

WORKERS' RIGHTS AND THE OLYMPIC GAMES: THE INTERNATIONAL OLYMPIC COMMITTEE AND INSTITUTIONAL LAW MAKING

ZACK BOWERSOX*

ABSTRACT

Creating international laws in an international system is a well-known phenomenon. International organizations encourage the creation and practice of normative behaviors by states that might eventually be recognized as law by treaty or as common practice. While international organizations are well-versed and focused on inter-governmental organizations like the United Nations, in these studies, the International Olympic Committee, (IOC) for all its years and notoriety, has never been examined as a source of institutional law making. This article examines the IOC's relation to the norms and laws pertaining to international labor rights. Why has an organization so active in the creation of new jobs and the promotion of large-scale, state projects been completely oblivious to the rights of workers? Examining the case of China's 2008 and 2022 Games, this article argues the IOC has created few incentives to enforce or encourage a set of norms that will inherently drive the cost of hosting up, and then, perhaps, the commercial viability of the Games down. Ultimately, the IOC seemingly surrenders its ability to incentivize change in state behaviors.

TABLE OF CONTENTS

INTRODUCTION	424
I. INSTITUTIONAL LAW MAKING.....	428
A. <i>Historical Development</i>	431

* Lecturer, Department of Political Science, Washington University in St. Louis.
Direct correspondence to bowersox@wustl.edu.

424 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

<i>B. Modern Interpretations and Examples</i>	440
II. THE INTERNATIONAL OLYMPIC COMMITTEE	445
<i>A. The Politics of the International Olympic Committee</i>	448
<i>B. The Business of the International Olympic Committee</i>	452
<i>C. The International Olympic Committee as Institutional Law Maker</i>	456
III. INTERNATIONAL LABOR RIGHTS AND THE PEOPLE'S REPUBLIC OF CHINA	458
<i>A. The Household Registration System and Labor Migration in China</i>	461
<i>B. The International Olympic Committee and China</i>	464
CONCLUSION	470

INTRODUCTION

The International Olympic Committee (IOC) has been referred to as a global sporting organization (GSO) because, as an international organization, it supersedes state authority.¹ Indeed, the sports and the sporting rules these organizations regulate are not bound by state borders. Instead, they are in effect public property.² These organizations are also strictly international, unlike the private regulatory organizations. One example is the International Organization for Standardization.³ For the IOC to accomplish its mission, states' cooperation or acquiescence is necessary.⁴ Competitions, even those at the most localized level, often require government participation in the allocation of space for an event to be held either through commercial zoning or outright public ownership of a recreational facility.⁵

1. John Foster & Nigel K.W. Pope, *The Political Economy of Global Sporting Organizations* 4 (Routledge ed., 2007).

2. *Id.*

3. *About Us*, INT'L ORG. FOR STANDARDIZATION, <https://www.iso.org/about-us.html> (last visited Mar. 7, 2022).

4. *Id.*

5. Eva Lechner & Harry Arne Solberg, *The Competition for Government Funding of Major Sports Events: Why do Some Applicants Pass the Needle's Eye?*, 13 INT'L J. OF SPORT POL'Y AND POL 13, 13 (2021).

The process of choosing a host is perhaps the best example of this cooperation.⁶ If potential hosts withdraw (as has been the case recently, a phenomenon discussed further below), the IOC can be stripped of its real influence. When states wish to host an expensive and overly formalized selection process, they need to appease the IOC's wishes. This has led, in some instances, to a direct challenge of State sovereignty and the centrality of the State within the international system.

When the IOC, for instance, asks for assurances about security at the Games, the bid-State would be admitting failure if it was unable or unwilling to oblige the IOC.⁷ Classically, security is the greatest concern of any State, and it is rare for a non-governmental organization such as the IOC to affect their security policies. Nevertheless, the IOC has a surprisingly successful track record when it comes to affecting high-state policies, albeit often temporarily, in many of its hosts.⁸ This has been demonstrated best when a host State does not diplomatically recognize one of its fellow IOC members. In these cases, the laws governing entry visas and accepting of formal documents need to be adjusted.

Frustratingly for some, the IOC has seemed to be more rhetorical and less substantive in its efforts to improve human rights. This is especially so when one examines labor rights, an area in which the IOC has made little headway in terms of empowering laborers or promoting normative labor practices.⁹ Although a key aspect of its recently approved Agenda 2020 + 5, the plight of vulnerable laborers around event construction continues to be an underserved issue area within the

6. See INTERNATIONAL OLYMPIC COMMITTEE, OLYMPIC CHARTER art. 33-34 (2020), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf> [hereinafter OLYMPIC CHARTER].

7. See generally Philip Boyle & Kevin D. Haggerty, *Spectacular Security: Mega-Events and the Security Complex*, 3 INT'L POL. SOCIO. 257, 263 (2009). Richard Giulianotti & Franciso Klauser, *Security Governance and Sport Mega-events: Toward an Interdisciplinary Research Agenda*, 34 J. SPORT & SOC. ISSUES 1, 2 (2009).

8. Travis Nelson & M. Patrick Cottrell, *Sport Without Referees? The Power of the International Olympic Committee and the Social Politics of Accountability*, 22 EURO. J. OF INT'L RELATIONS 1, 3 (2015).

9. Vivian Wang, *Faced With Questions About Forced Labor in China, the I.O.C. Is Tight-Lipped*, N.Y. TIMES (Jan. 4, 2022), <https://www.nytimes.com/2022/01/04/world/asia/ioc-china.html>.

426 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

Olympic Movement.¹⁰ Events leading to Beijing 2008, Sochi 2014, and presently Beijing 2022, raise questions regarding labor practices that have gone largely unaddressed by the IOC. Instead, the organization has often defended host States against criticisms.¹¹

Since its inception, the politics surrounding the Olympic events, also known as “mega-events,” have attracted a great deal of attention. Hosting one of these events is often treated as a marker of international legitimacy or modernity bestowed on the winning state.¹² In turn, this has led to an equally strong stereotype that the IOC is political in nature.¹³ Despite the IOC’s insistence of neutrality, this contention often serves only to validate critics claims. These critical narratives often exaggerate the superficial political effects, like power or economic gains, while overlooking or downplaying the actual influences and consequences of the State’s interactions with these bodies—primarily, a legitimization and reinforcement of regimes and their policies, both international and domestic.

Why hasn’t the IOC moved to influence a State’s labor practices? These practices directly tie to the Olympic Agenda and hosting legacies. The IOC has stretched its influence to admit athletes from unrecognized states¹⁴ or its behaviors in regards to LGBTQ+ citizens,¹⁵ so why stop there? This article seeks to understand the IOC’s place in what is often referred to as institutional law making. In the international

10. *Olympic Agenda 2020+5 15 Recommendations*, INT’L OLYMPIC COMM., <https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/IOC/What-We-Do/Olympic-agenda/Olympic-Agenda-2020-5-15-recommendations.pdf> (last visited Apr. 7, 2022) [hereinafter Olympic Agenda].

11. Wang, *supra* note 9.

12. Vishvas Nandwani, *Why do Countries Want to Host the Olympics?*, ITAT ORDERS (Aug. 3, 2021), <https://itatorders.in/blog/why-do-countries-want-to-host-the-olympics/>.

13. Jules Boykoff, *The Olympics are Political. The IOC Denies Reality—and Athletes their Voice*, NBC NEWS (Jan. 16, 2020), <https://www.nbcnews.com/think/opinion/olympics-are-political-ioc-denies-reality-athletes-their-voice-ncnna1117306>.

14. *Parade of Nations: Which Countries Are (and aren’t) in the Olympics?*, POL. GEOGRAPHY NOW (Feb. 3, 2022), <https://www.polgeonow.com>.

15. *Olympic Agenda*, *supra* note 10; *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, INT’L OLYMPIC COMM., <https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf>.

system, States interact with and participate in a collection of organizations in bi- or multi-lateral relations. These interactions can produce regularized behaviors that have the tendency to become (via treaty) law or treated as law through customary practice. The IOC, like other international organizations, has an opportunity to affect this process, and *create* customary practices, if not law.

This article's purpose is not to revisit the familiar debates about the value of hosting such events, but to examine the role of these organizations in affecting the *opinio juris*, or the sense of legal obligation a State believes it has in the international system. Institutional law making is a well-known potential, if not always actual, consequence of the deepening interdependence of States within an ever-expanding system of IOs. What role does the IOC play in this process and what this suggest for our current understanding of institutional law making?

The argument herein is that the IOC ultimately occupies a precarious position in the international system. The IOC sits at the top of the international sporting regime, but is also a part of the broader international diplomatic institution: one that values free exchange and an equality among nations. The IOC also encourages the adoption of certain rights and values, including those regarding the treatment of laborers. Today, it more commonly interprets its role in relation to the former position: a functional role as keeper of the Olympics, which is increasingly defined as a commercial product. When the IOC has acted to influence States and forwards a legal outcome among its members (the Taiwan issue,¹⁶ the South African sporting boycotts,¹⁷ the creations of the Court of Arbitration for Sport¹⁸ and later the World Anti-Doping Agency¹⁹) it has operationalized the latter role.

16. Davis Van Opdorp, *Beijing 2022: Taiwan remains hot-button issue at Olympics*, DEUTSCHE WELLE (Feb. 19, 2022), <https://www.dw.com/en/beijing-2022-taiwan-remains-hot-button-issue-at-olympics/a-60840768>.

17. Matt Bersell, *Sports, Race, and Politics: The Olympic Boycott of Apartheid Sport*, 8 W. ILL HISTORICAL REV. 1, 1-2 (2017).

18. See generally Richard H. McLaren, *Introducing the Court of Arbitration for Sport: The Ad Hoc Division at the Olympic Games*, 12 MARQ. SPORTS L. REV. 515 (2001).

19. *Who We Are*, WORLD ANTI-DOPING AGENCY, <https://www.wada-ama.org/en/who-we-are> (last visited Mar. 6, 2022).

This article continues in four parts beginning with an introduction to the concept of institutional law making. This is followed by a discussion about the IOC and the Olympics as aspects of the international system, including actors in the process of institutional law making. After introducing China's history of migratory labor laws, a discussion of the 2008 and 2022 Olympics concludes the argument.

I. INSTITUTIONAL LAW MAKING

Creating new institutional law is often hard to define and typically only identified in hindsight, after the process is complete and a law has already been recognized.²⁰ In general, it refers to laws that emerge through the repeated interactions of state governments with international organizations, transnational networks, and their peers as a consequence of their interdependent activities.²¹ In other words, laws emerge through their activities in international institutions. A wide variety of definitions exist identifying institutions. These institutions are identified as "relatively stable sets of related constitutive, regulative, and procedural norms and rules that pertain to the international system, the actors in the system (including States as well as non-State entities), and their activities."²²

In fact, the United Nations (UN) itself is often misidentified as an international institution.²³ The UN is the hub of one of the more dominant institutions we recognize today, that of multilateral governance, in which each state is an equal. In Rita Guerreiro Teixeira's recent examination of IOs' role in environmental law, she notes:

[T]he UN has convened the Global Conferences, leading to the adoption of foundational declaration of principles, and numerous other international organizations have prepared draft texts, promoted

20. See generally N. D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS (2nd ed. 2005) (offering a fuller examination of the variety of definitions that have been operationalized in the study of international organizations).

21. Robert O. Keohane, *International Institutions: Two Approaches*, 32 INT'L STUD. Q. 379, 384 (1988).

22. John S. Duffield, *What Are International Institutions?*, 9 INT'L STUD. REV. 1, 2 (2007).

23. See A. WIVEL & T.V. PAUL, INTERNATIONAL INSTITUTIONS AND POWER POLITICS: BRIDGING THE DIVIDE (A. Wivel & T.V. Paul eds., 2019) (treating "international organization" and "international institution" as synonyms).

the conclusion of environmental agreements, adopted standards, guidelines and recommendations, and prepared influential studies.²⁴

Each of these activities has been taken up by these respective bodies as a result of the need for governance with regards to issues States have a shared interest in. These are also points on which common behaviors and norms will emerge as a result of institutional practices.

The international system is familiarly characterized as anarchic, as it does not have a singular world government.²⁵ In the absence of such a body, governance is practiced by States in any number of organizations and institutional settings.²⁶ The most familiar example of this being the United Nations, an inter-governmental organization (IGO) made up of all recognized States in the international system. This is one example of States acting unilaterally and agreeing between themselves to certain behaviors with an eye to creating predictable and regularized behaviors that might be added to this. Examples of governance like this create customs that approach the status of law. This

24. Rita Guerreiro Teixeira, *The Role of International Organizations in the Development of International Environmental Law: Adjusting the Lenses of Analysis*, 53 CASE W. RSRV. J. INT'L L. 237, 237 (2021).

25. Silviya Lechner, *Anarchy in International Relations*, INT'L STUD. ASSOC. AND OXFORD UNIV. PRESS (Feb. 24, 2022), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-79>.

26. Forgoing a discussion about how and why cooperation is achieved in anarchy the reader is referred to. See generally Robert Axelrod & Robert O. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226 (1985); David A. Lake, *Escape from the State of Nature: Authority and Hierarchy in World Politics*, 32 INT'L SEC. 47 (2007); Alexander Wendt, , *Anarchy is What States make of it: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

430 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

has been largely accepted.²⁷ However, debates are still ongoing as to what behaviors do and do not amount to law.²⁸

Indeed, international law does not resemble domestic law. Of particular interest is what contributes to the ability of international institutions to help create international law. The clearest and longest accepted form of international law—treaties—are the business of States, and while it is true many IOs like the United Nations will manage or house treaty bodies within their own frameworks, only States may create and join them.²⁹ This has arguably left customary international law (CIL) as the only space from which institutions might influence international law. This often relies on the activities of the non-State organs within them, but what agency do IOs have in the creation of CILs?

