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**Transformative Equality, Due Diligence and Female Players’
Rights: CEDAW as an Avenue for Women’s Rights Accountability in
the World of Football**

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Transformative Equality, Due Diligence and Female Players' Rights: CEDAW as an Avenue for Women's Rights Accountability in the World of Football

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'Football is all very well as a game for rough girls,
but it is hardly suitable for delicate boys.'

Oscar Wilde

Abstract.

This work aims to reflect on the role that CEDAW Committee could play in tackling direct, indirect and structural forms of discrimination suffered by girls and women in football. While recognizing the autonomy of sports associations in the application of their own *lex sportiva*, the author maintains that the perspective and concrete recommendations provided by this UN human rights treaty body could help to break the chain of gender-role assumptions that explain women and girls discrimination in football. Thus, the purpose of the analysis is twofold. First, the work will examine the applicability of CEDAW Committee's views on article 5 of the Convention to the football governance realm and the role of States under standards of due diligence in this regard. Secondly, it will support that autonomy of sport shouldn't imply that female footballers could be prevented from having access to CEDAW Committee seeking concrete recommendations regarding changes in situations of systemic discrimination. While identifying certain obstacles to individual access, the work advocates for a more decisive action of the Committee in this regard. In particular, through General Recommendations and Concluding Observations.

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1. Introductory Remarks

Although allegations about human rights abuses in connection with sports organizations' activities are not new, those abuses have been usually overshadowed. With self-regulation being a traditional claim of the sport movement, national and supranational institutions have met with serious difficulties when intervening in the sector. Sports authorities have traditionally called both for independence and normative and organizational autonomy. In addition, regarding settlement of sporting controversies, the Court of Arbitration for Sport (CAS) was created 'to take international sports disputes out of national courts and provide a highly specialized forum where those disputes could be heard and decided, quickly and inexpensively, according to a flexible procedure.'¹ In other words: The sport movement tends to apply its own set of rules and procedures, its own *Lex sportiva*.² In this context, it seems obvious why national and international courts and human rights monitoring bodies have only intervened in a limited way in sporting disputes.³

It could be affirmed that this situation is coming to an end to give a step to a renovated relationship between sports organizations and International (Human Rights) Law (IHRL). Different evidences would support this conclusion. First, certain recent events reveal the growing interest of sports associations on human rights enforcement.⁴ Second,

¹ Reilly, 'An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes', 1 *Journal of Dispute Resolution* (2012) 63. Specific concerns regarding the compatibility of sport arbitration rules with due process have arisen. See for instance: Gubi, 'The Olympic binding arbitration clause and the Court of Arbitration for Sport: an analysis of due process concerns', 18 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2007) 997.

² Defined as the body of sports law generated by the sports movement and generally applied by CAS: Parrish, 'Lex Sportiva and EU sports law', 37(6) *European Law Review* (2012) 716, at 716.

³ Article 59.2 of the Fédération Internationale de Football Association (FIFA) Statutes is a good example of the reticence on the part of sports organizations to the intervention of public authorities in the regulation of sporting matters. According to it, 'recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.' The current version of the Statutes is available at <https://www.fifa.com/about-fifa/who-we-are/the-statutes.html> (accessed 11 August 2020).

⁴ Thus, specific changes have been made by the International Olympic Committee (IOC) to the Host City Contract with regard to human rights policy. This new version includes a section specifically designed to strengthen provisions protecting human rights and countering fraud and corruption related to the organization of the Olympic Games. Also, as it will be developed afterwards, in May 2017, FIFA adopted its new human rights policy, based on the UN Guiding Principles on Business and Human Rights (available at <https://www.fifa.com/about-fifa/who-we-are/news/fifa-publishes-landmark-human-rights-policy-2893311>, accessed 11 August 2020). Also, in July 2018 the World Players Association launched a Universal Declaration of Players rights, which includes player's right 'to pursue sport without limitation because of his or her race, color, birth, age, language, sexual orientation, gender, disability, pregnancy, religion, political or other opinion, responsibilities as a career, property or other status.' (emphasis added).

athletes seem prepared to challenge the compatibility of sporting rules with IHLR before international human rights monitoring bodies.⁵ This is the case of the anti-doping whereabouts rules approved in the framework of the World Anti-Doping Agency (WADA). In different cases brought before the European Court of Human Rights (ECtHR) applicants questioned the compatibility of national legislative measures which had been adopted with the purpose of incorporating into domestic legal order the rules contained in the WADA instruments with art. 8.1 (right to respect for private and family life) of the European Convention of Human Rights (ECHR) and art. 2 (freedom of movement) of Protocol 4 to the ECHR. In its judgment of 18 January 2018,⁶ the ECtHR found no violation of the right to private and family life, since public interest grounds justified the “particularly intrusive” interference with the applicants’ privacy. In other cases,⁷ the applicants consider that arbitration proceeding before CAS is in breach of art. 6 (right to a fair trial) of the ECHR. More recently, the ECHR has stated that Turkey has to make several amendments to the rules governing the composition and functioning of the football Dispute Resolution Committee, the first legal-instance Committee of the Turkish Football Federation.⁸ In my view, despite the frustrating approach of the ECtHR to the question of the protection of human rights in sport,⁹ bringing the cases before this international judicial body might reveal a paradigm shift in sports law. This work will maintain that this is a path to follow also for female footballers.

In this context, the question of the protection of women and girl’s rights in sports deserve a specific analysis. Regarding football, a recent study shows that serious forms of

⁵ European Union (EU) law also offers an excellent example in this regard. As known, the European Court of Justice (ECJ) has applied the rules on free movement of workers to the sport activity, being *Bosman* ruling adopted in 1995 a milestone. On ECJ’s case law, see A. Duval and B. Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship between EU Law and Sport* (2016).

⁶ ECtHR, *National Federation of Sporting Syndicates (FNASS) and others v. France*, Appl. no. 48151/11, and *Longo and Ciprelli v. France*, Appl. no. 77769/13. All ECtHR decisions are available at <https://hudoc.echr.coe.int/eng> (accessed 11 August 2020).

⁷ ECtHR, *Mutu and Pechstein v. Switzerland*, Appl. no. 67474/10 and 40575/10, Judgment of 2 October 2018, and *Bakker v. Switzerland*, Appl. no. 71198/07, Decision on Admissibility of 3 September 2019.

⁸ ECtHR, *Ali Riza and others v. Turkey*, Appl. no. 30226/10 and 4 others, Judgment of 28 January 2020.

⁹ The frustrating thing is, at least from Academia, a more critical approach to sporting rules and procedures was expected: Czepek ‘Sports in the Case-Law of the European Court of Human Rights’, 20(2) *Espaço Jurídico Journal of Law* (EJL) (2019), 251.

discrimination, including gender pay-gap, persist.¹⁰ Gender discrimination in the sport domain has been only partly addressed by IHRL. A variety of binding and non-binding instruments adopted under the auspices of a number of International Organizations encourage States and sporting organizations to promote both women's equality in sports and the role of sports in combatting gender discrimination.¹¹ This paper aims to explore how a feminist approach to IHRL could help to eradicate particular forms of discrimination and human rights violations suffered by female footballers. The role of Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the concept of transformative equality enshrined in article 5 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention),¹² on the one hand, and the due diligence principle, on the other, will be considered. The concept of due diligence has been developed thanks to CEDAW Committee's specific expertise on gender discrimination.

The purpose of the analysis is twofold. First, I will examine the applicability of CEDAW Committee's views on article 5 of the Convention to the football governance realm and the role of States under standards of due diligence in this regard. Secondly, I will support that autonomy of sport shouldn't imply that female footballers could be prevented from having access to CEDAW Committee seeking concrete recommendations regarding changes in situations of systemic discrimination.¹³

2. FIFA and Gender Equality: What is Needed?

A. A Feminist and Gender Oriented Approach to Football Governance

The link between good governance and gender equality is a truism. Although there is not a single definition of good governance, a consensus can be found on its relationship with

¹⁰ See the Report titled 'When football rhymes with women', elaborated by UNESCO, the French Institute for International and Strategic Affairs (IRIS) and the National Union of Professional Footballers, available at <https://en.unesco.org/news/when-football-rhymes-women> (accessed 11 August 2020).

