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# Athlete Activism at the Olympics: Challenging the Legality of Rule 50 as a Restriction on Freedom of Expression



Mark James and Guy Osborn

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**Abstract** Since Colin Kaepernick began taking the knee during the American national anthem to protest social injustice and inequality in the USA in 2016, athletes across a range of sports and from diverse national backgrounds have used their high media profiles to draw attention to the causes that they support. The International Olympic Committee, however, has maintained its stance that politics and sport should not mix, and that human rights should not be used as a tool to undermine the political autonomy of sport. Rule 50(2) of the Olympic Charter states that, “No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas”. Anyone in breach of this provision may be disqualified from their event and have their Olympic accreditation removed, a position that was reinforced by the guidance issued to athletes prior to the Tokyo 2020 Olympic Games.

Using examples of athlete activism at Tokyo 2020 as case studies, this chapter will analyze whether any of these exercises of the right to freedom of expression were in breach of Rule 50(2). It will then examine whether the application of Rule 50(2) at Tokyo 2020 is compatible with Article 10 European Convention of Human Rights and the likely outcome of any challenge before the Court of Arbitration for Sport, the Swiss Federal Tribunal, and the European Court of Human Rights. It concludes by arguing for a complete overhaul of Rule 50(2) so that it promotes, rather than prohibits, freedom of expression.

## 1 The Rise of Athlete Activism

For the first time since the Black Power salute at the Mexico 1968 Olympic Games,<sup>1</sup> there has been a dramatic increase in activist athletes around the world engaging in protests to promote their support for a range of social justice causes. From the National Football League’s Colin Kaepernick taking the knee during the American national anthem to protest social injustice and inequality in the United States of America, to wearing rainbows to support LGBTQI+ rights, athletes across a range of sports and from diverse social and national backgrounds have used their high profile and moments in the spotlight to draw attention to the causes that they support. In response, the International Olympic Committee (IOC) has sought to reassert its control over athlete behavior by providing additional guidance on how Rule 50(2) of the Olympic Charter (Rule 50) operates to prohibit demonstrations and propaganda in support of political, religious, and racial causes. The question addressed by this chapter is whether the prohibitions and restrictions on athletes’ ability to exercise their freedom of expression is infringed by the operation of Rule 50.

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<sup>1</sup>From this point, each edition of the Olympic Games is referred to by its ‘City + Year’ format, for example, Mexico 1968.

The IOC justifies the need for Rule 50 by stating that the Olympic Games should be politically neutral, with the world's focus solely on the sporting performances of the athletes. To achieve this, all acts of athlete activism are prohibited, or severely restricted, to ensure that athletes do not exploit their moment in the spotlight for non-sporting causes. Here, the legality of Rule 50 will be interrogated using the framework of protections for free expression provided by Article 10 of the European Convention on Human Rights (ECHR). By analyzing these restrictions through a human rights lens, this chapter will explain how Rule 50 lacks the necessary clarity, serves no legitimate aim, and is neither a necessary nor a proportionate response to the activities that attract the opprobrium of the IOC.

The aim of this chapter is to demonstrate that, despite the IOC's ideal of a politically neutral Olympics, the means by which it has sought to achieve this cannot withstand legal analysis. It argues that freedom of expression, and in particular the freedom of political expression, is a necessary part of a democratic society, and that any restrictions on the operation of Article 10 ECHR should not be imposed on a section of society, Olympic athletes, at the whim of a non-state actor, the IOC. In concluding that Rule 50 in its current form is an unlawful infringement of Article 10 ECHR, practical advice is offered to the IOC, and the Olympic Movement more generally, on how a more inclusive approach to athletes' human rights can be developed.

To conduct this analysis, the chapter draws on a wide variety of instances of athlete activism that occurred at Tokyo 2020. This was the first Olympic Games to take place under the specific new guidance on the interpretation and operation of Rule 50, with a number of athletes taking the opportunity to exploit the lack of clarity of the new regime. These acts of activism are first analyzed to determine whether they were in breach of Rule 50 and the accompanying guidance. Having determined the scope of the operation of Rule 50 through its application to the real-life examples from Tokyo 2020, a hypothetical challenge to a finding that an athlete should be disciplined for exercising their freedom of expression is undertaken. This demonstrates that an athlete is likely to succeed in a claim that Rule 50 infringes Article 10 ECHR in either the Court of Arbitration for Sport (CAS), the Swiss Federal Tribunal (SFT), and/or the European Court of Human Rights (ECtHR).

The chapter begins with an analysis of the evolution of athlete activism and the restrictions that have been imposed on athletes' ability to display in public their views on issues of social, racial, and political justice. It will move on to examine how Rule 50 was applied at Tokyo 2020 and the precedents that this could set for athletes at future editions of the Games, before analyzing the ways in which an athlete could bring a human rights challenge to any punishment imposed on them for exercising their freedom of expression. Finally, the chapter will examine the IOC's indirect law-making capabilities to demonstrate how it could require host nations to provide specific protections for athletes' human rights. This will contrast the approach of the IOC towards the protections required of hosts in respect of its intellectual property and commercial rights, and its claimed inability to influence legal change to increase human rights protections. It concludes that the forced transplantation of Olympic Laws from one host jurisdiction to the next, a technique that has been used to

regulate ambush marketing, could be used in a positive way as a template for ensuring that universally accepted human rights are embedded in the host jurisdiction as a condition of hosting the Games.

## 2 Athlete Activism at the Olympic Games

Sport and politics have long had an uneasy relationship. Whilst most major sports bodies, including in particular the IOC, claim to be apolitical or politically neutral, international sport is regarded by many as inherently political.<sup>2</sup> The relationship between sport and politics is particularly strained when athletes themselves engage in moments of activism. Mexico 1968 witnessed a step-change in the impact that athlete activism could have in a mediated world. The Black Power salute of US athletes John Carlos and Tommie Smith, supported by Australian Peter Norman wearing an Olympic Human Rights Project badge, and Czech gymnast Vera Čáslavská's looking away whilst the Russian national anthem was played during the gymnastics medal ceremony, are now considered to be iconic moments of athlete activism that rightly deserve to be celebrated. Such overtly political demonstrations are rarely condoned and regularly condemned by sports administrators, fans, and the media, who still consider that sport and politics should not mix. Only with the benefit of hindsight are these activists celebrated for their bravery; Carlos and Smith were inducted into the United States Olympic and Paralympic (USPOC) Committee Hall of Fame in 2019,<sup>3</sup> Norman was posthumously awarded Olympic Order of Merit by the Australian Olympic Committee in 2018,<sup>4</sup> and Čáslavská became President of the Czech Olympic Committee and, in 1995, a member of the IOC.<sup>5</sup>

Since 1956, the Olympic Charter has contained a specific prohibition on athletes 'profiting politically' from their participation in the Games.<sup>6</sup> Any breach of this provision could be punished under what was then Rule 23 of the Charter, which stated that, as the Supreme Authority, the IOC was the final arbiter on all questions concerning the Olympic Games and the Olympic Movement. Rule 23 provided the IOC with absolute discretion on how to deal with anything that it considered to be

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<sup>2</sup>For an overview of sport and politics see Kelly and Lee (2020), and for further detail on specific issues see Boykoff (2017), Hoberman (2011) and Kidd (2013).

<sup>3</sup>Hall of fame biographies for Carlos: <https://www.teamusa.org/Hall-of-Fame/Hall-of-Fame-Members/John-Carlos> and Smith: <https://www.teamusa.org/Hall-of-Fame/Hall-of-Fame-Members/Tommie-Smith> (last accessed 2 March 2022).

<sup>4</sup>Australian Olympic Committee, 'Peter Norman's family to accept Olympic Order of Merit tonight' <https://www.olympics.com.au/news/peter-normans-family-to-accept-olympic-order-of-merit-tonight/> (last accessed 2 March 2022).

