

JUSTIFICATION FOR DIRECT NATIONALITY DISCRIMINATION AGAINST ATHLETES IN SPORTS SANCTIONS:

An analysis of IOC sanctions on Russian athletes for Russia's invasion of Ukraine

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Abstract: *The International Olympic Committee's (IOC) decision to impose a ban on Russian athletes due to Russia's invasion of Ukraine, constitutes direct discrimination against Russian athletes for violating human rights. The right to non-discrimination based on nationality is a fundamental right protected by international human rights law. However, there is no consensus in practice on the justification of defending direct discrimination. To prevent the arbitrariness of autonomy power implemented by the International Sports Federations (IFs) and to protect the fundamental right of athletes not to be discriminated against, it is essential to define the standards for direct discrimination and to affirm the justification scrutiny criteria for direct discrimination in sports. First, it is necessary to clarify that the Court of Arbitration for Sport (CAS) is the appropriate subject for reviewing human rights issues in sports. Second, given the potential implications for the safety of international sports events and the fundamental human rights of athletes, it is recommended that the case law of the European Court of Human Rights (ECtHR) and the United States courts be consulted to apply the principle of strict scrutiny. Finally, the decision was admittedly discriminatory, but that they nonetheless represented a proportionate means of ensuring safe and fair competitions.*

Keyword: *direct discrimination; nationality; athletes; sanction; neutrally*

Introduction

After Russia invaded Ukraine, to protect the integrity of global sports competitions and for the safety of all the participants, the International Olympic Committee (IOC) Executive Board (EB) recommended that the International Sports Federation (IFs) not invite or allow the participation of Russian athletes in international competitions.¹ However, according to a report by a United Nations (UN) Special Rapporteur who deemed a ban on Russian athletes would be discriminatory and a violation of human rights.² In light of these considerations, the IOC EB has revised its decision, readmitting Russian athletes as individual

1. See Press Release IOC (2022,) 28 February 2022, available at <https://olympics.com/ioc/news/ioc-eb-recommends-no-participation-of-russian-and-belarusian-athletes-and-officials>.

2. See Press Release the UN Human Rights Office (2022). 14 September 2022, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=27552>

neutral athletes under certain conditions.³ The issue arises from the fact that the IOC's measures are changed without a human rights scrutiny, which could easily lead to uncertainty in sanctions and violate human right.⁴ This may result in the abuse of discretion by the IFs and cause chaos in the sports world.⁵

In practice, CAS did not distinguish between direct and indirect discrimination in this series of case, and even recognised that sports organizations sanctioning Russian athletes was an "unprecedented global reaction" rather than discrimination.⁶ This confusion is further compounded by the fact that an understanding of how the concepts are interpreted may assist in the appropriate enforcement of non-discrimination law in the CAS in question, as well as in identifying areas where further clarification may be necessary. Discrimination is a complex concept that has been the subject of considerable debate regarding its meanings, types, and justifications. In the context of Russia's invasion of Ukraine, there is a consensus among academics that the decision to sanction athletes constitutes discrimination.⁷ However, there is disagreement about the types of discrimination.⁸ This inconsistency renders it challenging to justify the discrimination.⁹

3. See Press Release IOC (2023), 28 March 2023, available at <https://olympics.com/ioc/news/ioc-issues-recommendations-for-international-federations-and-international-sports-event-organisers>.

4. "... is violation of human rights concerning athletes of Russia and Belarus who they follow policies of their governments," See Sam Noshadha; Mariia Duka (2023), "Sports Sanctions in War Situations under International Law," in: Ukrainian Journal of International Law, vol.1, pp.50; "In conclusion, sport sanctions against Russia and Belarus – whether on the part of the IOC, FIFA, or international federations – have negatively impacted athletes and teams." See Adair D (2023), "Sport Sanctions Against Invasive Russia," in: The Geopolitical Economy of Sport. Routledge, p.24.

5. Wiater P (2023), "Chaos in the sporting world over Russia's war of aggression: Political neutrality in light of human rights protection", in: Business and Human Rights Journal, Vol. 8:3, pp.461-467.

6. *Football Union of Russia (FUR) v. Union of European Football Associations (UEFA) et al* (2022) CAS 2022/A/8871, at para. 125 of transcript.

7. "The measures of FIFA and UEFA against Russian clubs appear prima facie to be discriminatory." See Jamali A, Kozlová A, Whelan K A, et al (2023), "Game Over for Russian Athletes? Human Rights Aspects of Measures Adopted by International Sports Organisations as a Response to the Russian Aggression against Ukraine", in: International and Comparative Law Review, Vol. 23: 1, pp.197; See Wiater P(2023), Ibid.

8. Wiater P. argues that exclusion decisions are directly related to unacceptable distinguishing characteristics and constitute direct discrimination if unequal treatment cannot be justified. See Wiater P (2024), "Rechtsgutachten zum Thema ", 12 June 2024, available at https://cdn.dosb.de/uploads/DOSB_Gutachten_Wiater_fin.pdf; Næss argues that direct discrimination on the grounds of nationality is categorically prohibited, and that indirect discrimination is defined as behavior that is presumed to be lawful. Consequently, it can be argued that the sanctions imposed by IFs on Russian athletes can be classified as indirect discrimination. See Hans Erik Næss (2024), " Sport governing bodies and the prioritization of human rights: a conceptual analysis of the International Olympic Committee's dispute with Russia", in: Sport, Ethics and Philosophy, pp.1-14.

9. Because it is generally believed that indirect discrimination can be justified, while direct discrimination is directly recognized as illegal and cannot be justified.