¹¹ Lemmon, 'Evening the playing field: women's sport as a vehicle for human rights', 19(3-4) *The International Sports Law Journal* (ILSJ) (2019) 238, at 239.

¹² 1979, 1249 UNTS 13.

¹³ Violations of human rights of female athletes could be seen as systemic since they result from the particular organization of sport worldwide and in an important number of countries they are reinforced by cultural and social assumptions and practices that legitimize gender inequality.

the accountable, transparent, efficient and inclusive functioning of the organizations, both public and private.¹⁴ The question of football good governance has been addressed by different International Organizations. Thus, the Parliamentary Assembly of the Council of Europe (PACE) has affirmed 'that sports governance, and especially the governance of football, must be based on the values of democracy, human rights and the rule of law, as well as the values of living together, such as tolerance, respect, fair play and solidarity'.¹⁵ The Resolution recommends also the implementation of gender oriented measures.¹⁶ Following the same line, European Parliament resolution of 2 February 2017, on an integrated approach to sport policy, highlights the link between good governance and gender equality.¹⁷ Enshrining the gender perspective in the work of sporting authorities is also the main purpose of the Ibero-American Network 'Women and Sport', created by the XV General Assembly of the Ibero-American Sports Council held in Panama on 19 and 20 March 2009.¹⁸ At the universal level, UNESCO has played a leading role in this regard.

Regarding football governance, this link is enshrined in article 15.j) of FIFA Statutes, that compels to national associations to comply with the principles of good governance. To do so, national Statutes shall contain, at a minimum, provisions relating to, among other matters, the constitution of legislative bodies in accordance with the principles of representative democracy and taking into account the importance of gender equality in football. Gender equality is also listed in article 49 of the Statutes, related to the high relevance issues that should be addressed during the annual member association conference.

B. Gender Equality in FIFA Human Rights Policy and Practice

¹⁴ See Grindle, 'Good Governance: The Inflation of an Idea', *RWP1023 HKS Faculty Research Working Paper Series*, John F. Kennedy School of Government, Harvard University (2010), available at <https://dash.harvard.edu/handle/1/4448993> (accessed 11 August 2020).

¹⁵ PACE Resolution 2200 (2018), 24 January 2018, towards a framework for modern sports governance, at 1. The Resolution is available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=244444&lang=en> (accessed 11 August 2020).

¹⁶ *Ibidem*, at 11.

¹⁷ EP Resolution of 2 February 2017, OJ 2018 C 252/2.

¹⁸ The Ibero-American Sports Council is an intergovernmental organization created in 1994 by the Treaty of Montevideo. Its main activities can be followed at <http://coniberodeporte.org/en/home> (accessed 11 August 2020).

1. Normative Measures: Gender Equality in FIFA Law

Promotion of gender equality in football is one of FIFA's objectives. Concrete provisions in this regard have been enshrined in FIFA Statutes, FIFA Disciplinary Code and FIFA Code of Ethics.¹⁹

Article 2 of FIFA Statutes establishes that the organization shall 'use its efforts to ensure that the game of football is available to and resourced for all who wish to participate, regardless of gender or age.' This is, including women and girls. In this sense, article 2 f) sets up as a FIFA objective 'the development of women's football and the full participation of women at all levels of football governance.'²⁰ Also, according to article 3 of FIFA Statutes, the organization 'is committed to respecting all internationally recognised human right and shall strive to promote the protection of these rights.' Among these rights, gender equality has to be considered as part of customary IHRL²¹ and even of *jus cogens*.²²

Gender equality is also acknowledged in FIFA Code of Ethics. According to article 22.1 'persons bound by this Code shall not offend the dignity or integrity of a country, private person or group of people through contemptuous, discriminatory or denigratory words or actions on account of race, skin colour, ethnicity, nationality, social origin, gender, disability, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason.' The Code of Ethics establishes a set of rules of conduct that confederations and national member associations are obliged to include within their respective applicable regulations.

Finally, discrimination against women and girls is considered a disciplinary offence by article 13 of FIFA Disciplinary Code, that foresees sporting sanctions for individuals, clubs

¹⁹ Current versions of FIFA Code of Ethics and Disciplinary Code are available at <https://www.fifa.com/who-we-are/legal/rules-and-regulations/documents/> (accessed 11 August 2020).

²⁰ In 2016, the Senegalese Fatma Samba Diouf Samoura became the first woman holding FIFA Secretary General position. Also, specific provisions aimed to ensure female participation in FIFA Council and FIFA judicial bodies are contained in articles 33.5 and 55.2 of FIFA Statutes.

²¹ Wang, 'The maturation of gender equality into customary international law' 27 *New York University Journal of International Law and Politics (NYUJ Int'l L. & Pol.)* (1994) 899.

²² Askari, 'Girl's Rights under International Law: An Argument for Establishing Gender Equality as a Jus Cogens', 8 *Southern California Review of Law and Women Studies (S. Cal. Rev. L. & Women's Stud.)* (1998) 3.

and associations who offends the dignity or integrity of a country, 'a person or group of people through contemptuous, discriminatory or derogatory words or actions (by any means whatsoever) on account of gender (among other grounds).' The current version of the Disciplinary Code, in force since 15 July 2019, added new elements in this regard.

First, when the offence is committed by supporters, the association or club responsible will be sanctioned with a partial stadium closure and a fine. Second, besides these punitive measures, sanctions include the implementation of a prevention. Third, prohibition of discrimination on the grounds of gender and sexual orientation becomes explicit.²³ It also clarifies that if a match is abandoned by the referee as a consequence of this kind of behavior, it will automatically be forfeited. Finally, penalties for individuals involved in football (i.e. players and officials) who are found responsible of discriminatory abuse increase from 5 to 10 matches.

Although these normative novelties are positive²⁴ and an example of how 'FIFA can indirectly influence decisions at the club level',²⁵ it requires a convincing application by disciplinary committees in order to gain credibility.

2. Political Measures

Gender equality was one of the areas chosen by the current president of FIFA in order to improve the image of the organization.²⁶ Specific goals were set up in the Women Football

²³ Article 58 of the previous version of the Disciplinary Code did not offer protection against discrimination on grounds of gender or sexual orientation. The 2017 version of the Code is available at <https://resources.fifa.com/image/upload/fifa-disciplinary-code-500275.pdf?cloudid=koyeb3cvhxnwy9yz4aa6> (accessed 11 August 2020).

²⁴ Surprisingly, only racism is mentioned in article 5.5 of the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events, adopted on 3 July 2016. Being an international treaty specifically aimed to deal with this kind of misbehavior in football matches and other sporting events, the explicit inclusion of gender would help to draw attention to this discriminatory phenomenon in the context of football. The Convention is available at <https://www.coe.int/en/web/sport/safety-security-and-service-approach-convention> (accessed 11 August 2020).

²⁵ Since FIFA Statutes also impose upon member associations the obligation of including the prohibition of all forms of discrimination in national statutes: Covo, 'Beyond Individual Discrimination: Why FIFA Fails to Address Discriminatory Practices in World Football', 20 *Texas Review of Entertainment and Sports Law* (2019) 133, at 169.

²⁶ Hughson and Hughson, 'Transnational football's male elite. The unsustainability of FIFA?', in J. Hearn, E. Vasquez del Aguila, and M. Hughson (eds), *Unsustainable Institutions of Men: Transnational Dispersed Centres, Gender Power, Contradictions* (2018) 55, at 63.