<sup>5</sup>Čáslavská's Olympic biography: <https://www.olympedia.org/athletes/29115> (last accessed 2 March 2022).

<sup>6</sup>IOC (1956), p. 77.

inappropriate behavior, with no right of appeal available to any athlete punished under this power.

The IOC's response to the activism at Mexico 1968, led by its then President Avery Brundage, was to reaffirm the absolute prohibition on athletes demonstrating or engaging in 'propaganda' whilst at the Olympics. Over the next 10 years,<sup>7</sup> this prohibition was given increasing visibility in the 'Instructions to Athletes' section of the Charter. Following further protests by US athletes Vincent Matthews and Wayne Collett at Munich 1972,<sup>8</sup> the prohibition was elevated to the main body of the Olympic Charter as part of Rule 55, which placed restrictions on athletes' ability to exploit their participation in the Games commercially or politically. The prohibition has remained largely unchanged, resulting in what is now Rule 50.

Technically, any athlete in breach of Rule 50, or any of its predecessor Rules and Instructions, ran the risk of disqualification from their event, removal of their Olympic accreditation and expulsion from the Athletes' Village. Although rarely used to its fullest extent, the threat of being sanctioned under Rule 50 has resulted in Olympic athletes rarely having tested its limits, and generally backing down in response to a threat from the IOC that their conduct might be in breach.<sup>9</sup>

Since Colin Kaepernick first took the knee in 2016, athlete activism and its relationship with freedom of expression has been increasingly under the spotlight, becoming a particular concern of the IOC's in the months leading up to Tokyo 2020. For the first time, it issued detailed guidance on how Rule 50 was to be interpreted and applied at an Olympics, making clear that it had no intention of allowing the Games to become a platform for political expression. Although later amended, and in some ways relaxed by subsequent guidance, the ground rules had been set for a clash between the IOC's determination to keep the Olympic Games free from politics, and athletes' determination to use perhaps the highest profile stage of their career to demonstrate their support for a specific cause.

### **3 The Evolution of the Restrictions Imposed on Athlete Activism at the Olympic Games<sup>10</sup>**

One of the founding and fundamental principles of the modern Olympic Movement was an avowed adherence to the concept of amateurism. This prevented any athlete from profiting commercially from competing at the Games, as well as preventing professional athletes and others who earned a living from sport from becoming

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<sup>7</sup>For more detail on the evolution of Rule 50 see James and Osborn (2024) and Terraz (2014).

<sup>8</sup>See Tomizawa (2016).

<sup>9</sup>James and Osborn (2014), and the protest by US 400m gold medallists Lee Evans, Larry James and Ron Freeman, who wore Black Panther style berets raised their fists, but stopped protesting as the medal ceremony began: Anon (2021).

<sup>10</sup>On the evolution of Olympic governance more generally, see Chappelet (2016).

Olympians. In the 1956 edition of the Olympic Charter, this general prohibition was extended to prevent all individuals, organizations, and nations from profiting from the Games both commercially *and politically*. This prohibition was, at first, not part of the main body of the Charter, but constituted ‘General Information’ about the Games, found under the section, ‘The Olympic Games are Amateur’.<sup>11</sup> Anyone breaching this prohibition could be punished under Rule 23 of the Olympic Charter, which stated that, as the Supreme Authority, the IOC was the final arbiter on all questions concerning the Olympic Games and the Olympic Movement. It was this power that enabled IOC President Avery Brundage to demand the expulsion of Tommie Smith and John Carlos from Mexico 1968.

There is a long and rich tradition of athlete activism at, or around, the Olympic Games. Cottrell and Nelson have identified several characteristics that help to explain why the Olympics are such an attractive platform for activism:<sup>12</sup> that the Olympics are accessible and high-profile, with almost all states invited to attend, ensuring that any protest is likely to attract significant and worldwide media attention; that activists can expect to forge new alliances with like-minded others as a result of their activism (as was seen when Peter Norman supported Tommie Smith and John Carlos at Mexico 1968); and that, as the Olympics are attributed special symbolic meaning, there is a resultant widening of political opportunity. It is, therefore, no surprise that athletes have used these high-profile and highly mediated opportunities to draw attention to the causes that they support when the Olympic spotlight is on them.

Mexico 1968 took place against a backdrop of political turmoil around the world. Europe had witnessed the Prague Spring and student riots in Paris. In the USA, Martin Luther King Jr and Robert Kennedy were both assassinated, and in Mexico, the Tlatelolco Massacre saw more than 200 students killed when the army opened fire on a protest against the Government’s spending on the Olympics instead of on social and welfare programs. Mexico 1968 saw some of the most iconic instances of athlete activism: Smith and Carlos’ Black Power salutes, the support of the Black Panther movement by Lee Evans, Larry James and Ron Freeman, and the subtle act of defiance by Czech gymnast Vera Čáslavská, who looked down and away from the flags when the Russian national anthem was played for the controversial award of joint gold medals in the beam and floor exercises. These acts of activism triggered the rapid evolution of what had been a general prohibition on athlete activism into the Rule 50 that is applicable today, as the IOC determined that further action was needed to protect the political neutrality of the Olympic Games and the wider Olympic Movement.

The 1971 edition of the Olympic Charter gave greater prominence to the prohibition by placing it in a new section of the Instructions titled, ‘The Olympic Games are not for Profit’, though without changing the wording first introduced in 1956.<sup>13</sup>

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<sup>11</sup>IOC (1956), p. 77.

<sup>12</sup>Cottrell and Nelson (2010), p. 733.

<sup>13</sup>IOC (1971), p. 48.

Following further protests by US athletes Vincent Matthews and Wayne Collett at Munich 1972,<sup>14</sup> the prohibition was finally included in Rule 55 of the Olympic Charter, under the subheading, ‘Advertising, propaganda’:

Every kind of demonstration or propaganda, whether political, religious or racial, in the Olympic areas is forbidden.<sup>15</sup>

In 1978, Rule 55 was broken down into separate issues, resulting in the prohibition on athlete activism being elevated to the status of a Rule of the Olympic Charter in its own right:

57 Propaganda and advertising

Every kind of demonstration or propaganda, whether political, religious or racial, is forbidden in the Olympic areas.<sup>16</sup>

Finally, in 2011, we see the current version of Rule 50 for the first time, becoming Rule 50(2) in 2015: No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas.<sup>17</sup>

Throughout this period, there was no specific justification for the prevention of athlete activism, except the IOC’s claim that that politics should be kept away from sport to protect its political neutrality. Further, there were no prescribed procedures for the investigation and prosecution of suspected breaches of Rule 50 or any of its predecessors. This left the IOC with an incredibly wide-ranging discretion on whether and how to punish an athlete using its powers as the Supreme Authority of the Olympic Movement under Rule 23. More recently, a similarly wide explanation of the IOC’s powers to investigate athletes for breaches of the Olympic Charter now can be found in Rule 59, supplemented by Bye-law 1. If found in breach, Rule 59(2.1) gives the IOC Executive Board, or its delegate, the power to punish athletes with:

Temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the relevant infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or a team may lose the benefit of any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; in such case the medals and diplomas won by him or it shall be returned to the IOC (Executive Board).

Further, Rule 59(2.5) enables the IOC to impose a financial penalty in addition to any punishment imposed in Rule 59(2.1). Finally, Rule 61(2) of the Olympic Charter provides that any appeal against a decision of the IOC made in respect of the Olympic Games can only be made to the CAS. Although the range of punishments and route of appeal is now clear, the investigatory process and powers of the IOC to

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<sup>14</sup>Tomizawa (2016).

<sup>15</sup>IOC (1975), p. 35.

<sup>16</sup>IOC (1978), p. 31.