The authors will strive to fill the gap and explore these questions, given the increased importance and substantial athletes' right to non-discrimination. The article is divided into three sections. Section 1 analyses the legal nature of athletes' right to participate based on their nationality in international human rights law, as well as in the context of *lex sportiva*. Section 2 explores the reasons for IOC sanctions against Russian athletes, which could be considered direct discrimination. Section 3 considers a justifiable defence in cases of direct discrimination and provides an approach to situations where judicial scrutiny is required.

1. The legal nature of athletes' right to participate based on nationality

In the context of international human rights, there is a recognition of the existence of a hierarchy of rights in some literature.¹⁰ The theory posits that the degree of protection¹¹ and the obligation to derogate vary¹² depending on the hierarchy of rights. Consequently, to safeguard the rights and interests of athletes more effectively in the context of sports sanctions, it is essential to first clarify the legal nature of the rights of athletes to be violated.

1.1 The right to participate in sports is not protected by law as a fundamental human right

The sanctions imposed by the IFs have the effect of limiting the rights of athletes to participate. The IOC asserts in its Olympic Charter (OC) that "sports are a human right..." (Principle 4). Article 1 of the International Charter of Sport and Physical Education of UNESCO also recognises the fundamental right of all individuals to engage in physical education, physical activity and sport. This document asserts that all individuals are entitled to engage in sports without discrimination. Nevertheless, these two legal documents lack direct legal binding force on the state.

10. Moritz, Staes, and Mena Parras (2014), "Francisco, Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration ", in: *European Journal of Human Rights*, Vol. 3, pp.326; De Wet, Erika et al (2012), " Hierarchy in international law: the place of human rights ", in: Oxford University Press, Polity Press: London.

11. For example, the United States Supreme Court held that freedom of expression, including speech, publication, and assembly, occupies a "superior position" within the constitutional rights system. Consequently, in comparison to other constitutional rights, particularly economic freedom, such as property rights, it must be accorded a higher degree of protection. The specific approach is to review the constitutionality of legislation that is regulated based on this. This entails adopting stricter standards than those applied in the relevant review of legislation regulating the latter. See *United States v. Carolene Products Company*, No. 640, Judgement of April 25, 1938, the United States Supreme Court, paras.304.

12. Koji T (2001), " Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights ", in: *European Journal of International Law*, Vol. 12-5, pp. 917-941.

Regarding the realm of legally binding international human rights law, there are no regulations providing "the participation rights of sports." The main international human rights framework includes the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Convention on Human Rights (ECHR). In these treaties, only Article 15 of the ICESCR appears to extend the right of individuals to participate in cultural life to all sports. However, it can be argued that this right is not necessarily linked to elite sports, which are defined as exclusive and recognised based on qualifications. It can be observed that the participation of athletes, particularly elite athletes, in sporting events does not constitute an aspect of the right to participate in cultural life.

1.2 The right to non-discrimination against nationality is protected by international human rights law

The IOC declares in its documents that it prohibits "any form" of discrimination.¹³ The principle of non-discrimination is also explicitly affirmed in international human rights law. The ICCPR prohibits any form of discrimination against "all persons", citing the protected grounds of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The ICESCR provides for the same reasons as the ICCPR and the ECHR.

Considering the foregoing, the right to non-discrimination against nationality constitutes a well-founded basis for international human rights law. However, the categorisation of athletes based on nationality by the IFs does not always violate non-discrimination legislation.¹⁴ It follows that if any differential treatment on the grounds of nationality were to be deemed both legal and appropriate, further analysis would be required to determine the legal nature of the right to non-discrimination.

1.3 The right to non-discrimination against nationality as an independent fundamental right

In the context of international human rights law, non-discrimination rule is characterised by two distinct legal attributes: subordinate and independent. The right to non-discrimination, as defined in ICCPR Article 2 (1), Article 14 of the ECHR and ICESCR Article 2 (2), is clearly subordinate.¹⁵ As a subordinate right,

13. Olympic Charter, Fundamental Principles of Olympism, paras. 4.

14. Worster, W.T(2024), "Respecting the Right to Nationality in International Sport ", in: Interdisciplinary Studies in Human Rights, [Boillet, V., Weerts, S., Ziegler, A.R. Eds], Workshop on Sports and Human Rights, pp. 149-186.

15. See ICCPR, Article 2 (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language,

it can only be applied in conjunction with the right to enjoy other substantive rights recognised in the se treaties.¹⁶ The provision of Article 26 of the ICCPR, which prohibits discrimination, has been widely acknowledged by scholars as a general legal principle, treating the right to non-discrimination as an independent human right.¹⁷ In addition, the EU has gradually recognized the limitations of Article 14 of the ECHR and extended non-discrimination to protect other rights beyond the scope of the Convention.¹⁸

It can be observed that although the right to participate in sports events is not explicitly recognised as a fundamental human right in international and regional human rights law, the right to non-discrimination may exist as an independent fundamental right. Consequently, athletes are entitled to protection from discrimination on the grounds of nationality and may invoke international legal norms against discrimination. Although the Contracting Party, of international human rights law is state, it is argued that IFs should be held to account for their human rights responsibilities based on "indirect" influence.¹⁹ Another rationale for holding IFs to account for their human rights responsibilities is that they are perceived to be state-like entities.²⁰ Consequently, IFs have obligation to safeguard the non-discrimination rights of athletes and should implement sanctions with caution to avoid violating their fundamental human rights.