Strategy launched in 2018.²⁷ In the same line, ‘accelerate the growth of women’s football’ is one of the goals proposed by in the strategic document ‘Making Football Truly Global. The Vision 2020-2023’.²⁸

Furthermore, fight against discrimination is one of the objectives of FIFA Human Rights Policy adopted in May 2017.²⁹ After referring to article 4 of FIFA Statutes, this policy document affirms that ‘FIFA places particular emphasis on identifying and addressing differential impacts based on gender and on promoting gender equality and preventing all forms of harassment, including sexual harassment.’ FIFA Human Rights Advisory Board, set up later on that year, has dealt with the topic in its three reports made public until now.³⁰ Specific issues cover, for example, the ban of women to attend sport matches in Iran,³¹ or the discrimination suffered by certain individuals due to their actual or perceived sexual orientation, gender identity or gender expression.³² Next section aims to give a brief overview of the variety of discriminations suffered by women and girls in football.

3. Main Gender Discriminations in Football

Female sport, both amateur and professional, has historically suffered from stigma. By the end of the XIX century, Pierre de Coubertain, the founder of the IOC, affirmed that

²⁷ The Strategy is available at <https://resources.fifa.com/image/upload/women-s-football-strategy.pdf?cloudid=z7w21ghir8jb9tguvbcq> (accessed 11 August 2020) and has been recently reviewed by Krech, ‘Towards Equal Rights in the Global Game? FIFA Strategy for Women’s Football as a Tightly Bounded Institutional Innovation’, 25(1) *Tilburg Law Review* (2020) 12.

²⁸ Available at <https://resources.fifa.com/image/upload/making-football-truly-global-the-vision-2020-2023.pdf?cloudid=z25oyskjgrxrudiu7iyim> (accessed 11 August 2020). (accessed 11 August 2020).

²⁹ Available at <https://img.fifa.com/image/upload/kr05dqyhwr1uhqy2lh6r.pdf> (accessed 11 August 2020).

³⁰ The three are available at <https://www.business-humanrights.org/en/fifa-human-rights-advisory-board> (accessed 11 August 2020).

³¹ Also the Human Rights Committee (HRC) has repeatedly referred to ‘the persistence and importance of discrimination against women in the sport domain’ in this country and has affirmed that such discriminations breach article 3 of the International Covenant on Civil and Political Rights (ICCPR). Among these discriminations, the HRC mentions the prohibition against the practice of sports in its Concluding Observations regarding the second periodic report of the Islamic Republic of Iran (CCPR/C/28/Add.15) available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=5 (accessed 11 August 2020).

³² The role played in this regard by Non-Governmental Organizations can’t be forgotten. About the work of Human Rights Watch and Amnesty International see: Keys, ‘Reframing Human Rights: Amnesty International, Human Rights Watch, and International Sport’, in B. Keys (ed.), *The Ideals of International Sport* (2019) 109.

an Olympiad with females would be impractical, uninteresting, unaesthetic and improper, and justified the exclusion of women from the first Olympic Games alleging that they were not prepared for the practice of sport.³³ Since then, gender equality in sports has gradually emerged as a main objective both for private and public organizations and authorities. Despite of the normative and political developments aimed to tackle it, 'on average, girls and women play sports less than boys and men worldwide. In some countries, women may be restricted from accessing sport, while a general lack of safe sporting facilities worldwide may greatly hinder women's opportunities to pursue sports as both a career and recreation'³⁴ and women and girls are still victims of direct, indirect and structural discrimination in the football domain. Thus, regarding sport in general, and football in particular, a wide range of worrying aspects have to be mentioned. The purpose of the examples that will be listed below is not fully cover all the possible discriminations faced by women and girls, but to substantiate the affirmation that discriminatory practices are individual, institutional and structural, and that a transformative approach is needed in order to revert this situation.

A. Direct Discrimination

According to CEDAW Committee, direct discrimination can be defined as the attribution of 'different (unequal) rights and responsibilities to men and women on the basis of gender stereotypes and fixed parental gender roles.'³⁵ The approval by FIFA of a 'financial package for the 2019 Women's World Cup (...) flagrantly disproportionate to that which' was 'afforded to the men's tournament' can be considered an example of a direct discrimination as well as a breach of FIFA express statutory obligations.'³⁶

³³ Fitzgerald, *Women and the Olympic Games: "uninteresting, unaesthetic, incorrect"* (2016), available at <https://www.sbs.com.au/topics/zela/article/2016/05/03/women-olympic-games-uninteresting-unaesthetic-incorrect> (accessed 11 August 2020).

³⁴ ILO (2019), *Decent work in the world of sport. Issues paper for discussion at the Global Dialogue Forum on Decent Work in the World of Sport*, Geneva, 20-22 January 2020, at 7, available at https://www.ilo.org/sector/Resources/publications/WCMS_728119/lang--en/index.htm (accessed 11 August 2020).

³⁵ Holtmaat, 'Article 5', in M. A. Freeman, *et. al.* (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: a commentary* (2011) 142, at 155.

³⁶ Collins, *Gender equality in football-how much does FIFA "value" the women's game?* (2019), available at <https://www.lawinsport.com/topics/item/gender-equality-in-football-how-much-does-fifa-value-the-women-s-game> (accessed 11 August 2020).

There is a considerable literature against gender segregation in sports and, also, in football.³⁷ It is also a question that FIFA has addressed. In 2004, the Mexican Football Association, on behalf of the Mexican professional club *Celaya FC*, requested FIFA Council to sign a female player, Mónica Domínguez. The bid was rejected by FIFA executive committee. In a written statement, it was highlighted that there must be a clear separation between men's and women's football, to which the laws of the game and Fifa's regulations do not provide for any exception.³⁸

Separation of male and women in sporting competitions in general, and football professional and amateur competitions in particular, is acceptingly based in differentiated physical conditions, strength and testosterone level.³⁹ Being those characteristics decisive in sporting performance, women would be unfairly treated if they were forced to compete with men. Various approaches have been proposed to address the issue of sex segregation in sports. In her seminal work on the question of sex equality in sports, Jane English suggests that 'our concept of "sports" contains a male bias' that explains why women are considered naturally inferior if only speed, size and strength are socially and sportingly valued.⁴⁰ In the same sense, Torbjörn Tännsjö pointed out in 2007 that 'within sport sexual discrimination is taken for granted' and 'that even by radical feminists (...) has rarely been questioned.'⁴¹ However, a recent review of the literature on

³⁷ The organization of the game presents other questions that deserve some consideration. Even if not frequent in football, specific issues regarding women's athletic uniforms deserve some consideration. At some point, female beach volley players' uniforms constitute a good example in this regard. In 2004 Olympic Beach Volleyball Tournaments Specific Competition Regulations of the Fédération Internationale de Volleyball made the following requirements regarding women uniforms: 'The top must fit closely to the body and the design must be with deep cutaway armholes on the back, upper chest and stomach (2-piece) . (. . .) The briefs should be in accordance with the enclosed diagram, be a close fit and be cut on an upward angle towards the top of the leg. The side width must be maximum 7 cm. (...) The one piece uniform must closely fit and the design must be with open back and upper chest'. The same Regulations required men to compete in shorts and a tank top. These regulations are available at <http://www.fivb.org/EN/BeachVolleyball/Competitions/olympics/wath2004/2004%20Specific%20Events%20Regulations.pdf> (accessed 11 August 2020). It has been said that 'these rules effectively promote the objectification and "sexploitation" of female athletes: Sailors, Teetzel and Weaving, 'No Net Gain: A critique of media representation of women's Olympic beach volleyball', 12(3) *Feminist Media Studies* (2012) 468, at 468.

³⁸ Wood, 'The Beautiful Game? Hegemonic Masculinity, Women and Football in Brazil and Argentina' 37(5) *Bulletin of Latin American Research* (2018) 567, at 574.

³⁹ The participation of transgender athletes and female athletes with certain forms of what is known as 'disorders of sex development' will not be addressed in this work.

⁴⁰ English, 'Sex Equality in Sports', 7 *Philosophy and Public Affairs* (1979) 269, at 276.

⁴¹ Tännsjö, 'Against sexual discrimination in sports', in W. J. Morgan (ed), *Ethics in Sport* (2007) 347, at 347.

this area found an increasing number of studies calling into questions that assumption.⁴² Certainly, knowing the views of CEDAW Committee about this would be of utmost importance.