There are two broad answers to this question. On the one hand, organizations are not independent of States and do not possess a juridical independence. On the other, the monitoring and compliance activities of these actors do seem to suggest that they play a role in creating customary international law. By reinforcing the “good” behaviors and punishing or discouraging the “bad,” IOs are said to increase a sense of *opinio juris* among states in relation to certain behaviors.³⁰ Still, to what degree IOs are leading States, as opposed to the reverse, is continually debated.³¹ To a great degree, the problem lies in the bifurcation of international law as either “hard” or “soft.”

27. That customary international law is accepted as a valid form of international law has been repeatedly affirmed by the International Court of Justice. Comments on its value and interpretation by the International Law Commission, not to mention many legal scholars, usually take this as their starting point. See *How the Court Works*, INT'L CT. OF JUST., <https://www.icj-cij.org/en/how-the-court-works> (last visited Mar. 7, 2022); Philippe Couvreur, *Upholding the Rule of Law at the International Level: The Role of the International Court of Justice*, UN CHRON., <https://www.un.org/en/chronicle/article/upholding-rule-law-international-level-role-international-court-justice> (last visited Mar. 7, 2022).

28. See R. B. Baker, *Customary International Law in the 21st Century: Old challenges and New Debates*, 21 EUR. J. INT'L REL. 173, 178-79 (2010).

29. Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 5 (1998).

30. Ronald Alcala, *Opinio Juris and the Essential Role of States*, LIEBER INST. (Feb. 11, 2021), <https://lieber.westpoint.edu/opinio-juris-essential-role-states/>.

31. See generally CATHERINE BROLMANN, CAPTURING THE JURIDICAL WILL OF INTERNATIONAL ORGANISATIONS (Sufyan Droubi & Jean d'Aspremont eds., 2020).

In brief, hard laws are those that are considered binding on States, whereas soft laws are considered non-binding or can be derogated.³² Hard laws tend to be most commonly recognized in the realms of security and conflict. The Geneva Conventions (1949) and the prohibition of crimes against humanity, such as those in the Genocide Convention of 1948, are commonly treated as hard law, while human rights such as the freedoms of assembly and right to due process have been derogated during times of crisis.³³ Furthermore, hard laws tend to be codified in treaty form, whereas soft laws are customary practices.³⁴ The customary nature leads some to question the legal status of certain "soft" laws.³⁵

Because hard laws are typically enshrined in treaties, and treaties are the provenance of States, there is no question of *opinio juris*. Conversely, IOs tend to be active norm entrepreneurs, especially in the area of rights.³⁶ That security-based law tends to be considered hard, and human rights-focused law considered soft is due to the evolution of international law over the last century. Nevertheless, the sovereignty of states and state power have stubbornly remained front and center.

A. Historical Development

A comprehensive examination of the advent of international law's changes across time is beyond the scope of this article. Still, a narrowed

32. Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712-13 (2010); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-22 (2000).

33. In the U.S. alone, Lincoln's suspension of *habeas corpus* during the Civil War, the Espionage Act under Wilson, and the internment of Japanese American citizens during World War II are examples of just such behaviors. In each case the U.S. Supreme Court affirmed the governments right to do so. *See generally* Ex Parte Milligan, 71 U.S. 2 (1866); Schenck v. United States, 249 U.S. 47 (1919); Korematsu v. United States, 323 U.S. 214 (1944). *See also* Hernan Montealegre, *The Compatibility of a State Party's Derogation Under Human Rights Conventions with its Obligations Under Protocols II and Common Article 3*, 33 AM. U. L. REV. 41 (1983-1984).

34. Shaffer & Pollack, *supra* note 32, at 767.

35. *Id.* at 720.

36. Martha Finnemore, *International Organizations as Teachers of Norms: UNESCO and Science Policy*, 47 INT'L ORG. 565, 566 (1993).

432 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

examination of the genesis of the United Nations system does bear on the debate over the role of the IOC.³⁷ Prior to the end of World War II and the advent of the United Nations, states as political units had enjoyed an almost unchallenged position as the creators of international law. This position was mostly accomplished through treaties and the belief in *pacta sunt servanda*, or “agreements must be kept.”³⁸ If a state signed a treaty, it was a commitment to certain behavior. States expected other respective States to comply.³⁹ There was no law governing treaties and their formation until the Vienna Convention on the Law of Treaties of 1969.⁴⁰ Much of the belief in a treaty’s power to bind states fell to what we might consider a state’s honor. To break one’s word would bring dishonor to a State, government, or leader.

For much of the early twentieth century, the supremacy of a state’s sovereign right to govern its affairs, and thus the primacy of domestic law over any international “law,” save what a State voluntarily chose to follow, was not in doubt.⁴¹ Alternatively, several examples in diplomatic history would suggest, at the very least, a growing recognition by this time of a mutually affirmed understanding that there were *rules*, if not proper laws, governing the international system. For instance, while maintaining the primacy of British law over the international, Sir Edward Grey’s Foreign Office often relied on an implied code of conduct, either supported by tradition or the honor of nations.⁴² Like other statesmen of the time, Grey would leave the particulars of what international law required of the state vague, thereby

37. The international system, it has been argued, did not exist as a truly international system until the twentieth century. *See* MARGARET P. KARNS & KAREN A. MINGST, INTERNATIONAL ORGANIZATIONS: THE POLITICS AND PROCESSES OF GLOBAL GOVERNANCE 67 (Lynne Reiner, 3rd ed. 2010).

38. Richard Hyland, *Pacta Sunt Servanda: a Meditation*, 34 VA J. INT’L L. 405, 406 (1994).

39. *Id.* at 421.

40. It has only been effective since 1980. *See* Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

41. J. Samuel Barkin and Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT’L ORGS. 107, 111 (1994).

42. *See* Clive Parry, *Foreign Policy and International Law*, in BRITISH FOREIGN POLICY UNDER SIR EDWARD GREY 89-112 (F.H. Hinsley, ed., 1977).

never bringing the domestic law into conflict with the international;⁴³ thus, never forcing the state to choose between the two to demonstrate some finality of which level of governance was subservient to the other.

It is true most states enjoyed the privilege of interpreting international responsibilities and laws in ways that suited their needs. Prior to World War I, the United States, which was expressly neutral in European affairs, hoped this stance would allow it to freely move goods across the increasingly hostile Atlantic waters.⁴⁴ Here, the United States called into play the international conventions regarding neutral states, the laws of the sea, and those of trade as well.⁴⁵ To be sure, Washington D.C. was not, by any stretch, a center for internationalist sympathies at this time, but did desire to impress upon Europe a shared obligation, even if only to enjoy American goods.

After World War I, the efforts to create and then buttress the League of Nations saw renewed support of the claim that some international rules were to be abided by, at the very least.⁴⁶ On the one hand, British efforts to support the League's efforts in 1937 to create an international, permanent court demonstrated the need the British government saw for an international code to address such crimes.⁴⁷ On the other hand, in the British's efforts to derail international rules, the court demonstrated its belief that the international court's success could pin the British government to certain behaviors it might later discover restricted its sovereignty in the future.⁴⁸

43. *Id.* This was not always successful and the United Kingdom, like other States, would find themselves having to reconcile, often with great difficulty, domestic behaviors with international prescripts and *vice versa*.

44. Woodrow Wilson, *World War I, and Freedom of the Seas*, NAVAL HIST. & HERITAGE COMMAND, <https://www.history.navy.mil/content/history/nhhc/browse-by-topic/wars-conflicts-and-operations/world-war-i/history/ww1-freedom-of-seas.html> (last visited Mar. 7, 2022).

45. The contemporary weight of the Freedom of the Seas is often lost in today's discussion of the period. See E.S. Corwin, *The Freedom of the Seas*, 209 N. AM. REV. 29, 30-31 (1919) (providing pre- and post-World War I commentary).

46. Gabriela A. Frei, *International Law and the First World War: Introduction*, 29 EUR. J. INT'L L. 229, 230 (2018).

47. Suzane Katzenstein, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, 55 HARVARD INT'L L. J. 154, 184 (2014).

48. See MICHAEL CALLAHAN, *THE LEAGUE OF NATIONS, INTERNATIONAL TERRORISM, AND BRITISH FOREIGN POLICY, 1934-1938* (Palgrave Macmillan ed., 2018) (providing a full examination of British response to international rules).

434 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

Growing interdependence among nations, both economically and politically, meant the consequences of a state's behaviors, or non-state actors within it, did not stop at its border. The period from the beginning of World War I, through the Great Depression, and on to the end of World War II, often referred to as the Thirty-Year Crisis, demonstrated this fact quite clearly. Financial concerns, increased migration, and the concerns of increasing anarcho-syndicalist terror shattered the unilateral policymaking processes across many issue areas.⁴⁹ The United States, for instance, would find that its former approaches to deporting undesirables would no longer be acceptable to many of its allies.⁵⁰ Issues of borders and who passed in either direction would require at least two states to settle the issue of sending and receiving.⁵¹

Many of these issues were difficult enough to solve bilaterally, and as an international issue, with innumerable points of view and veto players often proved intractable. The above-referenced effort for a permanent terror court at the League, even with wide support in general, proved too tricky in the specifics of operational minutiae to succeed.⁵² The League itself could never overcome the hesitancy that many states had in aligning themselves and their sovereignty with the League's activities.⁵³ The question was, at that time, as it has often been repeated and rephrased since, whether such a thing as international law existed or should exist.

There was, in fact, one area in which almost all would agree international law was thriving: war.⁵⁴ Since the nineteenth century,

49. See *The Voyage of the Buford: Political Deportations and the Making and Unmaking of America's First Red Scare*, in 132 DEPORTATION IN THE AMERICAS: HISTORIES OF EXCLUSION AND RESISTANCE (Kenyon Zimmer & Cristina Salinas eds., 2018).

50. *Id.* Mexico especially did not appreciate U.S. deportations because non-Mexicans were deposited at Mexico's borders. The United States viewed European states as the source of anarchists and Communists. Mexico and European governments wanted a greater say in who was being deported to them and what responsibilities they had to the United States.

51. *Id.*

52. CALLAHAN, *supra* note 48, at 7-8.

53. Katzenstein, *supra* note 47, at 190.

54. War was most famously referred to as a natural phenomenon by Hugo Grotius. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 18-20 (Oxford Clarendon Press ed., 1625). Later, Carl von Clausewitz, suggested war is the normal "continuation of [politics] by other means." See CARL VON CLAUSEWITZ, ON WAR 87 (Michael Howard & Peter Pare eds., 1832). Modern adherents include realist thinker

conflict among nations had many rules and regulations that States adhered to.⁵⁵ War has always been the business of states, and it would occur when and where states chose; this was never in doubt.⁵⁶ The conduct of forces within it, the outcome, and whether justice was truly done were never (and still is not) guaranteed. Yet early twentieth century moves to codify the practices within warfare were quite common. From 1899, through the First World War and then the Second, rules regarding the treatment of prisoners and civilians were introduced and strengthened.⁵⁷ That the Kellogg-Briand Pact of 1928 was thought to end the war as a legal means of resolution may have been naïve, but it at least demonstrated the belief that war could be codified, or even outlawed.

That war, which only states can engage in, would find such a robust legal system is perhaps not surprising. Armed conflict has always been recognized as an extension of state politics, and war, like diplomacy, would also be governed by tradition and rules.⁵⁸ The consequences of winning or losing a war could mean the end of a regime or even a state *in toto*. There was a great interest in how these wars would be prosecuted and what would happen to those who did not abide by the rules. With the Treaty of Fontainebleau and Napoleon's exile to the island of Elba, the proposition had been introduced that a collection of states could bind themselves to the task of punishing a shared foe for their behaviors during times of war. At the close of World War II, the international community would again, in Nuremberg and Tokyo,

Hans Morgenthau who argued that States behave as individuals do in conflict in anarchy. *See HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (Alfred Knopf ed., 1948); *KENNETH WALTZ, MAN, THE STATE, AND WAR 11* (COLUM. UNIV. PRESS ED., 1959) (Morgenthau and Waltz both argued there was no morality in war, and power to act was the only determinant of right or wrong, just, or unjust).

55. The first humanitarian code of conflict, the Lieber Code, only applied to the U.S. North in the U.S. Civil War in 1863. Howard S. Levie. *History of The Law of War on Land*, 838 I.R.R.C. 339, 340 (2000). Also in 1863 was the first Geneva Convention. *Id.* at 341. In 1874 a conference in Belgium produced the Declaration Concerning the Laws and Customs of War. *Id.*

56. *See generally* Levie, *supra* note 55, at 339.

57. *Id.* at 343.

58. *See CARL VON CLAUSEWITZ, ON WAR 23* (Michael Howard & Peter Pare eds., 1832) (defining war as a “mere continuation of policy by other means.”).