2. Identification of Discrimination in sanctions against Russian athletes: direct or indirect?

2.1 Types of discrimination

The texts of the ICCPR and ECHR do not define the term "discrimination."

religion, political or other opinion, national or social origin, property, birth or other status. See ICESCR Article 2 (2), The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

16. See Samantha Besson, Eleonor Kleber (2019), "Article 2: The Right to Non-Discrimination." Tobin, John; Alston, " Philip. The UN Convention on the Rights of the Child: A Commentary" in: Oxford Commentaries on International Law, Oxford University Press, pp.41–72.

17. Atrey S (2017), " Fifty years on: the curious case of intersectional discrimination in the IC-CPR", in: Nordic journal of human rights, vol,35-3, pp.220-239.

18. See Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177)

19. Tsubasa, Shinohara (2022), "Which states parties should be held responsible for the implementation of positive obligations under the ECHR in sports-related disputes? ", in: The international sports law journal, Vol,22, pp.332–342.

20. Wiater P (2023), Ibid, p. 462.

The most frequently used definition of the term "discrimination" in the ECtHR is found in the case: "*Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.*"²¹ It can be seen that discrimination is related to four elements: treatment, situations, objective and justification.

In the EU legal system,²² direct discrimination is characterised as follows:

"When one person is treated less favorably than another is, has been, or would be treated in a comparable situation on any of the grounds mentioned in various legal provisions."

By contrast, indirect discrimination is characterised in the following way:

"Indirect discrimination: when an apparently neutral provision, criterion or practice would put persons having a particular protected characteristic (e.g., their religion or belief, disability, age or sexual orientation) at a disadvantage compared with others."

Even though the EU directives – and equivalent statutes in EU jurisdictions – set out different tests for direct and indirect discrimination, there is considerable disagreement about how the distinction between these two forms of discrimination should be understood. EU directives seems to consider justifiable reason as an element of indirect discrimination, which belongs to "result oriented analysis". Judges use "result" as an element of indirect discrimination, reversing the logical order of discrimination analysis. In fact, this differentiation is only the preliminary identification of discrimination. The subsequent stage of judicial scrutiny involves the allocation of the burden of proof and the assumption of legal results, which is known as justification.

The focus of this article is on the distinction between direct and indirect discrimination in the context of the decision on sports sanctions. There are many ways of differentiating between direct and indirect discrimination that have been discussed in the literature.²³ As Campbell proposes an optimal approach to distinguishing between direct and indirect discrimination from legal perspective. Direct discrimination occurs when an individual is treated differently based on a protected ground.²⁴ However, Campbell seems return to the path of proving

21. See *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, Judgment of 13 November 2007, ECtHR, para.44.

22. Directive 2000/78/EC, Article 2(2).

23. Distinguish between direct and indirect discrimination based on "discriminatory intent". See Ferracioli L (2015), "Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination", in: *Economics and Philosophy*, vol.31-3, pp.486-492; What's more, Some authors believe that indirect discrimination is not truly a distinct kind of discrimination, but it is simply a legal construct designed to address distributive inequalities between groups. See Eidelson (2015), "Discrimination and Disrespect", in: *Oxford Philosophical Monographs*, pp5-8.

24. Campbell C, Smith D (2023), "Distinguishing Between Direct and Indirect Discrimination",

indirect discrimination through justification reasons like the EU Directive previously mentioned.²⁵

Hence, this article presents an analysis with "treatment" serving as the *prima facie* criterion. Direct discrimination is constituted of two elements: (1) Differential treatment is based on protected grounds; and (2) Adverse effects. Indirect discrimination could be defined as two distinct elements: (1) Equal treatment, which appears to be neutral or equal on the surface; and (2) Adverse effects. Nevertheless, to distinguish between the two, it is also necessary to identify a comparator with which to evaluate the "treatment".

2.2 Reason why IOC Sanctions Russian Athletes constitute direct discrimination

Frist, differential treatment is based on a protected ground. The initial premise of direct discrimination is the existence of a difference in treatment based on a protected ground. It is worth noting that the principle of equal treatment does not prohibit all kinds of differential treatment. In the context of sports competitions, some differential treatments are legitimate, as they serve to ensure fairness and equality in competition.

The differential treatment of individuals or groups based on an "identifiable ground" that is protected by law may be prohibited. The differential treatment must relate to one of the protected grounds listed in Article 21 of the Charter of Fundamental Rights of the EU (Charter) or Article 14 of the ECHR, including sex, race, ethnic or social origin, nationality, etc. In other terms, the causal relationship between differential treatment and protected grounds will affect the identification of direct discrimination. On occasion, direct discrimination may be "covert" rather than "overt".²⁶ This is because discriminators may not openly admit to discriminatory practices on the grounds of protected characteristics. Consequently, courts may be required to examine the underlying reasons for a distinction to identify instances of direct discrimination.

Second, clarify comparator. The comparator of direct discrimination refers to an individual or group that is used as a reference point to determine whether discrimination occurs based on protected characteristics. As stated by the ECtHR, '[t]he success of a discrimination complaint depends first and foremost on when persons are deemed to be in situations that are alike'.²⁷

In: The Modern Law Review, vol, 86-2, pp. 307-330.

25. Indirect discrimination occurs where discriminator instead acts in a way that disproportionately disadvantages members of a group, to which complainant belongs, distinguished by the members' possession of a protected characteristic. Campbell C, Smith D, Ibid, p.307.

26. See Arnardóttir (2003), Equality and Non-Discrimination under the European Convention on Human Rights, Policy Press: Hague, pp.73, 182.

