

**Addis Ababa University**  
**College of Law and Governance**  
**School of Law**

**International Law Governing Doping in Sports vis-a-vis the Ethiopian Anti-Doping Legal  
and Institutional Framework**

A Thesis submitted in Partial Fulfillment of the Requirements for Master of Laws (LLM) in  
Public International Law

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## **Declaration**

I, undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used for the thesis have been duly acknowledged.

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Rediet Seyoum

February, 2017

This thesis is submitted for examination with my approval as an advisor to the candidate.

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Tshai Wada (Associate Professor)

February, 2017

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## **List of Acronyms**

<b><i>CAS</i></b>	Court of Arbitration for Sport
<b><i>COP</i></b>	Conference of Parties
<b><i>EU</i></b>	European Union
<b><i>IAAF</i></b>	International Association of Athletics Federations
<b><i>IF</i></b>	International Federation
<b><i>IOC</i></b>	International Olympic Committee
<b><i>ISL</i></b>	International Standards for Laboratories
<b><i>ISPPP</i></b>	International Standard for Protection of Privacy and Personal Information
<b><i>ISTI</i></b>	International Standard for Testing and Investigations
<b><i>ISTUE</i></b>	International Standards for Therapeutic Use Exceptions
<b><i>NADO</i></b>	National Anti-Doping Organization
<b><i>NF</i></b>	National Federation
<b><i>NOC</i></b>	National Olympic Committee
<b><i>OMADC</i></b>	Olympic Movement Anti-Doping Code
<b><i>PED</i></b>	Performance Enhancing Drug
<b><i>RADO</i></b>	Regional Anti-Doping Organization
<b><i>UNESCO</i></b>	United Nations Educational, Scientific and Cultural Organization
<b><i>WADA</i></b>	World Anti-Doping Agency

## Introduction

The need to eradicate doping from sports has brought about a greater cooperation between private sports institutions and public authorities both at the international and national levels. The World Anti-Doping Code (hereinafter the Code) and World Anti-Doping Agency (hereinafter WADA) are at the center of the international regulatory framework created to abolish doping in sports. However, this framework is complemented by the adoption of instruments under public international law. The International Convention Against-Doping in Sports adopted by UNESCO (hereinafter the Convention) is the prominent example of such instruments. Literatures on the regulation of doping in sports mainly focus on the framework created by the Code and WADA. By using qualitative research methodology, this study provides detailed discussions on the normative and institutional frameworks created by the Convention in an attempt to show its relationship with the Code. In addition, the study examines how the Ethiopian domestic legal and intuitional framework designed to combat doping in sports fits into this international framework.

The study is organized in five chapters. Chapter one is the introductory chapter containing the background of the study, statement the problem, research questions, objective, scope of the study, research methodology and design, data analysis strategy and method of research participants selection. Chapter two presents the history, definition of doping in sports as well as the rationales for its prohibition. The problems encountered in defining doping and the justifications for its prohibition as stipulated under the Convention and the Code are discussed under this chapter. These justifications are not above criticism and arguments raised against them are also presented under the chapter.

Chapter three is devoted to discussions on the regulation of doping at the international level. A detailed examination of the international legal framework created by Convention and its interaction with the Code is presented under this chapter. At an institutional level, the chapter discusses the mandate and function of the Conference of Parties (hereinafter the COP) of the Convention and its interaction with WADA. These discussions reveal the role played by the Convention and its COP which is creating a unified anti-doping framework that is in harmony with the Code. The effectiveness of the COP in monitoring the implementation of the Convention is also assessed under this chapter.

Chapter four studies the Ethiopian anti-doping regime. The national legal and institutional structures for the regulation of doping in sports are examined under this chapter. Regarding legal measures, the country has ratified the Convention and has criminalized doping under Article 526 of the Criminal Code. This chapter discusses this criminal provision and issues that can arise in the criminal prosecution of athletes who are found to be doping offenders under the Code. The chapter also identifies and discusses the work of the national institution that has a mandate over the issue of doping in sports. Moreover, these domestic frameworks are assessed for their conformity to the Convention.

Chapter five is the last chapter presenting the conclusions to the study and recommendations. The study has shown the Convention's inability to monitor its proper implementation as well as its lack of enforcement mechanisms. On the other hand, the hybrid public-private structure of WADA and the hierarchical structure of The Olympic Movement enable the Code to have a strong enforcement mechanism. This fact together with the legal recognition the Convention bestows on the Code and on WADA as the leader of the world anti-doping program has enabled WADA to monitor the implementation of both the Code and the Convention. And the need to avoid sanctions from WADA has provided signatories to the Convention with the incentive to uphold their commitments under it.