436 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

respectively, bind themselves together to see that international laws of war were observed.⁵⁹

The narrative of international law emerging from war often increases the place of states in the formation of this law and downplays the activities of civil society, non-governmental organizations (NGOs), and international institutions. The laws regarding the humanitarian aspects of conflict were a direct result of the activities and efforts of the International Committee of the Red Cross, one of the first modern NGOs.⁶⁰ The turn of the twentieth century also saw a number of peace movements emerge from a growing sense of cosmopolitanism in Europe. The IOC itself was formed in parallel to these pacific organizations, and they gave rhetorical purchase to the idea of shared humanity.⁶¹

The peace envisioned largely concerned the nations of Europe and did not extend to Africa, Asia, and the colonized peoples throughout the world.⁶² This narrow concept of peace is an important point and one that will be revisited when the development of customary international law is discussed below. For now, the fact that the high politics of states, including the practice of war, were being shaped by civil society and emerging non-governmental organizations only need be acknowledged here. The popular conclusion that the League of Nations failed and that the Great Powers of Europe similarly failed to understand the continental balance of power sufficiently to prevent World War I dominates the narrative.⁶³ This narrative ignores the fact that the

59. The Treaty of Fontainebleau acted as an explicit reference for these tribunals. See M.R. MARRUS, THE NUREMBERG WAR CRIMES TRIAL, 1954–46: A DOCUMENTARY HISTORY (Bedford Books eds., 1997). The maligned German-signed Kellogg-Briand Pact forms the basis of Nazi Germany's illegal activities. See Julie M. Bunck & Michael R. Fowler, *The Kellogg-Briand Pact: A Reappraisal*, 27 TUL. J. INT'L. & COMP. L. 229, 230 (2019).

60. Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law*, 6 IND. J. GLOB. LEGAL STUD., 579, 583 (1999).

61. D. R. Quanz, *Civic Pacifism and Sports-Based Internationalism: Framework for the Founding of the International Olympic Committee*, 2 OLYMPIKA: INT'L J. OLYMPIC STUD. 1 (1993).

62. See, e.g., MURIEL E. CHAMBERLAIN, PAX BRITANICA? BRITISH FOREIGN POLICY 1789–1914 (Routledge ed., 1989).

63. Jari Eloranta, *Why did the League of Nations Fail?*, 5 CLIOMETRICA 27, 27 (2005).

League was successful in preventing war in 1934⁶⁴ and that civil society similarly failed in overcoming national sympathies.⁶⁵

After World War II and the advent of the United Nations, the universe of international organizations expanded rapidly. The Bretton Woods System, designed by the United States, institutionalized financial relations among states while the General Agreement on Trade and Tariffs (GATT) regulated trade.⁶⁶ Europe too began to institutionalize its relations through the European Coal and Steel Community as well as the European Economic Community.⁶⁷ It is at this point in time that we might be closer to the locus of institutional lawmaking. As more states began to join these organizations, they likewise began to bring their behaviors into line with their rules and regulations. They also acted to create, through their mechanisms and reporting processes, new rules by which members should abide.

During the Cold War, this creation of new rules was especially prevalent in areas that were framed as or by security concerns. The destructive power of the nuclear weapon as well as the growing post-colonial movement were reshaping the concerns of states, which is not to say that power and the state monopoly of the legitimate use of force were devalued.⁶⁸ The IOC, like the United Nations and other IOs, found itself at the mercy of the East-West political tug-of-war.⁶⁹ IOs were beholden to the West, as the Soviet system lacked equivalent

64. CALLAHAN, *supra* note 48, at 7.

65. The international workers' movements, anarchist, syndicalist, and communist, were weakened by the national divisions ending solidarity with the First World War. See James Riordan, *Worker Sport*, in BERKSHIRE ENCYCLOPEDIA OF WORLD SPORT 457, 458 (2005); Stephen Jones, *The European Workers' Sport Movement and Organized Labour in Britain Between the Wars*, 18 EUR. HIST. Q. 3, 3-4 (1988) (placing divisions in context of international sport).

66. Sandra Kollen Ghizoni, *Creation of The Bretton Woods System*, FED. RSRV. HIST. (Nov. 22, 2013), <https://www.federalreservehistory.org/essays/bretton-woods-created>.

67. Barry Eichengreen, *European Economic Community*, ECONLIB, <https://www.econlib.org/library/Enc/EuropeanEconomicCommunity.html> (last visited Mar. 7, 2022).

68. David Ropeik, *The Rise of Nuclear Fear: How We Learned to Fear the Radiation*, SCI. AM. (June 15, 2012), <https://blogs.scientificamerican.com/guest-blog/the-rise-of-nuclear-fear-how-we-learned-to-fear-the-bomb/>.

69. Dilek Latif, *United Nations' Changing Role in the Post- Cold War Era*, 30 TURKISH Y.B. 23, 27 (2000).

438 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

development and international interdependence, and thus most of the Cold War-era events were hosted in countries which identified with the capitalist, democratic world order.

Despite this, it was a time when regularized meetings, uniform calendars for international business and politics, as well as the emergence of norm entrepreneurs began to rapidly appear.⁷⁰ The centralization of certain governance functions at the United Nations or the European Economic Community made creating common policies more convenient than ad hoc conferences to address individual issues of governance as had been done in the past.⁷¹ So too, the practice of institutional lawmaking could be observed with growing regularity, but it fully blossomed after the Cold War.⁷²

The dissolution of the Soviet system made previously untenable powers or activities of IOs possible. For instance, the United Nations Council on Human Rights (UNCHR) saw the Cold War as a contentious organ with all states that were wary of expanding or empowering the UNCHR.⁷³ states were more concerned with preserving their sovereignty than the increased prevalence of respect for basic human rights. After the Cold War, the UNCHR became more active and empowered to both publicly shame states for their poor behaviors and advise them on proper behaviors.⁷⁴ The UNCHR shift represented a move towards global norms and standards of behavior as a foundation for legitimate state behaviors.

An increase in the advancement of CIL occurred when normative practices previously confined to the West were raised in status to and were included in emerging treaty bodies.⁷⁵ The challenges to the traditional means of creating international law became more apparent

70. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORGS. 887, 909 (1998).

71. Latif, *supra* note 69, at 34.

72. *Id.*

73. James H. Lebovic & Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 59 INT'L STUD. Q. 861, 863 (2006).

74. *Id.* at 866.

75. See Leslie Deak, *Customary International Labor Laws and their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. INT'L L. 1, 14 (1994).

as aspirational designs provided better standards of behavior.⁷⁶ Those who advocated this viewpoint highlighted that the traditional means of creating international law were captured by a select few states, leaving out a substantial portion of the international community.⁷⁷ As noted above, the Eurocentrism of the international order devalued the status of non-European states and isolated them outside the legitimate business of the day.

This increase in CIL benefitted issues like labor rights, the existence of which had largely been identified only as a domestic matter for much of the twentieth century.⁷⁸ Labor rights might not be some of the oldest internationally acknowledged rights, but they are often the first to be recognized by liberalizing states.⁷⁹ They were the progeny of efforts to eradicate the slave trade in the eighteenth and nineteenth centuries containing the antecedents of more modern conceptions regarding the individual and the right to self-determination.⁸⁰ The ability to form collectives, or unions, that guaranteed remuneration and fair practices, as well as safety standards, were certainly still some years off. Many of the familiar characteristics of the labor rights regime did not take shape until the latter twentieth century and, unfortunately, continue to be unfulfilled in many parts of the world.⁸¹

With the advance of the welfare-state, the focus of labor in the twentieth century has moved from a classic collective action problem (organizing and dissuading free-riding) to a post-modern issue (migration and sustainability).⁸² While, as suggested prior, the state remains the focal point for international activity, the post-Cold War process of globalization has altered this position. This process has

76. See generally Baker, *supra* note 28, at 184-89.

77. B.S. Chimini, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 33 (2018).

78. Deak, *supra* note 75, at 13.

79. See JOE FOWERAKER & TODD LANDMAN, *CITIZENSHIP RIGHTS AND SOCIAL MOVEMENTS: A COMPARATIVE STATISTICAL ANALYSIS* (Oxford University Press, 1997).

80. Caitlin Rosenthal, *How the History of Slavery in America Offers an Important Labor Day Lesson*, TIME (Aug. 30, 2018), <https://time.com/5377803/slavery-labor-day/>.

81. Anke Hassel, *The Evolution of a Global Labor Governance Regime*, 21 GOVERNANCE 231, 238 (2008).

82. G.P. Freeman, *Migration and the Political Economy of the Welfare State*, 485 ANNALS AM. ACADEMY POL. SCI. 1 (1986).

440 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

weakened the state's position and the classic conception of borders that shaped the state-citizen relationship. In short, states began to serve citizens (social security and services) instead of the other way round (military conscription and centralized economies).⁸³

Many states found that the free(er) movement of people and ideas challenged their previous conceptions of the world and their place in it. For instance, large influxes of migrant laborers routinely made native laborers sensitive to economic competition, whose impacts were often only imagined.⁸⁴ The impact is a familiar root for the fomentation of nationalist rhetoric or xenophobic politics.⁸⁵ The international movement of people was not the only concern of many states. The internal movement of people also proved to be a challenge to hegemonic social structures and political regimes.⁸⁶ This internal migratory pattern, predominantly rural citizens moving to urban, industrial areas, has been of particular concern for the People's Republic of China since its inception.

B. Modern Interpretations and Examples

As international activities were sunk deeper into the growing number of international organizations, two key assumptions about IOs emerged. First, since these organizations' members are states, the organizations must inherently reflect cooperation among states; "[s]ince cooperation is a good thing, so too... are international

83. F. Nullmeier, & F.X. Kaufmann, *Post-War Welfare State Development*, in 81 THE OXFORD HANDBOOK OF THE WELFARE STATE (Oxford University Press ed., 2010).

84. See Gordon H. Hanson, *The Economic Consequences of The International Migration of Labor*, 1 ANN. REV. ECON. 179, 199-202 (2009) (summarizing research).

85. Jonathan Crush, *The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa*, 38 INT'L MIGRATION 103, 105 (2001); C. Ruzza, *Populism, migration, and xenophobia in Europe*, in ROUTLEDGE HANDBOOK OF GLOBAL POPULISM, 201-216 (Routledge ed., 2018).

86. Denise Hare, 'Push' Versus 'Pull' Factors in Migration Outflows and Returns: Determinants of Migration Status and Spell Duration Among China's Rural Population, 35 J. DEV. STUD., 3, 45-72 (1999); VAN DER MENSBRUGGHE & DAVID ROLAND-HOLST, HUMAN DEVELOPMENT RESEARCH PAPER 2009/50: GLOBAL ECONOMIC PROSPECTS FOR INCREASING DEVELOPING COUNTRY MIGRATION INTO DEVELOPED COUNTRIES (UN Development Programme Human Development Reports ed., 2009).

organizations.”⁸⁷ Second, IOs were assumed to be solely the instruments through which states saw their cooperative arrangements completed.⁸⁸ There existed no independent act or thought from these organs to save those states imbued with them. They were functional, not sovereign.

On the first point, institutionalism in the international system has been championed as a corrective for a history of destructive behaviors by states.⁸⁹ Colonialism, mercantilism, and the narrow self-interest that preceded the United Nations era would be outlawed or regulated.⁹⁰ The states had lofty goals to achieve cooperation and solutions through diplomatic means as the norm. It would beggar belief to think that some saw a utopian end arising from the floor of the United Nations General Assembly. It was absolutely true that *participation* in these institutions did reflect on the member nations, or it may be more accurate to say it reflected on the non-participants.

If the dominant trend in the post-World War II era was deepening ties to and within IOs for the purpose of institutionalizing multilateral governance, then those states who chose *not* to participate must clearly have been against cooperation and for war or conflict. It is worth remembering that the West dominated much of the international organizational ecosystem, thus delegitimizing much of the East almost by design.⁹¹ Participation for its own sake, and not outcomes as a result of cooperative participation, was in a sense being incentivized as to be outside the legitimate world order. As a result, such participation could damage a state, reputationally and materially. States, for instance, who chose not to participate in the UNCHR’s review process were easily delegitimized as international pariahs.⁹²

87. Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT’L L. 645, 646 (2014).

88. *Id.*

89. Karns & Mingst, *supra* note 37, at 47.

90. *Id.*

91. Communist states were not technically barred from many international organizations they did not join because many rules and expectations in membership would be difficult to reconcile with Communist systems. Free trade and market reforms kept the Soviet Union out of the GATT and did not become an observer until 1990. See Kazimierz Grzybowski, *International Organizations from the Soviet Point of View*, 29 L. & CONTEMP. PROBS. 882, 885 (1964).

92. Lebovic & Voeten, *supra* note 73, at 868.

442 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

Thomas Franck's major argument in *The Power of Legitimacy Among Nations* was that law as we understand it, as citizens within our respective states, does not exist in the international system.⁹³ That states behave in a manner akin to law-abiding most of the time has nothing to do with the fear of punishment or reprisal, but rather with the alternative of having to exist outside of the legitimate world order. For example, the fact that the Democratic People's Republic of Korea is keen to use the Six-Party Talks and not piracy to acquire material likely does not convince anyone the Kim Jung Un's regime is "legitimate."⁹⁴ However, we take several international norms of behavior for granted that are apparent upon their violation.

Within the past seven years of this writing, the United Kingdom voted to leave the European Union, the United States engaged in a trade war with China, and Russia annexed a portion of Ukraine. These three acts were greeted with international reprobation. Each act respectively represented an example of a violation of a hard law (respect of sovereign borders), an international rule (the World Trade Organization's rule of equal tariff rates among members), and a norm (the principle of multilateralism).⁹⁵ Most of the time, these are the sorts of activities states do not violate, kept in check by the compliance pull of legitimacy.⁹⁶

The George W. Bush administration's seeking of United Nations Security Council approval of its (eventual) 2003 invasion of Iraq is a good example of compliance.⁹⁷ The United Kingdom's 2013 attempt to reconcile unilateral actions in Syria to the United Nations' "Responsibility to Protect" paradigm is another example.⁹⁸ Acting

93. See generally THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 5-6 (Oxford Univ. Press ed., 1990).

91. Christine Gray, *A Crisis of Legitimacy for the UN Collective Security System?*, 56 INT'L & COMPARATIVE L. Q., 157, 162 (2007).