27. See *Fábián v. Hungary* [GC], no. 78117/13, Judgment of 5 September 2017, ECtHR, para.10.

In the context of the background of the Russia-Ukraine conflict, the confirmation of the comparator has given rise to a complexity of questions regarding the CAS cases. In the case of *Russia Club v UEFA*, the Appellants identified "other international federations, which did not ban Russian national teams and clubs from participating in international tournaments," as a relevant comparator. The Panel, however, indicated that comparisons to the decisions of other sports federations taken in materially different circumstances and for different reasons should be avoided. In the case of *ROC vs IOC*, the appellant submits that the relevant comparator is "the countries of other territorial boundary disputes".²⁸ The CAS contended that the circumstances of the present case differed significantly from those of the previous case and thus lacked relevance, except to the extent that they served to illustrate the IOC's consistent reliance on the position of the international community in defining the area of jurisdiction of an NOC.²⁹ From this, the assessment of comparability of qualifications, experience, situations, etc. can prove to be a subjective task, with the potential for differing conclusions to be reached. The comparator is perceived as a barrier to discrimination claims.

Although both cases arose in the context of the Russia-Ukraine conflict, the complainants are sports institutions. Rather than comparing themselves with athletes, they have chosen to compare themselves with other IFs or countries. The CAS has considerable discretion in determining the suitability of a comparator, with a primary focus on supporting IFs. This has been acknowledged by the ECtHR, which has cautioned that the choice of comparator will often change the outcome of the case. Furthermore, the judicial choice of comparators is sometimes criticised for being arbitrary or lacking in a consistent rationale.³⁰ To facilitate this comparative process, EU rules seems to permit the use of hypothetical comparators.³¹ This method involves comparing the treatment of individuals in similar situations but with different protected characteristics to determine discriminatory practices.³²

28. See, for example, the territory of Kashmir between India; Pakistan and then China; the Turkish invasion of Cyprus; the conflict of Armenia and Azerbaijan etc.

29. See *Russian Olympic Committee (ROC) v. International Olympic Committee (IOC)* (2023) CAS 2023/A/10093, at para. 106 of transcript.

30. See *Fábián v. Hungary*, Ibid, pp.41.

31. Assuming that one person's treatment due to race or ethnic background is not as good as the other person's current, past, or future treatment. Council Directive 2000/ 43/EC, art. 2, 2000 O.J. (L 180) 22, 24 (emphasis added); see also Council Directive 2006/ 54 /EC, 2006O.J. (L 204) 23; Council Directive 2000/78/EC, 2000 O.J. (L 303) 16.

32. See Suzanne, B., Goldberg (2010), " Discrimination by Comparison", in: Yale Law Journal, vol,120-4, pp.728.

2.3 Prima facie finding of direct discrimination

In general, each sports federation conducts a selection procedure based on the results of competition to determine which athletes' eligibility. There should be a connection between "performance" and "eligibility". However, in the context of the Russian invasion of Ukraine, "nationality" has become a factor in determining "eligibility". The "nationality" as a protected ground is enshrined in international human law. In addition, the difference in treatment is reflected in whether athletes are allowed or prohibited from participating. Athletes holding Russian passports were unable to participate in sporting competitions. There is an obvious causal link between differential treatment and protected grounds.

Furthermore, according to hypothetical comparators, it is possible to draw a comparison between the treatment of Russian athletes and the hypothetical treatment of a non-Russian athlete. It is evident that where a Russian athlete is treated less favorably than another athlete is, has been or would be treated in a comparable situation on grounds of nationality, this constitutes a violation of the principle of equal treatment. As one commentator has observed, "the comparator need not 'exist'; the probability of 'his' or 'her' better treatment will suffice."³³

Hence, this analysis leads to the conclusion that IFs are engaging in prima facie direct discrimination based on Russia's invasion of Ukraine. Firstly, there is differential treatment based on nationality as a protected characteristic. Secondly, non-Russian athletes as comparable objects for Russian athletes participating in sports events. Thirdly, Russian athletes are at a disadvantage, and they are still unable to participate in sports events, even if they meet the eligibility criteria.

3.The possibility of justification for direct discrimination: the scrutiny power of CAS and the approach of stricter scrutiny

3.1 The possibility of justification direct discrimination

Once a differential treatment relating to a protected ground has been established, direct discrimination cannot in principle be justified under EU law.³⁴It is generally accepted that direct discrimination should be more difficult to justify than indirect discrimination, given its more insidious and corrosive nature.³⁵

33. Elisabeth Holzleithner (2005), "Mainstreaming Equality: Dis/Entangling Grounds of Discrimination", in: Transnational Law and Contemporary Problems, vol,14, pp.927-957.

34. Xenidis R (2022), "The Concept of Direct Discrimination in European Anti-Discrimination Law: Theory, Practice and Limits", in: book chapter in Colm O'Cinneide, Julie Ringelheim, Iyiola Solanke (eds.), p11.

35. QC J B, Moran E (2002), "Justification in direct sex discrimination law: breaking the taboo", in:Industrial Law Journal,vol,31-4, pp. 308.

However, there is a perception that even direct discrimination should be capable of justification, albeit in limited circumstances.³⁶

Firstly, a protected characteristic may be used as a ground for differential treatment if its objective is legitimate and the requirement is proportionate.³⁷ For example, in the case of *Bosman*, which concerned the limitation of the number of players from other Member States who could be fielded in a match, the CJEU determined that the following objectives allow for differential treatment based on nationality, despite constituting direct discrimination.³⁸

Derogations exist in relation to public order, security and health, as well as the protection of the rights and freedoms of others. The EU Charter of Fundamental Rights considers state actions based on the reduction of rights and interests in war as legitimate.³⁹ This implies that differential treatment based on protected grounds may be justified if it prevents the right damage caused by war.

