116]

At the same time, the emerging status as a *non-State Treaty-Maker* of the IOC would imply a right to be involved in the legal framework addressing the sporting antinomies. Indeed, several authors and some UN legal instruments argue that the general duty of States and IOs to involve non-State actors that can play a strategic and essential role in the realisation of the treaty objectives would confer corresponding rights on these non-State actors. This interpretation would be partly supported by a *principle of inclusion* of all relevant SOs, understood as an underlying principle of the general duty to co-operate, which is emerging in the international practice. Moreover, regarding the IOC's co-operation as a condition for the legitimacy of the SM would suggest a minimum of procedural guarantees for the *legitimate legislator* of the global private regimes of sport to prove its good faith in addressing specific sporting antinomies. The increasing involvement of the IOC in the UN legal framework, through the granting of observer

[116] On the potential scenarios where a violation of the duty of co-operation may occur, by analogy with the international law, see the authors mentioned in the note 14.

status at the UNGA and the signing of MoUs with various UN's bodies, provides a first model for the integration and implementation of the duty to co-operate, which should also be adopted by the regional organisations that define the general legal framework of the IOC, such as the CoE.

This study has namely shown that the CoE is probably the most active IO in combating the negative externalities of SOs and in promoting their positive action, adopting strategic documents since the mid-1970s that have not only influenced sporting activities at European level, but have also served as a global reference for all sport stakeholders. In particular, it was assumed that the IOC's legal status as a non-profit organisation under Swiss national law would provide additional support for its action. As an organisation registered in Switzerland, a Member State of the CoE, the activities of the IOC would fall under the legal framework of the CoE, which would be an essential part of the general legal framework in relation to which the duty of co-operation and co-ordination should then be applied and implemented. The IOC, as well as the ISFs based in a Member State of the ECHR, would have the duty to co-operate with the CoE, which in turn would have the right and the duty to make recommendations and to monitor the activities of sports authorities that could have an impact on the respect and implementation of the ECHR, by involving the IOC in the legal framework dealing with sporting issues.

By moving from the idea of human rights as an indirect legal source of the *lex sportiva*, the respect for human rights would constitute a relevant limit to the autonomy of sport, in relation to which the SOs would be obliged to co-operate in order to achieve the necessary co-ordination, avoiding conflicts and antinomies. Human rights should form part of the transnational legal order of sport and would contribute to *unify* the different legal systems concerning the same population and/or geographical area. It has then been argued that the sharing of fundamental principles would determine the transition from the *pluralism of orders* to the *pluralism of the principles*. Legal orders would cease to be *autonomous* and *exclusive*, because they would share a fundamental source of law that tends to be *universal* (the human rights), thus becoming *open* and *inclusive*. This *openness*, which is partly embodied in the notion of responsible autonomy, would therefore be closely linked and interdependent with the more general issues of the rule of

law and respect for human rights in the SOs.

In light of the above, the granting of observer status to the IOC at the PACE, similar to that recognised by the UNGA, and its stable integration into the sporting Conventions, for example through the signing of specific MoUs, would be a necessary, but not a sufficient, condition for overcoming sporting antinomies. It would be an institutional implementation of the duty to co-operate, potentially capable of catalysing public efforts to resolve or reconcile legal conflicts. The CoE's capacity to develop international co-operation networks, within an established framework of expertise on the rule of law and respect for human rights, could potentially contribute to overcoming the systemic *aporia* in addressing sporting antinomies, while promoting the Olympic ideals and ensuring the social function of sport as an *instrument of peace and sustainable development*, a *vehicle of rights* and a *source of social inclusion*.