95. Note well that the U.S., U.K., and Russia are world powers and each act mentioned concerned domestic responses over international. A full individual and comparative examination of their acts is beyond the scope of this paper.

96. FRANCK, *supra* note 93, at 7-8.

97. George Bush's Speech to the UN General Assembly, THE GUARDIAN (Sept. 12, 2002), <https://www.theguardian.com/world/2002/sep/12/iraq.usa3>.

98. See Sufyan Droubi, *Opinio Juris: Between Mental States and Institutional*, in INTERNATIONAL ORGANIZATIONS, NON-STATE ACTORS, AND THE FORMATION OF CUSTOMARY INTERNATIONAL LAW (Manchester Univ. Press 2020).

through and with IOs is thought to add legitimacy to state behaviors as they, quite visibly, provide an objective conclusion on said activities.⁹⁹ Had the United Nations Security Council approved the United States' invasion of Iraq, it would have sent a strong signal to international audiences that what the Bush administration planned was just and in line with the norms and behaviors of legitimate actors. In other words, it would not be the unilateral action of a self-interested state, the sort of behavior the present international system abhorred.

That the Soviet Union sought admission to the IOC while it took on its United Nations responsibilities is perhaps best viewed in this light. The Soviets had eschewed, for the most part, the international order, sporting, and all, in favor of its own institutions.¹⁰⁰ After World War II, the Soviet Union sought admittance into the IOC, but found its domestic laws would first need to be reconciled with the rules and regulations of those of the Olympic community.¹⁰¹ This meant Moscow had to relinquish hegemonic control of its sporting calendar and competitions to the various sports' international federations and cease the state sponsorship of sports and athletes, a violation of the principle of amateurism.¹⁰²

Moreover, functionalism has legally come to dominate the interpretation of IO actions in the international system. This view isolates IOs from the broader institutions and limits their understanding to just their design. Functionalism also privileges the agency of states and reinforces the lack of judicial independence and legal agency among IOs. Consequently, IOs are unable to affect the *opinio juris* of states because states imbue their instruments with such a sense of legal obligation.

99. Terrence L. Chapman & Dan Reiter, *The United Nations Security Council and The Rally'round The Flag Effect*, 48 J. CONFLICT RESOL. 886, 890 (2004).

100. These sporting institutions included the Red Sport International (sporting), Council for Mutual Economic Assistance (economic), and Warsaw Pact (security).

101. Jörg Krieger & Austin Duckworth, 'Vodka and Caviar Among Friends'—*Lord David Burghley and the Soviet Union's Entry into the International Association of Athletic Federations*, 41 SPORT IN HIST. 260, 280 (2021).

102. See Allen Guttmann, *The Cold War and the Olympics*, 43 INT'L J. 554, 556 (1988) (discussing Soviet Russia's difficulty ending state sponsorship to meet amateur rules). While there would never be satisfaction for many as to the amateur status of Communist system athletes, it should be noted that the United States collegiate athletics practices were indistinguishable.

444 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

The *opinio juris* debate around IOs is particularly strong as it concerns customary law. As mentioned above, this is the realm of international law and we would expect to see the most activity from these organizations. There are well-reasoned points to be made about why IOs do not affect the legal obligations of states. Still, these are often static in that they treat uniformly the many and varied organizations and their similarly varied relationships with states.¹⁰³

For instance, the North Atlantic Treaty Organization (“NATO”) is very much an organization that requires the member states to give it agency. Perhaps for obvious reasons: NATO as a military agent, acting on its own or even with greater autonomy might do more harm than good no matter its objectives. Conversely, much of the international human rights regime functions outside the purview of state discretion. In the former case, states necessarily legitimate the use of force, while in the latter, states are the locust of human rights behavior, good and bad, and need to be observed by an independent actor.¹⁰⁴

The framework by which we understand the state—the IO relationship is often illustrated as a hierarchy: states act as principals delegating tasks to their agents, in this case, IOs.¹⁰⁵ The dominant assumption is that states delegate to IOs to increase the legitimacy of their activities.¹⁰⁶ Only the most fervent realist, one who understands the international system as state-centric, would accept this assertion in total today. A great deal of international law has emerged from the floor of the United Nations General Assembly. For instance, the principle of

103. See Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 104 (1987) (in which the author vivisects the International Court of Justice’s *Nicaragua* (1984) ruling).

104. See Eva Herschinger, Markus Jachtenfuchs, & Christiane Kraft-Kasack, *Scratching the Heart of the Artichoke? How International Institutions and the European Union Constrain the State Monopoly of Force*, 3 EURO. POL. SCI. R. 445, 450 (2011), for a fuller examination of the effect of institutions on a State’s monopoly on force.

105. See DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren G. Hawkins, David A. Lake, Daniel L. Nielson, & Michael J. Tierney, & Cambridge Univ. Press eds., 2006).

106. See generally T.L. Chapman & Reiter, *supra* note 59; FABRIZIO GILARDI, DELEGATION IN THE REGULATORY STATE: INDEPENDENT REGULATORY AGENCIES IN WESTERN EUROPE (Cheltenham, U.K. & Edward Elgar eds., 2008); Daniel J. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT’L ORG. 241, 242 (2003).

“common heritage” appears in the Treaty on Outer Space (1967) and the Convention on Law of the Sea (1982).¹⁰⁷ Far from merely acting as repositories for treaties or the instrument by which a state carries out business, IOs have become more proactive, or even, as is the case with the European Court of Justice, uncharacteristically powerful relative to its members.¹⁰⁸

There is no issue area where this has been more apparent than the international environmental regime. The regularized conferences of the parties (COPs), the empowerment of non-governmental organizations (NGOs) through the Paris Agreement, and the simplified legislative practices embedded in many of the environmental agreements are all entry points for IOs to inform the creation of international law.¹⁰⁹ Unlike sports, though, sophisticated regulatory practices dominate the environmental regime, minimizing customary law in environmental issues.¹¹⁰ Therefore, the practices that do emerge in the sporting regime are more likely to be soft law, and their status *as law*, less clear.

All these issues matter to our understanding of the IOC and its ability to participate in the promotion or creation of international norms of behavior. Institutionally, there are strong arguments for the power this organization is thought to have over states; functionally, on the other hand, there are significant questions, not about what the IOC does or is meant to do, but what it *chooses* to do and why. In short, the IOC has a greater opportunity to affect state behavior when acting as part of the broader international institutional system but has operationalized its mission (its functionality) as commercial.

II. THE INTERNATIONAL OLYMPIC COMMITTEE

In the study of IOs, sporting organizations like the IOC and the equally maligned International Federation of Association Football

107. KARNS & MINGST, *supra* note 37, at 103.

108. Karen J. Alter, *Who are the “Masters of the Treaty”? European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 121 (1998).

109. See generally ALIX DIETZEL, *GLOBAL JUSTICE AND CLIMATE GOVERNANCE: BRIDGING THEORY AND PRACTICE* (Edinburgh University Press ed., 2014); M. HEDEMANN-ROBINSON, *ENFORCEMENT OF INTERNATIONAL ENVIRONMENTAL LAW: CHALLENGES AND RESPONSES AT THE INTERNATIONAL LEVEL* (Routledge ed., 2019).

110. Teixeira, *supra* note 24, at 254.

446 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

(FIFA) are largely ignored. Political scientists have dismissed their import either because of these organizations' status as nuclei for forms of commercial entertainment or the outright acceptance of their non-political declarations.¹¹¹ Both FIFA and the IOC have longer histories than the United Nations and more member states than many of the other IOs produced from the post-World War II international system.¹¹² The United Nations recognized the Olympic Truce and in 2014 the two signed an agreement to work together at their highest levels toward their shared goals.¹¹³ The IOC also has a higher profile than many of the IOs that have more to do with managing the day-to-day business of their respective sports.¹¹⁴

Despite its stated non-political nature, the IOC, and, so too the Olympic Games they manage, are often interpreted as political. It is a non-governmental organization to be sure, but one whose membership is based on nationality, and whose product is based on the competition among nations.¹¹⁵ The IOC's adherence to this apolitical notion has led

111. A JSTOR search for the IOC and FIFA represented in the leading political science journal, *International Organization*, on this topic returns 52 results over the past fifty years. Many of these results only reference sport and these organizations in relation to some other topic like international law.

112. The IOC was formed in 1894 and lists 206 nations as members. See Yannick Kluch & Eli Wolff, *What's the IOC—and Why Doesn't it Do More About Human Rights Issues Related to the Olympics?*, THE CONVERSATION (Feb. 18, 2022), <https://theconversation.com/whats-the-ioc-and-why-doesnt-it-do-more-about-human-rights-issues-related-to-the-olympics-176499>. FIFA was formed in 1904 and recognizes 211 nations as their members. See *FIFA Fast Facts*, CNN (Sept. 5, 2021), <https://www.cnn.com/2016/01/13/world/fifa-fast-facts/index.html>.

113. See G.A. Res. A/69/L.5, Sports as a Means to Promote Education, Health, Development and Peace (Oct. 16, 2014).

114. Compare the IOC with FIBA, or the International Federation of Basketball for context. This latter organization organizes international and regional competitions, maintains a world ranking of its over 200 members, and has a regularized calendar ending with a World Cup every four years. See *About Us*, FIBA, <https://www.fiba.basketball/> (last visited Mar. 7, 2022). The highest level of international competition, and *de facto* world championship, remains the Olympic Summer Games. See *Olympic Games*, INT'L OLYMPICS COMM., <https://olympics.com/en/olympic-games> (last visited Mar. 7, 2022). Perhaps only FIFA can lay claim to its quadrennial World Cup superseding the Olympic final in importance. *About FIFA*, FIFA, <https://www.fifa.com/about-fifa> (last visited Mar. 7, 2022).

115. See Efthalia Chatzigianni, *The IOC as an International Organization*, 2 SPORT MGMT. INT'L J. 91, 94-95 (2006) (for a straight forward argument to this end).

to its presenting a contradictory image. On the one hand, it discourages explicit acts of political protest, while, on the other, it reinforces status quo politics by legitimizing regimes through state-centric rituals like the medal presentation with national anthems and flags.¹¹⁶ It is the host selection process through which the IOC has historically maintained much of its prestige and influence.

The right to host an Olympic Games is awarded through a long bid process that, for determined aspirants, will include what is in effect a “practice” bid destined to fail.¹¹⁷ The competition has been historically incredibly competitive, and stories of foul play surrounding bids is, if not always known in detail, certainly familiar in anecdotes.¹¹⁸ Bribes for votes and sweetheart deals are commonly suspected, and in certain cases have been considered *pro forma* behaviors for would-be hosts.¹¹⁹ The desire to win a bid and gain the previously discussed marker of international legitimacy, is certainly demonstrated by the willingness to cheat or engage in subterfuge.

As discussed below, there has been a trend of potential hosts backing out, often at the end of a public referendum on the matter.¹²⁰

116. Sean Ingle, *IOC Bans Athletes From Taking a Knee and Podium Protests at Tokyo Olympics*, THE GUARDIAN (Apr. 21, 2021), <https://www.theguardian.com/sport/2021/apr/21/podium-protests-to-be-banned-at-tokyo-olympics-after-athletes-poll>.

117. There are a number of histories and examinations of the bid process that discuss either the political or economic consequences. See, e.g., M. BURBANK, ET AL., *OLYMPIC DREAMS: THE IMPACT OF MEGA-EVENTS ON LOCAL POLITICS* (Lynne Rienner Publishers ed., 2001); C. R. HILL, *OLYMPIC POLITICS* (Manchester Univ. Press ed., 1992); RICHARD ESPY, *THE POLITICS OF THE OLYMPIC GAMES: WITH AN EPILOGUE, 1976-1980* (Univ. of Calif. Press ed., 1981).

118. Salt Lake City's 2002 Winter Games bid behavior is again today being discussed as that city preps for a bid for a potential second event. See, e.g., Brady McCombs, *Salt Lake City's new Olympic bid comes after scandal's lessons*, LAS VEGAS REV. J. (Dec. 18, 2018), <https://www.reviewjournal.com/news/nation-and-world/salt-lake-citys-new-olympics-bid-comes-after-scandals-lessons-1554309/>.

119. The Nagano bid committee was convinced that these behaviors were just part of the process as they were the very same behaviors they had observed by other hosts in previous bid cycles. See Mary Jordan & Kevin Sullivan, *Nagano Burned Documents Tracing '98 Olympics Bid*, WASH. POST FOREIGN SERV. (Jan. 21, 1999), <https://www.washingtonpost.com/wp-srv/digest/daily/jan99/nagano21.htm>.

120. Vivienne Walt, *The Biggest Olympics Hurdle: Finding Host Cities*, FORTUNE (May 22, 2021), <https://fortune.com/2021/05/22/the-biggest-olympics-hurdle-finding-host-cities/>.

448 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

This has been especially prevalent after the Great Recession of 2008 when policies of austerity developed. Suffice to say here that the bid process pits actors against one another in a competition for what is in effect a private good; that is, it is rival and excludable. The right to host cannot be divided, and the benefits of hosting accrue solely to the host.¹²¹ These benefits exist because the Games themselves are, in a sense, a public good; non-rival and non-excludable for all to enjoy. This competition has shaped the political life of the IOC to be sure, and where it gains much of its influence over states.