The study revealed that Ethiopia's efforts to combat doping in sports were significantly revamped after the country received threat of sanctions from WADA and IAAF in December, 2015. Prior to that, the country was reluctant to take concerted policy and institutional measures to combat doping domestically. The study also revealed that the country's domestic anti-doping measures have enabled it to be in compliance with the Convention. However, these measures were not enough to enforce the Code domestically.

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# Chapter One

## Introduction

### 1.1. Background of the Study

Questions ranging from its existence to what it means and what it constitutes surround the concept of international sports law. While most contemporary scholars on the field agree that by now a separate legal field for the regulation and governance of sports both at the national and international level exists, there is still no consensus on the correct terminology that should identify the corpus of norms created and developed by private international sports governing bodies and institutions under public international law.<sup>1</sup> This is mainly because the central role of governing organized sports is undertaken by autonomous private international organizations such as the International Olympic Committee (IOC) and various International Federations (IFs).<sup>2</sup>

The traditional structure of organized sports could be defined as a multi-level top-down structure which includes clubs, leagues and National Federations (NFs) and IFs, on the one hand, and National Olympic Committees (NOCs) and the IOC on the other.<sup>3</sup> The IOC and IFs are created in accordance with private domestic laws whose members are regional and national sporting associations that have been admitted into membership.<sup>4</sup> They take decisions that can have profound impacts on the careers of sportspeople together with important economic

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<sup>1</sup> The classic representative of the traditional view which holds that there is no separate field of law to be identified as 'sports law' is Edward Grayson. He claims that what is termed as 'sports law' is nothing more and nothing other than an amalgamation of elements from different substantive areas of national law that are relevant in the context of sport and suggest the term 'sport and the law' to identify the discipline., R. C.R. Siekmann, "What is Sports Law? Lex Sportiva and Lex Ludica: a Reassessment of Content and Terminology", *The International Sports Law Journal*, 2011/3-4/, (2011), P. 3., at: ([http://www.asser.nl/media/2072/islj\\_20113-4.pdf](http://www.asser.nl/media/2072/islj_20113-4.pdf)), accessed on May, 17, 2016,. On the other hand, scholars like Franck Latty, Ken Foster, Robert C.R. Siekmann, Lorenzo Casini, and James A.R. Nafzige represent the contemporary view that argues sports law has ripened into as a separate field in law.

<sup>2</sup> K. Foster, "Is There a Global Sports Law", *The International Sports Law Journal*, 2012/1-2/, (2012), p. 1., at: ([http://www.springer.com/cda/content/document/cda\\_downloaddocument/9789067048286-c2.pdf?SGWID=0-0-45-1293560-p174256763](http://www.springer.com/cda/content/document/cda_downloaddocument/9789067048286-c2.pdf?SGWID=0-0-45-1293560-p174256763)), accessed on May, 17, 2016.

<sup>3</sup> C. Pérez González, "International Sports Law And The Fight Against Doping: An Analysis From an International Human Rights Law Perspective", edited by Christina Binder, Photini Pazartsis and Mario Prost, *European Society Of International Law Conference Paper Series, Conference Paper*, Vol.4, No.5, (2014), at: (<http://ssrn.com/abstract=2546141>), accessed on May, 17, 2016, P.3. The IOC recognizes only one IF for each sport, and only one NOC per country. The National Federations which are charged with the regulation of each sport at the national level are then associated to their respective IFs and NOC. This structure has been described as a "double pyramid", one relating to the relationship of IOC with the NOCs, the other relating to the relationship of the IFs to the NFs, Ibid.

<sup>4</sup> Ibid

consequences.<sup>5</sup> They avoid judicial intervention from national courts by commanding a private dispute settlement mechanism through national and international sports arbitrations, the Court of Arbitration for Sport (CAS) being the supreme dispute settlement body of the system.<sup>6</sup> These private sports organizations claim for a so-called “sport specificity” as a way to preserve regulatory autonomy and maintain in force private sporting rules, their own *lex sportiva*.<sup>7</sup>

Public international law only intervenes infrequently in the field of sports. For instance, Wax recognizes five areas of sport regulated by public international law. These are, the struggle against Apartheid and other forms of prejudice and discrimination in sport, peacekeeping during the Olympic Games, preventing football hooliganism and combating spectator violence in sport, preventing and fighting doping in sport, and the question of recognizing a ‘right to sport’ as a human right.<sup>8</sup>

