



# African Sports Law and Business Bulletin

Issue 3/2017

Sports Law and Policy Centre

## INTELLECTUAL PROPERTY RIGHTS IN SPORTS: A TRICK OR TWO NIGERIA CAN LEARN FROM THE GLOBAL GAME

by *Ugochukwu Johnson Amadi* LLM [LEEDS BECKETT UNIVERSITY]

### ABSTRACT

*The concept of sport has transcended the context of mere leisure and entertainment to become a significant revenue stream and a major contributor to economies all over the world. Sports practitioners all over the world have been able to generate enormous revenues from the exploitation of aspects of intellectual property rights via merchandising and so on. However, in Nigeria the recognition of the potential resident in a vibrant sports industry has been non-existent or too little. This article explores generally how sports professionals and sports events organisers in the UK, US and India have been able to exploit intellectual property rights in sports with a view of suggesting that sports professionals and sports associations/sports events organisers to embrace intellectual property rights. Finally this article will proffer solutions that could be adopted in the Nigerian jurisdiction with respect to more effectively protecting intellectual property rights in Nigerian sports.*

### *Introduction*

Sports have always been an important part of human social existence. They are so ingrained in our lives and have hence become an exciting part of our daily lives. Right from the time of the Roman Empire to this modern era it has always been a crucial and endearing sector. However, in recent time sports has transcended from pure entertainment or leisure and have now gained commercial and economic significance especially in the United States, the United Kingdom and all through the European Union. Through marketing, promotion, franchising, merchandising and brand building of professional sports teams, such teams these teams in these countries have now become more economically significant and viable and have assumed the influences associated only with multi-national companies. Sportsmen and women have also become more commercially important surpassing previously existing notions with respect to their financial worth.

There has been an evolution of the most popular sports, such as football, tennis, basket, cricket, car-racing, and so on into mega international events. They have also evolved into profitable domestic sports events like; Major League Soccer (MLS), the English Premier League (EPL), The Spanish La Liga. The organisers of these sporting events on the international level have been able to reap immense financial rewards by inter alia exploiting and leveraging on aggressive marketing campaign taking advantage of the marketable potentials resident in these sports<sup>1</sup>.

Therefore it has only become logical for professional sports teams and corporations to exploit and capitalize on varying intellectual property rights. These intellectual property rights are usually exploited via merchandising, advertisement, exclusive and non-exclusive licenses, broadcast rights and so on. However, it is imperative to point out that the major IP related tool that is inadvertently exploited by these sports powerhouses are their brands.

Brand exploitation is a fast and ever growing trend among sporting corporations in various sports and sports competitions and/or events. In football for instance, Clubs like; Chelsea FC, Real Madrid, Manchester United and Futbol Club De Barcelona, are examples of professional sports clubs that have been developed and consequently marketed as huge brands worth multi-million dollars. The popular sports brand publication *Brand Finance Football 50* in its 2014 edition ranked German Bundesliga giant Bayern Muchen<sup>2</sup> as the most valued football club in the world for the year 2014 with the winning of Bundesliga title for the 2014/2015 season valued at \$896,000,000.00. Sports business is big business and IP is a big part of that business. Therefore, it is important that professional sports

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<sup>1</sup> P Kandiah, Sports and Intellectual Property, <http://EzineArticles.com/5202279> accessed on 28th July 2015

<sup>2</sup> Brand Finance Football 50, The Annual Report On the World's Most Valuable Football Brands, 2014 pg 4; it is a yearly report on football finances and brand related issues

teams in countries like Nigeria, especially the Clubs in the Nigerian Premier League; Kano Pillars (Kano State) Sharks, Dolphins (Rivers State), Bayelsa United (Bayelsa State), Enyimba (Abia State) for example look at the immense potentials in the development and exploitation of intellectual property rights.

This present article intends to explore the creation and nexus between various calibre or specie of intellectual property rights and professional sports teams internationally with a view of drawing lessons for professional sports clubs in Nigeria to imbibe, emulate and exploit. It is true that the subject of intellectual property rights more often than not raises various legal issues. This article will make attempts to comprehend how professional football clubs can protect their intellectual property rights while creating palpable value from them.

#### Sports and Intellectual Property

In today's climate sports is no longer only a source of leisure and entertainment. Now it not only creates a profitable career path but also represents a significant industrial and business opportunity. Upon the creation of a sports team whether professional or amateur it becomes recognisable by its name. Further, for the purposes of identification and distinction logos tagline/slogans are created. Also sports associations outside the pitch and beyond the stadiums, sportsmen enter into endorsement and advertisement contracts worth millions of dollars. Similarly, sports teams and sports organisations are able to derive commercial benefits via branding, merchandising, licensing sponsorship and other related activities. It is argued therefore that sportsmen, sports teams and sports associations in Nigeria should consider similar activities.

On the successful commercialisation of various creative aspects the issue of their protection immediately arises and becomes imperative. For example names like New York Yankees, Chelsea FC, Los Angeles Lakers, and so on alongside their distinguishing logos, signs, emblems and taglines are of high commercial value and are important components of merchandising and branding alongside similar type of activities. The same is true of sports events like; the Wimbledon and US Tennis Tournaments, UEFA Champion's League and so on. Hence their legal protection is made necessary to prevent free-riding third parties from illegally exploiting them. In another respect, television broadcast rights, licensing, sponsorship and other like revenue stream for sports teams and associations also require certain legal instruments to preserve and serve as safeguards for such rights.

However, it is important at this point to state that there is no singular law that is capable of protecting all these rights in one swoop. Hence a set of laws are resorted to serve like a legal protection *cocktail* in the bid to secure the business interests within sports. These sets of Laws are dominated by intellectual property law.<sup>3</sup>

The following is a consideration of the key areas with respect to intellectual property rights in sports:

#### Trademarks

Trademarks provides protections for marks, symbols, logos, slogans, names and so on that distinguish the products (goods/services) of one undertaking from those of other undertakings<sup>4</sup> and business from other businesses. They can also be described as indicators of the source of origin of particular product as against others. In the UK's Trademark Act 1994 S.1 a trademark is defined as '...any sign capable of being represented graphically which is capable of distinguishing the goods and services of one undertaking from other undertakings...'<sup>5</sup>. From the foregoing statutory definitions, the major characteristic of a trademark is the ability to create a visible distinction via graphical representation between two or more like products produced or supplied by different undertakings. In Nigeria similar sentiments are shared with the British statutory provisions as to the nature of trademarks<sup>6</sup>

Trademark is one the most commonly created intellectual property rights associated with sports. The ability to protect and distinguish one sport team/club from another is crucial with respect to brand building and development. The names, titles, tagline, slogans and logos of professional sports teams

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<sup>3</sup> Intellectual property law is used to represent the set of rules and regulations utilised in the protection of properties that are created by human intellect; trademark, copyright, patent and so on.

<sup>4</sup> D. Bainbridge, Intellectual Property Law (OUP) 2010, *Sporty's Farm LLC v Sportsman's Market Inc., World Sport Networks Ltd v. Artinternet S.A, CCBN.com, Inc v. C-Call.com. Inc*

<sup>5</sup> *Arsenal Football Club Plc v Matthew Reed* (2003), S.10(1)–(3) *ibid* 4 S.43 and S.42

<sup>6</sup> *Alliance International Limited v Saam Kolo International Enterprises Limited* (2010) 13 NWLR (pt121) C.A 270, see also S.57 Trademark Act Cap T13 LFN 2004

can be registered as trademarks. For instance Chelsea FC has logos, badge, etc registered as a trademark<sup>7</sup>. It is argued that since in Nigeria similar provisions exist with respect to trademark Nigerian professional sports teams should be able to exploit intellectual property protection. Sports events organisers also protect their competitions via trademark; for instance the English Premier League and the Olympics spring to mind.

Trademark registration therefore adds immensely to the value associated with sports teams and sports events as well. Trademarks are utilised by sports teams not only to protect the jerseys worn by their individual teams during competitions but also other items that may be associated with or bear the trademark or logos; for instance Kolkata Knight Riders in India apart from being a cricket team exploits their trademark as represented by its team badge in the sale of t-shirts, caps and so on<sup>8</sup>. It is argued that a professional sport team can register its trademark under multiple classes. Spanish La Liga giants Real Madrid has registered its trademark under sixteen (16) classes as international trademark at the European Union's trademark office<sup>9</sup>. Trademarks can also be registered in multiple jurisdictions and therefore can be enforced over different jurisdictions and this is crucial as sports teams have fan bases that spread across the world.

In cases of trademark infringement statutory remedies exist in the EU, United Kingdom, United States, India, Nigeria and so on<sup>10</sup>. Trademark registration is important for sports teams but however, if a trademark is not registered a party can rely on the common Law principle of passing-off subject to proving the trinity or three basic requirements for establishing passing-off<sup>11</sup>. The trinity with respect to establishing or proving passing-off are; the claimant's goodwill, misrepresentation and damages, these must be proved by the claimant conjunctively, that is all three elements must exist in the act that is alleged to be passing-off.

A professional sport team, sports association and/or event organizer must establish it has a certain level of goodwill or reputation, which it has built up over a period of time that makes consumers (fans, TV broadcasters, etc.) continuously return because of the quality of its brand<sup>12</sup>. It may seem that goodwill implies that the claimant which in this case would be a stakeholder in sport needs to establish that its reputation or goodwill has been built up for years or at least a long period of time. This would then imply that only well established sporting associations and/or event organizers and professional sports teams could rely on passing off. However, in *Elida Gibbs Ltd v Colgate Palmolive Ltd*<sup>13</sup> and *Stannard v Reay*<sup>14</sup> the courts held inter alia that even if an organisation has been in business for a relatively short period of time it could still rely on passing off. This therefore implies that relatively new sports associations and/or sports events organizers and professional sports teams in Nigeria can rely on the passing off.

In order to rely on passing off a professional sports team, sports association and/or event organizer must establish that another sports team, event organizer or other party has misrepresented its product<sup>15</sup> which could be the name of the or the title of the event or the unauthorised broadcast of an event. It is immaterial whether misrepresentation was done intentionally with respect to establishing a claim in passing off. For instance, the NFF and the LMCNPFL must be able to establish that a television station broadcasting its matches in the Cameroun is misrepresenting the fact that such telecast emanates from or at least is authorized by the NFF and the LMCNPFL. It is also crucial that the misrepresentation in question has caused or has at least the likelihood of causing confusion in the minds of not just the consumer (fans) but in the minds of business associates like sponsors for example.

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<sup>7</sup> <http://us.trademarkdirect.com/chelsea-fc-7910895> accessed on the 28th of July 2015

<sup>8</sup> S. Kalamadi Intellectual Property and the Business of Sports Management, 18 July 2012

<sup>9</sup> <http://trade.markify.com/trademarks/ctm/real+madrid/000517474>, accessed 30th July 2015, Detailed trademark information from the official European Union trademark database (OHIM/CTM)

<sup>10</sup> Trademark Act 1994, Trademark Act 1999 (India), Trademark Act LFN 2004

<sup>11</sup> The three basic requirements are famously referred to as the classical 'trinity' and was first enunciated in the House of Lords decision of *Reckitt Products Ltd v Borden Inc* [1990] 1 WLR 491

<sup>12</sup> *Trego v Hunt* [1895] AC 7,

<sup>13</sup> [1983] FSR 94

<sup>14</sup> [1967] RPC 589

<sup>15</sup> *Coombe International v Scholl* [1977] RPC 1., *Spalding (A G) & Bros v Gammage (A W) Ltd* (1915)

The last limb in the proof of passing off is establishing that there has been some level of damage or at least there is the probability of damage<sup>16</sup>. Therefore, in sports, sports teams and sports association and/or sports events organizers and sports professionals must prove that as a result of the unauthorized exploitation their goodwill, and the false representation of the claimant has resulted in at least in potential damage probably in form of profits that would have accrued to the claimant or damage to public perception of the goodwill of the sports brand.

A further protection of trademark resides in anti-dilution laws, which are limited to very popular and well known trademarks. When a trademark is very popular and well-known it is given prime importance under the trademark laws due to ready association of the human mind with those products. Therefore, if for instance an automobile industry manufactures a sport sedan and sells under the trademark Manchester United it would be in default of anti-dilution laws as it would amount to a dilution of the Manchester United trademark.

In Nigeria like in most Common Law jurisdictions statutory protection for regular trademark exists and the doctrine of passing off is also in force as well. However, the courts have not interpreted the provisions of the Nigerian Trademark Act to cover trademark within the context of the sporting industry though this may stem from the fact that sports jurisprudence in Nigeria is not as active as it is in other jurisdictions like the UK, US, Germany, etc. It is therefore crucial in order to reap the rewards of exploiting trademark in sports stakeholders in the Nigerian sporting industry fully exploit the provisions of the Trademark Act LFN Cap. T13 2004 and the Common Law doctrine of passing off.

This present article will now examine *Sports Events Marks* which are a relatively recent intellectual property rights development.

#### Sports Events Marks

Sports events marks are essentially any sign logo, mark, name, etc that is capable of distinguishing one sports competition (event) and its organiser from another. The most popular example of a sports event mark would be the interconnected rings of the Olympic Games<sup>17</sup>. The rings of the Olympic Games are not only the most important Sports Event Mark due to the obvious popularity of the games but they are also important with respect to the legal protection that can be available for sports event marks.

The Olympic Games being an international event is protected not only at the international level but also at the various national levels. At the international level it is protected by the *Nairobi Agreement*<sup>18</sup>. At the national level the rings of the Olympic Games are protected by special local trademark legislation which the International Olympic Committee makes a prerequisite for any country that intends to host the Olympic Games. For instance in the United Kingdom the Rings are protected by the provisions of the London Olympic Games and Paralympic Games Act 2006 (as amended), which also protects the motto of the Olympic Games as well as the expression 'the Games', 'Olympians' and 'Olympiads'. This protection available for the Olympic Games it is argued is to guard against free-riders or Ambush Marketers and the preservation of the interests of the sponsors of the games. In the UK the protection available to the Olympic Games has been criticised by the members of the UK's Advertising Industry positing that it is draconian and hinders free speech which includes commercial or advertising free speech<sup>19</sup>. In other words they are of the opinion that enforcement of the protection for the Mark, symbol and phraseology associated with the London 2012 Olympic Games by the London Organising Committee of the Olympic Games (LOCOG) which insists on its express authorisation for the use of any of the phrases associated with the Olympic Games or its mark or symbol for the purpose of trade or commerce irrespective of the form of commerce is very strict. In the defence of the LOCOG and the International Olympic Committee (IOC) the reputation and integrity of the Olympic Games is crucial to its brand and since the IOC and any OCOG are usually in the business of granting licenses it is only fair that steps are taken to protect the integrity of the license granted to licensees.

Away from the radical protection available for the Olympic Games, sports events marks can be protected by relying on the various trademark laws. For instance a close examination of the UK's

<sup>16</sup> *Tattinger SA v Allbev Ltd* [1993] FSR 641, Chocosuisse

<sup>17</sup> I, Blackshaw 'Protecting Major Sporting Events with Particular Reference to the 2012 London Olympic Games' Entertainment and Sports Law Journal, ISSN 1748-944x, January 2010

<sup>18</sup> The Agreement on the Protection of the Olympic Symbol of 1981

<sup>19</sup> I, Blackshaw, Protecting Major Sporting Events with Reference to the Olympic Games, 2012

Trademark Act 1994 which reads thus in S.1 with regards to what a trademark is “any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trademark may, in particular, consist of words (including names), designs, numerals or the shape of goods or their packaging”<sup>20</sup>

It is argued that sports events marks could be protected via trademark statutory provisions provided such event marks meets the basic legal criterion of distinctiveness. In 1998 the attempt to register the words ‘World Cup’ failed the distinctiveness test. A similar attempt in the year 2000 met a similar fate; it is however, argued that if these words were combined with a unique and thus distinctive logo the trademarks would have been granted.

With respect to Nigeria it would be advisable if sports events organiser protect their event marks by adopting the stratagem of the International Olympic Committee as well as relying on the protection available via the Trademark Act<sup>21</sup> which is similar to the provisions of the UK Trademark Act<sup>22</sup>. It is suggested that every state where a particular sports event would take place should enact a Law that would provide a mirrored protection available in a Federal Act enacted by the national Houses of Assembly. For instance, with respect to the Nigerian Premier Football League an Act tagged ‘the Nigerian Premier League Event Mark and Related Rights Act’ while at the various State levels there could be enacted by the State Houses of Assembly tagged ‘the Nigerian Premier League Event Mark and Related Rights Law’. This would serve as the principal protection for the all marks associated with the NPFL throughout the Federation while the Trademark Act serves as secondary or ancillary protection for the football league.

Sports events marks would allow sports events organisers in Nigeria to benefit from licensing the use of their event marks in exchange for license fees. Also it is argued that with a Law such as the one suggested above prospective sponsors and commercial partners would feel confident and have a sense of security with respect to their investments.

## Copyrights

Copyright is an aspect of intellectual property rights that provides legal protection of the expression of ideas. This is to be distinguished from an idea in itself which at this stage of legal development has no actual legal protection<sup>23</sup> save for schemes like confidentiality agreements and trade secrets. Copyright protects the ideas expressed in; literary works, musical works, dramatic works, photographs, sound recordings and cinematographic films<sup>24</sup>. The protection that is available via copyright arises immediately it is created, though works created on or before the 1<sup>st</sup> of January 1978 are seen as being in the *public domain* which implies that works created at that period though ordinarily protectable via copyright would be open to the public to exploit.

Copyright bestows on the creator or owner via assignment the right to produce, reproduce, make replica copies, market and sell, adapt the work into several formats, license or assign entirely the ownership of the work to another. The immediately mentioned rights remain in the owner to the exclusion of other third parties thereby preventing freeriding<sup>25</sup>.

In the promotion and marketing of sporting events and/or competitions copyright is inadvertently created. The artistic designs of the logos of both sports teams and sports competitions represent copyrights, as well as the literature contained in promotional literature for sports events including game-day programmes sold to fans and supporters, the merchandise, the software of computer and online games are also subject-matter of copyright. As earlier alluded to copyright resides in a work whether it is registered or not and its legal protection lies in its creation and originality. However, it seems that it is the global trend that a copyright be registered in order for an owner of an infringed copyright to claim remedies and damages under copyright statutes; India presents a veritable case in

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<sup>20</sup> See S. 1 (1) of the UK Trademark Act, 1994

<sup>21</sup> Cap T13 LFN 2004

<sup>22</sup> S.1(1)

<sup>23</sup> *Opportunity knocks case* see also *Exxon Corp v Exxon Insurance Consultants (1982)* R.P.C 69 (C.A.)

<sup>24</sup> S.3(1) Copyrights, Designs and Patents Act 1988 (UK), *Kenrick v. Lawrence (1890)* 25 Q.B.D, *Oladipupo Yemitan v. Daily Times (Nig.) Ltd & Anor (1980)* F.H.C.R, Copyright Act Cap. C28 LFN 2004

<sup>25</sup> M. Ajakpovi, ‘Intellectual Property In An Electronic Environment: The Nigerian Perspective’ 9 *Modern Journal of Finance and Investment Law* Nos 3-4 (2005)

point<sup>26</sup>. It is however argued that this trend is not in conformity with the spirit and nature of Copyright. Since the right to ownership of a copyrightable subject-matter does not reside in its registration but rather in the fact that it has been created and therefore the creator or legal owner of a copyright should not need to have his/her copyright registered in order to claim damages unlike patent that has at its core the need for registration to ensure its monopoly.