Consequently, in instances of direct discrimination, it is not permissible to assume that justification cannot be carried out. If there are legitimated reasons or further legal provisions that permit the derogation of rights, justification may still be possible.

3.2 *The Scrutiny power of CAS: protecting human rights in sport*

Given the tensions between athlete fundamental right and law, a wider regulatory question concerns who deals with discrimination disputes and where athletes turn to secure the protection of their rights. The expertise or capacity of CAS to deal with human rights violations is often questioned.⁴⁰ The consequence of the

36. For example, in the European Court of Justice, the justification for direct discrimination based on nationality must be of a particularly weighty and convincing nature, as evidenced by the case law. See *Konstantin Markin v. Russia* [GC], no. 30078/06, Judgment of 22 March 2012, ECtHR, para. 127.

37. There are other reasons, such as by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out', the 'characteristic constitutes a genuine and determining occupational requirement, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief.

38. The legitimated aims include: (i) the need to encourage the training and development of young players, (ii) maintaining a certain level of sports and financial balance between clubs, or (iii) the need to ensure the regularity of matches and the uncertainty of outcomes. See *Union royale belge des sociétés de football association and others v Bosman and Others*, no. Case C-415/93, Judgment of 20 September 1995, CJEU pp.5008.

39. "... when they take action in the areas of national defence in the event of war and of the maintenance of law and order, in accordance with their responsibilities recognised in Article 4(1) of the Treaty on European Union and in Articles 72 and 347 of the Treaty on the Functioning of the European Union ...", See EU Charter of Fundamental Rights, Article 52.

40. The *Chand* and *Semenya* cases demonstrate that CAS may not be the most appropriate loca-

application of mandatory arbitration in CAS was the difficulty in applying human rights law and the necessity of a review according to the arbitration rules.⁴¹ Thus, the CAS previously asserted that it was not responsible for addressing human rights issues, but rather for that task were the courts.⁴²

In order to address the issue of the absence of a human rights review mechanism in sports, West proposes the establishment of a Sports and Human Rights Arbitration Court, which would be accessible to any individual victim who wishes to submit an appeal to the European Court of Human Rights.⁴³ Seema Patel posits that the United Nations Human Rights Council plays a pivotal role in establishing an international, independent, and accessible sports human rights dispute resolution court that links the existing sports system with the legal framework.⁴⁴

Nevertheless, over time, it became evident that the human rights scrutiny model of the CAS would be a viable approach for promoting justice in sport. The establishment of the CAS as an institution with the purpose of resolving sporting disputes has resulted in the formalisation of the process, which has contributed to the development of professionalism in the field of sports disputes. Conversely, the CAS has not entirely avoided scrutiny of human rights issues. The stance of the CAS about human rights review has undergone a notable shift, moving from outright rejection to active acknowledgment. This suggests that the consideration of international human rights law in the resolution of sports disputes is not precluded.⁴⁵

Moreover, although the current application of CAS to international human rights law is relatively chaotic and seems to be determined based on the interests of IFs, this issue is precisely due to the lack of human right scrutiny provisions

tion for such challenges. See *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, no.2014/A/3759, award of 24 July 2015, CAS; *Semenya v. Switzerland*, no.10934/221, judgement of 3 May 2021, ECtHR.

41. Baddeley M (2019), “The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn”, in: *The International Sports Law Journal*, vol,20, pp. 3–17.

42. See *Mokgadi Caster Semenya v. The International Association of Athletics Federation (IAAF)*, no.2018/O/5794 and *Athletics South Africa v. The International Association of Athletics Federation (IAAF)*, no. 2018/O/5798, CAS, award of 30 April 2019, para 555.

43. West D (2019), “Revitalising a phantom regime: the adjudication of human rights complaints in sport”, in: *The International Sports Law Journal*, vol,19-1, pp.2–17.

44. Patel, S (2021), “Gaps in the protection of athletes gender rights in sport—a regulatory riddle”, in: *The International Sports Law Journal*, vol,21, pp.257–275.

45. See *Fenerbahçe SK v. Union des Associations Européennes de Football (UEFA)*, Arbitration CAS 2013/A/3139, award of 5 December 2013; *Gabriel Fernando Atz v. PFC Chernomorets Burgas*, CAS 2015/A/4034, award of 23 December 2015; Arbitration CAS ad hoc Division (O.G. Sydney) 00/009 in the matter Angel Perez, award of 25 September 2000.

of CAS. Additionally, establishing a sports human rights institution is not cost-effective.

Therefore, by reforming the CAS and stipulating that it should adhere to the same standards as public courts in examining human rights issues, it is possible to avoid questioning decisions based on the interests of IFs and protect the human rights of athletes.

3.3 Criteria for justification of direct discrimination: stricter scrutiny approach

The CAS has adopted a framework analogous to that employed by state courts for the purpose of evaluating the legitimacy of apparent discrimination. This framework encompasses three stages: proportionality, necessity, and the balance of rights.⁴⁶ However, the CAS panels appear to have attempted this approach without fully considering which "human rights" are threatened and the degree of infringement.⁴⁷

According to ECtHR, a proportionality test is applied in the context of direct discrimination.⁴⁸ Compared to ECtHR, US courts provide a clearer sliding scale of judicial review about the proportionality test.⁴⁹ Among them, strict scrutiny applies to the government's "suspicious classification" based on race, nationality, and similar standards, it is a violation of fundamental rights, as proposed under the equal protection clause of the *14th Amendment to the Constitution*. In gen-

46. CAS 2018/O/5794, Ibid.

47. Cooper J (2023), "Protecting human rights in sport: is the Court of Arbitration for Sport up to the task? A review of the decision in Semenya v IAAF", in: *The International Sports Law Journal*, vol.23(2), pp. 151-175.