<sup>17</sup>IOC (2015), p. 93.



determine whether an athlete is in breach of Rule 50 (or any other Rule) remains opaque.

#### **4 The Re-Emergence of the Athlete Activist and the IOC's Rule 50 Guidance**

The re-emergence of the high-profile activist athlete began in 2016, with American footballer Colin Kaepernick 'taking the knee' when the US national anthem was played before San Francisco 49ers games.<sup>18</sup> At the 2019 Pan-American Games, US hammer thrower Gwen Berry and fencer Race Imboden raised a fist and took the knee on the medal podium respectively.<sup>19</sup> The high-profile nature of their demonstrations, and their status as prospective participants at Tokyo 2020, caused IOC President Thomas Bach to state that, "The Olympic Games [. . .] are not, and must never be, a platform to advance political or any other potentially divisive ends".<sup>20</sup>

The current iteration of Rule 50 of the Olympic Charter states that, "No kind of demonstration or political, religious or racial propaganda is permitted in any Olympic sites, venues or other areas".<sup>21</sup> Without further gloss, Rule 50 provides for an absolute prohibition on all demonstrations and political propaganda. The IOC Executive Board is the sole arbiter of whether or not an athlete's expression constitutes a prohibited demonstration or other form of propaganda, and is therefore in breach of Rule 50, and the type and severity of the punishment that will be imposed on them.

In January 2020, the first Rule 50 Guidelines were published by the IOC Athletes' Commission.<sup>22</sup> This stated unequivocally that all protests and/or demonstrations taking place during an event, in the Olympic Village, or during the opening, closing, and medal ceremonies were prohibited. A non-exhaustive list of what would constitute a prohibited protest, as opposed to a legitimate expression of an athlete's views, included: displaying any political messaging, including signs or armbands; gestures of a political nature, like a hand gesture or kneeling; and refusing to follow the Ceremonies' protocols.<sup>23</sup>

If an athlete was suspected of acting in breach of Rule 50, the incident would be evaluated by their respective NOC, ISF and the IOC, with disciplinary action taken on a case-by-case basis as necessary, which could include the disqualification of the athlete and the removal of their Olympic accreditation. Although this guidance was

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<sup>18</sup>Kotecha (2020).

<sup>19</sup>Anon (2019).

<sup>20</sup>Bach (2020).

<sup>21</sup>IOC (2021), p. 94.

<sup>22</sup>IOC Athletes' Commission (2020).

<sup>23</sup>IOC Athletes' Commission (2020), p. 2.

later modified, it set the tone for the IOC's approach to athlete activism: it is not welcome at the Olympic Games.

Following a survey of athletes conducted by the IOC Athletes' Commission,<sup>24</sup> revised Guidelines were published in July 2021.<sup>25</sup> This new guidance relaxed the original Guidelines by allowing Olympic participants to make 'expressions' (including gestures) in the playing arena before the start of an event. Demonstrations were still prohibited, as were expressions, demonstrations, and propaganda during all official ceremonies. This change of approach allowed athletes, for example, to take the knee on the pitch before the start of a football match.<sup>26</sup> To comply with Rule 50, the Guidelines require that an 'expression' must:

- (i) be consistent with the Fundamental Principles of Olympism;
- (ii) not target, directly or indirectly, people, countries, organizations and/or their dignity;
- (iii) not be disruptive [for example, it must not interfere with other athletes' concentration on and/or preparation for the event, physically interfere with the introduction of another athlete, or risk causing, or actually cause, physical harm to persons or property]; and
- (iv) not be prohibited or otherwise limited by the rules of the relevant National Olympic Committee and/or the competition regulations of the relevant International Federation.<sup>27</sup>

Further, any expression must also be compliant with the laws of the host nation.

The four requirements that any such expression must fulfil provide the most detailed guidance to date on what is, and what is not, an acceptable expression. First, an interesting development in the Tokyo 2020 Guidelines is the reference to the Fundamental Principles of Olympism (FPOOs). Found at the beginning of the Olympic Charter, the FPOOs have evolved over time into a mission statement and guiding ethos for the Olympic Movement. Of the seven FPOOs, three are of particular importance here and can be summarized as requiring athletes to: act with social responsibility and respect for universal fundamental ethical principles (Principle 1); promote a peaceful society concerned with the preservation of human dignity (Principle 2); and act at all times without discrimination of any kind (Principle 6).<sup>28</sup>

A novel approach to athlete activism was used by a number of athletes at Sochi 2014 as part of the 'Principle 6 Campaign'.<sup>29</sup> Instead of criticizing directly Russia's

<sup>24</sup>IOC Athletes' Commission (2021a).

<sup>25</sup>IOC Athletes' Commission (2021b).

<sup>26</sup>Both FIFA and World Athletics had supported athletes' right to take the knee before the start of an event. See for example, Steinberg (2020) and BBC (2020).

<sup>27</sup>IOC Athletes' Commission (2021b), p. 3.

<sup>28</sup>IOC (2021), p. 8.

<sup>29</sup>Athlete Ally statement on the Principle 6 Campaign and its impact: <https://www.athleteally.org/p6-campaign-continues-make-difference/>.

'anti-gay' laws, athletes supported LGBTQI+ rights by promoting the anti-discrimination agenda defined in Principle 6 FPOOs, ultimately resulting in the addition of sexual orientation to the list of protected characteristics.<sup>30</sup> By requiring that any expression complies with the FPOOs, the range of causes that can be supported by activist athletes has the potential to be expanded dramatically as, it will be argued, occurred at Tokyo 2020.

Secondly, an important limitation on athletes' freedom of expression is that it must not target people, countries, and/or organizations. This prevents both direct and indirect comment on the behavior, policies and politics of identifiable others, as occurred on three occasions at Tokyo 2020, ensuring that only expressions of support for generic causes should be tolerated. The third criterion will rarely come into play, as it is justifiable on the grounds that it is needed to promote the integrity of sport and/or prevent what is likely to be unlawful conduct of some kind. The fourth criterion adds little, as any additional prohibition required by an NOC or ISF that goes beyond the restriction on freedom of expression imposed by Rule 50 itself is unlikely to be justifiable legally.

As both the IOC and the CAS, where appeals against the IOC's decisions on conduct at the Olympic Games are heard, are located in Lausanne, Switzerland, the application and legality of Rule 50 will be analyzed against the right to freedom of expression as protected by Article 10 ECHR.<sup>31</sup> Following *Platini v Switzerland*,<sup>32</sup> the SFT has the power to review both procedural and substantive complaints raised under the ECHR. This in turn will allow athletes to bring actions against Switzerland where their freedom of expression has been unlawfully restricted by a sports organization headquartered there.<sup>33</sup>

The legality of the Rule 50 restrictions on athletes' freedom of expression under Article 10 ECHR is determined by addressing the following criteria: is Rule 50 an interference with athletes' freedom of expression; is that interference prescribed by law; does the interference serve a legitimate aim; and is the interference necessary and proportionate in a democratic society? Despite Rule 50 being watered down by the Tokyo 2020 Guidelines, its application appears to be a *prima facie* restriction on athletes' freedom of expression because: it prevents them from expressing political opinions that, under normal circumstances, they would be free to express; it lacks sufficient clarity, accessibility, and predictability to be considered 'law' and appears to operate as an unfettered exercise of the IOC's discretion; and it is neither a necessary nor proportionate restriction that operates in furtherance of one of the acknowledged legitimate aims. Before examining whether the operation of Rule

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<sup>30</sup>The Olympic Charter was updated on 8 December 2014 to reflect the additional of sexual orientation to Principle 6 FPOOs, IOC (2014).

<sup>31</sup>For how other human rights instruments could apply to this issue, see Shahlaei (2017).

<sup>32</sup>Federal Supreme Court, *Platini v Switzerland* 5 March 2020, no. 526/18, (dec.).