A. The Politics of the International Olympic Committee

The familiar arguments about mega-sporting events (especially the Olympics) value to hosts need not be repeated in full here. While some scholars have summarily found these events result in a financial loss for the hosts,¹²² in terms of soft power these events typically do provide a measurable incentive.¹²³ Soft power, the measure of a state's ability to get other states to do what it wants without the use of coercion,¹²⁴ is often an explicit goal of bid cities. After London hosted the 2012 Summer Games, there was a noticeable increase in people's positive perception of the United Kingdom; a stated goal that nation had sought to achieve via a strategy of "engagement" through the Games.¹²⁵ Anecdotally, when the present author has had the opportunity to speak

121. Hosts may be multiple actors, such as the 2026 FIFA World Cup. See *FIFA World Cup 2026*, FIFA, <https://www.fifa.com/tournaments/mens/worldcup/canadamexicousa2026>, (last visited Mar. 7, 2022). The *right* to host cannot be divided. Therefore, while traditionally bids and hosts have been one nation or city in the past, it is not inconceivable (and in fact more likely in the future) that a bid will spread duties across multiple hosts, but the rights in essence remain singular; confined to the bid as designed. See *OLYMPIC CHARTER*, *supra* note 6, art. 33-34.

122. R. A. Baade & V. A. Matheson, *Going for the Gold: The Economics of the Olympics*, 30 J. ECON. PERSP. 201, 204 (2016).

123. Jonathan Grix, *Sport Politics and the Olympics*, 11 POL. STUD. REV. 15, 17 (2013).

124. Joseph S. Nye, *Public Policy and Soft Power*, 616 ANNALS AM. ACAD. POL. & SOC. SCI. 94, 95 (2008).

125. B. Houlihan & R. Giulianatti, *Politics and the London 2012 Olympics: The (In)security Games*, 88 INT'L AFFS. 701, 716 (2012); Y. W. Li, *Public Diplomacy Strategies of the 2008 Beijing Olympics and the 2012 London Olympics: A Comprehensive Study*, 30 INT'L J. OF THE HIST. OF SPORT 1723 (2013).

with Canadians, they will assert, to this day, that the 1984 Calgary Winter Games put that city on the international map, and many supported that city's flirtations with a second bid.¹²⁶

One might assume that a bid indicates a regime's desire to host, and that a successful bid is the fulfillment of this desire irrespective of the actual events final balance of payments. Although this logic seems obvious enough, it is often lost in the discourse that a regime's goal when bidding might not be material, economic gains or infrastructure expansion, and something less tangible. For instance, Tokyo, Japan, Summer 2020 hosts, initially bid for the 2016 Games. They did so in a time that China's ascendancy was on full display thanks in part to the 2008 Beijing Games. Japan, as a nation, was "[anxious] about the political and economic challenge of its rival East Asian superpower."¹²⁷ The Olympics were thought to be a way to reassert Tokyo, and Japan's, place in that region and in the world.

That the Olympics have always been characterized as non-political denies a long history of preferential treatment of formal states. Despite their worst behaviors, a sitting government was taken to be legitimate and thus a worthy participant in the Olympic Movement. The 1936 Berlin Games for instance, as well as the previously noted awarding of the 1940 Games to Tokyo, followed by the IOC's acceptance of Germany as the potential replacement host for the 1940 Games when Tokyo backed out,¹²⁸ as well as the planned 1944 Cortina d'Ampezzo

126. Kaylen Small, *Why Insider Says 2026 Olympics Wouldn't Have Been a Good Fit for Calgary*, GLOB. NEWS (June 24, 2019), <https://globalnews.ca/news/5426773/2026-olympics-host-italy-ioc-calgary-rob-livingstone/> (e.g., There is an interesting geographic difference when discussing Canada and hosting the Olympics. While those from the west of Canada are commonly pointing to the Calgary (1984) and Vancouver (2010) Winter Games as examples of hosting's benefits for the nation. Toronto in the east has struggled for years to gain popular support for a Summer Olympic bid and has a long history of anti-Olympic social movements. Yet, Torontans seemed more passive when the present author was shown construction in 2014 for the Pan-American Games that were to occur in 2015).

127. William W. Kelley, *Asia Pride, China Fears, Tokyo Anxiety: Japan Looks Back at 2008 Beijing and Forward to 2012 London and 2016 Tokyo*, 7 ASIA-PAC. J. 4 (2009).

128. Under the hosting arrangement of the time, the Winter and Summer Games were held in the same year with the Winter preceding the Summer Games. The proposed solution to Tokyo's abandonment was to return to Garmisch-Partenkirchen, Germany for the Winter Games which would have been hosted there in 1936. The

450 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

Games in Mussolini's Italy were all examples of hosts whose international behaviors were counter the Olympic Truce and its pacific mission.¹²⁹

The IOC and the Olympic Games were started in Europe by a French nobleman whose ideals were universal in rhetoric only, while practically reinforcing the centrality of Europe and in the world order.¹³⁰ Initially, there was no interest in making the Games truly global. The early example of the Anthropology Days that the 1904 hosts (St. Louis, USA) attached to them demonstrated the organizers' antipathy to much of the non-European world.¹³¹ Tokyo's initial selection to host the abandoned 1940 Games would have marked the first non-Western host. The 1956 Games would leave the Northern Hemisphere, but for the former British colony of Australia. It would not be until 1964 that a non-European, non-Western nation, Japan, would host the Games.¹³²

Had it not been for grassroot efforts to impress the issue upon the powers that be, it might never have been that the IOC would bar

Summer Games would then be hosted by Helsinki, Finland. *See* Gillian Brockell, *This Isn't the First Time Olympics in Japan have been Disrupted*, WASH. POST (Mar. 24, 2020), <https://www.washingtonpost.com/history/2020/03/24/1940-tokyo-olympics-postponed-coronavirus/>.

129. Mussolini's invasion of Ethiopia (then known as Abyssinia) was viewed as an act of aggression and a violation of the Kellogg-Briand Pact. It had also tested the bounds of what the international community, through the League of Nations, would tolerate. Each of these Games would be abandoned due to the outbreak of World War II as well as the 1940 Games. *See Ethiopia: Lesson in War*, THE NEW REPUBLIC (July 16, 1935), <https://newrepublic.com/article/90604/ethiopia-lesson-in-war>; *See also U.N. and the Olympic Truce*, UNITED NATIONS, <https://www.un.org/en/olympictruce> (last visited Mar. 7, 2022).

130. *Who Was Pierre De Coubertin?*, INT'L OLYMPIC COMM., <https://olympics.com/ioc/faq/history-and-origin-of-the-games/who-was-pierre-de-coubertin> (last visited Mar. 7, 2022).

131. The 1904 Games are widely believed to be the worst Olympics of all time. Few participant nations and the Games produced as a side show to the concurrent World's Fair, the Anthropology Days and its racist overtones would seemingly confirm this opinion. *See* THE HISTORICAL DICTIONARY OF THE MODERN OLYMPIC MOVEMENT (John E. Findling & Kimberly D. Pelle eds., 1996) (for a summary of the event).

132. Brockell, *supra* note 128.

apartheid South African participation from 1964 until 1992.¹³³ It eventually did so based on unequal participation among white and Black South Africans in sport. That the inclusion of seven non-whites on their Olympic team was ignored by the IOC reaffirmed that this had more to do with superficial participation and struck at the heart of the cause of such inequality.¹³⁴

The Olympic Charter, which is routinely updated, and a state's adherence to it is the bedrock of participation and the Olympic Movement.¹³⁵ Sport as a human right and equal access to sport being the *raison d'être* of the entire Olympic institution, when a state like South Africa cannot ensure equal participation for all citizens no matter their skin color, we might suspect the conclusion a simple one. Yet, the IOC was slow to adopt the South African ban, and then it had to overcome the centrality of white, European hegemony to its executive structure.¹³⁶ It was not uncommon for the familiar refrain "politics should not be allowed to interfere with sport" to be used in defense of IOC inactivity on this issue as it commonly is.¹³⁷ As observers noted at the time, South Africa had already politicized sport when it segregated it based on race.¹³⁸

By arguing that sport was non-political, it separated the IOC from the responsibilities of encouraging the adoption of contemporary norms regarding the equality of people and treatment due them. It was, in essence, saying that sport, and that which defined its function, was inherently above politics, and thus it could not engage in the apartheid discourse without corrupting sport. External pressure eventually won

133. *Olympics; Ban Asked on All Athletes Competing in South Africa*, N.Y. TIMES (Dec. 10, 1988), <https://www.nytimes.com/1988/12/10/sports/olympics-ban-asked-on-all-athletes-competing-in-south-africa.html>.

134. *1964: South Africa Banned from Olympics*, BBC (Aug. 18, 1964), http://news.bbc.co.uk/onthisday/hi/dates/stories/august/18/newsid_3547000/3547872.stm. See ERIC P. LOUW, THE RISE, FALL, AND LEGACY OF APARTHEID (Westport, Conn: Praeger ed., 2004) (for a general history of apartheid in South Africa).

135. The present Charter was enacted on August 8, 2021. See OLYMPIC CHARTER, *supra* note 6.

136. R. E. Lapchick, *The Olympic Movement and Racism: An Analysis in Historical Perspective*. 17 AFRICA TODAY 14, 14-16 (1970).

137. Jim Bouton, *South Africa's Membership in the International Olympic Committee*, 15 AFR. TODAY 3, 3 (1968).

138. *Id.* at 3.

452 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

out and the IOC did ban the South African participation at its events.¹³⁹ As more and more actors began to take part in the Olympic Movement, it was harder for Euro-centrality to be maintained as other viewpoints would need be incorporated into IOC behaviors. Even so, much of the prospective influence the IOC could have exerted on states would be diluted by a growing emphasis on its corporate relations and the Olympics as a commodity; its most recent functional form. This has been the particular mode by which the Games have been understood in the post-Cold War era.

B. The Business of the International Olympic Committee

While the Olympics, and other mega-sporting events like the FIFA World Cup, are apt to advertise an idealized image of a nation or region, they are also ready-made to advertise for some of the world's largest multi-national corporations (MNCs).¹⁴⁰ This has made them especially attractive to cities with an eye to post-globalized economic development.¹⁴¹ Since the 1992 Games of Barcelona, television audiences have only increased, and so too, television revenue and the opportunities for corporate sponsorship.¹⁴² This increased attention is precisely why MNCs, like the Coca-Cola Company and Anheuser-Busch InBev, seek sponsorship opportunities in relation to these events. These companies face competition, not just in their domestic market, but also in the international markets.¹⁴³ The use of the Olympic logo in association with their brand, the reward for sponsoring the Olympics, can transfer the Games' popularity to a corporation,¹⁴⁴ as well as signal a brand's superiority over its competitors.¹⁴⁵

139. Lapchick, *supra* note 136, at 16.

140. Rama Yelkur et. al, *The Alchemy of Olympics Advertising & Sponsorship: Turning the Games into Gold*, 13 J. MGMT. POL'Y & PRAC. 34, 35 (2012).

141. Nandwani, *supra* note 12.

142. David Whitson & John Horne, *Underestimated Costs and Overestimated Benefits? Comparing the Outcomes of Sports Mega-events in Canada and Japan*, 54 SOCIO. REV. 73, 75 (2006).

143. Brenda J. Ponsford & Jagdish Agrawal, *Why Corporations Sponsor the Olympics*, 5 J. PROMOTION MGMT. 15, 22 (1999).

144. Thade Dudzik & Andrea Groppel-Klein, *The Efficiency of Integrated Sponsorship Advertising*, 7 INT'L J. SPORTS MKTG & SPONSORSHIP 51, 59 (2005).

145. Ponsford & Agrawal, *supra* note 143, at 24.

Ponsford and Agrawal write that “[i]t is possible that repeated pairing of the company or brand with the image represented by the Olympics causes transfer of this image from the Olympics to the sponsoring firm or brand.”¹⁴⁶ Following the 1985 introduction of TOP,¹⁴⁷ the IOC was able to provide corporations with a global, media-friendly platform and product/brand exclusivity.¹⁴⁸ While TOP members tend to be dominated by the largest, western MNCs, corporations within the host nation have an opportunity for preferential exclusivity within many of the same categories. For instance, while Anheuser-Busch InBev has been a long-time sponsor enjoying exclusivity in the beer category, Chinese brewers Tsingtao were given branding rights for the duration of the 2008 events.¹⁴⁹

Scholars like Preuss, Gemeinder, and Seguin and Piatkowska, and Zysko have documented the growth of Olympic revenue under this program as well as the increased incentives to “ambush” an event.¹⁵⁰ That is, to try and attach a brand to an event although one cannot afford or does not want to pay the associated fees. For some time, the Olympic “brand” had been infallible, and the Olympic symbol of the five interlocked rings is the most recognized non-written logo across the

146. *Id.* at 22.

147. TOP is short for “The Olympic Partner” Programme which denudes it of its commercial nature. Whether a strategic decision to obfuscate the aggressive, commodification of the Games or as a result of an uninspired creative process remains unknown, *See What is the TOP Programme*, INT’L OLYMPIC COMM., [https://olympics.com/ioc/faq/olympic-marketing/what-is-the-top-programme#:~:text=The%20abbreviation%20%E2%80%9CTOP%E2%80%9D%20stands%20for,OCOGs\)%20and%20the%20Olympic%20Movement](https://olympics.com/ioc/faq/olympic-marketing/what-is-the-top-programme#:~:text=The%20abbreviation%20%E2%80%9CTOP%E2%80%9D%20stands%20for,OCOGs)%20and%20the%20Olympic%20Movement) (last visited Mar. 7, 2022).

148. Michael C. Hall, *Urban Entrepreneurship, Corporate Interests and Sports Mega-events: The Thin Policies of Competitiveness within the Hard Outcomes of Neoliberalism*, 54 SOCIO. REV. 59, 59-60 (2006).

149. *China: Olympics Help Tsingtao Sales*, N.Y. TIMES (Aug. 19, 2008), https://www.nytimes.com/2008/08/20/business/worldbusiness/20fobriefs-OLYMPICHELP_BRF.html.