Doping is among the major issues facing the world of sports. At the international level, the need to prevent doping in sport has brought about an enhanced role to be played by international law in the monopolistic self-regulation of sport. The first international instrument dealing with the issue of doping in sport was adopted at a regional level in the European Union (EU) in 1989.<sup>9</sup> After a series of Declarations, the last being the 2003 Copenhagen Declaration, UNESCO adopted the Convention setting the first universal legal framework to deal with the problem of doping in sport.<sup>10</sup> The rapid pace at which governments have adhered to this international

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<sup>5</sup> Foster, cited above at note 2, p. 1.

<sup>6</sup> González, cited above at note 3. Whereas all IFs recognize arbitration as the sole dispute settlement mechanism, almost all of them have recognized the jurisdiction of the CAS as the supreme dispute settlement body, *Ibid*. For instance, Rule 61(2) of the Olympic Charter states that “Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration.” Moreover, the same rule provides for the finality of the CAS decisions., Rule 61 of the Olympic Charter, adopted by International Olympic Committee, in force as from 2, August, 2015, at: ([http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf)), accessed on May, 17, 2016.

<sup>7</sup> *Ibid*

<sup>8</sup> A. Wax, “Public International Sports Law - A ‘Forgotten’ Discipline?”, *The International Sports Law Journal*, 2010/3-4, (2010), P, 25., at: ([http://www.asser.nl/media/2071/islj\\_2010,3-4.pdf](http://www.asser.nl/media/2071/islj_2010,3-4.pdf)), accessed on May, 17, 2016., The 1985 UN International Convention against Apartheid in Sports and the 1981 Nairobi International Treaty on the protection of the Olympic Symbol of the Five Rings can be mentioned in this regard.

<sup>9</sup> EU Anti-Doping Convention, done at Strasbourg, France, 1989, entry into force, 1, March, 1990, at: ([www.coe.int/t/dg4/sport/Source/CONV\\_2009\\_135\\_EN.pdf](http://www.coe.int/t/dg4/sport/Source/CONV_2009_135_EN.pdf)), accessed on May, 12, 2016.

<sup>10</sup> UNESCO International Convention Against Doping In Sport, done in Paris, France, 2005, entry into force 1, February, 2007, at: (<http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport>), accessed on May, 12, 2016.

instrument is without precedent.<sup>11</sup> It is the most successful convention in the history of UNESCO in terms of speed of development and entry into force.<sup>12</sup> The Convention establishes a Conference of Parties (COP) as its monitoring mechanism.<sup>13</sup>

The regulation of doping in sports is not, however, initiated by the adoption of these regional and international instruments. It was IFs that were responsible for the formulation of anti-doping rules applicable for their respective sports and the duty of drug testing was left to NOCs.<sup>14</sup> Policy development was fragmented, with IFs developing different test standards, different prohibited substances lists, and different sanctions.<sup>15</sup> Prior to the adoption of the Convention, the attempt to create a harmonized anti-doping policy at the international level was undertaken by the IOC. Even though the IOC's attempt dates back to 1967, it was in response to increasing doping scandals associated with the 1998 Tour de France tournament that the IOC convened a World Conference in Sport in Lausanne, Switzerland in February 1999.<sup>16</sup> The Declaration on Doping in Sport approved in the framework of the conference proposed the creation of the first independent international anti-doping agency.<sup>17</sup> Following this, WADA was created in November 1999 to coordinate, harmonize and monitor efforts against doping in sports at the international level.<sup>18</sup> WADA is a private foundation incorporated under Art 80 of Swiss Civil Law.<sup>19</sup> However, with respect to its institutional structure, WADA is a hybrid private-public international organization with equal representation from The Olympic Movement and government bodies mostly National Anti-Doping Organizations (NADOs) of states.<sup>20</sup>

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<sup>11</sup> Conference of Parties to the International Convention against Doping in Sport, First Session, Paris, UNESCO Headquarters, February, 5-7, 2007, ICDS/1CP/Doc. 5, at:

(<http://unesdoc.unesco.org/images/0015/001524/152412e.pdf>), accessed on September, 3, 2016.

<sup>12</sup> Ibid

<sup>13</sup> Art 28 of the Convention.