Direct discrimination of female footballers is also frequent in the labour realm. A particularly visible and outrageous example are the anti-pregnancy clause used in football, and other sports, which allows clubs to terminate the contract of a female player if she gets pregnant, with no right to obtain any compensation. Often, female footballers are afraid of reporting these cases because of the negative consequences they would have to confront regarding their professional development, which affect the possibilities of labour courts to intervene. Surely, State regulation of female professional football and the inclusion of female leagues⁴³ would protect women against these kind of practices. Being States reluctant to do so, a clear statement from CEDAW could provide a powerful boost to act.⁴⁴

B. Indirect Discrimination

Second, indirect discrimination is result of the application of rules and norms that being apparently sex neutral, are the reflection of 'existing unequal gender relations and gender stereotypes'.⁴⁵

As said, pay-gap in football, considered 'the most basic social divide',⁴⁶ persist at present.⁴⁷ Making payment depend on the audiences drawn by the teams/competitions

⁴² See for instance Foddy and Savulescu, *Time to re-evaluate gender segregation in athletics?*, 45 *British Journal of Sports Medicine* (2011) 1184; and Leong, 'Against Women's Sports', 95 *Washington University Law Review* (2018) 1249.

⁴³ In most countries, only male football leagues enjoy professional status. On the role of CEDAW in this regard see Jones, 'Women's national leagues: does CEDAW go far enough?', 13(1-2) *International Sports Law Journal* (2013) 35.

⁴⁴ CEDAW Convention 'requires accommodation of women's biological differences, requiring special measures to protect maternity, including provision of maternity leave with pay and encouragement of provision childcare facilities.': Raday, 'Gender and democratic citizenship: the impact of CEDAW', 10(2) *International Journal of Constitutional Law* (2012) 512, at 526.

⁴⁵ Holtmaat, *supra* note 35, at 155.

⁴⁶ Fuchs, 'Great divides: The cultural, cognitive, and social bases of the global subordination of women', 72 *American Sociological Review* (2007) 1, at 1.

⁴⁷ See FIFpro, *2017 FIFpro Global Employment Report. Working Conditions in Professional Women's Football* (2017) available at http://safp.ch/sites/default/files/article_attachment/2017_fifpro_women_football_global_employment_report-final.pdf (accessed 11 August 2020). The United States women's national soccer claimed in March

and on the revenues this generates puts female footballer at a particular disadvantage. Since unequal pay is an issue frequently addressed by CEDAW Committee, both in its general recommendations and in its final observations, could provide a useful guide for States and sporting associations in this regard.⁴⁸

C. Structural Discrimination

Finally, structural discrimination reflects traditional and stereotypical attitudes and assumptions about gender roles that would permeate legal, political and social responses limiting 'women's full enjoyment of their rights'.⁴⁹ As will be examined below in this work, according to CEDAW Committee it is in this respect that transformative equality can play a central role.

In my view, restrictions experienced by women and girls in access to sport in general, and football in particular, can be considered an example of structural discrimination largely explained by fixed ideas or images people have about football as a 'men game'⁵⁰ 'premised upon a sex-gender binary'⁵¹. Typical discrimination includes restrictions in participation of women in decision making bodies and processes.⁵² Also, certain forms of violence,

2019 they were underpaid compared to their male counterparts on the men's national team, and filed a highly publicized lawsuit demanding equal pay. On May 2020, the Federal District Court in Los Angeles disagreed and rejected the players' claims that they were paid unfairly and ruled in favor of the US Soccer Association. The Court's decision is available at <https://assets.documentcloud.org/documents/6881283/Document.pdf> (accessed 11 August 2020).

⁴⁸ See, in particular, CEDAW, *General recommendation No. 13 equal remuneration for work of equal value* (2013), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/5832&Lang=en (accessed 11 August 2020).

⁴⁹ Holtmaat, *supra* note 35, at 155.

⁵⁰ See, for instance, Scraton, *et al.*, 'It's still a man's game? The experiences of top-level European women footballers' 34(2) *International review for the sociology of sport* (1999) 99, and Stirling and Schulz, 'Women's Football: Still in the Hands of Men', 7(2) *International Sport Management Journal* (2011) 53. Frequently, this occurs in contexts which discourage girls 'from engaging in physical activity, often in very subtle ways': Young, 'The exclusion of women from sport: Conceptual and existential dimensions', 9 *Philosophy in Context* (1979) 44, at 46.

⁵¹ Woodward, 'Gender and Football', in J. Hughson *et al.* (eds), *Routledge Handbook of Football Studies* (2017) 257, at 260.

⁵² The feminization of ruling bodies proves to be a main element for a policy leading to stronger diversity within the sport movement. The introduction of quotas in view to assuring the participation of women in ruling bodies appears as an efficient way to eradicate this discrimination.

exploitation and trafficking, in particular with the purpose of sexual exploitation⁵³ result from structural discrimination suffered by women and girls.

If we assume that inside FIFA control could not be enough nor effective in order to tackle human rights violations in sports in general, and gender discrimination in football in particular,⁵⁴ it make sense to reflect on the role to be played by existing human rights monitoring mechanism. Next section explores how typical IHRL mechanisms should be available to female footballers seeking the protection of their rights. In particular, I will address how the examples analysed above could come to the attention of the CEDAW Committee and which could be the potential effects its pronouncements could have.

4. Women, Sports and Human Rights: A Multidimensional Approach

The analysis of the relationship between sports and IHRL regarding the rights of female footballers admits a triple approach. First (A), there is a growing consensus on the idea of conceiving sport as a useful tool for the promotion of human rights worldwide, including gender equality. Second (B), questions should be raised about the legal recognition of (the practice of) sport as a human right for women and girls. Finally, we will focus on the role of CEDAW in this context regarding the protection of women footballers from discriminatory practices (C).

A. Sport as a Means to Promote Human Rights Protection and Gender Equality

The inarguable allure of sport has pushed States and International Organizations to resort to sport as a means to implement promotion and protection of women's rights measures, strategies and policies.⁵⁵ This link has been otherwise explicitly reclaimed by the Unites

⁵³ Linked to the increase of prostitution associated to the celebration of mega sport events: Hayes, 'Human trafficking for sexual exploitation at world sporting events', 85 *Chicago-Kent Law Review* (2010) 1105.

⁵⁴ Weiler, 'FIFA-The Beautiful Game-The Ugly Organization', 30(3) *European Journal of International Law (EJIL)* (2019) 1039, at 1040.

⁵⁵ Kirchsclaeger, 'Sports and Human Rights from an Ethical Perspective: The Relevance of Human Rights for Sports', in Ch. Akrivopoulou, Ch. (ed), *Defending Human Rights and Democracy in the Era of Globalization* (2017) 337.

Nations General Assembly (UNGA)⁵⁶ and the Human Rights Council.⁵⁷ In this regard, sport has also been labelled as ‘an important enabler of sustainable development’ and mentioned in the UN 2030 Agenda for Sustainable Development.⁵⁸

Cooperation between International Organizations and sporting authorities has been promoted as a way to combine private and public efforts in a more effective way. We find interesting examples in this regard. In 2016, UN Women and the IOC jointly launched the project *One Win Leads to Another*, a joint programme in partnership with Women Win and the Brazilian Olympic Committee.⁵⁹ More recently, on 7 June 2019, FIFA and UN Women signed a memorandum of understanding aiming to promote gender equality and empowerment of women and girls through sport.⁶⁰ Without a doubt, the eventual benefits of Public Private Partnerships (PPP) in this domain deserve more attention.

B. A Women and Girls Right to Sport?

No international conventional instrument autonomously recognizes an individual right to sport. Such a right has only been incorporated in *soft law* instruments. On 21 November of 1978, the UNESCO General Conference adopted the International Charter on Physical Education and Sport, revised in November 2015.⁶¹ Article 1 of the Charter proclaims that ‘every human being has a fundamental right to physical education,

⁵⁶ Resolution 65/4 of 18 October 2010, on sport as a means to promote education, health, development and peace (A/RES/65/4) emphasizes and encourages the use of sport as a vehicle to empower girls and women. The Resolution is available at <https://undocs.org/en/A/RES/65/4> (accessed 11 August 2020).