150. Holger Preuss, Kai Gemeinder, Kai, & Benoit Seguin, *Ambush Marketing in China: Counterbalancing Olympic Sponsorship Efforts*, 7 ASIAN BUS. & MGMT, 243 (2008); Monica Piatkowska & Jolanta Zysko, *Off-field Competition at Major Sport Events: Case Study of the 2010 FIFA World Cup South Africa*, 49 PHYSICAL CULTURE & SPORTS STUD. RSCH. 118 (2010).

454 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

world.¹⁵¹ Although the commercialization of the Games was not always popular, it had at least always been profitable.

This sort of advertising and branding, both for the national and commercial goals of a regime, cannot be generated by many, if arguably any, other means. Yet, there are also reputational risks that a host state takes on with the increased attention. For instance, Ukraine's 2012 cohosting of the UEFA European Championships resulted in negative publicity regarding that state's troubles with racism.¹⁵² In the case of Beijing, 2008, protests that preceded the Games highlighted the PRC's poor treatment of Tibetans.¹⁵³ At the same time, these events provide a source for increased attention the state can use to advance its aims. This same attention could also be used by activists and dissidents to get their messages out. Then, instead of one unified message about the host emerging from the event, competing views would be available to the event's audience.

This strategic use of the increased media on the part of NGOs would in effect be naming and shaming.¹⁵⁴ This is a tactic by which they can globally publicize state behavior that violates expected human rights norms.¹⁵⁵ The government faces a call to change this behavior from the domestic NGOs and international actors who likewise advocate for change. This is referred to as the "Boomerang Pattern" and it pressures the government to change through actors from "above" (at the international level) and "below" (at the domestic level).¹⁵⁶

The increased global attention of the event could give a domestic NGO the opportunity to capture the attention of the world in a crowded advocacy market.¹⁵⁷ One of the key players emerging in the post-Cold

151. HANS WESTERBEEK & AARON SMITH, SPORTS BUSINESS IN THE GLOBAL MARKETPLACE 26 (Palgrave Macmillan ed., 1st ed. 2002). Whether this assertion is still true, or the results of this survey robust, should be kept in mind.

152. Grix, *supra* note 123, at 18-19.

153. Anthee Carassava, *Tibet Protest at Olympic Ceremonies*, N.Y. TIMES (Mar. 31, 2008), <https://www.nytimes.com/2008/03/31/world/30cnd-greece.html>.

154. Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORGS. 689, 689-90 (2008).

155. *Id.*

156. Margaret P. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51 INT'L SOC. SCI. J. 89, 93 (1999).

157. CLIFFORD BOB, THE MARKETING OF REBELLION: INSURGENTS, MEDIA, AND INTERNATIONAL ADVOCACY (Cambridge Univ. Press ed., 2005); Amanda M.

War system have been trans-national advocacy networks (TANs), which exchange information and regularize communication in an issue area.¹⁵⁸ Groups utilizing this attention could insert themselves into existing TANs, and increase their ability to effect change. Yet TANs are not categorically exhaustive when it comes to issue areas,¹⁵⁹ and the presence of the world's media could raise issues to the international agenda, creating new TANs that would otherwise be overlooked.

ISOs like the IOC, the host, and the sponsoring MNCs are keen to keep these events as sanitized of political controversy as possible.¹⁶⁰ Yet, there have been arguments that awarding poor observers of human rights international sporting events can validate these state's policies.¹⁶¹ Since 2014 and the Winter Games in Sochi, Russia, the IOC has been proactive in trying to quiet protests by athletes.¹⁶² This has been interpreted as the IOC giving a host regime political cover. It might also be that the IOC would rather not associate event sponsors with "bad press" as "sponsors advertise their sponsorship well in advance of the Olympics as well as advertising heavily during the games themselves."¹⁶³ This suggests the brand transference could actually provide the sponsor with a negative image in line with the host's politics.

As an increasing number of potential hosts withdraw from the games and the leverage the IOC maintains over states through the bid process diminishes, the likelihood of the IOC's treatment of the

Murdie, *The Ties that Bind: A Network Analysis of Human Rights International Nongovernmental Organizations*, 44 BRIT. J. POL. SCI., 1, 4 (2014).

158. Keck & Sikkink, *supra* note 156, at 191.

159. Charli R. Carpenter, *Vetting the Advocacy Agenda: Network Centrality and the Paradox of Weapons Norms*, 65 INT'L ORG. 69, 69-70 (2011).

160. Michelle Bruton, *IOC President Thomas Bach: Olympics 'Are Not About Politics,' Athletes Should Be Politically Neutral At Games*, FORBES (Oct. 26, 2020), <https://www.forbes.com/sites/michellebruton/2020/10/26/IOC-president-thomas-bach-olympics-are-not-about-politics-athletes-should-be-politically-neutral-at-games/?sh=3ca3461479d8>.

161. Chad Nold, *Olympic sized opportunity: Examining the IOC's past neglect of human rights in host cities and the chance to encourage reform on a global scale*, 11 LOY. UNIV. CHI. INT'L. REV. 161, 172 (2014).

162. Karolos Grohmann, *Sochi Sets Up Protest Zones in City: IOC*, REUTERS (Dec. 10, 2013), <https://www.reuters.com/article/us-olympics-sochi-protests/sochi-sets-up-protest-zones-in-city-ioc-idUSBRE9B90UV20131210>.

163. Ponsford & Agrawal, *supra* note 143, at 23.

456 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

Olympics as a commodity should rise. It will need to replace the rents accrued through the bid process with the rents it may extract from the final event. This is indicated by the fact that the IOC has sealed hosts for the Summer Games through 2032,¹⁶⁴ in addition to hosts for both the 2024 and 2028. Ensuring the occurrence of the events themselves, neither the quality nor the universality of their selection are guaranteed, this secures the IOC functionally. It may now capture the windfall from ensuing TV rights and sponsorship deals. Surely the three hosts selected, all cities in western states, demonstrates the IOC's further desire to reduce any potential criticisms it could face.

C. The International Olympic Committee as Institutional Law Maker

Hosting is admittedly a rarity for any one nation, and very few nations have captured the lion's share of events. Still, a state and its regime benefits from participation in the games. There is "more political capital to be gained by attending" than boycotting or abstaining from participating in the Games.¹⁶⁵ It has been argued that "interstate diplomacy has generally become more subtle and more concerned with the promotion of a nation's... image."¹⁶⁶ Maintaining a state's participation in the Olympic Movement then requires continued acquiescence to the international sporting regime, at the top of which sits the IOC.

The reconciliation of sporting calendars, rules regarding amateurism,¹⁶⁷ and membership within recognized IOs aside, the latter period of the Olympic Movement has recognized an acceptance of the Court of Arbitration for Sport (CAS) and the World Anti-Doping Agency (WADA) as legitimate. When a state accepts these bodies and their activities, they are demonstrating an "acceptance of the IOC's supremacy in the international sports order [such that] domestic courts

164. In order: Paris, France; Los Angeles, United States; Brisbane, Australia. See Shana McCarriston, *Where is the next Olympics? Explaining where the Summer and Winter Games will be held through 2032*, CBS SPORTS (Feb. 21, 2022), <https://www.cbssports.com/olympics/news/where-is-the-next-olympics-explaining-where-the-summer-and-winter-games-will-be-held-through-2032/>.

165. Houlihan & Giulinatti, *supra* note 125, at 703.

166. *Id.*

167. This has largely been devolved to the various IOs to be decided independently.

usually refrain from granting legal protection against punitive decisions of organs of the IOC, for example a prohibition from participating in the Olympic Games.”¹⁶⁸ Perhaps this has been most notable in the Russian doping-ban and WADA’s role within the process.¹⁶⁹ Despite the debate on CAS’s reputation in the international sports regime, it is often described as an efficient and objective player in the international sports regime.¹⁷⁰

Why do states and other international actors accept the legitimacy, and the finality of, the actions and decisions of these two bodies? It has been argued that the International Labor Organization (ILO) has encouraged greater legalization of international labor through its activities.¹⁷¹ By upholding labor rights as laws, it reinforced this belief among its members. Accordingly, many regional organizations and other treaty bodies have begun adopting the language of labor rights into their agreements.¹⁷² Therefore, the IOC can occupy a similar role in the context of the international sporting regime as its activities reinforce the norms and behaviors that eventually give the CAS or WADA a legal character.

What of issues outside of sport? Can or should the IOC affect these issue areas as well? As noted in the earlier discussion of the South African sporting ban, the IOC was able to effectively bridge apartheid and sport.¹⁷³ So we might expect that where this can be done, the IOC

168. Nowrot, *supra* note 60, at 599.

169. Tariq Panja, *Russia Banned From the Olympics and Global Sports for 4 Years Over Doping*, N.Y. TIMES (Dec. 9, 2019), <https://www.nytimes.com/2019/12/09/sports/russia-doping-ban.html>. Although, the bad and who it was meant to affect was never clear. For instance, many Russian athletes were still present at the Tokyo Games. See *Why are Russian athletes competing at the Tokyo Olympics despite the country’s ban?*, THE ECONOMIST (Jul. 28, 2021), <https://www.economist.com/the-economist-explains/2021/07/28/why-are-russian-athletes-competing-at-the-tokyo-olympics-despite-the-countrys-ban>.

170. Louise Reilly, *Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, an symposium, 2012 J. DISP. RESOL. 63, 80 (2012).

171. Deak, *supra* note 75, at 26.

172. *Id.*

173. 1964: *South African Banned from the Olympics*, BBC NEWS (Aug. 18, 1964), http://news.bbc.co.uk/onthisday/hi/dates/stories/august/18/newsid_3547000/354787

458 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

would be more amenable to taking up certain issues. For instance, the 2014 categorical inclusion of sexual orientation in the Olympic Charter's non-discrimination policy would suggest that it could ban the participation of states from the Movement on the basis of their conduct towards homosexual citizens.¹⁷⁴

Likewise, it might be suspected that the same would be the case for states who violate international labor laws and, in particular, the freedom of assembly and the right to collectively bargain. Decent work and sustainable production, the sustainable development goals reconciled to the IOC's Agenda 2020+5, would imply a recognition of non-exploitative labor as well as the right to employment.¹⁷⁵ The language in the Olympic Charter regarding "human dignity" and the United Nations Guiding Principles on Business and Human Rights would suggest a longer-term obligation than those established by the Agenda.¹⁷⁶ This is an especially sensitive topic, if not always salient, to the Olympic Movement whose increasing costs drive hosts to search for cheaper and cheaper labor.

III. INTERNATIONAL LABOR RIGHTS AND THE PEOPLE'S REPUBLIC OF CHINA

The 2008 Beijing Olympics were instructive in demonstrating the impetus for this transition and how the Games would endure some twenty years beyond the end of the Cold War. The People's Republic

2.stm. See ERIC P. LOUW, THE RISE, FALL, AND LEGACY OF APARTHEID (Praeger ed., 2004) (for a general history of apartheid in South Africa).

174. Notably, this came after the outcry caused by the Russians' human rights record and domestic laws affecting the LBGTQ+ community in that country. See Owen Gibson, *Olympic Anti-discrimination Clause Introduced After Sochi Gay Rights Row*, THE GUARDIAN (Sept. 25, 2014), <https://www.theguardian.com/sport/2014/sep/25/olympic-anti-discrimination-clause-sochi-gay-rights-row>.

175. The rhetoric surrounding sustainable production reconciles the environmental and employment aspects of adapting modes of production. Historically, one of the greatest threats of the environmental movement (real or otherwise) was what it would do to traditional jobs. Hence, environmental dialogues tend to include an explicit understanding of continued employment with little to no disruption within traditional economic sectors. See SHANTZ, J., GREEN SYNDICALISM: AN ALTERNATIVE RED-GREEN VISION 47 (Syracuse Univ. Press ed., 2017).

176. OLYMPIC CHARTER, *supra* note 6.

of China's bid on the 2008 Games. As with most states, they did so with an eye on positively utilizing the increased attention.¹⁷⁷ Not only would the 2008 Games be a triumphant display of the nation and its advancing progress in economic and world power, but it would also serve as redemption for the failed 2000 Games bid.¹⁷⁸ That bid made the IOC's voting members uneasy, as it was placed barely two years following the incidents at Tiananmen Square.¹⁷⁹ This latest effort included foreign designed stadia, a bid film by oft-maligned Chinese filmmaker, Zhang Yimou, and a promise to increase media freedoms.¹⁸⁰ These efforts would successfully win Beijing the bid, but it would also lead to increases in the number of domestic rights advocates disseminating information regarding the PRC's human rights violations.¹⁸¹ In March of 2008, protests ostensibly tied to the treatment of monks during a religious ceremony by the police erupted in Tibet and were soon accompanied by demands for independence.¹⁸² Internet images of the PRC's response to these protests quickly spread across the world, and on sites specially created to tie into the Olympics.¹⁸³

177. Dong Jinxia and James A. Mangan, *Beijing Olympics Legacy: Certain Intentions and Certain and Uncertain Outcomes*, in OLYMPIC LEGACIES: INTENDED AND UNINTENDED 136 (Routledge ed., 2010); Holger Preuss & Christian Alfs, *Signaling Through the 2008 Beijing Olympics—Using Mega Sports Events to Change the Perception and Image of the Host*, 11 EURO. SPORT MGMT. Q., 55, 66 (2011).

178. Alan Riding, *Olympics; 2000 Olympics Go to Sydney In Surprise Setback for China*, N.Y. TIMES (Sept. 24, 1993), <https://www.nytimes.com/1993/09/24/sports/olympics-2000-olympics-go-to-sydney-in-surprise-setback-for-china.html>.