If a copyright is infringed upon certain remedies are available to professional sports team or sports event organiser which include; injunctions, prohibitive orders, claims on damages, account of profits, seizure and destruction of infringing materials, and so on<sup>27</sup>.

Therefore professional sports teams and sports events organisers in Nigeria should create and develop their copyrights not only for the singular reason that it is profitable to do so but also that legal protection is available even within the ambit of present national Laws.

#### Patents

Patents are intellectual property rights that are used to protect inventions and inventive processes. For these inventions and inventive processes to be protected via patents they must be new, innovative and capable of industrial applications<sup>28</sup>. A patent gives the owner the exclusive right to produce, commercially exploit and prevent others from so doing, in other words it bestows the owner with a monopoly<sup>29</sup>.

In sports, patents have been varyingly awarded ranging from sports shoes (football boots, running converse, etc.)<sup>30</sup>. For instance, American sportswear and equipment giants Nike in 2013 were granted 540 patents by the US Patent and Trademark Office<sup>31</sup>. Also in recent times there has also been the introduction of technology to assist officials (referees, umpires, etc.) in making crucial judgement calls; for example in the English Premier League hawk-eye goal-line technology was introduced to determine in certain circumstances if the entire circumference of a ball has crossed the goal line and thus can be awarded as a goal by the human referee<sup>32</sup>. Also inventions with respect to sporting moves, methods and techniques have recently received patent protection; for example the method of placing a golf ball<sup>33</sup>, methods for fitness training<sup>34</sup>, the method for training pitchers in baseball, and so on. A professional sports team, player or league gains immensely significant benefits from exclusive control or rights of usage and permission over a playing technique that gives an edge in competition; sizeable amounts of revenues can be generated via the grant of licenses over agreed period of time which could be open to renewal.

Third party infringers with respect to patents are safeguarded against under patents like in trademark and copyright. However, unlike copyrights and trademark it is imperative that an inventor i.e. a professional sports team, sportsmen and sports events organisers who intend to rely on patents for intellectual property rights protection must register their patent. In registering a patent a qualified patent attorney must be consulted who would prepare a detailed patent claim. This practice is however, either non-existent or insignificant within the general legal space in Nigeria. Though letter of the Law exists and can be used by professional sports teams and other sports stakeholders to their advantage.

#### Trade Secrets

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<sup>26</sup> *Dhiraj Dharamadas Dewani v. M/s Sonal Systems Pvt Ltd*, decided by Mumbai High Court (Nagpur Bench), 2012

<sup>27</sup> Copyrights, Designs and Patents Act 1988 (UK), Copyright Act 1957 (India), Copyright Act Cap. C28 LFN 2004, courts have also not been hesitant in invoking criminal sanctions available via copyright statutes

<sup>28</sup> *Reynolds v. Herbert Smith & Co. Ltd* (1913) 20 R.P.C. 123,

<sup>29</sup> *The World Intellectual Property Organization (WIPO) Intellectual Property Reading Material (WIPO Publication No 476 (E) 13) Copyrights, Designs and Patents Act 1988 (UK), Patents and Designs Act Cap P2 LFN 2004,*

<sup>30</sup> *Detachable Cleat System* US 6421937 B2 <http://www.google.com/patents/US6421937> accessed 29 July 2015 Adidas Co holds 44 patents in football boots and other sports shoes

<sup>31</sup> <http://ml.marketwatch.com/articles/BL-MW244B-1245?mobile=y&mobile=y> accessed 29 July 2015

<sup>32</sup> [www.premierleague.co.uk](http://www.premierleague.co.uk)

<sup>33</sup> US Patent No5,616,089.

<sup>34</sup> US Patent No 6,190,291 issued on the 20<sup>th</sup> of February 2001 describing a new fitness method for an exerciser combining the benefits of isometric-like exercising with isotonic exercising for simultaneous training of the exerciser's cardiovascular and skeletal muscular-ture systems and strength and endurance build-up

Trade secrets are not intellectual property rights in themselves but they involve practices, processes or compilation of pieces of information by a business which is capable of giving that business some competitive edge. These aforesaid pieces of information are normally not divulged in order to maintain the competitive edge of the said business over its competitors. In sports there are certain pieces of information which are confidential in nature and therefore utmost confidentiality must be maintained. For instance, in 2008 veteran quarterback Brett Favre, who quit playing for the Green Packers and signed with the New York Jets went on to transmit the playing schemes of the Green Packers to their opponents the Detroit Lions can be said to have breached trade secrets law<sup>35</sup>.

Trade secrets are not in themselves protected by any law but however professional sports teams, sports associations and athletes can protect their trade secrets by ensuring that in any agreement where crucially vital information *would* be shared a properly couched confidentiality clause is included in the agreement.

Such confidentiality agreements and/or clauses are enforceable in various jurisdictions for instance in the English case of *Terrapin Ltd v. Builder's Supply Co Ltd*<sup>36</sup> Roxburgh said inter alia

*"A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential information, and...it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public"*

The implication of the case is that it is legally unacceptable for any person whether human or corporate to use any information divulged in confidence at the detriment of the person (human/corporate) who so divulges or shares such information in confidence. Nigerian courts have also similarly held in a plethora of decided cases<sup>37</sup>. Therefore it is argued that confidentiality agreements can be enforced by sports teams, sports associations as well as sportsmen to protect unique and crucial information to their trade. In Nigeria Trade secrets exists in terms its concept and is used in general trade and commerce but there has not been any legal activity with regards to sports whether by way of statutory enactment or judicial pronouncements.

#### Personality Rights

Every intellectual property right and scheme that has been examined earlier in this article have been those capable of exploitation by both human and corporate persons i.e. professional sports teams, sports association and sportsmen and other sports professionals. However, with respect to personality it is primarily exploitable by individuals; famous individuals but it is possible for corporations to leverage on these personality rights.

What then are personality or image rights as they are often called? Personality rights refers to the rights to control the commercial and economic exploitation of one's personality and its peculiar attributes, like an individual's name, image, likeness, unique personality traits and/or any other aspect relating to his/her personal identity.

Personality rights can be leveraged upon by sports association/sports events organisers to boost their competitive edge. It can help in no small measure in the brand development and building of sports teams and sports competition. For instance, in the United States Major League Soccer has exploited and continues to leverage on the personality rights of renowned football celebrities in the building of the corporate brand of the league and the brands of the individual clubs examples of this include, Andrea Pirlo Italian Serie A winner with Juventus FC, Champions' League winner with AC Milan and World Cup winner with the Italian national football team, Didier Drogba Chelsea FC legend now plying their trade from MLS Clubs New York City Football Club (NYCFC) and Montreal Impact respectively. These players have contributed in no small measure to the rising popularity of the MLS across Europe and Africa, while boosting the popularity of the sport in the US and strengthening the brands of the respective Clubs. Nigerian professional football clubs can adopt this brand development model, for instance the signing of a popular player like the Portuguese international Cristiano Ronaldo by NPFL champions Kano Pillars would provide immense financial windfall for the Kano Club.

Celebrity status gives birth to a plethora of different forms and shades of image creation and brand endorsements which has as the consequence of leading to revenue generation via fame exploitation

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<sup>35</sup> Williams Latrice Intellectual Property Law for Athletes, *Technologies for Writing*, 7(1-2) (Spring Issues 2010)

<sup>36</sup> [1967] RPC 375, see also *Faccenda Chicken Ltd v. Fowler* [1986] 1 Ch. 117, 137-138

<sup>37</sup> See also *R-Benkay Nigeria Ltd v Cadbury* (2012) SC.29/2006



and capitalization. It is presently, possible for popular sportsmen to register their name and likeness under Trademark laws. In the UK the likes of Alan Shearer and David Beckham registered trademarks in their names under the Trademark Act 1994. In India as well by virtue of the provisions of its Trademark Act 1999 creates this possibility for sports stars like Indian cricket legend Sachin Tendulkar to register his name as a trademark. Nigerian sports personalities could also exploit these rights via the Nigerian incarnation of the trademark laws represented by the Trademark Act Cap T13 LFN 2004. For instance the highest goal scorer in the Nigerian Premier Football league Mfon Udoh of Enyimba FC can afford to register a trademark over his name and derive immense commercial benefits thereby.

The association of a name or image of a sportsman or sports personality to a given product can present significant value to the individual or entity that becomes associated with it. It can also lead to significant loss for the owner of such name or image or the owner of the rights to the name or image and undeserved gain for the individual or entity which is associating itself with that name or image for their own commercial and economic benefits without obtaining prior permission to so exploit from the owner of the rights to the name or image or payment of any license fee and/or royalty<sup>38</sup>. It is therefore pertinent that a distinction is made between the image and personality rights of an individual sportsman in close juxtaposition with his position as a member of a professional sports team; it should be spelt into the sportsman's contract with respect to the extent of his image and personality rights that would be exploited by the his team. Any unauthorized exploitation of the trademark would amount gross unfair trade practice, unfair competition and by extension a dilution of the reputation, goodwill and all round hard-work of the owner of the right.

Connected to the concept of personality rights is character merchandising. In the wider sense, this implies the exploitation and leveraging of popular or well-known characters whether real or fictional, whether human or inanimate, whether representing human person or some other legally created entity used for the marketing and sales of either related or non-related pieces of merchandise. Now, narrowed down to personality rights character merchandising, it is simply the marketing, promoting a name or an image for commercial gains by leveraging on the popularity of that name and/or image of a celebrity's persona it is known character merchandising within the concept of personality rights. Various brands normally enter into endorsement contracts with sportsmen and associating themselves with the popularity of those sportsmen, For instance, Adidas has an endorsement with FC Barcelona forward Lionel Messi, Puma has a similar contractual relationship with 200meters record holder Usain Bolt.

It is however, the practice of some sportsmen to extend the scope of the exploitation of their image and personality rights by establishing enterprises to manufacture, market and sell merchandise bearing their image and personality rights<sup>39</sup>. Another instance of personality and image rights exploitation is a situation where a sports team embarks on a merchandising campaign using the most popular players on its team. A distinction has to be drawn between the players' individual personality rights and the personality rights the team is permitted to exploit for instance via employment contracts. Sports associations or sports event organisers also leverage the personality rights of players in promoting and marketing their various sports competitions. It is argued however, that the sports association can only legitimately exploit such personality rights based on the fact that the players' are members of teams that are participants in their competitions and consequently cannot extend their usage of the personality rights of the sportsman to his individual personal rights.

The above stated point has been enunciated in a number of decided cases, for instance; the position was given clarification in by an Indian High court in-

ICC Development (International) v. Arvee Enterprises and An<sup>40</sup> the court held thus

*“The right to publicity has evolved from the right of privacy and can inhere only in an individual or in any indicia of an individual's personality like his name, his personality trait, signature, voice, etc. An individual may acquire the right to publicity by virtue of his association with event, sport, movie, etc. However, that right does not inhere in the event*

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<sup>38</sup>D. Dalmia Vijay Pal, Intellectual Property Rights in Sports-India Perspective, <http://www.mondaq.com/x/164974/Trademark/Intellectual+Property+In+SportsIndian+Perspective> accessed 31<sup>st</sup> July 2015

<sup>39</sup> India Cricket legend Sachin Tendulkar owns merchandise business that market varying ranges of gifts like; key chains, knapsacks, mugs, crystal glasses and so on that leverage on his personality rights.

<sup>40</sup> 2003 VII AD Delhi 405.

*in question, that made the individual famous, nor in the corporation that brought about the organization of the event. Any effort to take away the right of publicity from the individuals, to the organiser {non-human entity} of the event would be vocative of articles 19 and 21 of the constitution of India. No person can be monopolised. The right of publicity vests in an individual and he alone is entitled to its profit. For example if any entity was to use....Sachin Tendulkar's name/persona/indicia in connection with the 'World Cup' without their authorisation, they would have a valid and enforceable cause of action."*

It is in the opinion of this author that Nigerian Courts should give similar interpretation to personality rights by relying on S.37 of the constitution of the Federal Republic of Nigeria<sup>41</sup> as the foundational bases for personality rights in Nigeria and therefore enforceable in the country. It would also be immensely commercially beneficial for sportsmen within the Nigerian sports industry to register trademarks over their names and/or adapt the Sachin Tendulkar approach and establish sales and merchandising enterprises to deal in merchandise with their names and/or images on them.

#### Broadcasting Rights

Broadcasting rights are a compilation of rights that are created as a result of the screening and live broadcast of sports events. In the UK broadcast rights are recognised as rights that are connected to literary works as some sort of recording. While under the Indian Copyright Act 1957 broadcast rights are recognized as distinct rights. These rights exist side by side but independent of the content of live matches. According to the Indian Copyright Act 1957 a holder of a broadcast right holds it for a period not exceeding 25 years, generally broadcast rights in India lie with the broadcasting companies in India. But the situation in the UK is that the rights reside in the sports event organisers who then go on to market and sell these rights to broadcast companies. In the US however the protection for broadcasts rights of sports event is a radical as it is protected by a Sports Broadcasting Act<sup>42</sup> which regulates and protects the sale and distribution of sports media rights in the US. It is argued in the opinion of this present writer that the American measure which adopts a unique law for sports broadcast is laudable and thus should be adopted in the Nigerian legal system

Broadcasting rights have over the years proven to be an important source of revenue into the football sub-sector particular but as well as the larger sports industry. At the close of the 2012/2013 the Television broadcast rights of the English premier league was sold for the total sum of £3 billion (£3,000,000,000.00), which implied that the bottom ranked club would receive about £60 million (£60,000,000.00)<sup>43</sup>. In 2015 the rights for the English Premier League rights were sold for £5 billion (£5,000,000,000.00). It is argued therefore that the economic importance of broadcast rights to professional sports in Nigeria would be immensely significant to the growth of the Nigerian sports industry.

The holder of broadcasting right can exploit the rights commercially in a number of ways which mainly include; fees received for the advertisement of the product entities who intend to exploit the viewership strength of the league and via licensing of the rights to rebroadcast the competitions to other broadcast companies. In India it is statutorily provided by virtue of its Copyright Act<sup>44</sup> that any rebroadcasting, or causing the audio of the broadcast to be heard or the recording of either the sound or visuals or both without a license properly applied for and obtained from the owner of the broadcast right would be illegal. In the Indian jurisdiction it is also illegal to download a broadcast while the person (human/corporate) does so without authorization<sup>45</sup>.

It is the opinion of this writer that sports events organisers should create a clearly defined process for the offer of their licenses to broadcast stations across the globe. While it is true that domestic sports competitions, for instance the Nigerian Premier League may not at this point of development be able to attract huge bids in the proportion of the EPL but it is trite that with the steady growth of the brand via development and marketing the economic value of such competitions would move towards an upward trajectory.

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<sup>41</sup> 1999 (as amended) LFN 2004

<sup>42</sup> Sports Broadcasting Act of 1961

<sup>43</sup> Owen Gibson Premier League Lands 3Bn TV Bonanza From Sky and BT, *The Guardian* 13 June 2012

<http://www.theguardian.com/media/2012/jun/13/premier-league-tv-rights-3-billion-sky-bt> date accessed 25th May 2015

<sup>44</sup> Copyright Act of 1957

<sup>45</sup> S.43 Information Technology Act 2000

It is also however, important that the Nigerian legal system is re-worked in order to strengthen the position of sports events organisers in within the jurisdiction. For instance, broadcast rights should be given similar statutory placement as it is in India with similar penalties available for infringers. It is argued that with such legislations in place sports associations/sports event organisers would be encouraged to innovate and create and would be more likely to exploit broadcast rights of sports competitions.

### **Internet Domain Names**

In recent history the Internet has become an important tool for the advancement of commercial activities over varying spectra of human endeavour, which includes sports. Domain names have also evolved into one of the most significant aspects of the internet as a tool; they do not only serve as addresses for communications but also serve as identifying markers for the specific entity that owns the domain name or particular site on the internet in view. In sports lots of information are shared and distributed via the domain names of various sporting related domain names be it owned; professional sports teams, sports associations, sports event organisers even individual sportsmen/athletes. For instance, Chelsea FC has its website [www.chelseafc.com](http://www.chelseafc.com), Spanish giants Real Madrid [www.realmadrid.com](http://www.realmadrid.com) as well as sports associations and sports events organisers in England the following domain names exists with respect to sports events organisers and sports associations; [www.premierleague.com](http://www.premierleague.com) and [www.thefa.com](http://www.thefa.com) with respect the English premier league and the English Football Association respectively. An example of a sportsman that has his own domain name is 100 metres world record holder Jamaican athlete Usain Bolt; [www.usainbolt.com](http://www.usainbolt.com).

Despite the economic benefits accruable by virtue of domain names it also creates an avenue for cyber free-riders that squat on the prominence of the owners of domain names. These cyber-squatters benefit from the lack of a domain-specific protection. However, owners of domain names can rely own copyright and trademark as well.

### **The challenge of Ambush marketing**

Ambush marketing can be referred to as a practice where a company claims association with a sports event that it does not legally have. Now, the fact that a company is not the creator of a particular sports event or an owner via assignment does not ordinarily mean that the said company is liable for ambush marketing; it is argued that insofar as the company has paid for and has duly obtained a license with respect to the sports event which backs up its claim, it would not be culpable as an ambush marketer. However, an ambush marketer makes a claim when it's not the creator or owner of the rights to the sports event and more importantly hasn't paid a dime with respect to the event in view. According to Sandler and Shani ambush marketing is an attempt by a third party to capitalize on the popularity of a sports event without the prior consent and authorization of the necessary parties (owner/creator)<sup>46</sup>. Some brand owners feel that ambush marketing is clever business as it represents a cheap way of attracting customers/clients to their specific brand. However, Michael Payne a former marketing director of the International Olympics Committee described ambush marketing thus '*Ambush marketing is not clever marketing-it is cheating...*' it is argued that this sentiment held by Payne is trite because in the opinion of this present author ambush marketing is simply corporate freeriding. It involves the use the unauthorized use of registered sports events logo on merchandise and claims of being official sponsor of a particular competition. For instance, if Etisalat claims to be the official sponsors of the Nigerian Premier League that would be tantamount to Ambush marketing; as it would amount to the telecommunications company capitalizing on the popularity of the league when the rightful sponsor of the league is Globacom Nigeria Limited.

Ambush marketing has the effect of driving down projected revenues of sponsors of a particular sports event. Also if an event is susceptible to persistent ambush marketing, it that would negatively affect the value of the event thus deterring both present and prospective sponsors from investing in the event. Ambush marketing is a major challenge that is faced by sports event organisers, especially as

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<sup>46</sup> D. M. Sandler, D, Shani *Olympic Sponsorship v Ambush Marketing: Who gets the gold?* *Journal of Advertising Research* 29(4) (1989) 9

there is no specific legal protection against ambush marketing even in the United Kingdom, India and the EU. However, event organisers rely on seeking legal redress based on the infringement of other intellectual property rights for instance, copyright and trademark. In India however, the courts have in certain circumstances recognised the concept of ambush marketing and consequently award damages to the plaintiff. Also many event organisers are now in the practice of entering into anti-ambush marketing agreements especially with their sponsors. Such agreements have the effect of creating a feeling of confidence and a sense of security in sponsors.

On the other hand the Olympic committee has adopted the *naming and shaming* technique in the fight against ambush marketing. This technique or procedure involves the announcement of corporations guilty of ambush marketing at public press conferences. The IOC also insists that host countries enact domestic laws to protect IPRs associated with the Olympic Games. Another scheme adopted by the IOC is its insistence on the promulgation of domestic legislations to ensure the protection of intellectual property rights of the Olympic Games especially trademarks and sports events marks and by extension give the exclusive rights of association to the sponsors of the Games.