<sup>33</sup>For more detail on this issue see, Rietiker, D, 'Freedom of Expression of Athletes and Players: The Current and Potential Role of the ECtHR as a Watchdog in Sport' and the introduction to this book. On identifying the appropriate state party see further, Shinohara (2021).

50 is in breach of Article 10 ECHR, it is necessary to analyze how it has been interpreted and applied to incidents of athlete activism in light of the new guidance.

## 5 The application of Rule 50 at Tokyo 2020

Tokyo 2020 saw more varied instances of athlete activism than at any other edition of the modern Olympic Games. The athletes supported a wide range of causes, using a variety of innovative expressions and gestures. In each case, the expression was made by means of a gesture, sign or other non-verbal behavior. In none of the cases could the expression be considered to be disruptive, as defined by the Guidelines, nor were they otherwise in breach of any additional rules of the relevant NOC or ISF, nor were they in breach of Japanese national law. Prior to the publication of the Guidelines, each of these gestures would have been in breach of Rule 50 and could have resulted in punitive action being taken against the athlete. At the same time, each of these gestures, whether in support of political, social, racial or religious causes, would be protected under Article 10 ECHR if performed anywhere other than at the Olympic Games. The Tokyo 2020 expressions can be divided into three categories: those that were clearly in breach of Rule 50 and the accompanying Guidelines; those that appeared to be in breach; and those that were permitted under the Guidelines.

### 5.1 *Clear Breaches of Rule 50*

There were three demonstrations or protests that could be considered overtly political at Tokyo 2020. First, before the Games started, the South Korean delegation protested that the IOC and Tokyo organizing committee had refused to take formal steps to prohibit the flying of the Rising Sun flag, which is associated with Japan's colonial past and was used by the Japanese Imperial Army during the Second World War. As the Rising Sun is not an official flag of Japan, and therefore should not be flown in any Olympic venue, a prohibition was considered unnecessary. In response, a banner was hung from the South Korean accommodation in the Olympic Village quoting the sixteenth Century Korean Admiral Yi Sun-sin, who led 12 warships to an unlikely victory over the 300-strong Japanese Navy: "I still have support from 50 million Korean people". The IOC officially requested the removal of the banners as a potential breach of Rule 50. The Korean Sport and Olympic Committee removed the banners after the IOC agreed to treat any display of the Rising Sun flag in the same way.<sup>34</sup> As a politically motivated demonstration aimed at a specific country or people, the banner was a clear breach of Rule 50.

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<sup>34</sup>Berkeley (2021).

Secondly, Algerian judoka Fethi Nourine withdrew from his event at Tokyo 2020 to avoid the possibility of facing Israeli competitor Tohar Butbul in the second round.<sup>35</sup> At his subsequent disciplinary hearing, Nourine was suspended from all International Judo Federation sanctioned events for 10 years, as his conduct was contrary to the Federation's Statutes, its Code of Ethics, and Rule 50. Nourine, who was the only athlete punished for his protest, was making a politically- and religiously-motivated expression in the belief that that his support for the Palestinian cause was bigger "than all of this" and that it was the right decision to retire.<sup>36</sup>

Thirdly, Chinese cyclists Bao Shanju and Zhong Tianshi were warned about their behavior after wearing badges depicting the former Chairman of the Chinese Communist Party, Mao Zedong, at their gold medal ceremony.<sup>37</sup> Although a clear breach of Rule 50 as a political expression, or propaganda, the IOC accepted the Chinese Olympic Committee's assurance that this would not be repeated so no further action was taken.<sup>38</sup> In all three cases, the actions of the athletes would be considered protected political expression in most other circumstances, providing clear examples of IOC exceptionalism.

## ***5.2 Apparent Breaches of Rule 50, But No Action Taken***

The next group of examples concern situations where the athletes' expressions not only appear to breach Rule 50, but do not conform with the criteria provided for allowable expressions under the Guidelines. During their initial pre-event introductions, three of the US men's fencing team wore pink face masks whilst the fourth, Alen Hadzic, wore a black one. Hadzic had not been informed that his teammates would be demonstrating their solidarity with survivors of sexual assault. Without further context, a pre-event demonstration of general support for survivors of sex crimes would fall into the same category of expression as taking the knee and could be interpreted as supporting Principles 1 and 2 of the FPOOs. However, as Hadzic was at the time being investigated for committing sexual assault against three women,<sup>39</sup> this could have been considered to be a protest targeted at an individual and therefore a breach of Rule 50.

Three other expressions appear in breach of Rule 50 because they were performed during the course of an event or during an official ceremony. Costa Rican gymnast Luciana Alvarado incorporated both raising her fist and taking the knee into the finale of her gymnastics floor routine. As this formed part of the artistic content of

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<sup>35</sup>Ingle (2021).

<sup>36</sup>Decision of the IJF available at: <https://www.ijf.org/news/show/fethi-nourine-and-amar-benikhlef-disciplinary-decision> (last accessed 27 May 2022).

<sup>37</sup>Reuters (2021).

<sup>38</sup>BBC (2021).

<sup>39</sup>Niesen (2021).

her routine, the IOC did not take action against what would have been a clear breach of Rule 50 in any other sport. Alvarado justified her anti-discrimination and inclusion message as being, “because we’re all the same. We’re all beautiful and amazing”.<sup>40</sup> Similarly, US discus thrower, Sam Mattis, competed with a cross surrounded by a circle drawn on his arm.<sup>41</sup> Technically, as this was an expression performed during the event, without prior permission from the IOC, and not forming part of an artistic element of the performance, it was in breach of Rule 50.<sup>42</sup> The same expression was made by US fencer, Race Imboden, when receiving his bronze medal, contrary to the absolute prohibition on making any expression during a medal ceremony. The cross surrounded by a circle drew inspiration from the actions of Raven Saunders (discussed below), drawing attention to social and racial injustices in the USA.

In each of these cases, the expressions could be said to support Principles 1, 2 and 6 of the FPOOs and do not in any other respect breach the Guidelines except for where they took place. In all four cases, expressing support for these causes in these ways would be considered a lawful exercise of the right to freedom of expression in non-Olympic settings.

### 5.3 *No breach of Rule 50*

The final examples illustrate where athletes were allowed to express themselves freely, though the precise reasons for why they were not in breach of Rule 50 are not always clear. The first group of athletes to avail themselves of the more relaxed approach to athlete activism permitted by the Tokyo 2020 Guidelines were footballers in the women’s competition. As the Guidelines, supported by FIFA, allowed for expressions to be made on the pitch prior to the start of the game, footballers from a number of countries took advantage of this new approach by taking the knee before kick-off. The first to do so were Team GB, who were joined by their Chilean opponents and the match officials, who wanted “to fight all forms of discrimination and inequality, not just within sport but in the world”.<sup>43</sup> Similarly, the Australian women’s football team stood behind the Aboriginal flag, instead of the Australian national flag, before their first group game against New Zealand.<sup>44</sup> Their justification was one of inclusion and anti-discrimination from a uniquely Australian perspective,

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<sup>40</sup> Adams (2021).

<sup>41</sup> For the reaction to the same expression performed during a medal ceremony, see below.

<sup>42</sup> Contrast this reaction with that of the USATF and USOPC who prevented Nick Symmonds from competing in the US trials for Rio 2016 with the logo of a personal sponsor drawn on his arm: *Gold Medal LLC v US Track & Field and US Olympic Committee*, US District Court for the District of Oregon, Civ. No.6:16-cv-00092-MC.

<sup>43</sup> Kyodo News (2021).

<sup>44</sup> NITV (2021).

again ensuring compliance with the new guidance. In both cases, the expressions can be said to support Principles 1, 2 and 6 of the FPOOs and so do not breach Rule 50 *at some events*. It should be noted that expressions of this nature were expressly prohibited by World Swimming,<sup>45</sup> demonstrating an ongoing lack of consistency and transparency in how the same actions can be treated differently by different ISFs, and potentially, NOCs.