⁵⁷ In 2011, the Human Rights Council adopted a resolution on promoting awareness, understanding and the application of the Universal Declaration of Human Rights through sport and the Olympic ideal that recognizes the imperative need to engage women and girls in the practice of sport for development and peace and, in this regard, welcome activities aimed to foster and encourage such initiatives at the global level. See Resolution 18/23, 28 September 2011 (A/HRC/18/L.18/Rev.1), available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/18/L.18/Rev.1 (accessed 11 August 2020).

⁵⁸ UNGA Resolution of 25 September 2015, A/RES/70/1, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (accessed 11 August 2020). The Resolution recognizes ‘the growing contribution of sport to the realization of development and peace in its promotion of tolerance and respect and the contributions it makes to the empowerment of women and of young people, individuals and communities as well as to health, education and social inclusion objectives’ (at 37, emphasis added).

⁵⁹ Information is available at <https://www.unwomen.org/en/news/stories/2019/4/op-ed-ed-phumzile-empowering-women-through-sport> (accessed 11 August 2020).

⁶⁰ Information is available at <https://www.unwomen.org/en/news/stories/2019/6/press-release-fifa-and-un-women-sign-mou> (accessed 11 August 2020).

⁶¹ Available at http://portal.unesco.org/en/ev.php-URL_ID=13150&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 11 August 2020).

physical activity and sport'. The Charter refers to gender equality in sports in articles 1.3, 1.4, and 9.2. Even if they are not binding, UNESCO General Conference declarations enshrine principles 'to which the community of States wished to attribute the greatest possible authority and to afford the broadest possible support.'⁶²

Regarding general IHRL, the question of the establishment of a human right to sport/physical activity/education can be addressed from different angles. First, that right has been conceived as part of the right to education, particularly in the case of minors,⁶³ and as part of the right to health.⁶⁴

Other international human rights treaties tackle discrimination in sport. Among these, the CEDAW Convention play a pivotal role.⁶⁵ Articles 10.g) and 13.c), both expressly mentioning sport and physical activity, are particularly clear in this regard. At the European level, article 14.2 of the Council of Europe 2011 Convention on preventing and combating violence against women and domestic violence is also relevant.⁶⁶

Finally, cases of non/or inadequate access to physical or sports activities can be considered, under certain circumstances, an inhuman or degrading treatment. We find

⁶² http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html#name=3 (accessed 11 August 2020).

⁶³ See art. 29.1.a) of the Convention on the rights of the child (available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>) (accessed 11 August 2020).

⁶⁴ See art. 12.1 of the International Covenant on Economic, Social and Cultural Rights (available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> -accessed 11 August 2020-) and Human Rights Council Resolution 26/18 on "The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: sport and healthy lifestyles as contributing factors", available at <http://www.ohchr.org/EN/Issues/Health/Pages/OverviewMandate.aspx> (accessed 11 August 2020).

⁶⁵ CEDAW Convention was adopted on 18 December 1979 and entered into force on 3 September 1981, in accordance with art. 27.1. At the time of writing 189 States are parties to it. It is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (accessed 11 August 2020).

⁶⁶ The Convention is available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210> (accessed 11 August 2020). This article refers to education in some issues, such equality between women and men, non-stereotyped gender roles, and mutual respect. States parties will include teaching materials on these questions both in formal curricula and 'in informal educational facilities, *as well as in sports*, cultural and leisure facilities and the media'. Emphasis added.

example of this within pronouncements of both UN⁶⁷ and Council of Europe human rights monitoring bodies.⁶⁸

C. International Law and Gender Discrimination in the Sport Domain

When examining the role of IHRL in general, and CEDAW Committee in particular, in tackling gender discrimination in the sport domain, two principles should be taken into consideration: due diligence and transformative equality. On the one hand, due diligence could be applied in order to substantiate the responsibility of both States and private corporations for the violation of human rights of female footballers occurred in a private/sporting associations domain. On the other, transformative equality, enshrined in articles 2.f) and 5.a) of CEDAW Convention, has been built to address sex roles and gender by requiring ‘states parties to address prevailing gender relations and the persistence of gender-based stereotypes.’⁶⁹

Before analysing the potential role these two principles can play, it is interesting to examine how sporting issues have been addressed by CEDAW Committee. A preliminary conclusion can be announced: questions related to discrimination of women and girls in the sport domain has been marginalised in the Committee’s work. First, it has not been directly addressed by any of the Committee’s pronouncements. In particular, by General Recommendations. Second, the Committee has not had the opportunity of doing so in an indirect way. This is, neither as a consequence of the information periodically submitted by States in compliance with their obligations under CEDAW Convention, nor because of alleged violations in particular cases through individual communications.

⁶⁷ See for instance paragraph 5.h) of the Concluding Observations the Committee Against Torture to the third periodic report of Bulgaria (CAT/C/CR/32/6) adopted in June 2004, available at <http://www.ohchr.org/EN/HRBodies/CAT/pages/catindex.aspx> (accessed 11 August 2020).

⁶⁸ The European Committee for the Prevention of Torture (CPT) has repeatedly affirmed that persons deprived of liberty should have daily access to the practice of physical activity or sport: See CPT Standards on ‘Living space per prisoner in prison establishments’ (CPT/Inf (2015) 44) adopted in December 2015, available at <http://www.cpt.coe.int/en/working-documents/cpt-inf-2015-44-eng.pdf> (accessed 11 August 2020). The CPT Factsheet on Women in Prison (CPT/Inf(2018)5), adopted in 2018 affirms that ‘women in prison should enjoy access to a comprehensive programme of meaningful activities (work, training, education and sports) on an equal footing with men.’ The Factsheet is available at <https://www.coe.int/en/web/cpt/women-in-prison> (accessed 11 August 2020).

⁶⁹ Cusack and Pusey (2013), ‘CEDAW and the Rights to Non-Discrimination and Equality’, 14 *Melbourne Journal of International Law* (2013) 54, at 65.

A paradigmatic change is needed in this regard. It is not a mere quantitative, but a qualitative one. In my view, this qualitative transformation can be the result of the internalization of the above mentioned two principles: due diligence and transformative equality. This idea will be further developed in the following section.

5. Sporting Issues in CEDAW System: It is Still to be Seen the Impact CEDAW Committee Can Have

As said, only two provisions of the CEDAW Convention refers expressly to sport: articles 10 h)⁷⁰ and 13 c).⁷¹ These references can somehow be considered an improvement, since we don't find any mention to sport in the UN Declaration on the Elimination of Discrimination against Women, adopted on 7 November 1967.⁷² Besides that, 'little attention has been paid to this right in the international legal sphere. For instance, there have been no communications by the CEDAW Committee directly addressing this right, and there is little development of discussion of the right in international human rights legal scholarship and practice.'⁷³ I think it is still true, as pointed out in 2012, that the CEDAW Committee 'has not paid much attention to this provision' to article 10 h).⁷⁴

As an introductory remark, some reflections are needed about the pronouncements of UN human rights treaty bodies, such as the CEDAW Committee. From a formal point of view, these bodies have not jurisdictional nature, as they have been shaped as experts

⁷⁰ 'States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women (...) (g) The same Opportunities to participate actively in sports and physical education.'

⁷¹ 'States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular (...) (c) The right to participate in recreational activities, sports and all aspects of cultural life'. Sport is thus considered by the Convention part of social life, and not an economic activity. In my view, the Committee should refocus this approach. As known, sport is a very lucrative economic activity and should be so contemplated.

⁷² A/RES/2263(XXII), available at <https://www.refworld.org/docid/3b00f05938.html> (accessed 11 August 2020).

⁷³ Blakey, 'Women's participation in sport: how is it regulated in international human rights law, and is Australia Meeting its international obligations?', 24(3) *Australian Journal of Human Rights* (2018) 292, at 292.