It is argued that for Nigeria to truly gain the enormous benefits derivable from the exploitation of intellectual property rights in general and with respect to sports in particular there must be in place proper legal mechanism to tackle the menace of ambush marketing. As earlier adduced sports event organisers as well as athletes can rely on the various independent intellectual property rights protections available. However, it would also be immensely beneficial for anti-ambush marketing clauses to be introduced in each of these individual IPRs and additionally a *sui generis* (new or novel) anti-ambushing Law should be enacted to cover every IPR. The adoption of these measures would not only encourage indigenous businesses to invest and innovate within the Nigerian sports sector but will also encourage foreign investors and sponsors to invest in the Nigerian sports sector in general and sports events; with such statutes in place it would suggest to the international business community that their investments and IPRs would be secured.

### **Peculiar legal challenges in the Nigerian intellectual property scene vis-à-vis the sports sector**

The major challenge that confronts the Nigerian sports jurisdiction especially with respect to the harnessing of the full potential of intellectual property rights has been that of brand development and unique intellectual property rights protection. The key to tackling this position it is argued rests on an intra-rights interface between intellectual property rights especially personality rights and trademarks on the one hand and the enactment of an intellectual statute that would give IPR holders in sports a *sui generis* protection.

An interface between personality rights of globally popular sportsmen and trade and games mark in Nigeria would lead to increased viewership not only domestically but internationally as well. For instance, football in the US (soccer) has always ranked below baseball, American football (NFL) and basketball but with the emergence of Major League Soccer and the influx of internationally renowned football from around the globe especially from the European continent the popularity of the sport has begun to move in an upward trajectory. If the NPFL/LMCNPFL for instance begins to enter into agreements to bring in Major European and African football stars into the Nigerian League the brand recognition of the league would begin to soar even higher than as it is presently in the US. It is argued that football is already a very popular sport in Nigeria in some quarters it takes up religious proportions.

### **Conclusion/Recommendations**

With the emergence of sports as a veritable economic sector and its commercial importance increasing rapidly both in terms of events on the field and of the business of the exploitation of various intellectual property rights that are associated with sports events organisers and professional sports clubs.

It becomes imperative that professional sports clubs and sports event organisers within Nigeria not only join this highly profitable global bandwagon but also take into consideration the various species of intellectual property rights that have a serious nexus with intellectual property within the context of sports like; trademark registration, copyright, patents, broadcast rights and so on. Commercial

exploitation of these diverse species of intellectual property rights within the context of Nigeria would not only result in an upward drive of the economic progression of the various domestic sports associations/sports events organisers within Nigeria but would also increase the individual profit margins of individual sportsmen in the country while attracting international interest and foreign investment. It is also imperatively necessary for the Nigerian sports jurisdiction to appreciate the fact that establishing proper protective legal framework for intellectual property rights would ensure the sustainability of foreign investments in the sector.

In all the other jurisdictions examined throughout the course of this work sports professionals and sports associations and/or event organisers have had to rely on a patchwork of rights that exists within regular intellectual property Law. I would recommend that Nigeria adopts a different approach to the question of intellectual property rights in sports. It is argued that Nigeria would be better served by the introduction of a sui generis intellectual property law that would solely protect aspects of intellectual property in Nigerian sports. This Law would be in the shape of a unique sports proprietary right to protect innovation and creativity in Nigerian sports.

This would ensure that Nigerian sports association/sports events organisers as well sports professionals would have a one-stop-shop of sorts for the protection of their intellectual property rights and innovations rather than having to rely on piecemeal protection. Also a sports-specific intellectual property law would grant a more comprehensive protection to aspects of intellectual property rights in Nigerian sports as it would adapt the mainstream definitions of intellectual property rights to suit the realities of sports.

A sui generis law would also boost investor confidence in Nigerian sports. As it would send out a message to local and foreign investors that the Nigeria sports industry is an investor paradise.

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## APPLICATION OF INTERNATIONAL MIGRANT WORKERS' PROTECTION INSTRUMENTS; THE CURIOUS CASE OF MIGRANT ATHLETES.

by *Ekpemi Onaré Ekhabafe*, LLM (UniMelb), ACI Arb (UK) .  
Doctoral Candidate (International Labour Law), Faculty of Law,  
University of Helsinki, Finland.

### *Introduction*

International Migration Law Scholar, Cholewinski succinctly stated: 'to be an economic migrant today carries with it a stigma, in a world where barriers to voluntary international migration are growing ever higher'.<sup>1</sup> Presently, international migration of athletes, coaches, and other sports professionals, are higher than past years. This increase can be attributed to the growing rate of globalisation.<sup>2</sup> Xenophobia, racial vilification, workplace discrimination, amongst others are sometimes reactions towards economically motivated migration.<sup>3</sup> The intensification of labour migration, and the feelings of anxiety that it has caused in host societies, has fuelled an increase in expressions of hostility against migrant workers, as well as those of foreign origin.<sup>4</sup>

Migrant athletes are often targets of abuse and unfair treatment in host countries. International migrant workers' instruments can be interpreted to exclude these categories of migrant workers, in the peculiarity of their trade. Migrant workers continue to suffer from inadequate International law protection; in spite of the existence of multifarious standards adopted by the International Federation of Association Football (FIFA) and the Union of European Association Football (UEFA) to curb unequal treatment of migrant athletes.

Research shows that sport, despite progress made in past years, migrant athletes continue to face a number of challenges related to racism and discrimination, at professional as well as at amateur level.<sup>5</sup> Also, studies have also found that effective systems for monitoring and recording inequalities in sports are limited.<sup>6</sup>

The United Nation has been a champion for equality since inception. The United Nations, by the Universal Declaration of Human Rights, mandates 'all persons and all nations'<sup>7</sup> to take steps to achieve a common standard for human dignity without distinction on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>8</sup>. The United Nations also recognises that: inherent dignity, and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.<sup>9</sup> This mandate is further replicated in the International Covenant on Civil and Political Rights<sup>10</sup> and the International Covenant on

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<sup>1</sup> Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, (Oxford University Press, 1997)

<sup>2</sup> Lucie Thibault, 'Globalization of Sport: An Inconvenient Truth' (2009) 23 *Journal of Sport Management*, 1-20

<sup>3</sup> European Union Agency for Fundamental Rights, 'Racism, ethnic discrimination and exclusion of migrants and minorities in sport: A comparative overview of the situation in the European Union', (2010) Luxembourg, Publications Office of the European Union

<sup>4</sup> International Labour Organisation, 'Equality at Work: Tackling the Challenges' (Report of the Director-General presented at the International Labour Conference, 96<sup>th</sup> Session, International Labour Office, 2007)

<sup>5</sup> European Union Agency for Fundamental Rights, above n 2

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *Ibid*, Article 2

<sup>9</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948)

<sup>10</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, p. 171



Economic, Social and Cultural Rights.<sup>11</sup>

The United Nations ‘UN’ and the International Labour Organisation ‘ILO’ have through conventions, covenants and recommendations sought to protect the rights of persons who migrate for work. The main migrant protection instruments are: the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990,<sup>12</sup> the International Labour Organization’s Migrant Workers (Supplementary) Convention,<sup>13</sup> and Migration for Employment Convention (Revised).<sup>14</sup>

However, the above instruments, as comprehensive as they might seem, do not protect all migrant workers in all circumstances. They are drafted with exemption clauses that delimit their provisions and legally exclude some categories of workers from its protection, particularly from the equality provisions.

The excluded categories across the three main migrant workers equality instruments are; frontier workers<sup>15</sup>, seafarers,<sup>16</sup> artists and members of the liberal professions migrating on a short-term basis,<sup>17</sup> persons migrating for training or education,<sup>18</sup> internationally outsourced employees,<sup>19</sup> and self-employed persons.<sup>20</sup> These exemption clauses, I believe, fail to consider the peculiarity of the working relationships of migrant athletes.

This work is broken down into parts that examine the interaction between exemption clauses in the three major International Migrant Workers’ Instruments and international sports and athleticism. This research paper considers the challenges of vulnerability faced by migrant athletes as students or trainees,<sup>21</sup> artists,<sup>22</sup> short-term migrant liberal professionals,<sup>23</sup> and outsourced employees.<sup>24</sup>

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<sup>11</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993, p. 3

<sup>12</sup> UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158

<sup>13</sup> International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, 24 June 1975, C143

<sup>14</sup> International Labour Organization (ILO), Migration for Employment Convention (Revised), C97, 1 July 1949, C97

<sup>15</sup> International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, Article 11 (2)(a); International Labour Organization (ILO), Migration for Employment Convention (Revised), C97, Article 11 (2)(a)

<sup>16</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 3 (f); International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, Article 11 (2)(c); International Labour Organization (ILO), Migration for Employment Convention (Revised), C97, Article 11(2)(c)

<sup>17</sup> International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, Article 11 (2)(b); International Labour Organization (ILO), Migration for Employment Convention (Revised), C97, Article 11 (2)(b)

<sup>18</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Articles 3 (e); International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, Article 11 (2)(d)

<sup>19</sup> International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, Article 11 (2)(e)

<sup>20</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 3 (c); International Labour Organization (ILO), Migrant Workers (Supplementary Provisions) Convention, C143, Article 11 (1); International Labour Organization (ILO), Migration for Employment Convention (Revised), C97, Article 11(1)

<sup>21</sup> Dean A. Purdy, D. Stanley Eitzen and Rick Hufnagel, ‘Are Athletes Also Students? The Educational Attainment of College Athletes’, *Social Problems* Vol. 29, No. 4 (Apr., 1982), 439-448

<sup>22</sup> ‘The Artist in the Athlete’, online, < <http://train4thegame.com/documents/Articles/how-diff/TheArtistInTheAthlete.pdf>>, accessed 09 November 2014; Yiannis Koutedakis and Athanasios Jamurtas, ‘The Dancer as a Performing Athlete: Physiological Considerations’, (2004) *Sports Medicine* 2004, 34 (10), 651-661

<sup>23</sup> Daniel Sandler, *The Taxation of International Entertainers and Athletes –All the World’s a Stage* (1995) *Kluwer Law International*, 177

## 1. International Law and Labour Migration

International human rights law and international labour law, amongst other regimes, principally govern international labour migration.<sup>25</sup> Key instruments under these regimes include the Universal Declaration of Human Rights,<sup>26</sup> the International Covenant on Civil and Political Rights,<sup>27</sup> the International Covenant on Economic, Social and Cultural Rights<sup>28</sup> (these instruments are collectively known as the Bill of Rights), the ILO's Migration for Employment Convention, 1949 (No. 97)<sup>29</sup> and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)<sup>30</sup> and the United Nations' International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

### A. *The International Bill of Rights: the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*

The UDHR, ICCPR and ICESCR recognises the inherent dignity, equality and inalienable rights of *all members of the human race* as the foundation of freedom, justice and peace in the world.<sup>31</sup> This presupposes equal enjoyment of human rights amongst human beings.<sup>32</sup> Article 1 of the UDHR provides that "all human beings are born free and *equal in dignity and rights*". The ICCPR and ICESCR equally recognises that human rights are inherently derived from the dignity of human person.<sup>33</sup>

The ideology of the equal status of migrant workers is succinctly demonstrated in the obligations of States under the International Bill of Rights.<sup>34</sup> States are obligated to promote universal respect for and observance of human rights and freedom of all, nationals and non-nationals alike. This duty is invariably extended to the treatment of migrant workers within the territory of States.<sup>35</sup>

Article 23 and 24 of the Universal Declaration of Human Rights provides for human rights at work. These rights include the right to work, free choice of employment, just and favourable conditions of work, equal pay for equal work, freedom of association and

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<sup>24</sup> Fédération Internationale de Football Association, Regulations on the Status and Transfer of Players, (2014)

<sup>25</sup> Joo-Cheong Tham and Iain Campbell, 'Equal Treatment for Temporary Migrant Workers and the Challenge of Their Precariousness' (Paper presented at ILERA (IIRA) 16th World Congress, July 2012) 18–19 <<http://www.ilera2012.wharton.upenn.edu/RefereedPapers/ThamJooCheongIainCampbell.pdf>>

<sup>26</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948)

<sup>27</sup> *International Convention on Civil and Political Rights*, opened for signature Dec. 16 1966, 999 U.N.T.S. 171, (entered into force March 23, 1976)

<sup>28</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature Dec. 16 1966, 993 U.N.T.S. 3 (entered into force Nov. 3 1976)

<sup>29</sup> *Migration for Employment Convention (Revised) 1949 (ILO No. 97)* opened for signature July 1, 1949, 20 U.N.T.S. 79 (entered into force Jan. 22 1952)

<sup>30</sup> *Migrant Workers (Supplementary Provisions) Convention, 1975 (ILO No. 143)* opened for signature June 24, 1975, 1120 U.N.T.S. 323 (entered into force 9 Dec. 1978)

<sup>31</sup> Preamble of the Universal Declaration of Human Rights, above n 25; Preamble of the International Covenant on Civil and Political Rights, above n 26; Preamble of the International Covenant on Economic, Social and Political Rights, above n 27

<sup>32</sup> Joo-Cheong Tham, above n 24

<sup>33</sup> Preambles of the ICCPR and ICESCR

<sup>34</sup> Yash Ghai, 'Human Rights and Governance: The Asia Debate' (1994) *Australian Year Book of International Law*, 1-34

<sup>35</sup> Preamble of the UDHR, ICESCR, ICCPR; Kristina Touzenis, 'Human Rights of Migrant Children' (International Migration Law Research No 15, International Organisation for Migration, 2008) 73; Joo-Cheong Tham, above n 24

reasonable working hours amongst other rights. These rights are replicated and elaborated upon in Articles 6,7, and 8 of the ICESCR.

The provision of human rights at work for all workers do not necessarily provide for equality of treatment. Moreover, the Human Rights Committee of the United Nations has stated that the rights of non-citizens may be qualified by *lawfully imposed limitations*.<sup>36</sup> For example, under the International Covenant of Social, Cultural and Political Rights, States are permitted to draw distinctions between nationals and non-nationals with respect to two categories of rights: political rights and the freedom of movement.<sup>37</sup> With regard to political rights, Article 25 grants the right to participate in public affairs to only citizens, and freedom of movement, under article 12 (1) is guaranteed only for persons who are *lawfully* residing within the territory of a State.<sup>38</sup>

Like most other international instruments, the Bill of Rights is an aspirational instrument.<sup>39</sup> Its purpose is to provide for minimum standards, which States ought not to derogate from. To this end, locals and migrants can enjoy unequal conditions at work provided both enjoy their human rights at work.<sup>40</sup> This can be interpreted to give States the permission to discriminate on the basis of nationality, so long as the minimum standards set by international human rights are made available to migrant workers.<sup>41</sup>

The International Bill of Rights is an umbrella instrument for the protection of basic human rights of all including migrant workers. As seen above, there are limitations to the extent of exercise of some of the rights provided in the various instruments that make up the International Bill of Rights. The United Nations and the International Labour Organisation have put together instruments that provided more specific protection for migrant workers. The application of these conventions to the international labour migration in sports is considered below.

#### *B. The United Nations' Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990*

The General Assembly of the United Nations upon consideration of the situation of vulnerability migrant workers constantly find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of All Migrant Workers and their Families, adopted the International Convention on the Protection of the Rights of Migrant Workers and Their Families in 1990, 'ICMW'.<sup>42</sup>

This United Nations' Convention provides for protection against discrimination in the application of the convention rights in Article 7. It mandates States to undertake to respect and ensure the convention rights of *all* migrant workers and their families within their territory or subject to their jurisdiction, without distinction. It goes ahead to list the prohibited grounds of discrimination to include sex, race, colour, language, religion or conviction, political or other opinion, ethnic or social origin, nationality, age, economic

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<sup>36</sup> The Rights of Aliens under the International Covenant on Civil and Political Rights, General Comment Adopted by the United Nations Human Rights Committee, 27<sup>th</sup> Session, 1989, General Comment No. 15

<sup>37</sup> Office of the United Nation's High Commissioner for Human Rights Human Rights Commissioner, 'Right of Non-Citizens', HR/PUB/06/11 (2006)

<sup>38</sup> Office Of the United Nations High Commissioner for Human Rights, 'The Rights of Non-Citizens, HR/PUB/06/11, (2006)

<sup>39</sup> Richard Pierre Claude and Burns H. Weston (eds), *Human Rights in the World Community: Issues and Action*, (University of Pennsylvania Press, 2006), 11

<sup>40</sup> Joo-Cheong Tham, above n 24

<sup>41</sup> *Ibid*

<sup>42</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted by General Assembly resolution 45/158 of 18 December 1990

position, property, marital status, birth or other status.<sup>43</sup> The inclusion of the analogous ground 'other status' allows for States to read into it, conditions otherwise unforeseen by the drafters of this convention, making the protection therein expandable.

The Convention does not seek to create new rights but to extend to migrant workers and their families; rights enshrined in other human rights based conventions of the United Nations.<sup>44</sup> The right to equality of migrant workers with nationals of a host state is a foundational right of the convention. It is the basis upon which all other rights are set out.<sup>45</sup> The phrase 'all migrant workers', presupposes the Convention's application to migrant workers in regular and irregular migration situations.<sup>46</sup> Legal migrant workers are provided with extra rights in part 4 of the Convention. This includes the right to freely associate, form and join trade unions,<sup>47</sup> equality of treatment with nationals in relation to education, vocational guidance, training and placement, housing, social and health services, co-operatives and self managed enterprises and participation in cultural life.<sup>48</sup>

The partitioning of the rights afforded documented migrants and undocumented migrant workers, invariably means that those of irregular migrant workers "fall below generally recognised international human rights standards", for example the unrestricted rights to join trade unions are denied undocumented migrants because these entitlements are inextricably connected with the sovereign interest of the state of employment.<sup>49</sup> Although the instrument on the surface appears to protect both regular and irregular migrants, in reality the extent of protection is not the same. Irregular migrant workers have considerably inferior rights to regular migrant workers.<sup>50</sup> While this may be logical to curb influx of irregular migrants, it doesn't deny the fact that undocumented migrant workers continue to enjoy institutionally sanctioned second class or even third class status.<sup>51</sup> Unfortunately the disparities between these treatments have not presented enough incentive for States to ratify it.<sup>52</sup>

Nevertheless, the ICMW illustrates the awareness by the international community of the hazards and hardship encountered by migrant workers and its aspirations to find solutions.<sup>53</sup> The Convention envisages the rights of migrant workers not only in countries of employment but also in states of transit, states of origin and state of habitual residence.<sup>54</sup> It also goes further to provide a large number of rights; including diplomatic protection,<sup>55</sup>

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<sup>43</sup> Ibid, Article 7

<sup>44</sup> Jennifer Yau, 'Promise and Prospects of the UN's Convention on Migrant Workers' (2005), Online Journal of the Migration Policy Institute, <<http://www.migrationpolicy.org/article/promise-and-prospects-uns-convention-migrant-workers>>.