Raven Saunders was initially investigated for performing a gesture at the end of the women's shot put medal ceremony. After the flags had been raised, the anthem had finished, and the protocols were completed, she crossed her arms above her head in solidarity with all oppressed people: "[The cross is] the intersection of where all people who are oppressed meet".<sup>46</sup> The IOC demanded that the USOPC conduct an investigation into the incident, which resulted in a finding that Saunders had not breached its code of conduct.<sup>47</sup> The IOC only dropped its investigation when Saunders had to return to the USA following the death of her mother. This incident raises a number of issues. First, did the expression take place during a medal ceremony? There is no recognised endpoint to a medal ceremony, so it is unclear whether her expression took place during (which is prohibited), or after its conclusion (which may not be prohibited). Secondly, if the expression was performed after the completion of the medal ceremony, not during competition on the field of play, and not in the Olympic Village, is it in breach of Rule 50 because it was performed in an Olympic Venue? Although Rule 50 itself prohibits demonstrations at Olympic venues, there is no additional guidance on the acceptability of post-event, as opposed to pre-event, protests. The lack of explanation from the IOC of both why Saunders was investigated, and why the investigation was ultimately dropped, again leaves the application of Rule 50 unclear and inconsistent.

Finally, German field hockey captain, Nike Lorenz, was permitted by the IOC to wear a rainbow band on her socks in support of LGBTQI+ rights, inclusion and anti-discrimination, a position clearly in support of Principle 6 FPOOs.<sup>48</sup> Under normal circumstances, an expression of this nature performed on the field of play during the course of an event would be absolutely prohibited. In this case, however, the athlete was granted permission to express her support for her chosen cause, which although laudable, creates further difficulties in terms of the need for transparency and consistency of application of Rule 50 and its accompanying Guidelines. There is no published process for requesting permission, and no guidance on what sort of expressions might be permitted, or why such permission might be granted or denied.

In conclusion, the approach taken to the enforcement of Rule 50 at Tokyo 2020 has created further confusion as to how and why it is applied to instances of athlete activism. Despite explicit prohibitions on expressions being performed during events and medal ceremonies, both were allowed at Tokyo 2020. The range of

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<sup>45</sup>FINA (2021).

<sup>46</sup>The Guardian (2021).

<sup>47</sup>Ganguly (2021).

<sup>48</sup>Welt (2021).

expressions allowed suggests that almost anything in support of a general cause promoting social and/or racial justice, inclusion and anti-discrimination will be permitted. Only the most overt displays of political advocacy remain prohibited, despite the wording of Rule 50 and its interpretative Guidelines. If an activist athlete is punished for their expressions in the future, it can be almost guaranteed that any penalty imposed will be challenged.

## 6 The Different Routes to Challenging a Punishment for Breaching Rule 50

If an athlete has breached Rule 50, there are two potential sources of punishment. First, the IOC can investigate and prosecute the breach, or delegate such powers to the relevant NOC and/or ISF, as happened in the case of Raven Saunders. If found in breach, the IOC has the power to disqualify and/or remove the accreditation of the offending athlete. Secondly, the athlete's ISF can impose sanctions, as happened with Fethi Nourine. In either case, a first appeal can be made to CAS, either to its Ad Hoc Division that sits at each edition of the Games, or to the full tribunal in Lausanne under Rule 61 of the Olympic Charter. From here, there are limited opportunities of appeal to the SFT, and ultimately, the ECtHR.<sup>49</sup>

As CAS has its seat in Switzerland, its arbitrations are governed by Swiss arbitration law, specifically Chapter 12 of the Swiss Private International Law Act. Following *Pechstein v Switzerland*,<sup>50</sup> as CAS is required to adhere to the requirements of Article 6(1) ECHR then, by analogy, CAS could decide that all claims founded on breaches of Convention rights are also within its jurisdiction.<sup>51</sup> Alternatively, as Swiss law is the governing law of disputes involving the IOC, then the ECHR can be applied, or its values taken into consideration, when interpreting the grounds for appeal.<sup>52</sup> In either case, CAS could determine whether the protection of

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<sup>49</sup> An alternative route for an athlete could be to go directly against the state in which their NOC is based, or against Switzerland, as the host jurisdiction of the IOC, as states are under a positive obligation to create an environment in which everyone is able to express their opinions and ideas without fear. This includes a positive obligation to protect that person's freedom of expression against attacks by non-state actors, *Dink v Turkey*, 14 September 2010, application nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, par. 106 et seq. As a challenge beginning with an appeal to CAS is the most likely path for this litigation, and the ultimate reasoning of the ECtHR would be the same, only this route is discussed here. For further information on alternative challenges, see Shahlaei (2017).

<sup>50</sup> ECtHR, *Mutu and Pechstein v. Switzerland*, 2 October 2018, application nos. 40575/10 and 67474/10. See further, Goertz (2020).

<sup>51</sup> For a discussion of when CAS has discussed ECHR issues, see de la Rochefoucauld and Reeb (2021).

<sup>52</sup> CAS 2013/A/3139 *Fenerbahce SK v. UEFA* 5 December 2013, par. 88–89.



political neutrality in sport is a legitimate aim for restricting athletes' freedom of expression.

The most closely analogous case that has been heard before CAS,<sup>53</sup> *Josip Šimunić v FIFA*,<sup>54</sup> found that no protection could be founded on Article 10 ECHR where a Croatian professional footballer led fans in chants evoking the Ustaše, a Croatian fascist organization responsible for atrocities against various ethnic groups during WWII. It was legitimate for FIFA to restrict references to the Ustaše regime and fascism on the basis of its discriminatory connotations, and the 10-match ban imposed was appropriate in the circumstances. In a separate appeal to the ECtHR following his criminal conviction for inciting hatred on the basis of race, nationality, and faith, it was held that the restriction on his Article 10 rights,

struck a fair balance between the applicant's interest in free speech, on the one hand, and the society's interests in promoting tolerance and mutual respect at sports events as well as combating discrimination through sport on the other hand, thus [the state was] acting within their margin of appreciation.<sup>55</sup>

Thus, CAS would have the jurisdiction to hear a case brought on the basis that Rule 50 breaches Article 10 ECHR.

If CAS either declines jurisdiction, or upholds the restrictions in Rule 50 as lawful, then an athlete has a limited ground of appeal to the SFT under Article 190(2)(e) of the Swiss Private International Law Act. The athlete will need to demonstrate that the CAS decision is contrary to Swiss public policy, such that Rule 50 is an unlawful restriction on free speech or offends the prohibition against discrimination on the grounds of their political opinions. The prohibition on discrimination has been interpreted extremely narrowly, with the SFT holding that Article 14 ECHR is not directly applicable as a ground for setting aside an international arbitral award in Switzerland.<sup>56</sup> A final appeal to the ECtHR could be brought against Switzerland on the grounds that a Swiss-based tribunal has failed to uphold the athlete's Convention rights.<sup>57</sup>

A possible alternative approach could be to bring proceedings directly against Switzerland on the basis of the state's failure to protect athletes' freedom of expression from interference by a non-state actor; the IOC.<sup>58</sup> The United Nations Guiding Principles on Business and Human Rights (UNGPs) apply, "to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure".<sup>59</sup> Thus, the

<sup>53</sup>For a history of CAS opinions on Article 10 ECHR see Abanazir (2022).

<sup>54</sup>CAS 2014/A/3562 *Josip Šimunić v FIFA* 29 July 2014.

<sup>55</sup>ECtHR, *Josip Šimunić v. Croatia*, 22 January 2019, application no. 20373/17, para. 48.

<sup>56</sup>Federal Supreme Court, *Leeper v World Athletics* 2 June 2021, 4A\_618/2020 (dec).