48. Arai-Takahashi Y, Arai Y (2002), *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia nv. pp.14.

49. US courts are developing what is known as a rational basis standard with bite, an intermediate scrutiny standard, and recently a softer version of strict scrutiny. The rational basis standard is applied when a law has a legitimate goal. Legislation that is generally applicable to socio-economic fields is subject to this standard; A softer version of strict scrutiny, whereby an administrative action must be the least restrictive of individual liberty, is believed to be limited to areas of maximum judicial control, where fundamental individual rights and freedoms are at stake. For constitutional review to be passed, government actions in such cases must simultaneously meet the following three conditions: (1) Government actions impose a "substantial burden" on fundamental rights; (2) The purpose of government actions is "urgent government interests"; (3) The government's actions are appropriately aligned with this goal. The intermediate scrutiny standard is currently mainly applicable to the government's regulation of commercial speech and performance behaviour, as well as the regulation of the time, place, or method of speech expression. Its content includes: (1) government actions serving "important and reasonable goals"; (2) the government must prove the authenticity of its purpose; (3) government actions are essentially related to their goals. See Sullivan E T, Frase R S (2009), "Proportionality principles in American law: controlling excessive government actions", in: Oxford University press, pp.53-66.

eral, strict scrutiny is regarded as an examination of the extent to which administrative actions result in the infringement of fundamental rights.

In this case, the sanction decision of IFs is an administrative one⁵⁰ and refers to the fundamental right of Russian athletes not to be discriminated against on the basis of nationality. Although the sanction for athletes is based on the principle of sports autonomy, the principles of strict scrutiny in US courts should be applied to protect the fundamental human rights of athletes. This article presents a refined version of the proportionality principle, which is based on the principle of strict scrutiny in US courts, legitimate aim, the causation test, the mean test, and the balance test.

legitimate aim

For restrictions to be justified by the ECtHR, it is essential that the aim in question is legitimate. "Very weighty reasons" could justify a difference in treatment based exclusively on the grounds of nationality for the purposes of Article 14 of the Convention.⁵¹ This implies that all restrictions on fundamental rights must be subjected to the highest degree of scrutiny. It is only in exceptional circumstances that fundamental rights can be limited.

According to the issued press release by IOC on February 25, 2022, excluding Russian athletes from participating in competitions has two aims: firstly, to provide fairness to Ukrainian athletes who were unable to compete as a result of the conflict; and secondly, to protect the integrity of global sports competitions and for the safety all participants. The above two aims of implementing the suspension are against the principle of non-discrimination – violation of Russian athletes non-discriminated right, and human rights law and autonomous rules of IFs need to be invoked to seek the legitimacy of the aim.

About the first of these objectives, it is necessary to consider the fundamental human rights of Ukrainian athletes, including their personal dignity,⁵² cultural life, and work rights.⁵³ To justify this objective, it is essential to clarify the ob-

50. The decisions of the sports association Executive Committee to exclude the teams of a member association from participation in competitions in consideration of its decision to suspend that member association's right of participation in competitions as a measure to deal with the consequences of a military conflict for football competitions that it organizes may be properly characterised as administrative decisions. See CAS 2022/A/8871, *Ibid*, para.94.

51. See *Savickis and Others v Latvia* [GC], no. 49270/11, Judgment of 09 June 2022, ECtHR, para. 205; *Andrejeva v. Latvia* [GC], no. 55707/00, Judgment of 18 February 2009, ECtHR, para. 87.

52. In the case of elite sport, the Swiss Federal Tribunal has stated that personality rights encompass: "In terms of high-level sport, it encompasses more particularly the right to health, bodily integrity, honour, professional consideration, sporting activity and, in the case of professional sport, the right development and economic growth" see *Schaffl ü tzel and Z ö llig v. Swiss Racing Federation (FSC)*, ATF 134 III 193, Judgment of 23 August 2007, Swiss Federal Tribunal, para 4.5.

53. Wiater P (2023), *Ibid*, p. 464.

ligation of IFs to safeguard the fundamental human rights of athletes. Firstly, it should be noted that both the IOC and the most significant IFs are registered in Switzerland, which is the Contracting Party to the ECHR. Consequently, athletes and members of IFs can, in principle, rely on the protection of human rights provided by the ECHR in the field of sports. Secondly, the IOC and other IFs publicly acknowledge compliance with *UN Guiding Principles on Business and Human Rights*, stating that "as a specialized agency of society, enterprises must comply with all applicable laws and respect human rights." It can be observed that international human rights law serves as an indirect *fons juris* for IFs to assume human rights obligations.⁵⁴ Therefore, the protection of the fundamental human rights of Ukrainian athletes by IFs has the legitimacy of aim.

Regarding the second objective, it is evident that the suspension decision is likely to safeguard the integrity and security of global sporting events and participants. In their respective ways, IFs are actively engaged in the process of embedding integrity and sustainability safeguards, including those that are human rights-related, into their internal processes.⁵⁵ It is therefore incumbent upon IFs to implement measures to ensure that global sports competitions and participants are respected at every stage.

causation test

For a causation test to be valid, it is necessary for the measure taken by the governing body to be capable of achieving the goal that has been set. In this instance, the ban on Russian athletes should facilitate the IFs aim of safeguarding the human rights and right of Ukrainian athletes during competition. The 'priority of human rights protection' model of ECtHR necessitates a robust causal relationship between the measures taken and the intended outcome.⁵⁶ To establish this, the following must be demonstrated: (1) Prior to any action being taken, it is first necessary to ascertain that the athlete and sports competition in question are in real danger. (2) With regard to the question of whether the measures in question achieve the desired outcome.