<sup>45</sup> UN ICMW, Article 7

<sup>46</sup> Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law*, (Cambridge University Press, 2012)

<sup>47</sup> UN ICMW, Article 40

<sup>48</sup> UN ICMW, Article 43

<sup>49</sup> Ryszard Ignacy Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Clarendon Press 1997

<sup>50</sup> Ryszard Cholewinski, 'Study on obstacles to effective access of irregular migrants to minimum social rights' (Council of Europe, 2005)

<sup>51</sup> Sarah S Willen, 'Citizens, "Real" Others, and "Other" Others: Governmentality, Biopolitics, and the Deportation of Undocumented Migrants from Tel Aviv', in Nicholas De Genova and Nathalie Peutz (eds), *The Deportation Regime: Sovereignty, Space and the Freedom of Movement* (Duke University Press, 2010)

<sup>52</sup> Ana Ilha, "'Illegals' in the Land of Opportunity: The Press and the Labor Rights of Undocumented Workers' (PhD Theses, Northeastern University, 2009)

<sup>53</sup> Rao Penna, 'Some Salient Human Rights in the UN Convention on Migrant Workers', (1993) *Asian and Pacific Migration Journal*, 161-178

<sup>54</sup> Ibid

<sup>55</sup> ICMW, Article 16 (7)

information,<sup>56</sup> transfer of funds,<sup>57</sup> political rights<sup>58</sup> and exemption from import or export duties.<sup>59</sup> The ingenuity of the Convention expressed in its innovative provisions however does not preclude failings.<sup>60</sup>

The lack of the right to free choice of employment has been a source of concerns for international labour migration specialist and civil societies seeking to promote equal treatment and protect the right of migrant workers.<sup>61</sup> This is why it is mildly shocking to see that free choice of employment and family reunification diminished to recommendations, instead of the rights they ought to be.<sup>62</sup> The extent of protection afforded to this right falls below that provided for by the ILO Conventions on migrant workers.<sup>63</sup> The instruments of the ILO will be discussed in more details later on in this essay. The classification of the right to access to housing for migrant workers, access to free choice employment and family reunification (there are no rights to stay or to naturalization under the ICMW) has been argued to prevent migrant workers from planning a secure life in the states of employment.<sup>64</sup>

Apart from the above-mentioned shortcomings of the ICMW, Article 3 provides a list of migrants, who although may be engaged in some sort of employment relationship, are exempted from the application of the convention and its protections. This includes self employed persons migrating as investors,<sup>65</sup> persons who have migrated for training or study purposes.<sup>66</sup> This leaves athletes who are invited by Universities, Colleges or Tertiary Institutions to migrate to engage in sporting activities and training while actively enrolled as students, usually under sport or elite scholarship schemes<sup>67</sup> with no protection under the ICMW. This is despite the profound nature of migrant athleticism at college level, and prominent factors that suggest that these athletes are in employment relationships with these institutions. Later part of this research will elaborate on the vulnerability of college athletes turned employees.

### C. *International Labour Organisation Migrant Workers Conventions*

The International Labour Organisation as the apex body for regulating and promoting decent working conditions developed two conventions to cater for the rights of migrant workers; ILO Migration for Employment Convention 'ILO 97' and the ILO Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 'ILO 143'. Convention 97 focuses on the standards applicable to the recruitment of migrants for employment and their conditions of work in the host country.<sup>68</sup> ILO 143 deals with surreptitious migration and acknowledges the rights of irregular migrants.<sup>69</sup> These two conventions undoubtedly make progress with respect to the

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<sup>56</sup> ICMW, Article 13

<sup>57</sup> ICMW, Article 47

<sup>58</sup> ICMW, Article 42

<sup>59</sup> ICMW, Article 46

<sup>60</sup> Rao Penna, above n 53

<sup>61</sup> Amnesty International, 'The Dark Side of Migration: Spotlight on Qatar's Construction Sector Ahead of the World Cup' (2013)

<sup>62</sup> Choleswinski, above n 3

<sup>63</sup> Joo-Cheong Tham, above n 24

<sup>64</sup> Alynna Lyon and Emek Ucarer, 'Mobilizing Ethnic Conflict: Kurdish Separatism in Germany and the PKK in Rey Koslowski (ed), *International Migration and the Globalization of Domestic Politics*, (Psychology Press, 2006), 62; Tugrul Ansay, 'The New UN Convention in Light of the German and Turkish Experience' (1992) 25/4 *International Migration Review*

<sup>65</sup> ICMW, Article 3 (c)

<sup>66</sup> ICMW, Article 3 (e)

<sup>67</sup> An example is the Australian Institute of Sports Athlete Scholarship Scheme

<sup>68</sup> Vincent Chetail and Celine Bauloz (eds), *Research Handbook on International Law and Migration; United Nations Treaty Bodies and Migrant Workers*, (2014, Edward Elgar Publishing), 307

<sup>69</sup> *Ibid*

promotion of the equal treatment of migrant workers with their national counterparts.<sup>70</sup> Under both migrant workers convention of the ILO, the rights of undocumented or irregular migrants are less favorably catered for.<sup>71</sup>

Convention 97 caters for the rights of migrants lawfully residing in the state of employment.<sup>72</sup> Convention 143 extends its protection to migrant workers in irregular situations, however this protection is limited only to rights relating to past employment ‘as regards remuneration, social security, and other benefits’. It also requires State to respect the basic human rights of all migrant workers, but these protections do not include the right to equal opportunity and the treatment provided to migrants legally present in the host State.<sup>73</sup>

*i. ILO Convention 97 and 143 and International Migrant Workers*

The International Labour Organisation's Convention 97 provides for treatment of lawful migrant workers in a manner ‘no less favourable’ than that which applies to nationals without discrimination as to nationality, race, religion or sex, in respect of a broad range of rights. These work rights include equality as to remuneration, hours of work, overtime arrangements, holidays with pay, minimum age for employment,<sup>74</sup> freedom of association and collective bargaining,<sup>75</sup> and also covers condition of accommodation.<sup>76</sup>

The provisions of Article 11 of Convention 97 limit the extent of rights guaranteed to migrant workers under the Convention. Article 11 excludes certain categories of workers from the application of the convention. The exempt categories are self-employed,<sup>77</sup> frontier workers,<sup>78</sup> short-term entry of members of the liberal professions and artistes<sup>79</sup> and seamen.<sup>80</sup>

The later 1975 Convention 143 improved on the rights of Convention 97 in the sense that its protection is extended to legal and illegal migrants. The protections available in convention 97 are replicated in convention 143. ILO convention 143 is broader in personal and material scope.<sup>81</sup> This convention was adopted as a response to the irregular migration following the stop on migration to Western Europe following the oil crisis of the early 1970s.<sup>82</sup> The convention therefore mandates States to ensure the protection of the basic human rights of all migrant workers: legal or illegal.<sup>83</sup> However, Part II of the convention is dedicated to the rights of only lawful migrant workers. That section guarantees equality of opportunity, treatment and integration in host societies.<sup>84</sup>

Convention 143 goes on to provide for the right of geographic mobility and free choice of employment for lawful migrants, in Article 14(a). It provides for a two-year window, within which States can restrict the employment of migrant workers with legal migration status.<sup>85</sup> The liberal provisions of convention 143 as it relates to irregular migrants is perhaps unattractive to states, hence its slow paced ratification. The number of states that

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<sup>70</sup> ILO Convention 97, Article 6; ILO Convention 143, Article 10

<sup>71</sup> Vincent Chetail and Celine Bauloz (eds), above n 68

<sup>72</sup> ILO 97, Article 6

<sup>73</sup> Vincent Chetail and Celine Bauloz (eds), above n 68

<sup>74</sup> ILO 97, Article 6 (a)

<sup>75</sup> ILO 97, Article (6) (a) (ii)

<sup>76</sup> ILO 97, Article (6) (a) (iii)

<sup>77</sup> ILO 97, Article 11 (1)

<sup>78</sup> ILO 97, Article 11 (2)(a)

<sup>79</sup> ILO 97, Article 11 (2) (b)

<sup>80</sup> ILO 97, Article 11 (2) (c)

<sup>81</sup> Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law*, (Cambridge University Press, 2012)

<sup>82</sup> *Ibid*, 288

<sup>83</sup> *Ibid*

<sup>84</sup> ILO 143 Article 9; Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law*, (Cambridge University Press, 2012)

<sup>85</sup> *Ibid*

have ratified this convention from inception till date remains below 30.<sup>86</sup>

While Convention 143 provides a wider range of rights for migrant workers on one hand, it exempts more categories of workers than Convention 97 on the other hand. Part II of the convention which relates to equality of opportunity and treatment, goes further to State in Article 11 that the definition of migrant worker for the purpose of the convention excludes frontier workers,<sup>87</sup> artistes and members of the liberal profession who have migrated on short term basis,<sup>88</sup> seamen,<sup>89</sup> persons coming specifically for purposes of training or education<sup>90</sup> and employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on completion of their duties or assignments. These are two categories of exemptions more than Convention 97.<sup>91</sup>

For the purpose of analyzing the vulnerability of athletes under these conventions, the focus will be on Articles 11 (2)(b) of the convention 97; the exclusion of members of liberal professions migrating on a short-term basis. This category is replicated in Convention 143 and will be discussed together. The possibility of Articles 11 (2)(d) and (e) of Convention 143 to impact on athletes adversely will be discussed. Article 11 (2)(d) exempts persons migrating specifically for training or education. This exemption can effectively be applied to exclude international students who also partake in sporting activities, from the scope of application of the convention. This raises concerns for college or elite athletes, who are even now more than ever argued to be employees of host institution.

a. *Athletes as Artists or Liberal Professionals Migrating on Short-Term Basis*

i. *Athletes as Liberal Professionals*

According to *iXOPOS*,<sup>92</sup> liberal professions are those occupations that traditionally serve the public interest rather than their own commercial benefit.<sup>93</sup> The European Commission has equally defined liberal professions to be occupations that require special training.<sup>94</sup> Athletes can therefore be described as members of a liberal profession, due to the expertise and training involved in professional sports.<sup>95</sup>

Furthermore, liberal professionals have been characterized by the *Charter of Liberal Professionals*<sup>96</sup> as people willing to accept responsibilities and serve the common good, provide personal, reliable, independent and high quality services, and who invest in training. There is no gain saying that athletes tick all the boxes in terms of upholding the

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<sup>86</sup> Ibid

<sup>87</sup> ILO 143, Article 11 (2)(a)

<sup>88</sup> ILO 143, Article 11 (2)(b)

<sup>89</sup> ILO 143, Article 11(2)(c)

<sup>90</sup> ILO 143, Article 11 (2)(d)

<sup>91</sup> ILO 143, Article 11 (2)(e)

<sup>92</sup> A service initiated by the German Federal Ministry of Economic Affairs and Energy, for foreign companies interested in the German market

<sup>93</sup> *iXOPOS, Service Occupations* (2014) <<http://www.ixpos.de/IXPOS/Navigation/EN/Your-business-in-germany/Eu-service-market/service-occupations,did=439732.html>>

<sup>94</sup> European Commission, 'Professional Services', <[http://ec.europa.eu/competition/sectors/professional\\_services/overview\\_en.html](http://ec.europa.eu/competition/sectors/professional_services/overview_en.html)>, last update 14 December 2013

<sup>95</sup> Leithner Leithner Tax Audit Advisory, *Advice for liberal professions (doctors, lawyers, freelance civil engineer, athletes)* <

[http://www.leitnerleitner.com/austria/en/services/Advice+for+liberal+professions+\(doctors,+lawyers,+freelance+civil+engineers,+artists,+athletes,+...\)\\_136](http://www.leitnerleitner.com/austria/en/services/Advice+for+liberal+professions+(doctors,+lawyers,+freelance+civil+engineers,+artists,+athletes,+...)_136)>

<sup>96</sup> Federation of Veterinarians of Europe, *Charter of Liberal Professions*, <

[http://www.fve.org/uploads/publications/docs/charter\\_for\\_liberal\\_professions\\_fin.pdf](http://www.fve.org/uploads/publications/docs/charter_for_liberal_professions_fin.pdf)>

values of liberal professionals, as set out in the *Charter of Liberal Professions*.<sup>97</sup>

ii. *Athletes as Artists*

Athleticism is a form of art in my opinion and a former athlete who echoed this views was NBA star Charles Barkley, in a famous *Nike Air* commercial of the 1990s.<sup>98</sup> In this advert Charles stated athletes be looked up to for entertainment, which they are paid for and nothing more. A study between members of the Australian Ballet School and the Victorian Institute of Sports have found more similarities between training methods in dancing and sports than anticipated or acknowledged.<sup>99</sup>

I strongly agree with the argument of Wolfgang Welsch of the Friedrich-Schiller University, Germany. In his works 'Sport- Viewed Aesthetically and even as an Art', he examines the evolution of sports and art and the overlapping characteristics and came to the conclusion that 'Sport is *one* kind of art [and] Art (in the usual sense) is another one.'<sup>100</sup>

[S]port has developed striking new affinities with aesthetics. This is obvious from the new style of sport clothing (some athletes, like Carl Lewis [and Tim Cahill], have in the meantime even become professional fashion designers), the increased attention to the aesthetic element in performance (even the alteration of rules today is often motivated by aesthetic considerations), through to the spectators' aesthetic delight - sport having become a show for the amusement of the entertainment society... aesthetic perfection is not incidental to sporting success, but intrinsic to it. What is decisive for the sporting success is perfect performance. And it is this feature, above all, which is aesthetically appreciated in sport.

In line with the view that Sport is a form of art and athletes invariably artists, Boris Godzinevski; a sports and society correspondent for *Bleacher Report* had this to say;

Professional sport is entertainment, it is also good exercise for us regular Joes, but for the men and women who are paid millions to play a game, it is almost an art form.<sup>101</sup>

Moreover, Athletes are increasingly becoming subject to legal issues that were once reserved for performing artists.<sup>102</sup> Publicity or right of publicity characterizes the performing art industry,<sup>103</sup> and entities in the industry gain value from their associations with these professionals. The endorsement contracts derived from the publicity of entertainers bring about intellectual property concerns.<sup>104</sup> Tom Brady, MVP quarterback for the New England Patriots, had an endorsement deal with General Motors that allowed the company to use his likeness and image. General Motors however continued adverts featuring Brady even after the end of the contract. This led to a dispute that was reportedly settled.<sup>105</sup>

The aesthetical, transient and itinerant nature of athlete's career is deserving of recognition and protection by the International Labour Organisation.

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<sup>97</sup> Federation of Veterinarians of Europe, 'Charter of Liberal Professions', online, < [http://www.fve.org/uploads/publications/docs/charter\\_for\\_liberal\\_professions\\_fin.pdf](http://www.fve.org/uploads/publications/docs/charter_for_liberal_professions_fin.pdf)>; see also *Christaine Urbing-Adam v Administration l'enregistrement et des domaines* (C-267/99) [2001] ECJ

<sup>98</sup> Lukas Raschilla, 'Athletes are artists, not role models', 25 July, 2014, online, < <http://www.theroar.com.au/2014/07/25/athletes-artists-role-models/>>

<sup>99</sup> Angela Gilltrap, 'Are Dancers Athletes?', < <http://www.abc.net.au/strictlydancing/txt/s1077896.htm>> accessed on 4 November 2014

<sup>100</sup> Wolfgang Welsch, 'Sport-Viewed Aesthetically, and even as an Art?' in Andrew Light and Jonathan M. Smith (eds), *The Aesthetics of Everyday Life*, (Columbia University Press, 2005) 135-155

<sup>101</sup> Boris Godzinevski, online, < <http://bleacherreport.com/articles/379123-the-entertainers-their-job-is-to-entertain>>

<sup>102</sup> *Ibid*

<sup>103</sup> Jesse Koehler, 'Fraley v. Facebook: The Right of Publicity in Online Social Networks' (2013) 28/4 Berkeley Technology Law Journal, 21

<sup>104</sup> Kenji Summers, 'What Makes and Athlete an Entertainer?' on *Sports Agent Blog* (13 February 2008)<<http://sportsagentblog.com/2008/02/13/what-makes-an-athlete-an-entertainer/#comment-113148473>>

<sup>105</sup> *Ibid*



iii. *The pitfall of the 'short-term' proviso*

Conventions 97 and 143 do not exempt artist and liberal professionals in its entirety. The down side of this exemption is the qualification of the duration of migration embarked upon. The ILO Conventions exempt liberal professionals migrating on short-term basis, the duration of what qualifies as 'short-term' is undefined. This is where the problem lies for athletes.

In professional sports, it is quite common to find players who migrate internationally for sports on short-term contracts. On the 31<sup>st</sup> of October 2014, former United States of America national team mainstay Oguchi Onyewu signed a short-term contract with *Charlton Athletic*, an English championship side. The contract is for duration of 3 months, to last up till January 2015.<sup>106</sup> Although FIFA contracting guidelines advocates for season-long contracts,<sup>107</sup> football contracts vary in length in reality.

In August 2009, French-Algerian national team winger, Hameur Bouazza, signed for Turkish Super Lig side Sivasspor on the 18<sup>th</sup> of August 2009. On 23<sup>rd</sup> August 2009, 5 days and one game after the commencement of his contract, he left Sivasspor. One the 1<sup>st</sup> of September 2009 he was signed on to Blackpool Football Club in England.<sup>108</sup> Another example of a short-term contract in soccer or world football, was that of Rory Fallon, a New Zealand international, who was signed on by *Yeovil Town Football Club* of Somerset, England for a month from 2 August, 2011 up till 31<sup>st</sup> August 2011.<sup>109</sup>

The Rugby league is not left out of the impermanency of sporting contracts. In September 2014, London's *Saracens Football Club* of the Rugby Football Union signed Thiel Phil, an American rugby player on a short-term contract.<sup>110</sup> Thiel Phil was engaged to provide a short-term cover for Sakaran's Schalk Brits, who was on international duty with South Africa at the Rugby Championship.<sup>111</sup>

Argentina's basketball first division; the *Liga Nacional* has sixteen teams in total across the country.<sup>112</sup> Each team is granted a limit of three of foreign players each year, who are more officially known as "import players."<sup>113</sup> A majority of the import players come from the United States of America and cut across professional players and those who come right out of university leagues.<sup>114</sup> Pecuniary interest has been credited as a major inspiration for basketball players to migrate to Argentina. It has equally been blamed for promoting precarious engagements of players. Argentine club sides are reluctant to engage import players on long-term basis because of the cost of maintaining that contract; in essence, short-term playing contracts are more popular for migrant basketball players. Usually for 3 months.<sup>115</sup>

Hakeem Rollins, a 28-year-old professional basketball player from the United States currently playing for the Paraná-based Centro Juventud Sionista club, one of the top

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<sup>106</sup> 'Transfer news: Charlton Athletic sign USA defender Oguchi Onyewu on short-term deal' on Sky Sports (1 November 2014) < <http://www1.skysports.com/football/news/11684/9542746/sky-bet-championship-charlton-athletic-sign-usa-defender-oguchi-onyewu>>

<sup>107</sup> Fédération Internationale de Football Association, *Regulations on the Status and Transfer of Players* (2014)

<sup>108</sup> 'Shortest Football Career in History', *The Independent* (online), 23 September 2009 <<http://www.independent.co.uk/sport/football/news-and-comment/the-shortest-careers-in-football-1791988.html>>

<sup>109</sup> 'Rory Fallon Signs Short Term Contract at Yeovil Town', *British Broadcasting Federation* (online) 2 August 2011 < <http://www.bbc.com/sport/0/football/14378210>>

<sup>110</sup> 'Phil Thiel: Saracens sign USA international hooker' *British Broadcasting Commission* (online), 1 September 2014 < <http://www.bbc.com/sport/0/rugby-union/29014899>>

<sup>111</sup> *Ibid*

<sup>112</sup> 'Basketball in Argentina', *The Argentina Independent* (online), 5 March 2012 <

<http://www.argentinaindependent.com/life-style/sport/basketball-abroad-argentinas-import-players/>>

<sup>113</sup> *Ibid*

<sup>114</sup> *Ibid*

<sup>115</sup> *Ibid*

teams in Argentina's A category in the *Liga Nacional*,<sup>116</sup> had this to say about the transient nature of player's contract and the difference in the rules of engagement for migrant players;

It's very common for players to have short contracts or switch teams. Foreign players get changed all the time. The Argentines have guaranteed contracts and are signed for a whole year. I mean, we signed real contracts, but the team can release you at any time, for whatever reason they want. That's kinda [sic] how it is down here.