<sup>57</sup>Schwab (2018), pp. 179–181.

<sup>58</sup>For more detail on the application of the UNGPs to sport see the introduction to this volume and further, Schwab (2019).

<sup>59</sup>United Nations Human Rights (2012), p. 1.

UNGPs apply to [International Sports Organisations] and all sporting organizations within the world of professional sport, including leagues, clubs, national associations, academies, dispute resolution services, regulatory and enforcement agencies. [. . .] It can also be safely said that the UNGPs include the human rights of the players within their purview.<sup>60</sup>

Thus, the UNGPs apply to the IOC in the same way that they apply to all businesses.<sup>61</sup> Indeed, in its Strategic Framework on Human Rights, the IOC, “affirms its commitment to respecting human rights within its remit in accordance with the UNGPs”.<sup>62</sup> As one of its Foundational Principles, the UNGPs state that, “Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.<sup>63</sup>

This requires the IOC to respect the human rights of those affected by its Rules, in this case, the freedom of expression of Olympic athletes. As states are under a positive obligation to protect individuals from human rights abuses committed by businesses located within their jurisdiction, the ECtHR would have jurisdiction over an action brought by an athlete where their freedom of expression has been unlawfully restricted by the operation of Rule 50.<sup>64</sup> This would enable the ECtHR to examine the legality of the restrictions imposed by a non-state actor in a horizontal relationship with an individual, including that between the IOC and athletes competing at the Olympic Games. In particular, the ECtHR has determined that Article 10 ECHR protects political comment and acts of protest or expression on matters of public interest and debate from restrictions imposed by horizontal relationships,<sup>65</sup> including making gestures and wearing badges expressing affiliation with an issue or political group.<sup>66</sup> If the Swiss state is unable to justify why the IOC’s restrictions are legitimate, necessary and proportionate, the Swiss government could be found to have violated Article 10 ECHR by its failure to protect athletes from the effects of Rule 50.

## 7 Does the Application of Rule 50 to Athlete Activism at Tokyo 2020 Breach Article 10 ECHR?

As noted above, the legality of any restrictions on an athlete’s freedom of expression under Article 10 ECHR is determined by addressing the following criteria: is Rule 50 an interference with athletes’ freedom of expression; is that interference

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<sup>60</sup>Schwab (2017).

<sup>61</sup>Ruggie (2016).

<sup>62</sup>IOC (2022).

<sup>63</sup>United Nations Human Rights (2012), p. 13.

<sup>64</sup>ECtHR, *Mutu and Pechstein v. Switzerland*, 2 October 2018, applications nos. 40575/10 and 67474/10.

<sup>65</sup>Faut (2014), p. 256.

<sup>66</sup>ECtHR, *Vajnai v. Hungary*, 8 July 2008, application no. 33629/06, para. 47.

prescribed by law; does the interference serve a legitimate aim; and is the interference necessary and proportionate in a democratic society? These will now be examined in more detail.

### ***7.1 Is Rule 50 an Interference with the Athlete's Freedom of Expression?***

The Rule 50 prohibition on any kind of demonstration and all political, religious and/or racial propaganda is a clear restriction on athlete activism and athletes' exercise of their right to free expression. Although neither 'demonstration' nor 'propaganda' are defined in the Olympic Charter or the accompanying Guidance, it is clear from the actions of the IOC in the past,<sup>67</sup> and comments by President Thomas Bach more recently,<sup>68</sup> that any comment, gesture, item of clothing, or badge that projects support for a political, social, racial, or religious message can breach Rule 50. Without good reasons for the restriction, and despite the spatial and temporal limitations provided by Rule 50 and the Guidelines, preventing athletes' ability to comment on political issues and matters of public importance and debate is a *prima facie* restriction on their Article 10 ECHR rights.

### ***7.2 Is the Interference Caused by Rule 50 Prescribed by Law?***

Any restrictions on freedom of expression must be clear, accessible, predictable, and not operate as an unfettered exercise of discretion.<sup>69</sup> The lack of specificity of its definitions and transparency of its application runs the risk of Rule 50 being found to be insufficiently precise to be considered 'law', and both unnecessary and disproportionate.

Neither Rule 50 nor the Guidelines provide definitions of what constitutes a demonstration, propaganda, or an expression, although a 'gesture' is provided as an example of an expression in the Guidelines. Prior to Tokyo 2020, unacceptable gestures included: raising a fist; taking the knee; wearing a black armband as a mark of respect or bereavement; crossing one's arms at the finish line; waving an unofficial flag; looking away from the winner's flag during a medal ceremony; and covering one's medal whilst the anthem of another country was playing.<sup>70</sup> Conversely, gestures that have not been investigated by the IOC include: crossing oneself or genuflecting

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<sup>67</sup>James and Osborn (2014).

<sup>68</sup>Bach (2020).

<sup>69</sup>For discussion of this issue in the sporting context, see Goh (2021), p. 23, and the shorter opinion piece version, Goh (2022).

<sup>70</sup>James and Osborn (2024), ch. 2.

before, during, or after an event; saluting one's flag; and placing one's hand on one's heart during a medal ceremony or whilst the national anthem is being played. Each of these gestures could be considered either an unacceptable political, religious or racial demonstration, or an acceptable expression of religion, nationality, or support for an issue of social justice and inclusion. This position was confused further by the lack of explanation of why the various gestures performed at Tokyo 2020 were neither investigated nor punished. This lack of clarity is exacerbated by the lack of explanation of why this wide range of gestures attracts such variable treatment.

The lack of definitional clarity leads to a lack of accessibility. As athletes cannot ascertain in advance with any degree of certainty which expressions are permitted and which demonstrations are prohibited, they are unable to adjust their behavior accordingly. This concomitant lack of predictability in the application of Rule 50 is compounded by the Guidance stating that expressions must comply with the Fundamental Principles of Olympism. Much of the athlete activism at Tokyo 2020 promoted diversity, tolerance, fairness, anti-discrimination, and inclusion. Conformity with the FPOOs should mean that such an expression is no longer a prohibited demonstration, protest, or propaganda stunt, as the IOC considers the Olympic Charter to be an inherently apolitical document.<sup>71</sup> However, it remains unclear where the line is drawn between promoting Olympism and acting politically.<sup>72</sup> The lack of clear definitions for the key behaviors leads to a rule that is open to inconsistency of both interpretation and application, resulting in unfairness to athletes engaging in activism in and around the Olympic Games. Further, the enforcement of Rule 50 appears to be an unfettered exercise of the IOC's discretion, as it has the ultimate power to determine whether a breach has occurred. This shows that the IOC has lost control of the interpretation of Rule 50, and, therefore, that it needs to be reframed through a human rights lens to ensure its future legitimacy.

### ***7.3 Does the Interference Caused by Rule 50 Serve a Legitimate Aim?***

Article 10(2) ECHR lists the circumstances in which freedom of expression can be restricted legitimately: in the interests of national security, territorial integrity or public safety; for the prevention of disorder or crime; for the protection of health or morals; for the protection of the reputation or rights of others; for preventing the disclosure of information received in confidence; or for maintaining the authority and impartiality of the judiciary. The principle of legitimacy is interpreted narrowly, leaving the preservation of sporting neutrality unlikely to be considered as necessary for the functioning of society.<sup>73</sup> Following the highly politicized responses of many

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<sup>71</sup> See also Anmol (2020), p. 71.

<sup>72</sup> James and Osborn (2014).

<sup>73</sup> For a more detailed analysis of the meaning of legitimate aims in sport, see Goh (2021), although her conclusions that Rule 50's claims to promote political neutrality are valid is disputed.