First, the term "a real danger" implies that those in opposition may indirectly,

54. Di Marco, A (2022), "Human rights in the Olympic Movement: The application of international and European standards to the lex sportiva", in: *Netherlands Quarterly of Human Rights*, vol.40-3, pp. 244-268.

55. "To promote safe sport and the protection of athletes from all forms of harassment and abuse;" "To protect clean athletes and the integrity of sport, by leading the fight against doping, and by taking action against all forms of manipulation of competitions and related corruption". see Olympic Chapter, Art.2 Mission and role of the IOC.

56. Jing C (2023), "The ECtHR's suitability test in national security cases: Two models for balancing human rights and national security", in: *Leiden Journal of International Law*, vol.36(2), pp.295-312.

partially, or over time contribute to a potential for violence.⁵⁷ The invasion of Ukraine by Russia has had a profound impact on the sporting world,⁵⁸ with the conflict posing a significant threat to the integrity of the Games. Russian athletes have been closely associated with military actions, which has the potential to incite other athletes to engage in crisis and violence.⁵⁹ Consequently, if Russian athletes make remarks about war and potentially incite violence towards other athletes, it can be considered as falling into a "real danger", and implementing sanctions is imperative to protect the interests of athletes.

Furthermore, to ascertain whether the measures in question achieve their intended objective, it is necessary to consider the objective legislative facts theory.⁶⁰ The lack of clarity in the text of the rules makes it impossible to infer the subjective intention of IFs. Consequently, this article proposes that the causal relationship between the two be evaluated from an objective perspective. This theory, which focuses on external acts and manifestations as distinct from subjective, internal intention, is generally used to predict the effects. Should Russia participate in major sporting events with full visibility and without restriction, this would send a message that sports can violate peace and that there is nothing that IFs can do about it. The implementation measures are aimed at responding to the following reactions in this case, the influence of major sporting competition⁶¹, the condemnation of the military conflict by international organisations and governments, the reaction of the international sports community to the conflict, the imposition of sanctions and travel bans on Russian people and businesses, , and the exceptional and widespread international public reaction against it.⁶²

57. "There had been no clear and present danger, as the statement (the headline) had not been likely to produce and had not actually produced any immediate violence or insurrection. The statement had been removed in time and space from any violence, actual or impending." See *MUKHIN v. RUSSIA*, no. 3642/10, Judgment of 14 December 2021, ECtHR, para 90.

58. Lindholm, J (2022), "How Russia's invasion of Ukraine shook sports' foundation", in: The International Sports Law Journal, Vol, 22, pp. 1–4.

59. "Olympian's skier Alexander Bolshunov, gymnasts Dina and Arina Averina, and Victoria Listunova spoke at a rally at Moscow's Luzhniki Stadium in March 2022 in response to the full-scale invasion of Ukraine by the Russian Federation. The event was hosted by Dmitriy Guberniev, who had worked as a commentator for several decades during the Olympic Games. " See Maryna Kulinich (2023), "Russia uses sports as a tool of aggression. How is the world reacting? ", available at <https://www.ukrainer.net/russia-sports-as-a-tool/>.

60. "An objective expression of intent is to be determined by what one contracting party "would" based on the other contracting party's actions, tend to believe about that party's intent. "See R. George Wright (2008), "Objective and Subjective Tests in the Law", in: Indiana University Robert H. McKinney School of Law, vol,16-1, pp 126.

61. See Maryna Kulinich (2023), Ibid.

62. Ivana K (2022), "Russia's war on Ukraine: Impact on athletes and sports competitions",

Therefore, the banning of Russian athletes from participating in sports events can, to some extent, achieve the goal of maintaining sports safety. This is because it can prevent protests against Russian athletes participating in sports events caused by Russia's invasion of Ukraine. Consequently, it can ensure the overall safety of sports events.

mean test

Mean test has always been regarded as a core principle for safeguarding civil rights. The reason is that through test, a "minimum harm" means for the degree of infringement of rights can be established among the available means. However, it is worth noting that having other alternative measures does not mean that the chosen measures of implementation do not conform to the principle of proportionality.⁶³

In this context, the IOC has two options: a complete ban on Russian athletes participating or allow Russian athletes to participate in individual neutral athletes. On the surface, the second means is less harmful than the complete ban on athletes participating. Nevertheless, the efficacy of this approach has been called into question by scholars who contend that individual neutral athletes is an inadequate means of implementing sanctions objectives within the context of a sports boycott.⁶⁴

Sports competition is extremely complex, and it is unrealistic and overly demanding to require international sports organizations to select neutral athletes within a specified time frame in different sports events. Furthermore, among the athletes selected to participate in the Paris Olympics, there have been allegations that they have supported Russia's invasion by attending a televised pro-war rally in Moscow last year. And they still could participate in the competition as neutral individuals. Therefore, whether neutral athletes can achieve their goals is questioned.

The concept of "minimum harm" should not be interpreted as an absolute minimum harm, but rather as a relative minimum harm within a reasonable range. Stricter scrutiny requires means not only to cause significantly less harm than other feasible means, but also to use significantly more effective. In this instance, the most appropriate means of action would be to impose a complete ban on Russian athletes from participating.

balance test

A measure must also strike 'a fair balance between the competing interests

available at [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729373/EPRS_ATA\(2022\)729373_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729373/EPRS_ATA(2022)729373_EN.pdf).