There was a guy playing for another team in Corrientes for four years, and this year was his fifth year. They changed coaches and the new coach didn't really like him as a player. The guy played hard, played well but just didn't get a lot of touches, so around Christmas time -halfway through the season- they let him go. He didn't do anything wrong, they just didn't want him anymore.

These examples are pointers to the frequency of short-term migration in athletics. The precarious nature of this kind of migration exposes migrant athletes to unfair treatment as seen in Argentina. If it is the intention of International labour migration regime to Law to protect the working rights of workers, including protection from arbitrary termination of employment contracts and provide equality of opportunity of employment, then short-term migrant athletes, like migrant athletes must be considered as a vulnerable group worthy of protection.

#### *b. Student Athletes as Migrant Workers*

Article 7 of the ICMW excludes persons who have migrated for training or education purposes. College athletics is considered non-professional, collegiate and university-level competitive sports and games requiring physical skill and the systems of training that prepare athletes for competition performance.<sup>117</sup> Competitive sport was originally 'employed to improve discipline, health, and appetite while keeping students away from illicit activities when not in the classroom'.<sup>118</sup> The dynamics of college athletics has since changed; it is now considered an important part of sports. Scientific research has concluded that it takes a minimum of 10 years and 10,000 hours of training for a talented athlete to reach elite levels.<sup>119</sup> It becomes imperative to develop and groom certain skills for success in athletics at a relatively young age<sup>120</sup> starting at puberty.<sup>121</sup> College athletics is now seen as a breeding ground for professional athletes<sup>122</sup> as against a supplement for studies.<sup>123</sup>

Sports labour migration research has explored the international movement of athletes in a number of sporting contexts including the collegiate division.<sup>124</sup> In the 2008-2009 academic year of the United States of America, the National Collegiate Athletic Association reported that there were over 10,000 aliens participating in Division-I

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<sup>116</sup> Ibid

<sup>117</sup> Ann Manes, Athletic Director, Junior Sports Corporation, South Carolina (<https://www.linkedin.com/pub/ann-maness/35/11b/738>)

<sup>118</sup> Andrew Warwick, *Masters of Theory: Cambridge and the Rise of Mathematical Physics*, (University of Chicago Press, 2003), 213

<sup>119</sup> Anders Ericsson and Neil Charness, *Expert Performance, Its structure and Acquisition*, August 1994, *American Psychologist*, Vol. 49, No. 8, 725-747

<sup>120</sup> Ages 13—14 for females and 17—18 for males; Peter Twist and Janice Hutton, *Identifying, Understanding And Training Youth Athletes*, *Idea Fitness Journal*, September 2007 (online) < <http://www.ideafit.com/fitness-library/identifying-understanding-and-training-youth-athletes>>

<sup>121</sup> Ibid

<sup>122</sup> MacDonald Paul Mirabile and Mark David Witte, 'Collegiate and Professional Careers of High School Athletes', *Journal of Issues in Collegiate Athletics*, 2013, 6, 41-56

<sup>123</sup> Andrew Warwick, *Masters of Theory: Cambridge and the Rise of Mathematical Physics*, (University of Chicago Press, 2003), 213

<sup>124</sup> Adam Love and Seungmo Kim, 'Sport Labour Migration and Collegiate Sport in the United States: A Typology of Migrant Athletes', (2011) *Journal of Issues in Intercollegiate Athletics*, 2011, 4, 90-104

athletics,<sup>125</sup> with some sports having as high as 36.8% of international migrant athletes participation. These athletes are grouped into typologies by eminent researchers in the field of athletic labour migration, Joseph Maguire<sup>126</sup> and Magee and Sugden.<sup>127</sup> They may be mercenaries, nomadic cosmopolitans, settlers, returnees, exiled, expelled or simply ambitionists; none of these typologies of migrant athletes are mutually exclusive or set on stone.<sup>128</sup> According to the grouping migrant athletes can be said to be ambitionist and may or may not become settlers.<sup>129</sup>

Sports can be a lot of things, including a unifying factor,<sup>130</sup> but it is first a competition and college sport is no exception. This is why it is not surprising that colleges aim to recruit the best talents for their teams and go as far as offering scholarships to students who possess exceptional sporting skills.<sup>131</sup> A talented student in a recognised sport is considered an asset to the school, usually universities or colleges.<sup>132</sup> The combination of the passion of ambitionist migrant athletes and coaches with equal ambition to win appears to be a perfect blend for college sports. According to Baylor's men's tennis coach Matt Knoll in a press conference in Kansas City, United States, 'if you do not recruit overseas, you are taking yourself out of a major market'.<sup>133</sup>

Local coaches have attributed their preference for International Students to play sport to the competition in the industry for 'first tier' college talents.<sup>134</sup> Students who are exceptional at sports usually proceed to join 'ivy league' teams, leaving other teams to make do of the remainder 'third tier talents'. These other teams in return expand their search for talents to include international students.<sup>135</sup> In the 1981 NCAA track and field championships for example, the University of Texas, El Paso won with 64 points. If International Students were to be excluded and all else remained the same, their team score would have been 12 points.<sup>136</sup> This exemplifies the mutually beneficial relationship between international students and college coaches who recruit them. The need to fulfill an ambition and get better quality of life and pay on the part of the students and the need to win by all means possible including cross border recruitment on the part of the college coaches.

## ii. Collegiate Athletes as Employees

In January 2014, football players of Northwestern University petitioned the National Labour Relations Board to form a union. The National Collegiate Athletic Association 'NCAA' disagreed with the petition, arguing that student-athletes are not employees under federal laws of the United States of America. Marc Edelman, Professor of Sports Law at the City University of New York, United States of America in concluding that college athletes are

<sup>125</sup> Zgonc, Erin, Student-Athlete Ethnicity, 1999-2000-2009-2010. NCAA[R] Student-Athlete Ethnicity Report

<sup>126</sup> Joseph Maguire, *Global Sport: Identities, Societies, Civilizations* (Polity, 1<sup>st</sup> ed, 1999)

<sup>127</sup> Jonathan Magee and John Sugden, 'The World at their Feet', *Professional Football and International Migration, Journal of Sport and Social Issues*, November 2002, Vol. 26, no 4, 421-437

<sup>128</sup> Joseph Maguire, above n 126

<sup>129</sup> Adam Love and Seungmo Kim, 'Sport Labour Migration and Collegiate Sport in the United States: A Typology of Migrant Athletes, *Journal of Issues in Intercollegiate Athletics*, 2011, 4, 90-104

<sup>130</sup> Jack Bell, 'From Many Nations, One Soccer Team', *The New York Times* (online), 13 September 2008 < [http://www.nytimes.com/2008/09/14/nyregion/14drivers.html?\\_r=0](http://www.nytimes.com/2008/09/14/nyregion/14drivers.html?_r=0) >

<sup>131</sup> College Scholarships, *College Football Scholarships*, <

<http://www.collegescholarships.org/scholarships/sports/football.htm> >

<sup>132</sup> Basketball Australia, 'Making Your Career in Basketball: A guide to the Australian Basketball Pathway' (2009) <

[https://secure.ausport.gov.au/\\_data/assets/pdf\\_file/0005/365261/BA\\_Making\\_Your\\_Career\\_In\\_Basketball.pdf](https://secure.ausport.gov.au/_data/assets/pdf_file/0005/365261/BA_Making_Your_Career_In_Basketball.pdf) >

<sup>133</sup> Maureen Weston, 'Internationalisation in College Sports: Issues in Recruiting, Amateurism, and Scope' (2006) *Willamette Law Review* 835

<sup>134</sup> *Ibid*

<sup>135</sup> *Ibid*

<sup>136</sup> John Bale, *The Brawn Drain: Foreign Student-athletes in American Universities*, (University of Illinois Press, 1991) 70

employees of Universities listed the time devoted to training; typically 43.3 hours a week (more time than they spent on academic activities, and more than a typical U.S. worker spends on his profession)<sup>137</sup> as a pointer to an employment relationship.<sup>138</sup> He canvassed that the NCAA requires students to miss classes for nationally televised games that bring in revenue. Adding that the NCAA's basketball tournament affects more than six hours of classes, and in some cases college athletes miss up to a quarter of all class days during their spring semester.<sup>139</sup> These factors establish control over the hours of athletes and the relinquishment of educational goals to play these sports. Supporting this proposition is the fact that there are instances where coaches regulate the 'out-of-training' behavior of the student athletes including their communications on social media platforms.<sup>140</sup>

Edelman went further to dissect the management of the revenue generated from college sport as a pointer to the fact that student athletes are engaged in the 'business' of the University. As of 2014, the NCAA produces nearly \$11 Billion in annual revenue for college sports and individual university report up to \$143.3 Million in athletic revenues. Much of these revenues are not reinvested into classroom education. College coaches are the highest paid public official in 40 out of 50 states of the United States of America. The athletes themselves do not merely play a sport of leisure. They are often core members of their Universities or colleges' marketing team, capitalizing on their fan base to recruit students into their institution. In summary, college athletes are the labour force behind a lucrative secondary industry in hosting organized sporting events.<sup>141</sup>

In April 2014, The National Labour Relations Board 'NLRB' per Peter Sung Ohr ruled that college athletes of Northwestern University were indeed employees of the university.<sup>142</sup> The decision of the board found that the athletes in question spent from 40 -50 hours a week on football related activities for the duration of the regular and bowl season, and have a virtual year-round commitment to the program, and thus were in a relationship akin to that of employment. The NLRB Chicago regional director in arriving at the decision also considered the commercial value or the athlete's work and the demands placed on a college athlete.<sup>143</sup>

Northwestern university argued that the athletes were first students, then athletes and so cannot qualify as employees. They went ahead to rely on the NLRB ruling of 2004 that students who also acted as teaching assistants while completing their studies were not employees.<sup>144</sup> The National Labour Relations board rejected this argument stating that the dynamics of both scenarios were different, mainly because the duty of a teaching assistant is not as farfetched from that of a student, compared to an athlete.<sup>145</sup>

In a more recent development, Samantha Sackos, a University of Houston women's soccer player from 2010-11 through 2013-14 has sued the NCAA and every Division 1 schools for violating the wage-and-hour provisions of the Fair Labour Standards Act.<sup>146</sup> The

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<sup>137</sup> Michael H. LeRoy, 'An Invisible Union for an Invisible Labour Market: College Football and the Union Substitution Effect', (2012) *Wisconsin Law Review* 1077, 1099

<sup>138</sup> Marc Edelman, 'A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act', (2013) 64 *Case Western Reserve Law Review* 77

<sup>139</sup> Marc Edelman, '21 Reasons Why Student-Athletes Are Employees And Should Be Allowed To Unionize', *Forbes* (online) 30 January 2014 < <http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize/> >

<sup>140</sup> *Ibid*

<sup>141</sup> *Ibid*

<sup>142</sup> *Northwestern University v College Athletes Players Association*, 13 RC 121359, (III NLRB, 2014)

<sup>143</sup> Jake Simpson, 'Of Course Student Athletes are University Employees', *The Atlantic* (online) 7 April 2014 <<http://www.theatlantic.com/entertainment/archive/2014/04/of-course-student-athletes-are-university-employees/360065/>>

<sup>144</sup> *Ibid*

<sup>145</sup> *Ibid*

<sup>146</sup> Si Wire, 'New lawsuit claims NCAA violated Fair Labor Standards Act', *Sports Illustrated* (online) 24 October 2014 < <http://www.si.com/more-sports/2014/10/24/ncaa-sued-fair-labor-standards-act> >

plaintiff alleges that student athletes meet the criteria for recognition as temporary employees of NCAA Division 1 Member Schools under the Fair Labour Standards Act and as such are required by law to pay student athletes at least the federal minimum wage. The plaintiff argues that athletes engage in non-academic performance for nonacademic credit in athletic competition.<sup>147</sup> Student athletes, in preparing for these competitions perform longer and more rigorous hours under strict supervision by full time staff. The results of these training confer tangible and intangible benefits in Division 1 schools.<sup>148</sup> The suit was brought before on behalf of all NCAA Division athletes in men and women's sports and it seeks unpaid wages for athletes and an injunction against the NCAA and schools.<sup>149</sup>

The situation in the United States of America is not that different from that in Australia. There are strong grounds to support the conclusion that Australian Institute of Sports' 'AIS' athletes are employees through the application of the multi-factor test expanded upon by the High Court of Australia in *Hollis v Vabu*<sup>150</sup> to an assessment of the AIS elite scholarship agreement.

### *iii. Australian Scholarship Athletes*

There are strong grounds to support the conclusion that AIS athletes are employees through the application of the multi-factor test to an assessment of the agreement.<sup>151</sup> Principal indicia of employment relationships are present; high level of control (including media and public communications),<sup>152</sup> the requirement to participate in public relations activities, remuneration which includes accommodation provision or accommodation allowances, coaching, sports medicine services, travel and accommodation expenses, and career development and education services.<sup>153</sup> Additionally, the AIS supply training facilities and training and competition equipment, and a mandate to provide work personally by the athlete, consistent with the role of an employer under an employment relationship.<sup>154</sup> 'The difficulty in propounding this conclusion with any great certainty is that the application of the multi-factor test remains an impressionistic assessment and not a mechanistic exercise. Nevertheless, the terms of the agreement lend little support for an alternative conclusion.'<sup>155</sup>

### *c. Outsourced Migrant Athletes*

ILO Convention 143 excludes internationally outsourced athletes from its protection by exempting employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.<sup>156</sup>

This can adversely affect athletes who migrate via transfer systems. International transfer of athletes between employers in sports is quite common, probably most common in

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<sup>147</sup> Steve Berkowits, 'New Lawsuit Targets NCAA and every Division 1 School', *USA Today* (online), 23 October 2014 <<http://www.usatoday.com/story/sports/college/2014/10/23/ncaa-class-action-lawsuit-obannon-case/17790847/>>

<sup>148</sup> *Ibid*

<sup>149</sup> *Ibid*

<sup>150</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21

<sup>151</sup> Lloyd Freeburn, 'Scholarship Athletes: Scholars, Serfs or Employees?' (2010) 23 *Australian Journal of Labour Law* 169

<sup>152</sup> *Ibid*

<sup>153</sup> *Ibid*

<sup>154</sup> *Ibid*

<sup>155</sup> *Ibid*

<sup>156</sup> ILO Convention 143, Article 11 (e),

football. This is the action taken whenever a player under contract moves between clubs.<sup>157</sup> Sport teams essentially trade existing player contracts under the transfer system.<sup>158</sup> This can function in a similar manner to player trades, where teams offer another player on their squad as part of the compensation, but some players in bargaining their contracts can include a 'do not trade clause' to prevent such transfers.<sup>159</sup> Transfer rules is one way of restricting the free movement of players.<sup>160</sup> Restraint of trade in athletics is beyond the scope of this paper and therefore will not be considered in further details.

International transfer of players often takes the form of loans. This is when an athlete moves temporarily to play for a club or sport organisation whilst maintaining a contract of engagement with his former club.<sup>161</sup> This is a temporary transfer can be with or without financial indemnity depending on the agreement of parties.<sup>162</sup> This kind of practice is quite common in football for players who want to get more playing time. Loan deals may last from a few weeks to all season-long and can also be for a few seasons in world soccer.<sup>163</sup> Australian football league recognises temporary transfers for only one season, any player wishing to elongate such transfer must sign a fresh contract.<sup>164</sup>

Transfers and loans are as common in Athletics as it is in other sports. Transfers in this field of sports can be internationally and not confined only to local transfer between athletic organisations. The European Union, for instance is giving sufficient attention to international athletic transfers.<sup>165</sup> Its policy document "Developing the European Dimension in Sport" (European Commission, 2011) emphasizes its support for a thorough review of sport transfers<sup>166</sup> from both a legal, social and an economic point of view of European sports club.<sup>167</sup>

#### *v. Why should the United Nations and the International Labour Organisation care?*

International transfer in football especially has garnered a lot of attention. International player loaning and global scouting accounts for the success of some sports entrepreneurs.<sup>168</sup> International player loans are a way of sourcing for talented players to better the lot of a team, and have sometime led to the rise of a second tier team to become a first tier team.<sup>169</sup> This practice is similar to that which John Bale referred to as 'the brawn drain; where American universities scout for talents abroad to enable them stand a better chance at winning. The difference is the international loaning system is more transient than international student scouting for colleges and tertiary institutions. Besides, international collegiate

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<sup>157</sup> Dabscheck, Braham 'Sport, Human Rights and Industrial Relations' (2000) 23 Australian Journal of Human Rights 129

<sup>158</sup> James Johnson, 'Restraint of Trade Law in Sport', Sports Law eJournal, (online), (7 2009, Bond University), < <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1009&context=slej> >

<sup>159</sup> US Legal, 'Sports Contracts – Basic Principles', online, < <http://sportslaw.uslegal.com/sports-agents-and-contracts/sports-contracts---basic-principles/>>.

<sup>160</sup> The Centre for the Law and Economics of Sports, 'The Economic and Legal Aspects of Transfers of Players', KEA – CDES: Study on the economic and legal aspects of transfers of players, January 2013

<sup>161</sup> Ibid

<sup>162</sup> Ibid

<sup>163</sup> Fédération Internationale de Football Association, 'Regulations on the Status and Transfer of Players' (2014), Article 5

<sup>164</sup> Australian Football League, National Transfer Regulations, Article 3.18

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<sup>166</sup> DANIJELA KULIŠ, JOSIP FRANIĆ, 'Financial and Tax Effects of Professional Athlete Transfer', Institute of Public Finance' No. 74 April 2013

<sup>167</sup> "The Economic and Legal Aspects of Transfers of Players" (European Commission, 2013)

<sup>168</sup> Joshua Kaye, The international player loan loophole, should and could it be closed?, 16 April 2013, online, < <http://www.lawinsport.com/blog/joshua-kaye/item/the-international-loan-loophole-should-and-could-it-be-closed> >

<sup>169</sup> Ibid

students usually do not have subsisting contracts with any team, which they must return to, at the point of recruitment.

One challenge posed by international loaning in football in Europe for example is the lack of restriction as to the number of loans a club can make per time. This is different from the rules governing domestic player loans. Domestic players are limited to 5 per game or time sheet for any individual match,<sup>170</sup> and there is further restriction on the number of domestic loan players a team can have per season.<sup>171</sup> This restriction is for all domestic players transferring from leagues governed by a football association including the football league, premier league, the football conference, northern premier league, Isthmian league and southern league.<sup>172</sup>

This kind of practice while it may be perceived to treat international loan players favourably but may in effect spur racism and xenophobia towards them, thereby putting them in a more vulnerable situation. This practice of international players loaning flourishes the business of sports entrepreneurs<sup>173</sup> who 'buy' international athletes, usually from developing nations and then 'sell' them on at a high profit. On the other hand it equally frustrates coaches of teams who are unable to afford international players on loan. In effect the football league rules allow a full team made up of international loan players to play against a team with limited domestic loan players. Without conceding that international loan players are better at the game than domestic players, Ian Holloway the manager of Crystal Palace Football Club in England, expressed his frustration at the inequality it causes among teams; the volume of loan signings is ludicrous...we are only allowed to borrow two from the same team in this country. Unlimited abroad? That gives a license to people to buy English clubs and chuck all their players over here and have a reserve team.<sup>174</sup>

No doubt, migrant athletes brought into this kind of hostile environment without proper protection are being set up for unfair treatment and unjustified stigmatization that comes with migrating for employment.