ISFs to the Russian invasion of Ukraine, including in particular the IOC, it will be all the more difficult to sustain an argument that athlete activism should be restricted to protect sport's political neutrality.<sup>74</sup>

Rule 50 should make clear that freedom of expression is protected, except in cases analogous to the legitimate aims, not that it is prohibited except in specific limited circumstances. The Guidance states that expressions must not be: targeted, directly or indirectly, against people, countries, organizations and/or their dignity; disruptive ... [in that they are capable of] causing or risking physical harm to persons or property; discriminatory, promote hatred or hostility, or have the potential to incite violence; illegal in the host country.<sup>75</sup>

These restrictions align with the legitimate aims of preventing disorder or crime, protecting the reputation or rights of others, and preventing the disclosure of confidential information, and, by analogy, could be justified as situations in which free expression could be limited. Although the ECtHR has held that restrictions on hate speech are incompatible with Article 10 ECHR,<sup>76</sup> a spatially and temporally limited restriction could perhaps be justified on the grounds of preventing disorder or crime.<sup>77</sup> The expressions made by Olympic athletes rarely breach these aims or the Guidance, providing little justification for prohibiting all demonstrations and propaganda in the name of maintaining the Olympic Movement's political neutrality. For example, only the conduct of the Korean Sport and Olympic Committee, Nourine, and the Team USA fencers could be said to have been targeted at a specific person or country.

#### ***7.4 Is the Interference Caused by Rule 50 Necessary and Proportionate in a Democratic Society to Achieve the Legitimate Aim?***

The breadth of interpretation of Rule 50 and the punishments imposed for its breach are not proportionate to its stated aim of preserving the political neutrality of sport. Restrictions on freedom of expression must meet a pressing social need, involve the least possible interference to meet the legitimate aim, and be underpinned by relevant and sufficient reasons for their imposition.<sup>78</sup> Without an underpinning 'legitimate aim' there is no acknowledged pressing social need for the restrictions

<sup>74</sup>Lindholm (2022), p. 1.

<sup>75</sup>IOC Athletes' Commission (2021b), p. 3.

<sup>76</sup>ECtHR, *Vejdeland and ors v Sweden*, 9 May 2012, application no. 1813/07.

<sup>77</sup>ECtHR, Application no. 20373/17, *Josip Šimunić v. Croatia*. See also Di Marco (2021), where the point is made that freedom to express criticism of superiors has been allowed, if not the more general freedom of expression under discussion here.

<sup>78</sup>Summarised in ECtHR, *Stoll v. Switzerland*, 10 December 2007, application no. 69698/01, para. 101, and restated in ECtHR *Morice v. France*, 23 April 2015, application no. 29369/10, para. 124.

imposed by Rule 50. On the contrary, it could be argued that there *is* a pressing social need for athlete activists to act as role models and use their platform to challenge structural injustices and discrimination of all kinds.<sup>79</sup>

Further, the punishments that can be imposed on athletes for breaching Rule 50 need to be clarified to ensure that they do not amount to a form of censorship, and that any penalties imposed are proportionate.<sup>80</sup> With no clear punishment structure in place and an inconsistent approach to explaining how and why an athlete has breached Rule 50, any penalty imposed appears to be arbitrary. To be proportionate, any restriction of athletes' freedom of expression must be the least restrictive means of achieving Rule 50's aim. Thus, freedom of expression, and in particular political expression, should be permitted, except in the circumstances highlighted in Article 10(2), not prohibited and allowed only in specific circumstances permitted by the IOC. Finally, no clearly articulated reasons for the imposition of the restrictions have ever been provided, beyond the argument that the rule is there to protect the political neutrality of the Olympic Games. Reasons that align with the legitimate aims, not simply a statement of the IOC's desire, must be provided.

### ***7.5 Does Rule 50 Unlawfully Interfere with Athletes' Freedom of Expression?***

The application of Rule 50 appears to be an unfettered exercise of the IOC's discretion, rather than a justifiable, necessary, and proportionate response to a specifically identified, pressing social need. The lack of clarity of the sanctioning framework reinforces this conclusion. Athletes simply do not know whether they are acting in accordance with Rule 50, or will be investigated (Saunders), warned (Bao and Zhong), expelled (Carlos and Smith), or banned (Nourine).

In its current form, Rule 50 appears incompatible with Article 10 ECHR. The justification for its existence lacks clarity and is inconsistently applied by the IOC itself. As can be seen from the approach undertaken at Tokyo 2020, Rule 50 lacks definitional clarity and its application lacks consistency and is without an underpinning rationale, making it difficult to justify either its legitimacy of purpose or inherent legality. Save for the most extreme and targeted demonstrations or expressions, it will be difficult to show that there is a compelling social need for Rule 50 that is necessary in a democratic society.<sup>81</sup> If the Swiss state is unable to justify why the IOC's restrictions are legitimate, necessary, and proportionate, it could be found to have violated Article 10 by its failure to protect athletes from the effects of

<sup>79</sup>See further, Di Marco (2021), p. 636.

<sup>80</sup>ECtHR, *Vereinigung Bildender Künstler v. Austria*, 25 April 2007, application no. 68354/01, para. 37.

<sup>81</sup>ECtHR, *Palomo Sanchez and others v. Spain*, 8 December 2009, application nos. 28955/06, 28957/06, 28959/06 and 28964/06.

Rule 50. A finding that Rule 50 is unlawful would allow athletes greater scope to exercise their freedom of expression, provided that, as role models, they do so responsibly.<sup>82</sup> The IOC would have a narrow margin of appreciation on expressions of public interest, but a much greater one where expressions are targeted at specific individuals, organizations, or countries.

## 8 Conclusion

The IOC's position on regulating athlete activism post-Tokyo 2020 is in many ways more confusing than it was when Rule 50 provided for an absolute prohibition on demonstrations and propaganda. The application of Rule 50 at Tokyo 2020 was inconsistent, did not always follow the interpretative Guidelines, and lacked transparency because of the IOC's lack of explanations for why it approached each incident in the way that it did. Further, any claim of sport's political neutrality has been decimated by the responses of many ISFs to Russia's invasion of Ukraine, making reliance on ostensible apoliticality to justify imposing restrictions on athlete activism even more problematic.<sup>83</sup> Expressions made in support of generic causes related to issues of social justice, inclusion, anti-discrimination and LGBTQI+ rights no longer appear to breach Rule 50, as in most cases the athletes can also be said to be promoting the FPOOs. Even expressions that were not covered by the relaxed interpretations provided by the Guidelines, including those that took place during an event or medal ceremony, were not investigated or punished. However, expressions that targeted a particular person or country will not meet the second of the Guidance criteria, although this was not used as a justification to penalize the Team USA fencing team, whilst those that are overtly political remain absolutely prohibited.

From a legal perspective, Rule 50 appears to breach Article 10 ECHR. The restrictions that it imposes on athlete activists do not support one of the acknowledged legitimate aims, cannot be justified as either necessary or proportionate, and lack clarity, accessibility, and transparency in both their definition and application. The result of this analysis is that Rule 50 either needs to be repealed or rewritten in a way that protects freedom of expression by narrowing the scope of its application, and is underpinned by a clear, coherent, and legally robust justification.

The IOC Strategic Framework on Human Rights provides a route towards how human rights will be protected, respected, and remedied throughout the Olympic Movement in the future, with a series of measures planned to be operative by 2030.<sup>84</sup> At present, however, future editions of the Olympics are required to protect and respect human rights only in respect of those activities conducted in the execution of the Olympic Host Contract that are linked to the organization of the Games.<sup>85</sup>

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<sup>82</sup> ECtHR, *Josip Šimunić v. Croatia*, 22 January 2019, application no. 20373/17.

<sup>83</sup> Lindholm (2022).

<sup>84</sup> IOC (2022).

<sup>85</sup> IOC (2018), para. 27.