<sup>14</sup> M. Hard, "Caught in the Net: Athletes' Rights and the World Anti-doping Agency", Southern California Interdisciplinary Law Journal, Vol. 19, (2010), p, 538, at: (<http://mylaw2.usc.edu/why/students/orgs/ilj/assets/docs/19-3%20Hard.pdf>), accessed on May, 17, 2016.

<sup>15</sup> Ibid

<sup>16</sup> González, cited above at note 3, p,10.

<sup>17</sup> Ibid

<sup>18</sup> Constitutive Instrument of the World Anti-Doping Agency, Art 4, revised version, done at Lausanne, Switzerland, July, 2014, at: (<https://www.wada-ama.org/en/resources/legal/revised-statutes>), accessed on 21, September, 2016.

<sup>19</sup> Art 1 Constitutive Instrument of the World Anti-Doping Agency.

<sup>20</sup> Article 5 of the Constitutive Instrument of the WADA. Both The Olympic Movement and government authorities contribute equally to the budget of the WADA, Article 6 (6) of the Constitutive Instrument of the WADA.

The Code first entered into force in 2004 under the auspices of WADA and the latest revised version of the Code entered into force in 2015.<sup>21</sup> To date, all members of The Olympic Movement, 112 NADOs, and thirty-one IFs that do not compete in the Olympics but are recognized by the IOC (e.g. bowling, chess, golf, motor sports, etc.) are signatories of the Code.<sup>22</sup> Besides the Code, WADA sets up five international standards that form part of the international anti-doping framework. These are the Prohibited List which includes the Prohibited Substances and Methods List, International Standards for Therapeutic Use Exemptions (ISTUE), International Standards for Laboratories (ISL), International Standard for Testing and Investigations (ISTI) and International Standard for Protection of Privacy and Personal Information (ISPPPI).<sup>23</sup>

Ethiopia is a nation that is able to gain longstanding fame and acclaim in international sportstournaments due to the excellence of its athletes mainly in track events. Until now there have never been any doping accusations made against any one of the country's athletes where they compete in international sports events representing the nation.<sup>24</sup> However, Ethiopian athletes competing in athletics have been accused of using performance enhancing drugs (PEDs) while participating in private internationalathleticstournaments.<sup>25</sup> The first instance of such accusations was reported in 2005 against a male athlete competing in half marathon in India.<sup>26</sup> Since then there have been different accusations against Ethiopian athletes for using PEDs in competitions, all in the field of athletics.<sup>27</sup>

The country is among the early nations to sign and ratify the Convention. Its commitment to combat doping in sports started with signing the Convention in 2005 and ratifying it in 2007.<sup>28</sup> Ethiopia has also criminalized doping under Art 526 of the 2005 Criminal Code.<sup>29</sup> The

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<sup>21</sup> World Anti-Doping Code, Adopted by World Anti-Doping Agency Foundation Board, done at Johannesburg, South Africa, 2013, entry into force, 1, January, 2015., at: (<https://www.wada-ama.org/en/what-we-do/the-code>), last visited on January, 21, 2017. All discussions of the Code are based on this revised version.

<sup>22</sup> (<https://www.wada-ama.org/en/what-we-do/the-code-signatories>), last visited on May, 21, 2016.

<sup>23</sup> (<https://www.wada-ama.org/en/international-standards>), last visited on May, 21, 2016.

<sup>24</sup> Interview with Dr. Ayalew Telahun, Sports Science, Sports Medicine and Anti-Doping Directorate Director at the Ethiopian Ministry of Youth and Sport, 28, November, 2016, Addis Ababa.

<sup>25</sup> Ibid

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> The Convention Against Doping in Sport Ratification Proclamation, Proc. No. 554/2007, Neg. Gaz.

Ethiopian Ministry of Youth and Sports (hereinafter the Ministry) is a member of WADA and The Ethiopian National Anti-Doping Office (hereinafter Eth-NADO) is a signatory to the Code.<sup>30</sup>

## 1.2.Statement of the Problem

The existence of a developed, autonomous and private regulatory order at the international level has made public international law to play a subsidiary role in the regulation of sports and the right terminology to designate the rules of sport created by the private and public regulatory spheres has provided scholars with a fertile ground for discussion. What should the term ‘international sports law’ refer to? Should it be used to refer to the rules created by the private sphere or should it refer to the application of international law to the regulation of sport? Moreover, the emergence of WADA as an international organization constituted of both private sport institutions and government bodies and the Code which serves as the international standard setting instrument for anti-doping efforts further complicate the clear demarcation of the scope of international sports law.