Additionally, the United Nations ought to recognise the need to protect student athletes for two main reasons. First, the engagement relationship of these students is gradually metamorphosing into full blown employment relationships as can be seen by the trend in the United States and Australia. Students are increasingly engaging in employment relationships, more now in the age of globalization and popularity of vicarious employment. A high percentage of these students are migrants, and do not qualify for protection under national employment laws. The Fair Work Act<sup>175</sup> for example provides for protection of all categories of workers from adverse action in the course of an employment relationship.<sup>176</sup> Adverse action in this sense relates to freedom to exercise work rights and freedom from discrimination. However, other salient positions of the act do not apply to workers in precarious form of employment, an example of such provision is the Unfair Dismissal provision.<sup>177</sup>

In Sports, especially at college level, the presence of migrant students cannot be denied. Danish women's league for example, is reported to have started recruitment of foreign players since as far back as 1990 when *FC Women* signed its first foreign players.<sup>178</sup> Since then more and more clubs have welcomed the migration of athletes to participate in their clubs with the aim of getting or remaining at the top of the Danish women league. Club

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<sup>170</sup> Article 52.3.1 of the football league rules

<sup>171</sup> Article 53.2.4 of the football league rules, Johnson Kaye

<sup>172</sup> Article 52 of the football league rules, Johnson Kaye

<sup>173</sup> Ibid

<sup>174</sup> Ibid

<sup>175</sup> *Fair Work Act (2009) (cth)*

<sup>176</sup> *Fair Work Act (2009) (cth)*, s. 342

<sup>177</sup> *Fair Work Act (2009) (cth)*, ss 383, 384, 394

<sup>178</sup> Joseph Maguire and Mark Falcoux (eds), *Sport and Migration: Borders, Boundaries and Crossings*, (Routledge, 18 Oct 2010) 160

leaders have also recognised the disadvantage their provincial city location poses for recruitment and keeping the best Danish players. Clubs sometimes have better chances recruiting better players internationally than convincing a Dane to move to the provincial city. Coaches in the Danish league have also emphasized that migrant players ‘usually brought professional attitudes to the clubs, are very competitive and have a gene for winning’.<sup>179</sup>

The expanding population of migrant student athletes is not without its disadvantages. The media and parents, for hindering the development of young Danish talents through its recruitment of foreign players, often critique Danish clubs. This has led to xenophobic treatment against foreign players.<sup>180</sup> The situation is not different in America. At the end of the first-round East regional game played in Pittsburgh between Kansas State University and the University of Southern Mississippi in March 2012, KSU freshman point guard Angel Rodriguez shot free throws with seconds left in the game, he was met with a barrage of racist chants of “Where is your green card?” by members of the USM band. Rodriguez is Puerto Rican.<sup>181</sup> The NCAA has tolerated other forms of racism at games, such as racist mascots and chants that degraded Indigenous culture by fans at Florida State and the University of Illinois.<sup>182</sup> To exclude migrant athletes from the protection of the United Nations and International Labour Organisation is to exert great injustice on this category of workers.

### *Conclusion*

Globalization has influenced employment relationships worldwide, increasing the rate of casual and precarious working arrangements. Athletes are not left out from the scourge of globalization. This means global talent hunt for elite/college sports, short-term contracts or transfer loans for athletes are more common now than they were when the instruments in question were enacted. A revisit to these provisions of the ILO 97 and 143 conventions and the United Nations Migrant Workers Conventions should be made to ensure protection for athletes on transfer loans, short term migrant athletes and college athletes.

The exemption provisions of the ICMW, ILO 97 and 143 are qualifications that negate the equality protection of the conventions. Discrimination, like equality, is indivisible. If some rights are granted to migrant workers and others refused, discrimination subsists. Therefore, if the grant of rights is effectively made subject to a qualification, there can be no genuine equality. In the global campaign against discrimination and bias, the United Nations and the International Labour Organisation cannot afford to have such lacunas in their instruments, capable of defeating the very purpose of the instruments.

It may be argued that standards to promote equality and eliminate discrimination are embedded in ILO convention 111 of 1958 concerning discrimination in respect of employment and occupation and in its accompanying recommendation 111, but these instruments do not protect against discrimination based on nationality.<sup>183</sup> This was recognised and moves were made to correct this abnormally in drafting Convention 143 but as discussed earlier, the loopholes present in this convention leaves migrant workers wanting for protection. The Committee of Experts on the Application of Conventions ‘CEAR’ has recognised that [Athletes as] migrant workers are more likely to be victims of prejudice and other unfavourable attitudes in their workplace’ and countries of engagement as a result of

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<sup>179</sup> Ibid, 158-163

<sup>180</sup> Ibid, 163

<sup>181</sup> Monica Moorehead, ‘Puerto Rican Athlete jeered by Racist Students’, *Workers’ World*, March 23, 2012, (online), <[http://www.workers.org/2012/us/puerto\\_rican\\_athlete\\_0329/](http://www.workers.org/2012/us/puerto_rican_athlete_0329/)>

<sup>182</sup> Ibid

<sup>183</sup> Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, (Oxford University Press, 1997)



discriminatory laws.<sup>184</sup> It is therefore surprising to have a convention that claims to protect the rights of migrant workers on one hand, and limits that protection with its exemptions on the other hand.

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<sup>184</sup> Ibid

## **ATHLETE WHEREABOUTS IN THE CONTEXT OF THE FIGHT AGAINST DOPING IN AFRICA ; MISSION : IMPOSSIBLE?**

by *Jean-Christophe LAPOUBLE\**

Recognition with the ratification of 19th October 2005 of the UNESCO Convention on the fight against doping<sup>1</sup> shall oblige signatory States to implement the World Anti-Doping Code<sup>2</sup>, which provides a series of controls outside sports competitions to detect for substances that are no longer present in the body during competitions. In Africa, 47 countries have ratified the Convention against doping. This type of control entails an obligation for national organizations to implement the whereabouts system (target group).

The idea of the localization of athletes is related to the existence of doping products whose effects last for several months while their detection is only possible for a limited period of time. This is particularly the case for anabolic steroids that are taken in the winter to prepare the summer season. The banned list issued by the World Anti-Doping Agency (WADA) distinguishes the prohibited products during competitions and those who constantly are. That was the localization program was created. If the goal is apparently laudable, the implementation rules lead us to have some concerns ... .In fact, not only the provisions are very restrictive for athletes involved, but in addition, they violate some fundamental law. For some athletes, such a system is *“unfair because only a few countries in the world have implemented it and may athletes can train and compete without of constantly submitting information”*<sup>3</sup>.

Ratifying the UNESCO Convention does not make the fight plan against doping operational. It also requires the existence of a functional national anti-doping organization. According to the World Anti-Doping Agency, the African countries who possess a National agency to fight against doping are: Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Congo, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Gabon, Guinea, Ivory Coast, Kenya, Libya, Malawi, Maldives, Mali, Mauritius, Niger, Nigeria, Senegal, Seychelles, South Africa, Sudan, Tunisia. Thus, it important to highlight the fact of 47 countries have ratified the UNESCO Convention but only 27 have established a national organization<sup>4</sup>. Does the fight against doping justifies a such breach of fundamental rights?

In fact, the introduction of such a system creates inequalities between athletes (depending on the country where they are resident) but increasingly it creates legal leak even by simple negligence. But in some countries, protection of right privacy need to respect some specific law, subject to prosecution in case of failure. It is the same for technology differences: *“Differential access to technology remains a reality that flies in the face of this morals based argument”*<sup>5</sup>. Furthermore, in Africa only one analytical laboratory is accredited by the World Anti-Doping Agency<sup>6</sup>.

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\*Lecturer , Institut d'Etudes Politiques de Bordeaux, Attorney : j.c.lapouble@sciencespobordeaux.fr

<sup>1</sup> List of signatories in Africa to 31 December 2014: Algeria , Angola, Benin, Botswana, Burkina Faso, Burundi, Cabo Verde, Cameroon, Comoros, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Maldives, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Somalia, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

<sup>2</sup> World Anti-Doping Code was first adopted in 2003. It entered into force in 2004. A second version came into force in 2009. The third and final version is applicable to January 1, 2015.

<sup>3</sup> Hanstad D.V., Loland S., Elite level athletes' duty to provide on their whereabouts : Justifiable anti-doping work or an indefensible surveillance regime ?, European journal of sport science, 2009, 9(1) pp. 3-10.

<sup>4</sup> The role and responsibilities of national antidoping organisation is defined by article 20.5 of the Code.

<sup>5</sup> Wong, B.J., Hutt, P. B, Doping in sport : An overview and analysis of doping and its regulation in international sport, May 16, 2003, p. 55.

<sup>6</sup> South African Doping Control Laboratory - Bloemfontein

## 1. The very restrictive measures for athletes

Article 5.6 of the new World Anti-Doping Code provides the establishment of a tracking system and the implementation modalities<sup>7</sup>.

The organizations may ask for out-of-competition controls are:

- The World Anti-Doping Agency (WADA);
- The International Olympic Committee or the International Paralympic Committee in connection with the Olympic Games or Paralympic Games
- The International Federation ;
- The National Anti-Doping Organisation (NADO)

The violations of the location requirement are discussed in the article 7.6. If the athletes miss three controls within a period of twelve months, they will have a sanction of two-year sanction or one year if the fault is negligence<sup>8</sup>. In order to implement these provisions, it is necessary to analyze the International Doping Standards and the guidelines that specify this implementation. Some explanations are given to know how to choose the athletes of the Pool.

The article 1.3 of the International Standard of Testing explains that the athletes must give some specific information to their National Anti-Doping Organisation : “ *Where daily information is required, it must be provided for each day of the following quarter, even if the Athlete is travelling, or competing, or on holiday, on any such day*”<sup>9</sup>. For each day, the athlete have to specify his residence, his travels, and a 60-minute time slot within he can be controlled.

The Anti-Doping Administration & Management System (ADAMS), centralise and share informations about controls and whereabouts in a Registered Testing Pool<sup>10</sup> (RTP) for each National Anti-doping Organisation (NADO). ADAMS is a clearinghouse where all data can be stored, especially informations on Anti-Doping Rules Violations. It eases sharing of informations among the Anti-Doping organizations and promotes efficiency, transparency and effectiveness in all anti-doping activities.

The writers of such provisions have certainly not thought of their applicability, especially in Africa. What makes an exception in some countries may be common in others countries such as difficult access to Internet:

*“In those rare cases where ADAMS cannot be used (e.g. online access isn’t generally available for RTP Athletes), there responsible ADO<sup>11</sup> may allow its Athletes to submit their Whereabouts Filings by post and/or fax or another approved system”<sup>12</sup>.*

<sup>7</sup> Article 5.6 : Athletes Whereabouts Information

*“Athletes who have been included in a registered testing Pool by their international Federation and/or national anti-doping organization shall provide whereabouts information in the manner specified in the international Standard for Testing and investigations. The international Federations and national anti-doping organizations shall coordinate the identification of such athletes and the collection of their whereabouts information. Each international Federation and national anti-doping organization shall make available, through ADAMS or another system approved by Wada, a list which identifies those athletes included in its registered testing Pool either by name or by clearly defined, specific criteria. Athletes shall be notified before they are included in a registered testing Pool and when they are removed from that pool. The whereabouts information they provide while in the registered testing Pool will be accessible, through ADAMS or another system approved by Wada, to WADA and to other anti-doping organizations having authority to test the athlete as provided in Article 5.2. This information shall be maintained in strict confidence at all times; shall be used exclusively for purposes of planning, coordinating or conducting doping Control, providing information relevant to the athlete biological Passport or other analytical results, to support an investigation into a potential anti-doping rule violation, or to support proceedings alleging an anti-doping rule violation; and shall be destroyed after it is no longer relevant for these purposes in accordance with the international Standard for the Protection of Privacy and Personal information”.*

<sup>8</sup> Article 10.3.2 : *For violations of Article 2.4, the period of Ineligibility shall be two years, subject to reduction down to a minimum of one year, depending on the athlete’s degree of fault. The flexibility between two years and one year of Ineligibility in this Article is not available to athletes where a pattern of last-minute whereabouts changes or other conduct raises a serious suspicion that the athlete was trying to avoid being available for testing.*

<sup>9</sup> Article 8.3.1 of World Anti-Doping Agency guideline of effective testing.

<sup>10</sup> Registered Testing Pool

*(RTP): The pool of highest-priority Athlete established separately at the international level by International Federations and at the national level by National Anti-Doping Organizations, who are subject to focused In-Competition and Out-of-Competition Testing as part of that International Federation's or National Anti-Doping Organization's test distribution plan and therefore are required to provide whereabouts information as provided in Article 5.6 and the International Standard for Testing and Investigations.*

<sup>11</sup> Anti-Doping Organisation

The data collected violate the privacy of athletes. The Article 5.6 of the Code explains that the processed data are confidential and each National Anti-Doping Organization must not only comply with the International Standard for the protection of personal information but also with the laws of the country (“*in accordance with the international Standard for the Protection of Privacy and Personal information*”), if their exists in the country.

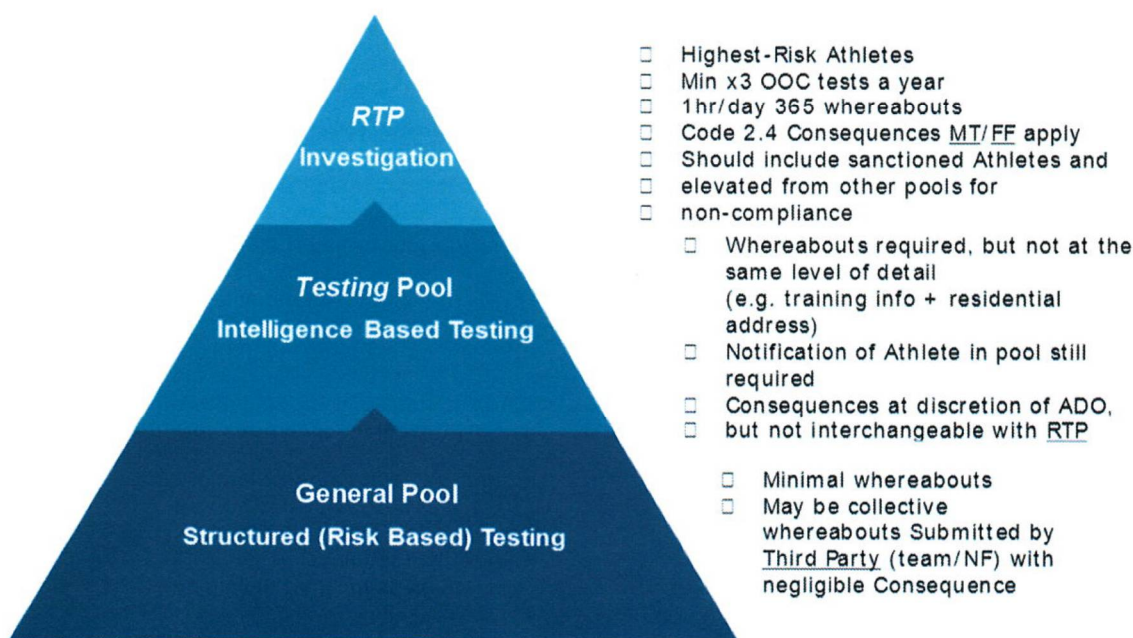
Since 2009, WADA has established an International Standard for the Protection of Personal Data in the Whereabouts system. The World Anti-Doping International Standard for the Protection of Privacy and Personal Information is a mandatory International Standard developed as part of the World Anti-Doping Program<sup>13</sup>. This Standard specifies how the data and samples has to be stored. Data includes as; name, birthdate, sport discipline and gender that will be kept indefinitely. Personal contact information such as address will be kept for ten years as the sample if it is not anonymous, otherwise it will be kept indefinitely. For the whereabouts data it will be store for 18 months but indefinitely in case of Anti-Doping Rule Violation (ARDV). More worryingly the International Standard states: “*Only small amount of Whereabouts is relevant to retain, but it is impossible to establish which part*”<sup>14</sup>.

There is a number of factors that are taken into account to determine whether an athlete will be part of a testing pool group such as doping history, the perceived culture in a particular sport, the discipline or the region but also personal factors and the level of corruption in a country. The article 4.8 of International Standart of Testing defines the conditions for setting up controls out of competitions.

The pyramid below shows the selection criteria :

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Figure 3. Pyramid Whereabouts Model



<sup>12</sup> Article 8.3.3.2 of World Anti-Doping Agency guideline of effective testing.

<sup>13</sup> <https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-2015-ISPPPI-Final-EN.pdf>

<sup>14</sup> Annex A to the International Standard on Protection of Privacy and Personnel Information.

Availability required by athletes depends by country: *"In the United States the athletes in the testing pool have to be available for testing practically 24 hour a day, in the United Kingdom is set to one hour five days a week..."*<sup>15</sup> However, the athlete has the right of inspection data for the athlete.

To validate these new measures, a legal opinion has been asked to Mr. Jean-Paul Costa, former President of the European Court of Human Rights<sup>16</sup>. He has now validated most of the new measures. Thus, the new writing of the article 5.2 of the World Anti-Doping Code states that *"Any Athlete may be required to provide a sample at any time and in any place by an anti-doping organization"*. This therefore clearly means that an athlete may be controlled at night, including between 11 p.m. and 6 a.m.! Just during this period; athlete would be given a possible sixty minutes-slot, if an anti-doping organization has serious and specific suspicions about this sports ....

## 2. Protection of the right of privacy

The analysis showed that obligations on athletes can be heavy out of competitions. Especially because the use of such measures is complex. If the government wants to use some information, it needs to adopt a specific law. Administrative authority is also, obliged to guarantee the safety of the information.

It's not necessary to be a lawyer to understand that the rights of the athlete part of a testing pool are greatly reduced. There are thus many laws protecting privacy, both international and domestic.

The right of privacy is recognized as a fundamental right. The first text international protecting the right of privacy is the United Nations Universal Declaration of Human Rights (1948) followed by the European Convention on Human Rights (1950) but the first text doesn't legally bind on the member of the United Nations. However, it is interesting to give the definition of the right of privacy. Article 12 specifies that :

*"No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference and attacks"*.

At the European level, the first paragraph of the article 8 of the European Convention on Human Rights of the Council of Europe states :

*"Everyone has the right to respect for his private and family life, his home and his correspondence."*

Breaches of privacy are only allowed if they are proportionate to the aim pursued: *"The Strasbourg Court has consistently held that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interests in society"*<sup>17</sup>

For the European Court of Human Rights, the article 8 of the Convention *"protects the right to individual development, whether in the form of personal development ... or the aspect of personal autonomy."*<sup>18</sup> It appears that in general the doctrine that *"In fact, any physical interference with an individual's life, especially when it is made against his will, is likely to prejudice to Article 8"*<sup>19</sup>. In France an appeal (not yet found) was filed with the European Court of Human Rights by the National Federation of Sports Unions, July 23, 2011 due to privacy violations driven by the introduction of the whereabouts system<sup>20</sup>.

Storage and personal data communication as they are provided for the localization an interference with privacy<sup>21</sup>. Indeed, justifying such an intrusion, implies that the interference corresponds to a pressing

<sup>15</sup> Hanstad D.V., Loland S., Elite level athletes' duty to provide on their whereabouts : Justifiable anti-doping work or an indefensible surveillance regime ?, European journal of sport science, 2009, 9(1) pp. 3-10.