⁷⁴ Banda, 'Article 10', in Freeman, *supra* note 35, at 269.

Committees and do not have the competence of adopting binding decisions.⁷⁵ This does not mean that their pronouncements lack any legal effects to be considered by States and by domestic courts.⁷⁶ In my view, it cannot be denied that they are authentic interpreters of the treaties they must monitor, so their pronouncements should be taken into account as decisive opinions. CEDAW Committee needs to further take responsibility for gender discrimination in the sport domain and reinforce its role of supervision of State compliance with the obligations imposed by articles 10.g) and 13.c) of CEDAW Convention. Thus, Concluding Observations on State periodic reports should incorporate this topic on a consistent manner. Also, a General Recommendations focusing on the question of gender discrimination in this field would shed light about the extent of State obligations in this regard.

Furthermore, the concrete legal impact of those Committees having competence to examine individual communications should be appreciated. This is the case of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1999. The role of domestic judiciaries becomes decisive at this point. In the case of Spain, it must be underlined that the Supreme Court has recently stated, just in a case regarding the CEDAW Committee,⁷⁷ that States should comply with the Committee decisions, since they are legally binding on it.⁷⁸

A. General Recommendations

⁷⁵ According to article 17 of CEDAW Convention, CEDAW Committee consists of twenty-three experts of high moral standing and competence in the field covered by the Convention. They elected by States Parties from among their nationals and serve in their personal capacity.

⁷⁶ See Machico, 'UN Human Rights Treaty Monitoring Bodies before Domestic Courts', 67 *International and Comparative Law Quarterly (ICLQ)* (2015) 201, and Krommendijk, (2015), 'The domestic effectiveness of international human rights monitoring in established democracies. The case of the UN human rights treaty bodies', 10(4) *The Review of International Organizations* (2015) 489.

⁷⁷ See Communication No. 47/2012, 15 August 2014, González Carreño v Spain, CEDAW/C/58/D/47/2012, available at <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/JurisprudenceSession58.aspx> (accessed 11 August 2020).

⁷⁸ The judgment is available at <https://www.womenslinkworldwide.org/files/3045/sentencia-angela-tribunal-supremo.pdf> (accessed 11 August 2020). See Jiménez Pineda, 'A commentary on the Supreme Court's Judgment of 17 July 2018 (STS 1263/2018) and its supposed impact for a legally binding value of the decisions adopted by the Committee on the Elimination of Discrimination against Women (CEDAW)', 23 *Spanish Yearbook of International Law* (2019) 129.

Despite the serious discriminations suffered by women and girls in the sport domain, and being undoubtedly an issue that affects women and girls worldwide to which States Parties should pay careful attention, this question has not been the object of a CEDAW General Recommendation so far.

Of course, some of the statements made by the Committee in previous General Recommendation are of interest. It is the case of those made in General Recommendation No. 25 (2004) on article 4, paragraph 1, of the Convention (temporary special measures).⁷⁹ According to this article, the adoption by States Parties of temporary special measures 'aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standard'. The Recommendation clarifies that these temporary special measures should aim to accelerate the equal participation of women in the political, economic, social, cultural, civil or any other field. Sport is specifically mentioned by the Committee. Consequently, it makes concrete recommendations to tackle this problem, including the institution of positive actions, preferential treatment or quota systems, in the area of sport.⁸⁰

As an exception, General Recommendation No. 36 (2017) on the right of girls and women to education makes a reference to the scope of the obligation enshrined in art. 10 (g) of the Convention.⁸¹ According to CEDAW, this article

provides that States parties are to ensure that girls and women have the same opportunities as boys and men to actively participate in sports and physical education. However, on the basis of prevailing stereotypes, positive outcomes for the empowerment of women and gender equality in that sphere are constrained by discrimination in all areas of sports and physical

⁷⁹ Available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/36&Lang=en (accessed 11 August 2020).

⁸⁰ See paragraph 38 of the General Recommendation.

⁸¹ CEDAW C/GC/36, 27 November 2017, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/36&Lang=en (accessed 11 August 2020).

activity. Sex segregation persists, and the participation of women in decision-making is limited at both the national and international levels. In addition, the value placed on women's sports is often lower, resulting in the inadequate allocation of resources to support their participation, as well as the lower remuneration of women athletes. Media representations of women in sports also influence prevailing stereotypes. Violence against women, exploitation and harassment in sports also reflect traditional male domination in the sporting arena.

B. Concluding Observations

Article 18 of CEDAW Convention imposes upon States the obligation to submit to the Secretary-General of the United Nations, for consideration by CEDAW Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the Convention and on the progress made in this regard. Periodic reports will be submitted within one year after the entry into force for the State concerned, and thereafter at least every four years and further whenever the Committee so requests. Thanks to these exercise, CEDAW Committee is able to detect existing gaps, and to identify required actions in order to improve the situation of women and girls. The Committee has sporadically addressed issues related to sports.

Thus, in the Concluding Observations to the seventh periodic report submitted by Italy,⁸² the Committee showed concern about the underrepresentation of women in sports federations and about the fact that women's sports competitions are allocated a significantly lower share of broadcasting time.⁸³ But far from making concrete recommendations, the Committee confined itself to highlight the need of pursuing efforts to achieve substantive gender equality in sports, including through the use of temporary special measures.⁸⁴

⁸² CEDAW/C/ITA/CO/7, 24 July 2017, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fITA%2fCO%2f7&Lang=en (accessed 11 August 2020).

⁸³ See paragraph 43 of the Concluding Observations on the seventh periodic report of Italy.

⁸⁴ *Ibidem*, at 44.

From a different perspective, now related to the right to education, CEDAW Committee has also referred to the lack or unequal access to recreational and professional sport⁸⁵ and has stressed the need of fighting against stereotypes that limit participation of girls and women in sports activities.⁸⁶ In a complementary way, in 2009 the Committee called upon Germany 'to ensure that girls in prison are provided with a full programme of educational activities, including physical education'.⁸⁷ It is worth noting that other UN mechanisms for the protection of human rights have expressed the same opinions and concerns.⁸⁸

C. Individual Communications

A complaint procedure is contained in an Optional Protocol to CEDAW Convention adopted on 6 October 1999.⁸⁹ States parties to it recognize the competence of CEDAW Committee to receive and consider communications submitted in accordance with articles 2 and 4. Despite the wide range of discriminations described above, a thorough

⁸⁵ See for instance paragraph 35 of the Concluding Observations) on the sixth periodic report of Tajikistan, CEDAW C/TJK/CO/6, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fTJK%2fCO%2f6&Lang=en (accessed 11 August 2020).

⁸⁶ In 2008, the Committee was eloquent enough in this regard in the case of Haiti: 'The report states that stereotypes limit substantially the participation of most poor girls in cultural, sport and other leisure activities and that most of their time is dedicated to domestic labour and helping their mothers in commercial or other activities in order to increase the household income. Please provide detailed information on any strategies the Government may be contemplating to promote participation of girls especially from rural areas in cultural, sport and other leisure activities, and on changing sex role stereotypes that limit such participation': See pre-session working group, list of issues and questions with regard to the consideration of initial and periodic reports CEDAW/C/HTI/Q/7, 9 July 2008, available at <https://www.refworld.org/docid/48d769192.html> (accessed 11 August 2020).

⁸⁷ See paragraph 59 of the Concluding Observations on the sixth periodic report of Germany, CEDAW/C/DEU/CO/6, 12 February 2009, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fDEU%2fCO%2f6&Lang=en (accessed 11 August 2020).

⁸⁸ The Special Rapporteur on the Right to Education underlined in 2006 that 'boys usually have sufficient space to practice certain sports' while 'girls are not provided with similar space': See paragraph 104 of the Report on Girls' Right to Education, E/CN.4/2006/45, 8 February 2006, available at <https://digitallibrary.un.org/record/568795?ln=en> (accessed 11 August 2020). In 1993, the Human Rights Committee reaffirmed that the persistence and extent of discrimination against women was incompatible with the provisions of article 3 of the ICPRC. Among them, 'the prohibition against the practice of sport in public': See paragraph 13 of the Concluding Observations on the second periodic report submitted by Iran, CCPR/C/79/Add.25, 3 August 1993, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f79%2fAdd.25&Lang=en (accessed 11 August 2020).