Further, only those human rights that are applicable in the host country are covered by this requirement, rather than requiring new rights to be protected by the host. The IOC has repeatedly claimed that it is powerless to require host countries to change their laws to provide greater protections for human rights. Such a claim is undermined by the IOC's requirement that specific legislation is implemented to protect its commercial rights, and those of the host organizing committee from ambush marketing,<sup>86</sup> and ignores Rule 33(3) of the Olympic Charter, which requires that:

33 Election of the host of the Olympic Games

3 The national government of the country of any candidature must submit to the IOC a legally binding instrument by which *the said government undertakes and guarantees that the country and its public authorities will comply with and respect the Olympic Charter* (emphasis added).<sup>87</sup>

At present, the restrictions imposed on the ability of athletes to speak freely on political, religious, or racial issues remains subject to Rule 50 and its interpretative Guidelines. If it wants to avoid challenges to the legality of Rule 50, it is our specific recommendation that the IOC urgently takes a number of proactive steps. It needs to ensure that it has a clear and understandable rationale for the existence of Rule 50, and that it is applied consistently and transparently to each incident. Although some restrictions on targeted expressions may be justifiable, the IOC needs to be aware that their necessity will be interpreted narrowly.

First, the IOC must revisit whether there is a need for Rule 50. At present, there is only a commitment to, "review the wording of Rule 50.2 to reflect the IOC Guidelines",<sup>88</sup> not to review its inherent need and purpose. Although the restrictions have wide-ranging support from parts of the athlete community,<sup>89</sup> that is not sufficient justification for their continued existence in breach of Article 10 ECHR. If some restrictions are still considered necessary, then Rule 50 will need to be recalibrated so that it protects athletes' freedom of expression,<sup>90</sup> and to ensure that its application is in compliance with Article 10 ECHR. It is particularly important for the IOC to ensure that expressions in support of the FPOOs are not captured by a new Rule 50, and that there is a clear and transparent process for ensuring that support for causes aligned to Olympism can be promoted as part of the Olympic ideal. This 'relativization' of sporting neutrality may be a convenient compromise,<sup>91</sup>

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<sup>86</sup> Ambush marketing is a highly contested term. In essence, it is a marketing technique used by brands that are not sponsoring an event that makes unauthorized associations with the event that either make it look like an official sponsor, or undermine the marketing campaigns of official sponsors. See further James and Osborn (2024), ch. 3.

<sup>87</sup> IOC (2021), p. 73.

<sup>88</sup> IOC (2022), Objective 1, Action 1.2, p. 27.

<sup>89</sup> IOC Athletes' Commission (2020).

<sup>90</sup> For more on the argument that the IOC needs to recalibrate its relationships with key stakeholders, see James and Osborn (2024).

<sup>91</sup> Di Marco (2021), p. 636.



but would need to be managed carefully to ensure clarity and consistency of interpretation and application of any revised Rule 50. Alongside of any revisions to Rule 50 and the Guidelines, the procedures for investigation, prosecution, and punishment will need to be stated clearly and accessibly, as will the process to be followed for applications for permissions to make an expression.

Secondly, the IOC must require the enforcement of the recalibrated Rule 50 in all host countries. Rule 33 requires that all host governments act in compliance with the Olympic Charter. If a new Rule 50 operated to protect and promote freedom of expression, instead of limiting or prohibiting it, then the IOC could require the host country to amend its laws to ensure that it has a suitably robust human rights framework in place to be able to host the Olympic Games. Objective 2, Action 2.1 of the Strategic Framework on Human Rights states that the IOC will finalize the creation and effective operation of the Human Rights Advisory Committee.<sup>92</sup> The aim of this Committee is to support the IOC to meet its commitments under the Strategic Framework, and to help monitor and evaluate its implementation. This should help to ensure that all bodies within the Olympic Movement, including the host nation, are human rights compliant.<sup>93</sup>

Thirdly, this requirement can be enforced using the transplant framework, which protects the IOC and the local organizing committees from ambush marketing,<sup>94</sup> by making adherence to appropriate fundamental human rights instruments a condition of hosting the Olympics. Despite its claims that it cannot require hosts to change their laws, the IOC has a long history of requiring law creation for the benefit of itself and its sponsors. In particular, the Olympic Host Contract requires legal protections for its intellectual property rights and those associated with the specific edition of the Games by means of laws to prevent and criminalize ambush marketing. Following this framework, the IOC creates its own internal legal norms, a *lex Olympica*, which it then requires by a clause in the Olympic Host Contract to be enacted into the law of the host of each edition of the Olympic Games. After the event's conclusion, the effectiveness of the enacted legislation is reviewed, creating changes to the *lex Olympica*, which then in turn is transplanted in an amended form into the law of the next host country. A failure to adhere to the legislative requirements can result in the withdrawal of the invitation to host the Games.<sup>95</sup>

Not only is there long precedent of the IOC requiring this indirect form of law creation, its ubiquity is reflected in more generic legislation on offer in some states for these protections to apply to events other than the Olympic Games.<sup>96</sup> Thus, the IOC is in a position, both under Rule 33 of the Olympic Charter, and by analogy with the anti-ambush marketing requirements, to demand that hosts allow athlete activists

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<sup>92</sup>IOC (2022), p. 27.

<sup>93</sup>IOC (2022), p. 46.

<sup>94</sup>James and Osborn (2016).

<sup>95</sup>IOC (2021), Rule 36(2).

<sup>96</sup>James and Osborn (2019).

to express themselves in accordance with general human rights standards and/or in accordance with a recalibrated Rule 50.

Finally, CAS will also need to be aware of these potential developments. If complex human rights issues are likely to come before its panels covering not only cases under Article 10 ECHR but other relevant Convention rights, then it will need to ensure that at least some of its pool of arbitrators are suitably qualified to hear these cases.<sup>97</sup>

The reality is that the IOC is willing and able to use its leverage over an Olympic host to force national, regional, and city legislatures to enact laws on its behalf. The IOC's law creating ability is exerted through its influence over domestic legislatures, resulting in a corpus of Olympic Law that both enables the Games to take place and provides novel and extensive protections for the Olympic Properties.

There is no reason why the IOC could not impose similar legislative requirements for the protection of athletes' freedom of expression, and of human rights more generally. This could take a number of forms: the host country is required to be a signatory of relevant regional or transnational instruments; the required rights are incorporated into domestic law; or specific constitutional or other legislative protections are enacted. This would mean that all competitors, and anyone else associated with the Games, would have their human rights protected. To do so is not the conceptual leap of imagination that it is sometimes considered to be. It is instead simply enforcing the *lex Olympica* defined in Rule 33 of the Olympic Charter.

The IOC has had an ambivalent attitude towards the protection of human rights at the Olympic Games and throughout the Olympic Movement. It claims to respect human rights for all and considers the practice of sport itself to be a human right.<sup>98</sup> However, when faced with the practicalities of human rights protections, it has been slow to show the leadership required of it. The Strategic Framework is the start of a journey towards the greater protection of human rights in the Olympic Movement, but one where there are no guarantees of what the destination will be. Despite a specific requirement that the host government must comply with the Olympic Charter, there is no evidence that the IOC is enforcing Rule 33(3). If the IOC begins to enforce its own *lex Olympica*, then the Olympic Charter in general, and the FPOOs in particular, must be respected and complied with by the host country. This justifies the application of our transplantation framework to embed human rights protections in the law of each Olympic host on threat of the removal of the invitation to host the Games where such protections are not offered. The approach described above to embed freedom of expression into athletes' rights at the Olympic Games can be extended to all fundamental rights throughout the Olympic Movement. At that point, *lex Olympica* and *lex sportiva* can begin to claim that they are legitimate additions to the transnational legal space.<sup>99</sup>

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<sup>97</sup>de la Rochefoucauld and Reeb (2021).

<sup>98</sup>IOC (2021) Principle 4 FPOOs.

<sup>99</sup>Schwab (2017).

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