<sup>16</sup> Costa, J.-P., Avis de droit sur le projet de révision du Code mondial antidopage, 23 juin 2013 : [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/Code\\_Review/Code%20Review%202015/WADC-Legal-Opinion-on-Draft-2015-Code-3.0-FR.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/WADC-Legal-Opinion-on-Draft-2015-Code-3.0-FR.pdf).

<sup>17</sup> Bachmaier-Winter L., Criminal investigation and right of privacy: The case-law of the European court of human rights and its limits, LESIJ nr. XVI, vol. 2/2009, p. 16.

<sup>18</sup> CEDH, K.A et A.D. c/Belgique, 17 févr. 2005, § 84.

<sup>19</sup> Maurer B., Le principe du respect de la dignité humaine et la Convention européenne des droits de l'Homme, La documentation française Paris, 1999, p. 423.

<sup>20</sup> Claim n°48151/11

<sup>21</sup> CEDH, K.A et A.D. c/Belgique, 17 févr. 2005, § 84.

social need, and a legitimate goal. Thus, a simple medical examination may be seen to constitute an invasion of privacy<sup>22</sup>.

The Organisation of American States (OAS) has adopted the American Convention on Human Rights and the article 11 describes a similar right of privacy.

Regarding data protection, the United Nations Guidelines for the regulation of Computerized Personal Data File<sup>23</sup> constitute the first effort done by The United Nations to develop concrete rules for protection of personal Data.

The African Charter on Human and Peoples' Rights (1987) also known as the "Banjul Charter" does not contain an explicit reference to the right of privacy. The State Party reporting guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted in Tunis in 2012 does not contain specific measures on the right of privacy. Some countries, as Mauritius<sup>24</sup> or South Africa<sup>25</sup> have specific texts about the protection of privacy. In these countries, the right of privacy is guaranteed by the Bill of rights of the Constitution (section 14). The Right of privacy is also protected by common law. But for some African countries, the data legislation is influenced by national laws of some members of the European Union members (e.g., Angola, Benin, Burkina-Faso, Cape Verde, Morocco, Mauritius, Senegal, and Tunisia)<sup>26</sup>. For A. B. Makulilo: "... it is imperative to note than the effect of national data privacy law by an EU member country to Africa is practically the same as the (European) Directive<sup>27</sup> itself"<sup>28</sup>.

For K. Reddy : "*Privacy is the right of individuals to control both information about themselves and their boundaries during interactions with others*"<sup>29</sup>. For this author<sup>30</sup>, the fair information principles are:

- Collection limitation ;
- Data quality ;
- Purpose specification ;
- Use limitation ;
- Security safeguards ;
- Openness ;
- Individual participation.

Such principles correspond to what is provided in in the article 5.6 of the World Anti-Doping Code, but it is not certain that such a level of data protection can be ensured throughout the African continent. Indeed, as the protection of privacy is not explicitly guaranteed by an international Convention at the continental level, it refers to the protection existing in each country. Now there are two types of pitfalls; the existence of an effective legal system protecting privacy and the ability of National anti-doping organizations to protect the informations they have about the athletes. As there are only 27 national anti-doping organizations in Africa, it must be inferred in the other countries the introduction out of competition testing is not legally possible, unless they are organized by WADA. Out of the 27 countries, only South Africa appears to us to organize such controls in the international standards<sup>31</sup>. For the athletes, the system may be unfair, because only a few countries have implemented it and many athletes can train without the legal obligation to be localised. In fact, in Africa such obligations would be very difficult to develop for several reasons. First, the existence of a law does not necessarily guarantee a good protection because the means of protection and control must be effective. Second, organizing of a doping control out of competition requires infrastructure that

<sup>22</sup> CEDH, Roger Acmanne et autres c/ Belgique, 10 déc. 1984

<sup>23</sup> Resolution 45/95 adopted by General Assembly of 14 December 1990 : <http://www.refworld.org/pdfid/3ddcafaac.pdf>

<sup>24</sup> A. B. Makulilo, Protection of personnel Data in Sub-Saharan Africa, Ph. D. in law, University of Bremen. 2012, p. 338.

<sup>25</sup> Refer to Reddy K., On digital forensic readiness for information Privacy incidents, Ph. D. in Computer Science, University of Pretoria, February 2012, p. 10

<sup>26</sup> A. B. Makulilo, Protection of personnel Data in Sub-Saharan Africa, Ph. D. in law, University of Bremen. 2012, p.269 and seq.

<sup>27</sup> European Data Protection Directive 95/46/EC.

<sup>28</sup> A. B. Makulilo, Protection of personnel Data in Sub-Saharan Africa, Ph. D. in law, University of Bremen. 2012, p. 268.

<sup>29</sup> A. B. Makulilo, idem p. 404. - Reddy K., On digital forensic readiness for information Privacy incidents, Ph. D. in Computer Science, University of Pretoria, February 2012, p. 10

<sup>30</sup> Idem p. 22.

<sup>31</sup> See for the whereabouts registration :<http://www.drugfreesport.org.za/registered-testing-pool/>

may not exist depending on the territory. Third, *“it clears that African culture of privacy is largely a by-product of external influence from the West”<sup>32</sup>*.

To assist in the establishment of effective controls, WADA has set up six zones for Regional Anti-Doping Organizations in Africa. The aim is : *“To help countries and organizations develop anti-doping programs that are compliant with the World Anti-Doping Code in regions of the world where no quality anti-doping activities have been established”<sup>33</sup>*.

Richard Frimpong Oppong considers that *“Africa will have to develop rules that address the need to protect existing personal law regimes, such as customary and religious law, which represents centuries-old traditions and experiences of various communities, while at the same time taking into account the international, human rights, and economic dimensions of the issues arising in the area”<sup>34</sup>*.

### 3. The risks of poor data protection

Article 14.6 of the World Anti-Doping Code states:

*“Anti-doping organizations may collect, store, process or disclose personal information relating to athletes and other Persons where necessary and appropriate to conduct their anti-doping activities under the Code and International Standards (including specifically the international Standard for the Protection of Privacy and Personal information), and in compliance with applicable law”*.

Although there is a right of complaint to formulate nearby National Anti-Doping Organization, the risk is important even if some countries provides an act for this right. In fact, the ADAMS system allows the transfer of informations and recognizes that the quality of data protection cannot be guaranteed<sup>35</sup> :

*“Your personal information may be made available through ADAMS to persons or parties located outside the country where you reside. For example, your information may be shared with WADA, established in Switzerland and Canada, or with Anti-Doping Organizations in countries where you may train or participate in sporting events. The data protection and privacy laws of these countries may not always be equivalent to those in your own country. These entities, however, will always be subject to the International Standard on Privacy and Data Protection.”*

If unsuccessful, the appeal involves a claim with the CAS. And if the International Standards have not been respected, the Anti-Doping Organization will be required to remedy the breach.

In the case of disclosure, a reputational damage can be considerable. In Europe, *“The Court considers particularly concerned about the risk of stigmatization, stemming from the fact that persons in the position of the applicants, who have been convicted of any offense and are entitled to the presumption of innocence, are treated in the same way as convicted”<sup>36</sup>*.

To finally find a remedy against errors that may be contained in the ADAMS file, it must turn to Canadian law. This suggests that it is, the Committee on Access to Information in Quebec which is competent under the law on the protection of personal information in the private sector and in particular article 28 which provided within thirty days to refuse an appeal before the commission<sup>37</sup>. In practice, the consequences of a malfunction in the file can be extremely serious. Supposing that data about the private life of an athlete may be revealed in a country where there is no text on data protection or no effective protection, the damage would never be compensated. There are even more worrying unannounced checks may that lead to the disclosure of the sexual preferences of an athlete.

<sup>32</sup> A. B. Makulilo, Protection of personnel Data in Sub-Saharan Africa, Ph. D. in law, University of Bremen. 2012, p. 242.

<sup>33</sup> <https://www.wada-ama.org/en/who-we-are/anti-doping-community/regional-anti-doping-organizations-rado#RADO-Africa>

<sup>34</sup> Richard Frimpong Oppong, Private International Law in Africa: The Past, Present and Future, The American Journal of Comparative Law , Vol. 55, No. 4, Fall, 2007, p.701.

<sup>35</sup> Agreement Governing the use and sharing of information in WADA’S Anti-Doping Administration and Management System (ADAMS), 2014, Appendix C :

[https://wada-main-](https://wada-main-prod.s3.amazonaws.com/resources/files/WADA%20ADAMS%20User%20Agreement%20%28ADO%20version%29.pdf)

[prod.s3.amazonaws.com/resources/files/WADA%20ADAMS%20User%20Agreement%20%28ADO%20version%29.pdf](https://wada-main-prod.s3.amazonaws.com/resources/files/WADA%20ADAMS%20User%20Agreement%20%28ADO%20version%29.pdf)

<sup>36</sup> CEDH, S. & Marper c. Royaume-Uni du 4 décembre 2008, requêtes nos 30562/04 et 30566/04.

<sup>37</sup> Tremblay M., Flux transfrontalières de données et protection de la vie privée : une conjonction difficile, Cahiers de recherches, Ecole Nationale d’Administration Publique, Montréal, Vol. III, n°1, mars 2010, p. 16.

But homosexuality is penalized in 76 countries<sup>38</sup>, including in African countries, presented an extreme risk posed by whereabouts. Homosexual acts are legal in only 19 countries in Africa<sup>39</sup>. The Special Rapporteur on Human Rights Defenders in Africa, Commissioner Reine Alapini-Gansou, received an information that on 24th February 2014, “*The Anti-Homosexuality Act, 2014*” was promulgated in the Republic of Uganda and considers that this act shall be cancelled<sup>40</sup>. This shows that the risk for athletes is real and not merely theoretical<sup>41</sup>. So the African Commission on Human and Peoples’ Rights in Luanda, has adopted , (28 April to 12 May 2014)<sup>42</sup> during the 55<sup>th</sup> Ordinary Session, a Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity which :

**“Strongly urges States to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.”**

The same reasoning can be applied to countries that provide criminal sanctions for adultery<sup>43</sup>. Even if in South Africa, on 25 September 2014, the Supreme Court of Appeal (SCA) ruled that one could no longer claim compensation for damages as a result of adultery<sup>44</sup>.

## Conclusion

Given the new features introduced in the 2015 WADA Code version, the abuses should be easier in terms of invasion of privacy, especially since they are justified by the effectiveness of anti-doping measures. However, doping is not considered by most State legislations as a crime which could justify such measures and it is also possible to consider according J. Kosiewicz<sup>45</sup>, than fighting doping cannot be based on moral arguments. Others<sup>46</sup> consider that the fight against doping must sign a more comprehensive system because doping is a culture, this is what justifies the increasingly stringent texts but:

*“The disparities of privacy in different national laws, sub-regional and regional in Africa are bound to produce far reaching consequences<sup>47</sup>”*

In order to fight doping, there is the establishment of a system that is similar to the fight against serious crime: *«The sporting exception that do exist are not absolute or unconditional. The courts have, to date, been very careful to not give governing bodies in sport an open exception from treaties, law and legislation<sup>48</sup>»*

<sup>38</sup> L. Paoli Itaborahi, J. Zhu, Homophobie d’Etat : Une enquête mondiale sur la criminalisation, la protection et la reconnaissance de l’amour entre personnes de même sexe, ILGA, mai 2013.

<sup>39</sup> Idem : South Africa, Bénin, Burkina Faso, Côte d’Ivoire, Cape Verde, Congo, Djibouti, Gabon, Bissau Guinea, Equatorial Guinea, Lesotho, Madagascar, Mali, Niger, Centrafrique, Democratic Republic of Congo, Rwanda, Chad.

<sup>40</sup> <http://www.achpr.org/press/2014/03/d196/>

<sup>41</sup> P. A. Ireland, A Macro-Level Analysis of the Scope, Causes, and Consequences of Homophobia in Africa, *African Studies Review*; Sep2013, Vol. 56 Issue 2, p.47-66, 20 p

<sup>42</sup> <http://www.achpr.org/sessions/55th/resolutions/275/>

<sup>43</sup> See D.J. Franck, B.J. Camp, S. A. Butcher, *Worldwide Trends in the Criminal Regulation of Sex, 1945 to 2005*, *American Sociological Review* 75(6) 867-893, 2010.

<sup>44</sup> RH v DE(594/2013) [2014] ZASCA133(25 September2014) : [http://www.justice.gov.za/sca/judgments/sca\\_2014/sca2014-133.pdf](http://www.justice.gov.za/sca/judgments/sca_2014/sca2014-133.pdf)

<sup>45</sup> J. Kosiewicz, *The Ethical and Legal context of Justifying Anti-Doping Attitudes*, *Physical Culture and sport Studies and Research*, Volume LXII Special Issue, 2014 , p. 60.

<sup>46</sup> R. Stokvis, *Moral entrepreneurship and doping culture in sport*, *Amsterdam School for Social science Research*, Working paper, 03 2004, p. 22.

<sup>47</sup> A. B. Makulilo, *Protection of personnel Data in Sub-Saharan Africa*, Ph. D. in law, University of Bremen. 2012, p. 242.

<sup>48</sup> Fogel, C. A. *On Privileged Grounds : Sport, Law and Agamben’s State of Exception*, *Journal of Politics and Law*, Vol. 7, N° 3, 2014, p. 78.



## RACISM IN EUROPEAN FOOTBALL<sup>1</sup>

by *Ivan Bykovskiy*

### Terminology of racism

In general terms the word or the phenomenon “racism” could be defined as set of institutional conditions of group inequality and an ideology of racial domination, in which the latter is characterized by a set of beliefs holding that the subordinate racial group is biologically or culturally inferior to the dominant racial group. These beliefs, in turn, are deployed to prescribe and legitimize society's discriminatory treatment of the subordinate group and to justify their lower status.<sup>2</sup> This article has as a main goal to show how the work on the fight against racism and other discrimination is realised now in the world of modern football, show organizations, which take necessary steps in such struggle and to reveal several interesting cases happened in legal field of presented subject.

### Documentary framework and organizational basis.

First essential step in the struggle of governing bodies in football versus racism is without any doubts establishing of a legal framework, providing all other persons with definition of racism, reasoning of it inadmissibility and sanctions in case of infringements. Thus, two main governing bodies of football world – FIFA and UEFA – have enshrined in their Statutes and Disciplinary Regulations above-mentioned matters.

First things first – football is a huge sphere of people’s life and of course it is affected by social problems, racism is not an exception. And as other spheres of modern society prohibit any kind of discrimination, football also stands on similar grounds. Football governing bodies have established pillars necessary to start struggle against racism and any other forms of discrimination and defend the principle of equality of every person under their jurisdiction and in order to get rid of this remnant of the past times.

Article 2 of UEFA Statutes specifies among others:

*“The objectives of UEFA shall be to:*

*b) promote football in Europe in a spirit of peace, understanding and fair play, without any discrimination on account of politics, 1gender, religion, race or any other reason;”*

Article 7 bis of UEFA Statutes says more concretely about racism and any other form of discrimination:

*“Member Associations shall implement an effective policy aimed at eradicating racism and any other forms of discrimination from football and apply a regulatory framework providing that any such behaviour is strictly sanctioned, including, in particular, by means of serious suspensions for players and officials, as well as partial and full stadium closures if supporters engage in racist behaviour.”*

UEFA Disciplinary Code provides sanctions in relation to racism issues in article 14:

*“Racism, other discriminatory conduct and propaganda*

*1 Any person [...] who insults the human dignity of a person or group of persons on whatever grounds, including skin colour, race, religion or ethnic origin, incurs a suspension lasting at least ten matches or a specified period of time, or any other appropriate sanction.*

*2 If one or more of a member association or club’s supporters engage in the behaviour described in paragraph 1, the member association or club responsible is punished with a minimum of a partial stadium closure.*

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<sup>1</sup> By Ivan Bykovskiy, sports lawyer at RUIZ-HUERTA & CRESPO SPORTS LAWYERS –www.ruizcrespo.com

<sup>2</sup> Social Psychology Quarterly, Vol. 66, No. 4, Special Issue: Race, Racism, and Discrimination (Dec., 2003), pp. 319-332, Lawrence D. Bobo and Cybelle Fox

*3 The following disciplinary measures apply in the event of recidivism: a) a second offence is punished with one match played behind closed doors and a fine of € 50,000; b) any subsequent offence is punished with more than one match behind closed doors, a stadium closure, the forfeiting of a match, the deduction of points or disqualification from the competition.*

*4 If the circumstances of the case require it, the competent disciplinary body may impose additional disciplinary measures on the member association or club responsible, such as the playing of one or more matches behind closed doors, a stadium closure, the forfeiting of a match, the deduction of points or disqualification from the competition.*

*5 If the match is suspended by the referee because of racist and/or discriminatory conduct, the match may be declared forfeit.*

*6 The above disciplinary measures may be combined with specific directives aimed at tackling such conduct.*

*7 All forms of ideological, political and religious propaganda are forbidden. If this provision is breached, paragraphs 1 to 6 above apply by analogy.”*

Back in 2009, UEFA has presented its **eleven values**, one of them being **respect**:

*Respect is a key principle of football. Respect for the game, integrity, diversity, dignity, players' health, rules, the referee, opponents and supporters. Our message is clear: zero tolerance against racism, violence and doping. Football unites people and transcends differences. The colour of the skin is invisible under the jersey and, for UEFA, this will always be so. Racism and any other forms of discrimination will never be tolerated. UEFA will not tolerate violence either on the pitch or in the stands. Football must set an example.<sup>3</sup>*

As it is clearly seen, UEFA has policy which can be characterised in the following: total non-comprehension and non-admission of racism or any other kind of discrimination on the field committed wither by players, supporters or officials. And sanctions definitely are as severe as possible for this kind of infractions.

The fight against racism is a high priority of UEFA who has a policy of zero tolerance towards racism and discrimination on the pitch and in the stands. All racist misbehaviours shall be considered as serious offences against disciplinary regulations and shall be punished regarding the circumstances and the previous records of every particular team or a person with the outmost severe sanctions.

But UEFA is not alone in this fight against racism and discrimination. Organisation named FARE (Football Against Racism in Europe) also has committed to tackle discrimination through football's inclusive power based on the principle that the game, as the most popular sport in the world, belongs to everyone and can propel social cohesion.

Fare combats all forms of discrimination, including racism, far-right nationalism, sexism, trans- and homophobia and discrimination against disabled people.<sup>4</sup>

FARE is an umbrella group of more than 100 NGOs (Non-governmental organizations), fan groups, migrant and ethnic minority organizations, individuals and members of the football family, including former players and representatives of professional clubs and players' unions, with representatives in around 40 countries around Europe.

Before each season, FARE presents to UEFA a work program detailing activities it has planned throughout the season. UEFA admits that FARE does not report incidents unless they have been directly observed by one of its neutral observers appointed and present at the match in question. However, UEFA does not leave to FARE to legally qualify the facts reported and does not necessarily feel bound by its assessment of them. And to sum up with this, FARE reports sent to UEFA are not considered by the latter as official report in the sense of article 37 of UEFA Disciplinary Regulations, but as Jurisdictional bodies of UEFA can use full variety of evidence, they have full right to consider FARE reports as essential evidence in the matter of racist or any other discriminatory behaviour.

FIFA also has implemented some measures in order to prohibit racism and other forms of discrimination in football field. Thus, FIFA Statutes contain following provision in the article 3:

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<sup>3</sup> <http://www.uefa.org/about-uefa/eleven-values/index.html>

<sup>4</sup> Official FARE web-site <http://www.farenet.org/>

*“Discrimination of any kind against a Country, private person or group of people on account of race, skin colour, ethnic, national or social origin, gender, language, religion, political opinion or any other opinion, wealth, birth or any other status, sexual orientation or any other reason is strictly prohibited and punishable by suspension or expulsion.”*

Provisions of FIFA Disciplinary Code about sanctions for discrimination follow this as well.