⁸⁹ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx> (accessed 11 August 2020).

search in the CEDAW jurisprudence database brings to light that female athletes haven't resorted to this mechanism. A variety of combined reasons explains this underutilization.

First, disputes arising in the field of sports usually demands a prompt response. As known, average span of professional athletes' careers is relatively short, which may prevent the answer of the Committee from timely solving the problem. On the one hand, it has to be considered that exhaustion of domestic remedies is required before submitting a communication 'unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.'⁹⁰ On the other, length of the procedures has to be taken into account. Although the duration of the procedure varies from Committee to Committee, 'for cases concluded in 2016, for example, it took the relevant committees, on average, three and a half years to reach their final Views.'⁹¹

Second, the sport movement shows a certain reluctance to let athletes to get their problems solved by ordinary courts.⁹² Such an attitude is heavily influenced by the idea of specificity of sport and may even turn into prohibiting access ordinary justice.⁹³ But it also works the other way round. As Nafziger has put it, the 'historic reluctance' of domestic courts to adjudicate issues arising in the sports arena can be explain by the unfamiliarity with the subject matter and structure of sports.⁹⁴

Finally, a risk of suffer reprisals from the sport movement is not an imaginary one. The case of the Belgium footballer, Jean-Marc Bosman,⁹⁵ provides a useful example in this

⁹⁰ See article 4.1 of the Optional Protocol.

⁹¹ Limon, *Reform of the UN Human Rights Petitions System*, 2018, at 25. This Report is available at <https://www.universal-rights.org/urg-policy-reports/reform-un-human-rights-petitions-system-assessment-un-human-rights-communications-procedures-proposals-single-integrated-system/> (accessed 11 August 2020).

⁹² Although it refers to antidoping, the quote of the former vice-president of the International Amateur Athletics Association gathered by Foster is illustrative enough: 'Courts create a lot of problems for our anti-doping work, but we say we don't care in the least what they say. We have our rules, and they are supreme': Foster, 'Is there a global sports law?', 2(1) *The Entertainment and Sports Law Journal* (2003) 1, at 1.

⁹³ *Supra* note 3.

⁹⁴ Nafziger, 'International Sports Law: A Replay of Characteristics and Trends', 86(3) *American Journal of International Law (AJIL)* (1992) 489, at 510.

⁹⁵ Case C-415/93, *Union royale belge des sociétés de football association ASBL and others v Jean-Marc Bosman* (EU:C:1995:463).

regard. His historical judicial success, that have been considered 'a hollow victory'⁹⁶, 'alerted potential litigants to the costs of challenging the game structure'.⁹⁷

As a consequence, the intervention of CEDAW through the individual complaints procedure seems unlikely. However, since a stronger role of this treaty body could make accountability for women's rights in the world of football gather momentum, the Committee should have a more active role in this regard by way of General Recommendations and Concluding Observations. Due diligence and transformative equality constitute useful tools in order to conform the extent of State obligations on this subject.

6. International Responsibility of States under Due Diligence Standards

The private nature of sports national and international federations poses a key question: Could the State be held responsible for the violations of women and girls footballers' rights perpetrated by private actors? To answer this question, we have to refer to the principle of due diligence and its development within IHRL. The principle has gained centrality under IHRL helping to challenge the idea of human rights obligations considered to be aligned vertically, and not horizontally, and has already played an important role to assess State responsibility regarding other violations of human rights that have a gender basis (i.e. domestic violence⁹⁸ or trafficking in human beings).⁹⁹

⁹⁶ S. Weatherill, *Principles and Practice in EU Sports Law* (2017), at 99.

⁹⁷ *Ibidem*.

⁹⁸ Hasselbacher, 'State obligations regarding domestic violence: The European Court of Human Rights, due diligence, and international legal minimums of protection', 18(2) *Northwestern Journal of International Human Rights* (2009) 190.

⁹⁹ As it is well-known, due diligence is also 'at the heart of the United Nations Guiding Principles on Business and Human Rights, which establish the main parameters internationally for considering corporate responsibility for human rights violations': Bonnitcha and McCorquodale (2018), 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', 28(3) *European Journal of International Law (EJIL)* (2018) 899, at 899. As remembered by the authors 'the concept of due diligence plays an important role in international human rights law in defining the extent of a state's obligations to prevent and respond to infringements of human rights by private actors within its territory or jurisdiction' (at 904). The Guiding Principles has been somewhat endorsed by FIFA through the Report written by John G. Ruggie in 2016: *For the Game. For the World. FIFA and Human Rights*, available at https://www.hks.harvard.edu/sites/default/files/Ruggie_humanrightsFIFA_reportApril2016.pdf (accessed 11 August 2020).

The exam of the international practice reveals that the State obligation of protecting individuals from human rights violations committed by other individuals has been traditionally linked to the personal security on aliens.¹⁰⁰ Although in such cases the acts of the individuals could not be attributed to the State, State responsibility aroused from a different wrongful act: not prevent or punish the act performed by private individuals. Today, due diligence principle acting as a shield against human rights violations committed by individuals has gained its own central position under IHRL, and imposes upon States the obligation of protecting all individuals under their jurisdiction from human rights violations committed by non-State actors. Among these, private individuals, corporations or armed gangs.¹⁰¹ I would also include sport organizations on this list. In this sense, due diligence has been considered as a specific source of obligations stemming from article 2 (f) of the Convention¹⁰² when it comes to ‘attacking the root causes of violence against women.’¹⁰³

7. Fighting Gender Stereotypes in Football through Transformative Equality

Enshrined in article 5 (a) of the CEDAW Convention,¹⁰⁴ the principle of transformative equality requires states parties ‘to address prevailing gender relations and the persistence of gender-based stereotypes.’¹⁰⁵ As suggested above, this article has to be read together with article 2 (f) of the Convention. The principle of transformative equality has been

¹⁰⁰ Pisillo-Mazzeschi, ‘The Due Diligence Rules and the Nature of the International Responsibility of States’, 35 *German Yearbook of International Law* (1992) 9, at 22.

¹⁰¹ Hakimi, ‘State Bystander Responsibility’, 21(2) *European Journal of International Law* (2010) 341.

¹⁰² Which imposes upon State Parties to adopt all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Accordingly, States parties have to ‘prevent and deter private acts of discrimination, to investigate and negate the harmful consequences of private acts, and to provide for compensation or sanctions’: Cook, ‘State Responsibility for Violations of Women’s Human Rights’, 7 *Harvard Human Rights Journal* (1994) 125, at 166.

¹⁰³ Holtmaat, ‘Preventing violence against women: The due diligence standard with respect to the obligation to Banish Gender Stereotypes on the Grounds of Article 5 (a) of the CEDAW Convention’, in C. Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (2009) 63.

¹⁰⁴ According to this article, States shall take all appropriate measures ‘to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.’

¹⁰⁵ Cusack and Pusey, *supra* note 69, at 55.

developed by the CEDAW Committee and can be applied to the sporting domain in order to protect women and girls rights.

Once the possibilities for CEDAW Committee to address gender inequality in football have been identified (procedural approach),¹⁰⁶ this section will explore the scope of this principle according to the jurisprudence of CEDAW Committee (substantive approach). This analysis should take into account the role played by gender stereotypes and its consequences in the participation of women in football not only as players (both professionals and amateurs), but also as officials¹⁰⁷ or members of sport governing bodies.¹⁰⁸ The four dimensional model of transformative equality outlined by Fredman provide a helpful framework for addressing this substantives approach. According to this multidimensional model four different complementary objectives should be pursued: (1) breaking the cycle of disadvantage, (2) promoting respect for dignity and worth, (3) accommodating difference by achieving structural change, and (4) promoting political and social inclusion.¹⁰⁹

As has been said here, the harmful effect of gender pervasive stereotypes have in relation to the participation of women and girls in sports has been taken into account by CEDAW Committee in its General Recommendation No. 36 (2017) on the right to girls and women to education.¹¹⁰ In this sense, there are at least four elements that need to be addressed by CEDAW in this regard: stereotypes that block women and girls' access to sport in general, and football in particular; stereotyping about the idea of football as a men game in society, including media; violence against women and girls in the sports domain; and economic and labour discrimination of professional female footballers. However, the

¹⁰⁶ See *supra* section 5.

