

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

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### *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.iler2012.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 inextricable 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-manes/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

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<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

<sup>165</sup>

<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