179. *China: Free Tiananmen Prisoners Before Olympics*, HUM. RTS. WATCH (Jun. 2, 2008), <https://www.hrw.org/news/2008/06/02/china-free-tiananmen-prisoners-olympics>.

180. Jinxia and Mangan, *supra* note 177, at 144; Ryan Ong, *New Beijing, Great Olympics: Beijing and its Unfolding Olympic Legacy*, 4 STAN. J. E. ASIAN AFF. 35, 49 (2004); Xuefei Ren, *Architecture and nation building in the age of globalization: construction of the National Stadium of Beijing for the 2008 Olympics*, 30 J. OF URBAN AFFAIRS 175, 176 (2004).

181. Jim Yardley, *Violence in Tibet as Monks Clash With the Police*, N.Y. TIMES (Mar. 15, 2008), <https://www.nytimes.com/2008/03/15/world/asia/15tibet.html>.

182. *Id.*

183. Kelsang Dolma, *The IOC Should Stop Lying to Itself About the Beijing Olympics*, FOREIGN POL'Y (Aug. 1, 2021), <https://foreignpolicy.com/2021/08/01/the-ioc-should-stop-lying-to-itself-about-the-beijing-olympics/>.

460 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

Students for a Free Tibet and protests at the torch relay linked the Games and the protests, and garnered international attention.¹⁸⁴ The IOC caught wind of the negative publicity and tried in vain to have videos of the protests removed from YouTube, fearing the harm that this sort of publicity could cause the Games.¹⁸⁵ The protest began just as the torch relay was set to start its world tour, and as it reached cities like London and San Francisco. The participants were met with an often hostile crowd in their reception.¹⁸⁶ This was certainly not the kind of publicity the Chinese government and IOC had hoped for, nor was it likely the manner of publicity the event's sponsors and corporate partners had envisioned.

That the IOC found itself in this less than ideal position might be considered a self-inflicted wound. Afterall, China was selected by the IOC over the likes of Toronto, Paris, and Osaka—all safe bets in states with a notable history of hosting mega-events.¹⁸⁷ There was another underlying aspect to these Games that was often lost in the tumult of the protests, and that was China's treatment of its migrant laborers. These were individuals who migrated from the rural west of China in search of work in the burgeoning metropolitan areas. Organizations like the International Trade Unions Federation directly addressed the IOC as complicit in its disregard of the issue.¹⁸⁸ The issue has a long standing history rather than being a cursory reaction to the 2008 Games.

184. Robert Barnett, *The Tibet Protests of Spring, 2008: Conflict between the Nation and the State*, 3 CHINA PERSP, 6 (2009); Jonathan Watts, *Beijing Locks Down Lhasa as Crisis Grows*, THE GUARDIAN (Mar. 16, 2008), <http://www.theguardian.com/world/2008/mar/16/tibet.china>.

185. Stephanie Condon, *Olympic Committee Rethinks Copyright Infringement Claim on YouTube*, CNET (Aug. 15, 2008), <https://www.cnet.com/news/olympic-committee-rethinks-copyright-infringement-claim-on-youtube/>.

186. John F. Burns, *Protests of China Make Olympic Torch Relay an Obstacle Course*, N.Y. TIMES (Apr. 7, 2008), <https://www.nytimes.com/2008/04/07/world/europe/07torch.html>; Austin Ramzy, *China's View of the Olympic Torch War*, TIME (Apr. 9, 2008), <http://content.time.com/time/world/article/0,8599,1729169,00.html>.

187. *World Reacts to U.S. Torture Report*, CNN (July 13, 2001), <https://www.cnn.com/2001/WORLD/asiapcf/east/07/13/beijing.win.rivals/>.

188. *Olympics: IOC Inaction on Labour Rights Shameful*, ITUF (Apr. 8, 2008), <https://www.ituc-csi.org/olympics-ioc-inaction-on-labour>.

A. The Household Registration System and Labor Migration in China

The PRC has, since 1958, made use of the Household Registration System (*hukou*) to identify its citizens as rural, agricultural laborers, or urban, non-agricultural laborers.¹⁸⁹ Effectively, this classification created a duality within the Chinese citizenry, as the urban residents enjoyed an “iron rice bowl” attributable to regular and steady employment, while the rural populations found themselves left behind by economic modernization schemes.¹⁹⁰ This outcome was exacerbated by the actions of the central government in Beijing in further devolving authority, particularly fiscal, to local governments.¹⁹¹ Far from secure in their day-to-day lives, many rural citizens found their existence precariously balanced between the nationally changing economic sectors and the austerity policies promoted locally.

The policy served several purposes, but particularly to the present interests in labor rights, it managed urban (un)employment numbers.¹⁹² While higher unemployment can be a threat to governments of all types, the unemployed may act as the vanguard of revolution for autocracies.¹⁹³ A priority would be keeping urban unemployment low by way of restricting the rural to urban migration pattern. This was a means to manage the costs of state welfare programs which were more generously offered to urban, non-agricultural workers.¹⁹⁴

Under Deng Xiaoping, reforms to the system began to redress some of the differences between rural and urban citizens. Migration became less difficult with the availability of permits for rural laborers to temporarily live and work in these urban areas.¹⁹⁵ However, the system

189. See Tiejun Cheng & Mark Seldon, *The Origins and Social Consequences of China's Hukou System*, 1994 CHINA Q. 644, 652 (1994) (for a discussion about the wider implications of the system).

190. Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 FORDHAM INT'L L.J. 1083, 1087 (2009).

191. Gabriella Montinola, Yingyi Qian & Barry R. Weingast, *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 81 (1995).

192. Cheng & Seldon, *supra* note 189, at 646.

193. See Joyce Sween & Remi Clignet. *Urban Unemployment as a Determinant of Political Unrest: The Case Study of Douala Cameroon*, 3 CANADIAN J. AFR. STUD. 3 (1969).

194. Cheng & Seldon, *supra* note 189, at 661-662.

195. See Cheng & Seldon, *supra* note 189, at 651.

462 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

maintained much of its inherent antagonism towards rural citizens. As China's economy became more industrial-minded and focused on the export of goods, a “floating population” (*lindong renkou*) of migrant laborers, who were attracted to the higher wage differentials of the city as well as the greater availability of services, were convinced to leave the rural west of China for its developing east.¹⁹⁶ They were seeking “to broaden their horizons and experience a modern life” as well as enjoy “cosmopolitan consumption.”¹⁹⁷

Often these individual moves were temporary, with these migrants eventually returning to their homes so as to maintain and claim possession of their lands.¹⁹⁸ Yet the continuous presence of a mobile population was too wrought with constant worry. Particularly, the varying systems of services for rural and urban populations operated to reward the latter often at the expense of the former.¹⁹⁹ Were this mobile population to become discontented, it may well signal trouble for the regime. In response to these mounting concerns, the PRC initiated a series of labor law reforms to address the different experiences of rural laborers to those of their urban counterparts.²⁰⁰

The first efforts to improve the migrant laborers’ plight emerged in 1994 following a series of labor protests.²⁰¹ In the wake of the 1989 Tiananmen Square protests, the PRC was sensitive to both large-scale demonstrations as well as international critiques of its response to them.²⁰² This was during a time when casual or informal labor was expanding in response to a growing need for Chinese industry to

196. *Id.*

197. Jenny Chan & Mark Seldon, *The Labour Politics of China’s Rural Migrant Workers*, 14 GLOBALIZATIONS 259, 261 (2016), https://www.responsibleglobalvaluechains.org/images/PDF/Jenny-Chan—Mark-Selden_The-Labour-Politics-of-Chinas-Rural-Migrant.pdf.

198. Hare, *supra* note 86 at 49.

199. See Cheng & Seldon, *supra* note 189, at 660. As Cheng and Seldon wrote, the PRC assumed “farmers produced grain for self-consumption and hence had little need for access to” state subsidized food rations. It was thus common for urban residents to move to the countryside during times of famine and doubly burden the rural infrastructure.

200. *Id.* at 663.

201. See Eli Friedman & Ching Kwan Lee, *Remaking the World of Chinese Labour: A 30-Year Retrospective*, 48 BRIT. J. INDUS. REL. 507, 518-519 (2010).

202. *China’s View of the Olympic Torch War*, BBC NEWS (Dec. 23, 2021), <https://www.bbc.com/news/world-asia-48445934>.

maintain a competitive economic position internationally.²⁰³ By acting to take advantage of a labor surplus, Chinese industrial hubs were able to attract and offer foreign investors a cheap base of operations.²⁰⁴ At the same time, the ability to shed labor during economic downturns functioned to protect these industries' competitiveness. Thus, there was a heavy reliance on flexible employer-employee relations.

The 1994 law introduced contracts into this relation, but there were no protections from discrimination based on household registry.²⁰⁵ While keeping the PRC's economy humming to its benefit, the law did little to protect and defend the inherently vulnerable migrant laborers. The decentralization of both labor regulation and fiscal policy to the authority of local governments resulted in a weakening of the few protections these laborers had.²⁰⁶ The regime's goal aimed to reserve urban employment for urban citizens who had found themselves laid off, and these efforts further restricted the movement of migrants.²⁰⁷

After a spate of protests in 2007, the PRC would once again address its labor laws. Yet this time, the PRC would pass the Labor Contract Law which would go into effect on January 1 of 2008—the same year as the Beijing Summer Games.²⁰⁸ This law was created with the aim to increase protections for migrant workers by ending fixed term contracts (which were thought to increase worker agency in selecting employment) and to increase the benefits to advantage migrant laborers.²⁰⁹

The unfortunate reality of migrant life was only marginally improved. By 2011, a majority of migrant laborers remained informally employed.²¹⁰ This was a result of the “[n]oncompliance with existing labor laws and regulations” compounded “with a lack of supervision and enforcement on the part of the state.”²¹¹ Further, “most private firms

203. Montinola, Qian & Weingast, *supra* note 191, at 75-76.

204. *Id.*

205. See Jing, *supra* note 190, at 1089.

206. *Id.* at 1088-89.

207. *Id.*

208. *Id.* at 1084-85.

209. *Id.* at 1114-15.

210. Xiaobo Zhang, Jin Yang, & Shenglin Wang, *China Has Reached the Lewis Turning Point*, 22 CHINA ECON. REV. 178, 180 (2011).

211. Jing, *supra* note 190, at 1101.

464 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

refuse to allow [migrant laborers] to exercise their social security rights" with little impetus from the local governments to do so.²¹² The lack of enforcement of these laws would mean localities were able to keep labor cheap and attractive to foreign investors. They would become self-sufficient with no need to seek relief from the central government.²¹³ Into this setting the IOC and Summer Olympics arrived.

B. The International Olympic Committee and China

In a 2008 report on the abuse of migrant workers, Human Rights Watch's Asia advocacy director, Sophie Richardson stated:

If the Olympic movement really prides itself on its dedication to 'fundamental universal ethical principles,' then the International Olympics Committee must ensure that workers who help build Beijing's Olympic venues are at least treated fairly and in accordance with Chinese law, and the fundamental international human rights standards that China has assumed and promised its citizens to respect.²¹⁴

The report notes that six worker fatalities at Olympic facilities had occurred in addition to an unending list of non-pay and accusations of physical abuse.²¹⁵

Moreover, the city and national government moved rapidly to remove migrant laborers from Beijing ahead of the Games. This would put the discrimination many migrants face on display as well as highlighting other behaviors like the closure of schools for migrant

212. Wang, *supra* note 9.

213. Yingyi Qian & Barry R. Weingast. *China's Transition to Markets: Market-Preserving Federalism, Chinese Style*, 1 J. POL'Y REFORM 149, 156 (1996).

214. *China: Beijing's Migrant Construction Workers Abused*, HUM. RTS. WATCH (Mar. 12, 2008), <https://www.hrw.org/news/2008/03/12/china-beijings-migrant-construction-workers-abused#>.

215. *Id.*

children,²¹⁶ evictions,²¹⁷ in addition to the aforementioned abuses.²¹⁸ Taking advantage of these workers' economic and social vulnerabilities kept the costs of event infrastructure low, and, as the event neared, the workers were forbidden from enjoying the events.

That the IOC did not move against China in 2008 could perhaps be interpreted as part of a learning period in which the former organization became aware of these behaviors and the international reactions to them. Yet, 2022 is shaping up to be another missed opportunity for the IOC to demonstrate through action that which it honors in rhetoric.²¹⁹ The actions would seem suggest that maybe the IOC is sensitive not to the divergence of a host's behaviors from the international norm, but to the production of the Games.

Furthermore, the IOC has been forced to respond to a diminishing pool of potential hosts as well as the exogenous changes in the international system. In the past, be it the Soviet Union's ascension to the IOC or the banning of South Africa from it,²²⁰ the IOC operationalized its role as a member of the broader, international community; one that shared a belief in the institutions of diplomacy and free exchange. By admitting or denying access to it, it was (de)legitimizing these actors and encouraging their adoption of the laws

216. *China: Beijing Closes Schools for Migrant Children in Pre-Olympic Clean-up*, HUM. RTS. WATCH (Sept. 25, 2006), <https://www.hrw.org/news/2006/09/25/china-beijing-closes-schools-migrant-children-pre-olympic-clean>.

217. Jonathan Watts, *Beijing to Evict 'Undesirables' Before Games*, THE GUARDIAN (Jan. 24, 2008), https://www.theguardian.com/world/2008/jan/24/china.international?CMP=gu_com.

218. Kitty Bu, *Beijing Olympic Clean Up Sweeps Out Migrant Workers*, REUTERS (July 21, 2008), <https://www.reuters.com/article/us-olympics-migrants/beijing-olympic-clean-up-sweeps-out-migrant-workers-idUSSP26521520080721>.