Article 58 of FIFA Disciplinary Code:

*“Discrimination*

*1. a) Anyone who offends the dignity of a person or group of persons through contemptuous, discriminatory or denigratory words or actions concerning race, colour, language, religion or origin shall be suspended for at least five matches. Furthermore, a stadium ban and a fine of at least CHF 20,000 shall be imposed. If the perpetrator is an official, the fine shall be at least CHF 30,000.*

*b) Where several persons (officials and/or players) from the same club or association simultaneously breach par. 1 a) or there are other aggravating circumstances, the team concerned may be deducted three points for a first offence and six points for a second offence; a further offence may result in relegation to a lower division. In the case of matches in which no points are awarded, the team may be disqualified from the competition.*

*2. a) Where supporters of a team breach par. 1 a) at a match, a fine of at least CHF 30,000 shall be imposed on the association or club concerned regardless of the question of culpable conduct or culpable oversight.*

*b) Serious offences may be punished with additional sanctions, in particular an order to play a match behind closed doors, the forfeit of a match, a points deduction or disqualification from the competition.*

*3. Spectators who breach par. 1 a) of this article shall receive a stadium ban of at least two years.”*

Last but not least, in recent FIFA circular no. 1369 dated 8 July 2013 FIFA also pronounced the way organization wants sanctions for racism and discrimination to be applied on national level:

*“[...] we wish to emphasise that the member associations are requested to take the appropriate steps to include in their own regulations in the near future the two-stage approach foreseen by the resolution:*

- For a first or minor offence, the sanctions of a warning, a fine and/or the playing of a match behind closed doors shall be applied.*

- For reoffenders or for serious incidents, sanctions such as point deductions, expulsion from a competition or relegation should be applied.”*

Therefore, even in the case that FIFA considers such infringement as “minor” (such characteristic is doubtful if we are speaking about racism and discrimination) the sanction for it is strict, as for repeated infringement – no excuses to the person committed and the most severe sanctions applied to the club or team involved.

Although it is important to understand that both FIFA and UEFA now are trying to take their first steps in the fight against discrimination – measures which are most important and crucial. However these organizations already realized that sanctions for infringements should not be the main way of this fight, as they only penalize violator, but have less preventive effect. With the “Respect” company UEFA tries to implement the idea of racial, ethical and universal equality of everyone in the football field and outside of it. However, the task of influencing the mind of people in the way of total inadmissibility of discrimination is without any doubt more difficult than just sanctioning for violations and takes more time to become perpetuated and accepted by people.

## **Governmental framework**

Football organizations are not alone in their fight against racism and discrimination. United Nations has elaborated and adopted International Convention on the Elimination of All Forms of Racial Discrimination which entered into force in 1969. Almost every country in the world has signed and ratified this convention. The impact of this convention was significant and led to elaboration of laws and other internal legal instruments not only in the fight of governments

with different forms of discrimination on racial base, but also in the matters of prevention of such discrimination. The convention promotes understanding among all races and demands governments to penalize any form of racial discrimination.

It is logical that by means of only sports organizations powers it would be almost impossible to fight racism and discrimination in football and both FIFA and UEFA strongly need support of governments. And adoption of any legal instrument in this matter facilitates the task of these football governing bodies. And it is clearly undisputed that the governments and non-governmental structures as FIFA and UEFA shall reunite their forces and act together.

And of course FIFA and UEFA, being governing bodies for the world of football, shall influence their members – national football associations – through the mechanisms of regulatory framework, circulars, guidelines, workgroups, the worldwide spread of the same principles, values and ideals which are founded on people equality and total inadmissibility of any form of discrimination.

### **Particular cases of racism and discrimination in European football:**

In the following paragraphs we will discuss several cases happened in a last few years in European football that concerned racism and discrimination. However, it should be admitted that although FIFA and UEFA do their best to struggle these infractions, cases on racism are not very rare and happen from time to time.

#### **Atletico Madrid vs Olympique Marseille case**

Olympique Marseille lodged an official complaint with European football's ruling body after Atletico fans targeted several of their players during their match in Madrid on 1<sup>st</sup> of October 2008. Monkey chants were aimed at the French club's players, while the Marseille team bus was attacked after the match.

UEFA said Atletico must play their next two European matches, the first of which will be against Liverpool on October 22, at a stadium at least 300km away from Madrid. As a result, Spanish club was not very happy with such sanction and appealed the decision of UEFA to Court of Arbitration for Sport (CAS).

And CAS overturned a suspended second match behind closed doors and reduced a UEFA fine of €150,000 by half because it said there was not enough evidence to support allegations that Atletico fans made racist chants.

Having examined the arguments and evidence submitted by the parties, the CAS Panel, concluded that Atletico Madrid committed several serious security breaches during the match against Olympique Marseille which allowed the incidents to occur,” the court said in a statement.

CAS has pronounced that “in light of the fact that the racist acts alleged by UEFA could not be established with certainty” they had reduced the fine in half.

This case shows that UEFA follows the principle of strict liability of supporters while sanctioning the team, and especially for racist behaviour. This responsibility is given for offences committed by any person supporting the team before, during or after the match, irrespective of the fault of the club or association in question. However, this example also demonstrates that UEFA sometimes overreacts to offences of supporters.

#### **Tavecchio case**

Loud case has happened in Italy last year, whose FA president Carlo Tavecchio has been barred from holding any position with FIFA for six months over an alleged racist comment he made in August.

UEFA has imposed a similar sanction on the President of Italian FA; FIFA decision was another embarrassment for the FA, whose own investigation had cleared Tavecchio of any wrongdoing. Tavecchio's comment about a fictitious African player he named Opti Poba “eating bananas” during the campaign for the presidency made quite a noisy reaction.

He was addressing the subject of the lack of opportunities for young Italian players at professional clubs, and said: "In England, they identify the players coming in and, if they are professional, they are allowed to play. Here instead we get 'Opti Poba', who previously ate bananas and then suddenly becomes a first-team player with Lazio."

FIFA pronounced that Tavecchio would be "ineligible for any position as a FIFA official for a period of six months starting from October 7, 2014.

However, Mr. Tavecchio said: "It makes no practical difference to me. I haven't missed out on anything because of the ban." Not a very acceptable reaction when one is convicted in racist behaviour. But this also shows how FIFA and UEFA both were helpless as the case concerned a man with powers.

### **Dinamo Zagreb and "Cigani"**

Rather interesting case happened in the match between Dinamo Zagreb and Cs Fola Esch on 23 July 2013 when the supporters of Dinamo were shouting at their own Club's chairman racist chants contained word 'cigani' (i.e. gypsy). UEFA has opened disciplinary proceedings against Dinamo.

However, the Club argued the terminology of the word "gypsy" which in the opinion of the Club was not discriminatory at all and in a language of Roman people even meant "good man" and calling the person of this ethnic group a gypsy could not be in any case considered as discriminatory.

But UEFA Disciplinary bodies were not satisfied with this argumentation. The appeal of Dinamo on these grounds was rejected. For UEFA it was clear enough that even given the historical and social context to the word "gypsy", attacking a person by calling him a gypsy demonstrates a derogatory and discriminatory attitude. This word was definitely not a neutral as they were trying to assault a person with such chants. Thus, UEFA concluded that usage of this word remains a sign of intolerant behaviour, which cannot be accepted in the world of football, and as a consequence, sanctions imposed were upheld.

### **Conclusion**

Football is a complex sphere of everyday life. It unites people from different countries, races, social groups, religions. Like any other social phenomenon, football is capable of influencing people, their ideals and thoughts. For every stakeholder in the world of football, being major organizations like FIFA or UEFA, or national football associations or clubs it is essential to educate people of such basic values like equality and inadmissibility of discrimination. Having elaborated legal basis and framework of sanctions for any improper conduct, these organizations made first step in the difficult fight against different forms of discrimination. But they should not stop only on this, as more valuable will be prevention of such discrimination and not only struggle with its consequences. Football authorities should not act alone in this matter and governments should help them. The simplest examples which come to our mind are educational aspect where state has influence or propaganda in mass media – through these means the goal of elimination of discrimination problem could be if not resolved but at least reduced. First steps already taken, but there is still a lot to do.

## TERMINATION OF SPORTS CONTRACTS: A CRITICAL ANALYSIS OF THE KENYAN SITUATION\*

by *Kilili Nthiw'a*\*\*

*“Contract law is essentially a defensive scorched-earth battleground where the constant question is, “if my business partner was possessed by a brain-eating monster from beyond space time tomorrow, what is the worst thing they could do to me?” - Charles Stross.*

### **Abstract:**

The purpose of this article is to examine the terminations of sports contracts in Kenya in order to highlight a number of problems concerning their drafting and enforcement. It grapples with the issue of sports contracts in the country with a strong bias on the sport of Football, one of the sports with a professional league in the country, the current situation, why it needs to be changed and how it can be remedied.

**Keywords:** Global Sports Law, Lex Sportiva, Sports Contracts, Professional Sport.

Sport, just like Law is a profession. It therefore follows that one can engage in fulltime sports activities and be able to earn therefrom, their daily bread. Professional sport is distinguished from amateur sport in that, while in the former, athletes are paid to compete, people are involved in the latter only for recreation purposes and as a means of spending their free time. Scholars have proposed a variety of names for the models that describe sport in the world. Smith 1988<sup>1</sup> distinguishes between amateur and professional models. The former, which had its origins among the nineteenth century British aristocracy, eschews recreation and is solely a means of spending one's free time while the latter involves athletic scholarships and mass spectacles for commercial gain. It is a unique creation of sports persons that embraces commercialism as well as the recruitment and subsidization of highly skilled athletes.

A combination of factors like mass media and leisure have brought professional sport to the fore. While the media expect to be paid to cover activities, professional sport goes against this norm in that the media are required to pay for the privilege of covering such events including but not limited to the live broadcast of matches. As a result, sports organizations and/or teams can therefore command large incomes which allows athletes to take sport as the primary career. The effect of this is to allow players to dedicate their time to training towards improving their skills and physicality.

Being a form of employment therefore, it follows that an employment contract has to be signed between the player and entity that has employed them. This entity could be a football club in the case of Football, a Cricket Club in the case of the case of the sport of Cricket or any other entity for every imaginable sport in respect of which there is an organized professional league<sup>2</sup>. It is this contract that forms the basis of

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\*This article, written in Summer 2014 is part of my articles which are a culmination of my ongoing extensive research work on Lex Sportiva.

\*\*Independent Researcher, LL.B Student, University of Nairobi.

<sup>1</sup> Smith, R. A., (1988). *Sports and freedom: The rise of big-time college athletics*. New York: Oxford University Press.

<sup>2</sup> A professional league governs the competitiveness of the teams in that league. They make rules for the competition and discipline its members where necessary. The Kenyan Premier League in Kenya, the English Premier League in England, the Bundesliga in Germany and the Eredivise in Netherlands are examples of professional league in the sport of football while the National Basketball Association is an example of a professional league dealing with the Sport of Basketball. Professional leagues can form associations and the European Professional Football league is a perfect example of a union of the professional league in

engagement between the player and the club. It creates a binding legal relationship between the player and the club so that the player is expected to be available for all the club's activities that are related to the sport. In other words, the player, absent Third Party Ownership<sup>3</sup> plans, becomes the property of the club and this is on the understanding that the players can be transferred from the club to another before their contract expires, subject to the payment of the requisite compensation. If that happens, a transfer fee is paid to the club with which the player is registered.

Termination of contracts in sports is not a new concept. It was extensively canvassed by the European Court of Justice sitting in Luxembourg in the Bosman case<sup>4</sup> in December 1995. This landmark case set precedence in that it allowed players to move for free to other clubs on the expiry of their contracts. It is therefore an issue that has been properly addressed before and therefore a settled one. Assuming therefore a player's contract has not expired, how else can the club dispense with the player and thereby terminate the contract?

Respect for employment contracts is a universal concept, and the sports contract signed between a player and the club is not a different one. The most salient feature of all contracts is a provision on the termination of the contract. This provision will depend on the parties to the contract and the provision on termination must be one that is agreeable to both parties. The freedom of contract must be respected. Article 13 of the *FIFA Regulations on the status and Transfer of Players*<sup>5</sup>, on the Respect of Contract emphasizes this position when it provides that "A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement". This is to say that unless the parties, by themselves agree to terminate the contract; the contract will remain valid and cannot be terminated at the behest of one party.

Unlike other ordinary employment contracts, the drafting of sports contracts especially the ones respecting the sport of Football must adhere to several rules laid down by FIFA. The termination of sports contracts is not alien concept in Kenya. It is therefore not uncommon to hear that a certain football club has released six or so players<sup>6</sup>. This number of players released by clubs from their contracts is inordinately high and this is in part due to the ignorance on the part of both the player and the club on the existing regulations respecting the termination of contracts. The *FIFA Regulations on the status and Transfer of Players* (supra) (herein after, the Regulations) provide grounds under which a contract may be terminated. The general rule in Article 13 is that contracts may only be terminated upon their expiry or by mutual contracts. The regulations alluded to above provide only two grounds under which a contract

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Europe that deal with the sport of Football. See their website situated at [http://www.epfl-europeanleagues.com/about\\_us.htm](http://www.epfl-europeanleagues.com/about_us.htm) (accessed 8th August 2014).

<sup>3</sup> A third party finances a player's development in exchange for the rights to that player's future transfer fee. Sometimes that third party investor will also be used as a method of financing to purchase players for clubs that do not have the money to fund the deals on their own by purchasing part or the total ownership of the economic rights of that player. In turn, the third party investor will receive all or part of the transfer value of the player, depending on the share owned. The concept of Third Party Ownership of a player has been heavily criticized and has been banned in some European countries including England, France and Poland. In England, the transfers of Javier Mascherano and Carlos Tevez were the subject of an investigation by the English FA. A certain Joorabchian, an Iranian businessman owned all the economic rights of the two players, and a move for the two players was completed to the football club West Ham United. An independent panel of the Premier League found the signings of those two players to be in breach of league regulations. The English Premier League fined West Ham United in 5.5 Million pounds and demanded the amendment of the contract. The practice has also been banned by FIFA. (See the FIFA Regulations on the status and Transfer of Players. See particularly Article 18).

<sup>4</sup> Union Royale Belge des Sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des Associations Européennes de Football (UEFA) v Jean-Marc Bosman. Case C-415/93.

<sup>5</sup> The Fédération Internationale de Football Association which is the international governing body of association football, futsal and beach soccer has developed rules on the transfer of players, their contracts and disciplinary measures where contracts are not honoured. See [www.fifa.com](http://www.fifa.com)

<sup>6</sup> <http://www.futaa.com/football/article/gor-mahia-drops-three-players> where the Football Club, Gor Mahia in Kenya released three players, one whose contract had expired while the other two were dropped owing to the little playing time they have been receiving. See also <http://www.the-star.co.ke/news/article-96988/thika-utd-release-four-players-ahead-next-season-premier-league> where another Kenyan club, Thika united released four players, two on the basis of contract expiry while the other two were released to continue their football elsewhere.

may be terminated, i.e. under a just cause or under a sporting just cause. Article 16 of the regulations contains restrictions to the effect that contracts cannot be terminated during the season<sup>7</sup>.

The Kenyan situation is appalling because these players are released because of administrative reasons<sup>8</sup> and the effect of that release is that they begin looking for other clubs. They are not compensated by the employer, who is considered to have higher bargaining power and therefore despite their contract having been terminated, the players walk out empty handed.

The criterion for unilaterally terminating a contract according to the regulations is two pronged. Article 14 of the regulations provides that contracts may be terminated by either party without consequences where there is just cause. The effect of this provision is that there is no compensation paid by either party to the contract upon its termination and further that no sanctions are imposed. The phrase “*just cause*” has no standard definition and the application of Article 14 will therefore rely on the merits and peculiar circumstances of each case, so that where for instance has gone for 3 months without payment, they may terminate the contract. A FIFA documentary on this subject explains that “*However, should the violation persist for a long time or should many violations be cumulated over a certain period of time, then it is most probable that the breach of contract has reached such a level that the party suffering the breach is entitled to terminate the contract unilaterally.*”

The situation discussed above is the only scenario under which a contract can be terminated unilaterally without compensation to the other party or without any consequences thereto. There are consequences for the unlawful termination of a contract which is the termination of a contract without a just cause. The regulations provide that the party in breach shall compensate the other and that such compensation, though dependent on the law of the country, shall be based on such factors as the length of the contract and the durations therefore remaining, the specificity of the contract and the amount of fees and expenses paid to the former club (if any) amortized over the term of the contract. The situation above, where it arises can be remedied as above but that has never been the case in Kenya and this is partly due to the presence of unfair termination clauses in the contracts of the players, which tend to give the employer (club) more bargaining power.

Article 15 of the regulations addresses the other limb of termination of contracts. The provision is that “*An established professional who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player’s circumstances in the appraisal of such cases. The existence of sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered*”. This provision can only be exercised by the player only. Neither of the two grounds discussed above have been satisfied in any situation in Kenya where players have been released by their clubs.

Having discussed the current situation, there is no denying that it needs to be changed and that the authorities need to acquaint themselves properly with the legislation governing the status and transfer of players. It is apparent that both the clubs and the players are ignorant of the regulations and this has haunted the players since it is them that suffer. The situation has not been made easier by the capricious management at the clubs who are keen to draft contacts that appear like it is they (club) that are doing the player a favour at the clubs by signing him to play for them. This has resulted to the infringement of the right of the players and the absence of release clauses in the contracts is in itself a breach of Article 35 of the Constitution of Kenya, a domestic law that finds great application in contract law in Kenya.

I have proposed a three pronged approach for remedying the situation. The contracts need to have a release clause. A release clause provides the grounds under which the contract of a player will be terminated. Such grounds will be agreeable to both parties and they will, needless to say, provide the

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<sup>7</sup> A season is defined as the period starting with the first official match of the relevant national league championship and ending with the last official match of the relevant national league championship.

<sup>8</sup> <http://www.futaa.com/football/article/thika-united-releases-four>



player with the much needed security. This will be so because the player is aware that the contract cannot be unilaterally terminated by the club at its behest and any termination is only possible if they (player) agree to it. That way, the player is sure that the minimum they will play for the club is for the duration of the contract unless they transfer to another club before their contract expires, in line with the regulations.

The players also need to be educated on their rights. If they can, it is advisable that players get represented by agents who negotiate terms on their behalf. In Europe, where the sport of football is highly developed, players usually have agents and it is such agents who represent the players in all dealings with the club. Such agents are usually knowledgeable persons who make sure that the contracts entered in to are conclusive and address all probable circumstances.

Finally, the authorities, namely, the Football Kenya Federation, the Kenya Premier League Board and the Ministry of Sports should draft and enforce regulations that protect the game's most important asset: the player. This is possible through putting in place mechanisms that ensure that clubs that act in breach of the regulations laid down by FIFA, CAF and the FKF. It is also imperative that a judicial system of dealing with disputes respecting contract or other sports disputes is established in Kenya. The recently enacted Sports Act, No 25 of 2013, which is yet to be fully implemented, provides at Section 55 for the establishment of a Sports Dispute Tribunal to arbitrate on all matters regarding sports in Kenya. Such a tribunal is yet to be formed. Sound domestic rules are required and their enforcement, coupled with the implementation of the FIFA regulations constitutes one sure way of dealing with this menace conclusively.