63. See *Bulgarian Weightlifting Federation (BWF) v. International Weightlifting Federation (IWF)*, no.2017/A/5127, CAS, award of 18 December 2017, para.80.

64. Waiter (2023), *Ibid*, p.462.

of the individuals concerned and of the community as a whole'.⁶⁵The Ontario Human Rights Commission provide an analytical framework for balancing conflicting rights.⁶⁶

Firstly, it is necessary to ascertain whether there is an actual conflict of rights. This can be achieved by beginning with an examination of the rights claims in question to ascertain whether they are characterised appropriately and whether they are valid, legally recognised rights. From the perspective of athlete rights, the athlete is entitled to non-discrimination, as evidenced in the second section of this article. From the perspective of the International Federation (IF), the IF has the right to govern the sport event. For example, the IOC Executive Board is responsible for the management of the Olympic Movement, and Article 19.3 of the OC provides it with the requisite authority to fulfil this role.⁶⁷ Moreover, in accordance with the byelaw to Rule 59 of the OC, the IOC EB is empowered to take any measure it deems necessary.⁶⁸ There is no doubt that the IOC EB was duly qualified and the appropriate entity to issue the suspension decision. Similarly, the competence or authority to oversee the sports contested at the event, including suspension decisions, is also possessed by other IFs EB in accordance with Extraordinary Events as defined by the relevant federation rules.⁶⁹

65. See *A.P., GARÇON AND NICOT v. FRANCE*, no. 79885/12, 52471/13 and 52596/13, Judgment of 06 April 2017, ECtHR, para.40.

66. See Ontario Human Rights Commission, "Balancing conflicting rights: Towards an analytical framework," August 2005, available at <https://www.ohrc.on.ca/en/balancing-conflicting-rights-towards-analytical-framework>

67. "The IOC Executive Board assumes the general overall responsibility for the administration of the IOC and the management of its affairs." See OC, Article 19.3.

68. "The IOC Executive Board has also been competent to take any measure to further IOC's objective of organising and conducting Olympic Movement and in view of the Suspension Decision which removed the individual athlete from participation in competitions." See OC Byelaw, Rule 59.

69. For instance, "...decide on all other current or urgent business in exceptional circumstances which cannot be decided by the appropriate body promptly, and to assume all responsibilities which are not expressly attributed to another body within the ITTF", See *International Table Tennis Federation Handbook 2022* (version with tracked changes), Art1.5.4.1.11; "...to make decisions in case of emergency and in any situation in which no other World Aquatics body may act", See *World Aquatics Constitution 2023*(mark up to previous version), Art 17.1 (j) and 18.2 (e) ; "...In case of occurrence of events or circumstances of exceptional nature which are out-side the control of FIG (such as terrorism, riot, civil unrest, war., etc.) resulting in the safe and/or regular conduct of activities of FIG or sanctioned by it, notably, but without limitation, the conduct of activities of bodies/commissions of the Member Federations and/or the organization (including preparation thereof) of and/or the participation to events and/or competitions hosted and/or sanctioned by the FIG, being made impossible, objectively endangered, or, in the reasonable judgment of the Executive Committee, not reasonably possible or appropriate under adequate conditions given the circumstances, the Executive Committee may decide exceptional

The subsequent question is whether the needs of the parties are truly in conflict. Adverse effects discrimination may occur about Russian athletes if preferential treatment is inadvertently given to non-Russian athletes. Should a Russian athlete fulfil the requisite qualifications and be eligible to compete, the necessity to maintain the safety of sporting events has been met by the refusal of IFs to permit Russian athletes to participate. However, as event managers, IFs may have an obligation to meet the needs of Russian athletes. They are under an absolute obligation to treat every athlete equally without discrimination.

Finally, the court did not provide a definitive answer as to whether the maintenance of the safety of sports events is sufficient to justify discrimination against others in public life under human rights legislation. In the Bosman case, the court acknowledged the maintenance of the regularity of sports events by sports organisations as a legitimate rationale for discriminatory conduct towards others. The concept of maintaining the regularity of sports events, which is of a higher order than the mere safety of sports events, should be recognised. It can be argued that maintaining the safety of sports events is sufficient to justify discrimination against others in the public sphere where human rights legislation applies.

Conclusion

Sports boycott are essentially measures taken by the sanctioned parties to force the target country to cooperate and change to achieve expected benefits. There is no strict international legal basis for their implementation, and preliminary analysis has determined that the sanctions constitute direct discrimination, which poses a risk of damaging the fundamental right of athletes not to be discriminated against. As a specialized sports dispute resolution agency, CAS is a suitable subject for examining human rights issues in sports. After strict scrutiny, it was found that the complete ban on Russian athletes by IFs has (1) legitimate purposes; (2) There is a causal relationship between the purpose and the measures; (3) Although "neutral identity" is the least damaging means, it cannot achieve the goal, so "comprehensive suspension" is a reasonable means; (4) Maintaining the safety of sports events is sufficient to justify discrimination against others in the public life sphere where human rights legislation applies. Therefore, although the sanctions imposed by IFs on Russian athletes constitute direct discrimination, legitimacy can be proven through strict scrutiny.

protective measures aiming at preserving the safe, peaceful and regular conduct of the FIG Activities. " See *International Gymnastics Federation Statutes Edition 2023*, Art. 13.3 etc.