¹⁰⁷ Forbes, Edwards and Fleming, 'Women can't referee': exploring the experiences of female football officials within UK football culture', 16(4) *Soccer & Society* (2015) 521.

¹⁰⁸ As highlighted by the PACE Resolution *Towards a framework for modern sports governance*, 'sports governance needs to become inclusive of different societal groups, in particular with regard to empowering young people and women to be involved in decision-making processes and to take leadership positions in sports governing bodies' (PACE, *supra* note 15).

¹⁰⁹ S. Fredman, *Discrimination Law* (2011), at 25.

¹¹⁰ *Supra* note 81. Also, the Committee has repeatedly shown its concern about the negative influence of gender stereotyping in curricula and its impact in women's professional options, careers and income and 'frequently makes comments on the way in which women are depicted in advertising and media': Holtmaat, *supra* note 35, at 159.

transformation of patterns and stereotypes is not the unique set of obligations CEDAW has deduced from the principle of transformative equality. As has pointed out, 'underlying causes of discrimination against women' have also to be effectively addressed while measures have to be adopted aiming the 'real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.'¹¹¹ We can conclude from this statement that States parties to CEDAW Convention have a responsibility on addressing football institutional patterns based on gender stereotypes.

8. Conclusions: Time Has Arrived to Take Inequality in Sports Seriously

From a legal perspective, sport is a riveting topic. As Prof. Rigaux brought to light in 1989, the economic exploitation of sport and entertainment has traditionally reached to skip state control. It is, he affirmed, 'a sacred cow that no government dare to reduce to the condition of a domesticated animal'.¹¹² However, this trend is coming to an end. Fed by administrative, commercial, labour and tax law, a new branch of law has been gradually taking shape: sports law is today a powerful legal discipline.¹¹³ Even though public international law has not completely stayed out of this process, the interest expressed by international lawyers has been notoriously poor until now.¹¹⁴ In particular, the application of IHRL standards to the sport domain is turning out to be singularly challenging.

¹¹¹ See paragraph 10 of CEDAW *General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures* (2004), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=en (accessed 11 August 2020).

¹¹² Rigaux, 'Les situations juridiques individuelles dans un système de relativité générale. Cours général de droit international privé', 213 *Recueil des Cours de l'Académie de Droit International de la Haye (RCADI)* (1989) 1, at 379.

¹¹³ This is not an unanimously shared opinion. As Prof. Franck Latty has highlighted, several authors have denied the existence of sports law as an autonomous legal area. In Grayson words, 'no subject exists which jurisprudentially can be called sports law. As a soundbite headline, shorthand description, it has no juridical foundation; for common law and equity create no concept of law exclusively relating to sport. Each area of law applicable to sport does not differ from how it is found in any social or jurisprudential category': quoted by Latty, 'Transnational Sports Law', in K. Vieweg (ed), *Lex Sportiva* (2015) 107, at 108.

¹¹⁴ According to Jean-Pierre Karaquillo, reflection on an International sports law is at the same time heady and daring: Karaquillo, 'Droit international du sport', 204 *Recueil des Cours de l'Académie de Droit International de la Haye RCADI* (2004) 1, at 22.

However, even if not always visible, a wide range of violations of human rights are committed in the sporting domain. Women and girls are also victims of discriminatory practices. In 2019, the Human Rights Council noted with concern:

Noting with concern that many women and girls face multiple and intersecting forms of stigma and discrimination in sport, and are still subjected to discriminatory laws and practices based on their race and gender, and that States have an obligation to ensure and promote a broader framework of substantive equality for women and girls.¹¹⁵

In this context, this work has advocated for a more decisive and explicit role of CEDAW Committee regarding the fight against women and girls' discrimination and inequality in the football domain. From a substantial perspective, and according to standards of due diligence, States can be held responsible for the violations of human rights committed by private parties, including those of sporting associations. As has been analysed here, in the sporting framework an important number of norms and practices are discriminatory on the basis of gender. This is why the principle of transformative equality, as developed by CEDAW Committee, could help to tackle this situation. According to CEDAW's doctrine, this principle imposes upon States two different groups of legal obligations: the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality; and the modification or transformation of harmful norms, prejudices and stereotypes.¹¹⁶

Being sports 'morally significant for both the individual and society',¹¹⁷ international human rights monitoring bodies in general, and CEDAW Committee in particular must exercise their competences to tackle gender discrimination in sports.¹¹⁸ Regarding our topic, it seems clear that IHRL imposes concrete obligations upon States regarding the guarantee of women and girls' access to sport and physical activities. These obligations

¹¹⁵ Human Rights Council, Elimination of discrimination against women and girls in sport, 20 March 2019, A/HRC/40/L.10/Rev.1, available at <https://undocs.org/en/A/HRC/40/L.10/Rev.1> (accessed 11 August 2020).

¹¹⁶ Cusack and Pusey, *supra* note 69, at 64.

¹¹⁷ Boxill, 'Football and Feminism', 33(2) *Journal of the Philosophy of Sport* (2006) 115, at 124.

¹¹⁸ Also, the establishment of a special procedure specifically mandated for addressing the topic of human rights in sport should be considered by the Human Rights Council.

are contained in/have been deduced from both binding and non-binding international instruments. In spite of these interesting developments, serious discriminations persists at the sporting domain. The fight against gender discrimination in sports has been marginalized before other fields that, as the labour, education of political fields, have gathered the efforts of the International Community in general, and CEDAW Committee in particular. Very likely, the reason behind this marginalization has something to do with the erroneous idea that the practice of sport is social and politically conceived as a minor or secondary need. Nevertheless, 'women's football may (...) provide a useful indication of the ability of women to realize their potential in different societies'.¹¹⁹

As said in the introductory section of this work, sport has been traditionally conceived as a self-contained regime. Notwithstanding, this work has shown that core principles enshrined in CEDAW Convention and developed by CEDAW Committee can be fully applied in the sport domain. Although 'the Committee's generous interpretation of the rights to non-discrimination and equality has breathed life into every word of CEDAW and ensure that it remains a dynamic and responsive instrument that women can use to advance their human rights and transform their lives',¹²⁰ it would appear that also this international body, by making marginal this topic in its pronouncements, has contributed to disempower female football players.¹²¹ This work has also examined how the Committee can apply the rights derived from CEDAW Convention to female footballers' general and individual situations (procedural approach).

IHRL has been conceived in this work as a shield aiming to protect the rights of women and girls in the sports domain. Undoubtedly, 'CEDAW's transformative potential'¹²² may

¹¹⁹ Hoffmann et al., 'International women's football and gender inequality', 13(15) *Applied Economics Letters* (2006) 999, at 1001.

¹²⁰ Cusack and Pusey, *supra* note 69, at 91.

¹²¹ Karen L. Jones examined a concrete example in this regard in 2013: the role of CEDAW in the promotion of women national leagues. As she highlights, '(perhaps the limited examination on this topic is also due to other issues that are deemed of greater importance to the plight of women's well-being, safety, human rights and equality, and creation of women's national sport leagues is not high on that list of priorities. However, the topic (...) is not only an issue of participation but also gets at the greater issues of equality and opportunity for women' (Jones, *supra* note 43, at 35).

¹²² Raday, 'Gender and democratic citizenship: the impact of CEDAW', 10(2) *European Journal of International Law (EJIL)* (2012) 512, at 514.

became an extraordinary driving force in order to support the defence of girls and women both in and outside the football pitch.