The one area where governments are playing an increasingly important role in sports is in the fight against doping. Even if the problem has existed for a long time, doping has been considered as the private concern of sports organization until recent times.<sup>31</sup> The international community assumed the existence of a role to be played by governments in the fight against doping and has adopted the Convention. It is by dint of this Convention that states are obliged to join the ongoing international effort led by WADA in the prevention of doping in sport as the Code, a fruit of a private foundation, cannot bind states under public international law. However, the Code serves as the pillar of the world anti-doping program and it has acquired legal recognition from the Convention under Article 4(1). This article commands party states to abide by the principles of the Code in their domestic anti-doping measures. WADA’s Prohibited List and the International Standard for Therapeutic Use Exemptions (ISTUE) are also made integral parts of the Convention pursuant to Article 4(3). Moreover, the Convention commands state parties to

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13<sup>th</sup> Year, No. 65.

<sup>29</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004.

<sup>30</sup> (<https://www.wada-ama.org/en/what-we-do/the-code/signatories>), last visited on May, 21, 2016

<sup>31</sup> González, cited above at note 3, p,1

cooperate with WADA in its mission and invite it to be present as an advisory body to the COP(Articles 14, 15, 16 and 29). It is significant that the Code, a private arrangement, and the extensive system of privateinternational sporting rules based on the Code have been rapidly granted important legal recognition by the UNESCO Convention and many national governments.<sup>32</sup>

Ethiopia has assumed an obligation to fight doping under the Convention. This Convention demands state parties to adopt the necessary legal, policy and administrative frameworks required for its implementation (Art 5 of the Convention). Proclamation No. 554/2007 ratifies the Convention and empowers, under Art 3, the Ministry to undertakeall the necessary measures needed for the implementation of the Convention.<sup>33</sup>TheMinistry is also a member of the WADAand Eth-NADO is a signatory to the Code.These international commitmentsneed to be complemented by adequate national legal and institutional measures so that the country can combat doping in sports and fulfill its commitments under the Convention.However,the country's efforts to enact national anti-doping legislations are highly fragmented andthere were no concerted efforts to create anational autonomous anti-doping institutionfor monitoringthe implementation of the Convention and the Code until December, 2015.<sup>34</sup>In December, 2015, WADA communicated that the country's failure to take adequate domestic measures for the implementation of the Codecanresult insanctions being imposed on Eth-NADO.<sup>35</sup>Moreover, the country's legal experiments in dealing with the problem of doping and its anti-doping efforts have never been able to receiveany academic attention so far. Therefore, this study examines the status of country'slegallandscape governing the problem of doping in sports as well asthe national institutionauthorized to lead the country's anti-doping efforts. The study also assesses whether or not thedomestic measures taken by the country can be judged as living up to its obligations under the Convention.

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<sup>32</sup> M. J. Mitten and H. Opie, "Sports Law": Implications for the Development of International, Comparative, And National Law and Global Dispute Resolution", Marquette University Law School Legal Studies Research Paper Series, No. 10-31, (June, 2010), p, 13., at:(<http://ssrn.com/abstract=1625919>), accessed on May 19, 2016,.

<sup>33</sup> The Convention Against Doping in Sport Ratification Proclamation, cited above at note 28.

<sup>34</sup>Interview with Ato Mengistu Abebe, Legal Affairs Directorate Director at the Ethiopian Ministry of Youth and Sport, 15, November, 2016, Addis Ababa and Interview with Dr. Ayalew Telahun.

<sup>35</sup>Interview with Dr. Ayalew Telahun, Interview with Ato Mengistu Abebe, and Interview with Dr. Bezabeh Wolde, a member of the Ethiopian Athletics Federation Executive Committee and a Lecturer at Addis Ababa University Sports Science Department, 16, November, 2016, Addis Ababa.

### **1.3. Research Questions**

This research attempts to address these central questions.

- What is the definition of doping in sports and what are the justifications for its prohibition?
- What is the relationship between the Convention and the Code both at the normative and institutional levels?
- What are the laws governing doping in sports in Ethiopia and what is the domestic anti-doping institutional structure?
- Are the domestic measures adopted by the country enough to fulfill its commitments under the Convention?

### **1.4. Objectives of the Study**

The primary objective of this study is analyzing the Ethiopian anti-doping legal and institutional framework in light of the Convention.