219. Stephen Wade, *Beijing Olympics Opens in 4 Months; Human Rights Talk Absent*, ASSOCIATED PRESS (Oct. 4, 2021), <https://apnews.com/article/sports-china-olympic-team-thomas-bach-tokyo-international-olympic-committee-7e9e5a2c49cd8c962f28f7aafe31654a>.

220. *On This Day: In 1964 South Africa was Banned from the Olympic Games*, SPORTS ENGINE, <https://www.sportsengine.com/article/none/south-africa-banned-olympic-games#:~:text=The%20IOC%20revoked%20the%20South,the%20government's%20policy%20of%20apartheid.&text=South%20African%20athletes%20were%20segregated,under%20the%20laws%20of%20apartheid> (last visited Feb. 10, 2022).

466 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52]

and customs of the hegemonic world order. The IOC has couched these activities in the sport. The fact that broader Soviet and South African policies would need to be altered need not have been explicitly addressed since this was implied. Especially so in the latter case as apartheid was a foundational social policy that affected all South African institutions.²²¹

The PRC and its *hukou* system²²² seem to be a ready candidate for IOC action. At its most basic, the Household Registration System is state-based discrimination. Its creation of a duality among Chinese citizens, rural and urban, drives inequality in many social institutions,²²³ including sport.²²⁴ In 2019 the General Administration of Sport (GAS) advanced a plan to increase facilities in access in previously underserved rural areas,²²⁵ where physical fitness levels were noted to be at risk with rapid urbanization.²²⁶ The above concerns the treatment of, ostensibly, Han Chinese citizens, who just happened to be born in rural areas of China. This does not even broach the unequal treatment of Tibetan,²²⁷ Uyghur,²²⁸ or other ethnic minorities within the PRC.²²⁹

221. BRIAN LEVY ET. AL, SOUTH AFRICA: WHEN STRONG INSTITUTIONS AND MASSIVE INEQUALITIES COLLIDE 17 (Carnegie Endowment for Int'l Peace eds., 2021).

222. See discussion *supra* Section III.A.

223. See Jing, *supra* note 190, at 1086-87.

224. See Xiujin Guo et. al., *Urban -Rural Disparity in the Satisfaction with Public Sports Services: Survey Based Evidence in China*, 55 THE SOC. SCI. J. 455, 455-56 (2018).

225. See Xinhua, *China to Increase Rural Access to Sports Facilities*, CHINA DAILY (July 20, 2019), <http://www.chinadaily.com.cn/a/201907/20/WS5d31f00ea310d83056400027.html>; see also Guo et. al., *supra* note 224, at 455-56.

226. Yunxi Tian et. al., *Urban-Rural Differences in Physical Fitness and Out-of-School Physical Activity for Primary School Students: A County-Level Comparison in Western China*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 1-2, 14 (2021).

227. See *Ethnic Minorities in China: Tibetans and Uighurs: Hearing Before the Congressional-Executive Commission on China*, 107th Cong. (2002), <https://www.govinfo.gov/content/pkg/CHRG-107hrg80922/html/CHRG-107hrg80922.htm>.

228. See Lindsay Maizland, *China's Repression of Uyghurs in Xinjiang*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/backgrounder/chinas-repression-uyghurs-xinjiang> (last updated Mar. 1, 2021, 7:00 AM).

229. See "Break Their Lineage, Break Their Roots" *China's Crimes Against Humanity Targeting Uyghurs and Other Turkic Muslims*, HUM. RTS. WATCH (Apr. 19,

The PRC has a highly centralized sporting system that is focused on winning gold for the sake of national glory.²³⁰ The GAS was empowered by the Sports Law of the People's Republic of China and The Plan for Olympic Glories, each introduced in 1995.²³¹ Like South Africa, state policies like the *Hokou* are inseparable from sporting policies and need be reconciled to one another. For instance, if the best sporting facilities are in urban areas, will rural citizens have equal access and equal opportunity to compete at the highest levels of Chinese sport? Or, as was the case with South Africa, would the PRC's national team be the result of a process of unequal competition?

The fact that the IOC has pursued the path it has seems even more divergent considering FIFA's relationship with its own 2022 World Cup's host, Qatar. Qatar is heavily reliant on oil rents which the central government uses to fund social services and makes direct payments to citizens.²³² This degree of reliance on one economic resource and sector discourages investment and support of other economic sectors as well as disincentivizes the citizens' need to work.²³³ In such a setting, labor must be imported for service industry work, construction, and similar forms of labor. The kafala system ensures low-cost workers for these sectors.²³⁴

2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>.

230. Hannah Beech, *The Chinese Sports Machine's Single Goal: The Most Golds, at any Cost*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/07/29/world/asia/china-olympics.html>; see also Jinming Zheng et. al., *Sport Policy in China (Mainland)*, 10 INT'L J. SPORTS POL'Y & POLS. 469, 474 (2018).

231. Jinming Zheng et. al., *supra* note 230, at 474.

232. Nader Kabbani & Nejla Ben Mimoune, *Economic Diversification in the Gulf: Time to Redouble Efforts*, BROOKINGS (Jan. 31, 2021), <https://www.brookings.edu/research/economic-diversification-in-the-gulf-time-to-redouble-efforts/>.

233. Alia Alzubair, *The Need for Economic Diversification in the Oil Dependent Nations of Saudi Arabia, UAE and Nigeria: Possible Pathways and Outcomes*, FORDHAM UNIV. RSCH. COMMONS (May 22, 2021) (Senior Thesis, Fordham University), at 24-25, https://research.library.fordham.edu/cgi/viewcontent.cgi?article=1060&context=international_senior.

234. Kali Robinson, *What is the Kafala System?*, COUNCIL ON FOREIGN REL. (Mar. 23, 2021), <https://www.cfr.org/backgrounder/what-kafala-system>.

468 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

The kafala system directly contravened internationally accepted labor rights²³⁵ and arguably upheld a form of state-sponsored human trafficking that was soon apparent to observers. The practice of confiscating and withholding a worker's personal papers (identification, passports, etc.) and thus their free choice of movement is a common ploy of traffickers. Further, the detention of workers, and their ensuing inability to leave one job for another, is another common feature of human trafficking.²³⁶

FIFA's choice of Qatar was heavily scrutinized by observers who found it an unacceptable choice. Eventually, an investigation by the United States' Department of Justice revealed that there had been a good deal of financial malpractice under then FIFA president Sepp Blatter.²³⁷ The steady stream of bad information was only compounded by the increasing awareness that Qatar's selection and the ensuing event construction was driving a surge in worker exploitation and even fatalities.²³⁸ This was the first many had heard of the kafala system and the treatment of migrant laborers under it.

235. Caroline Dumoulin, *The Kafala System: Incremental Reform is not Enough to Stop Abuse Against Migrant Domestic Workers*, GEORGE WASH. L. INT'L L. & POL'Y BRIEF. (July 12, 2021), <https://studentbriefs.law.gwu.edu/ilpb/2021/07/12/the-kafala-system-incremental-reform-is-not-enough-to-stop-abuse-against-migrant-domestic-workers/#:~:text=Under%20the%20kafala%20system%2C%20the,imbalance%20th> at%20is%20often%20exploited; See also "HOW CAN WE WORK WITHOUT WAGES?" SALARY ABUSES FACING MIGRANT WORKERS AHEAD OF QATAR'S FIFA WORLD CUP 2022, 3-6 (Human Rights Watch ed., 2020), https://www.hrw.org/sites/default/files/media_2020/08/qatar0820_web_3.pdf.

236. See G.A. Res. A/Res/55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, art. 3 (Nov. 15, 2000) (describing what constitutes trafficking).

237. See Press Release, Dep't of Just., Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption (May 27, 2015) (press release of full indictment), <https://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy-and>; see also Graham Dunbar, *Sepp Blatter, Platini Indicted for Fraud in Switzerland*, ASSOCIATED PRESS (Nov. 2, 2021), <https://apnews.com/article/soccer-sports-switzerland-fifa-sepp-blatter-883a052d92a1562720f064c7f206af84>.

238. *Qatar: Failure to investigate migrant worker deaths leaves families in despair*, AMNESTY INT'L (Aug. 25, 2021), <https://www.amnesty.org/en/latest/news/2021/08/qatar-failure-to-investigate-migrant-worker-deaths-leaves-families-in-despair/>.

FIFA found itself in a position where it needed to re-legitimate itself as a member of those institutions. Actors within this institution from governments to MNCs began to impress upon the organization their desire that it bring its behaviors back in-line with good governance practice as well as the dominant norms of human rights.²³⁹ In so doing, it was able to affect change in the nation to its kafala system and wider behaviors relative to migrants.²⁴⁰ FIFA chose to emphasize its institutional role, which its mission serves.

The IOC, alternatively, by emphasizing that sport is apolitical,²⁴¹ has denied its place in the process of institutionalizing the behaviors and practices important for, certainly labor rights as discussed here, but other norms that have become hegemonic in the international system.²⁴² As actors and organizations attempt to influence change, they will find the IOC not merely an empty node, but a counterforce to their activities. That China has no fears of international condemnation or IOC critique has been noted. Historian Xu Guoqi has said the greatest difference between 2008 and 2022 in Chinese attitudes was their wish to improve world opinion in the former, and its indifference to it in the latter.²⁴³

The International Trade Union Confederation has documented a crack down on unions, forced labor, and ill-treatment of ethnic and

239. *FIFA President Highlights Commitment to Good Governance and Human Rights at Council of Europe Address*, FIFA (Jan. 26, 2022), <https://www.fifa.com/about-fifa/president/media-releases/fifa-president-highlights-commitment-to-good-governance-and-human-rights-in>; see also *FIFA President Reinforces Commitment to Good Governance at UN General Assembly*, FIFA (June 2, 2021), <https://www.fifa.com/legal/football-regulatory/news/fifa-president-reinforces-commitment-to-good-governance-at-un-general-assembly>.

240. *Qatar: Significant Labor and Kafala Reforms*, HUM. RTS. WATCH (Sept. 24, 2020), <https://www.hrw.org/news/2020/09/24/qatar-significant-labor-and-kafala-reforms>.

241. Karolos Grohmann & William Maclean, *Olympics cannot solve problems politicians have not figured out—Bach*, REUTERS (Dec. 7, 2021), <https://www.reuters.com/lifestyle/sports/olympics-cannot-solve-problems-politicians-have-not-figured-out-bach-2021-12-07/>.

242. Rick Scott, *Opinion: The IOC and Human Rights*, WASH. POST (Jan. 12, 2022), https://www.washingtonpost.com/opinions/letters-to-the-editor/the-ioc-and-human-rights/2022/01/12/7c9df9d6-7246-11ec-a26d-1c21c16b1c93_story.html; Julie H. Liu, *Lighting the Torch of Human Rights: The Olympic Games as a Vehicle for Human Rights Reform*, 5 NW. J. OF INT'L HUM. RTS. 213, 213 (2007).

243. Wade, *supra* note 219.

470 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL [Vol. 52

LGBTQ+ minorities.²⁴⁴ Their report, *China: A gold medal for repression*, details five practices of repression they liken to the Olympic rings.²⁴⁵ Stories and reports of this nature will likely intensify as the opening ceremonies near. With no fear of having the event moved from Beijing, nor of being denied the right to participate in the international sporting institutions (and thus remain legitimate), the PRC has no incentive to alter its behaviors. If anything, it has an ally willing to run interference between it and its critics.

CONCLUSION

The year 2022 will see two of history's most controversial sporting events. What is true is that the FIFA World Cup in Qatar and the Beijing Winter Olympic Games will be held with a good deal of attention on their respective behaviors and questions about their suitability as hosts, especially in terms of labor rights where each nation has had a less than satisfactory history of behaviors. The poor treatment of migrant laborers in construction, internationally and internally, has been juxtaposed with the messaging of these mega-events.

There would be little doubt about what the IOC's position will be when the Winter Games commence in February 2022. When IOC president Bach was asked about the potential United States boycott, he repeated the familiar refrain about the IOC being apolitical.²⁴⁶ The IOC announced it will be a hollow node in the institutional progress of labor rights in the international system. With the next three Games' hosts already selected, and each being a "safe" choice, it is likely that the IOC sees itself as simply needing to survive 2022 and leave any critiques in the rearview mirror.

This article has outlined an understanding of the IOC's place in the practice of institutional law making. The IOC is an important player, as it is the central hub of the international sporting regime. It has the ability to (de)legitimize, relative to internationally accepted norms of behavior, the actors with which it interacts. Yet, instead of accepting this role, the IOC often defers to a narrower mission, one characterized by its

244. *China: A Gold Medal for Repression*, INT'L TRADE UNION CONFEDERATION (Sept. 11, 2021), <https://www.ituc-csi.org/china-a-gold-medal-for-repression-news>.

245. *Id.*

246. Grohmann & Maclean, *supra* note 241.

function as manager of the Olympics. This downplays its agency in the international system, and thus forgives it of any responsibility it has in being a proactive member in the process of institutional law making.

Future research focusing on the codification of international sports law and its hard or soft nature, as well as the processes that contribute to it, will need to take into account the evolving international system in which these events take place. Just as the Great Recession of a decade ago affected the pool of potential hosts, so too might the COVID-19 pandemic. Will the commodification of the Games and other events increase? Will the practice of selecting a host change and will this change the nature of the Games? Perhaps most consequentially, will the IOC be able to maintain itself as a legitimate actor within the international system as it adapts to these new realities? International pressure from states and organizations will be needed for these changes to come to fruition.