More specifically the paper examines;

- The meaning of doping in sports and the rationales for its regulation.
- The nexus between the Convention and the Code.

### **1.5. Scope of the Study**

The scope of the study is limited in content. At the international level, it is limited to studying the application of the Convention in governing the problem of doping in sport and its interaction with the Code and WADA. At the national level, the Ethiopian legal and institutional framework on the regulation of doping are explored and assessed for their compliance to the country's commitment under the Convention. The paper does not cover discussions on the jurisprudence of CAS and only include introductory discussion of the conceptual and terminological debates ensuing from the interaction between the application of public international law in the regulation of sport and the private global legal order created by private international sport institutions. The regional legal framework established by the EU for the prevention of doping in sport is also outside the scope of this study.

### **1.6. Significance of the Study**

Ethiopia is not immune from the problem of doping. The country needs to strengthen its efforts of preventing doping in sports and should strive to elevate its standards to those required by the international obligations it has assumed. The existence of academic researches on this area can contribute to the efforts the country is taking for the prevention of doping in sports. This thesis aspires to fulfill the gap existing in the academia regarding Ethiopia's legal and intuitional anti-doping experiment. And it may be helpful to those who will be interested to investigate the area further. It might also initiate inquiries to be made into the interaction between sports and the law in the country. The findings of the study can help to evaluate the efforts the country is taking to fulfill its international obligation of preventing doping in sports and can also serve as an input to any policy adjustments or institutional reforms which could be made on the subject.

### **1.7. Limitations to the Study**

This research is novel in its attempt to study Ethiopia's normative and institutional framework of controlling doping in sport. As such, the lack of academic works on this specific topic inhibited the researcher from making references or comparative analysis. The discussions made under the paper are also constrained by space limitation. The busy schedule of research participants is another problem that created shortage of time for conducting extensive and detailed interviews as desired.

### **1.8. Research Methodology and Design**

The methodology preferred to conduct this study is a qualitative one. This enabled the researcher to make an in depth assessment of primary and secondary sources of international law. The paper makes extensive analysis of international and national laws adopted for the regulation of doping in sports. Similarly, detailed analysis of standards created by the COP of the Convention, the Code and WADA are incorporated. The study also incorporated the views depicted in the existing literature on the topic of doping in sports. In addition, the researcher conducted semi-structured interviews with officials from the Ethiopian Ministry of Youth and Sport and Eth-NADO.



### **1.8.1.Selection of Research Participant**

Informant selection technique is based on purposive sampling method in both institutions. This method is chosen because it allows to access authorities and knowledgeable informants with the desired expertise on the area.

### **1.8.2.Data Analysis Strategy**

In qualitative research, generation and analysis of data are interwoven and take place concurrently.<sup>36</sup> Thus, the paper makes a thematic categorization and analysis of the primary and secondary data collected throughout the study. Finally, all descriptions are presented in a narrative form to provide a holistic picture of the subject under study.

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<sup>36</sup> C.J.W, *Research Design: Qualitative and Quantitative Approaches*, (2<sup>nd</sup> ed., 2003), p, 16., at: ([www.harvard.edu/fs/docs/2003\\_Creswell\\_A%20Framework%20for%20Design.pdf](http://www.harvard.edu/fs/docs/2003_Creswell_A%20Framework%20for%20Design.pdf)), accessed on May,17, 2016

## Chapter Two

### The Challenge of Doping

#### 2.1.Introduction

It necessary to have a clear definition of doping in sports in order to create a legitimate and effective anti-doping framework that aims to harmonize anti-doping rules across all sports and nations. The sanctions for committing a doping offence can have a devastating effect on the professional and personal life of an athlete. As such, athletes have the right to have notice of what behaviors and practices constitute a doping offence. Defining what exactly doping in sports is also essential in that it informs the justifications for its prohibition and the sanctioning of athletes who are in breach. However, the current working definitions of doping are subject to various criticisms and a definition of doping that can satisfactorily fulfill these purposes remains elusive. This chapter discusses the definitional conundrum surrounding the concept of doping in sports; the justifications posited for its prohibition and the criticisms raised against these justifications. The chapter opens by providing an overview on the history of doping in sport so as to provide a holistic introduction of the topic.

#### 2.2.A Brief History of Doping in Sport

The practice of enhancing performance through foreign substances or other artificial means is as old as competitive sport itself.<sup>37</sup> As early as BC 776, the Greek Olympians were reported to use substances such as dried figs, mushrooms, and strychnine to perform better.<sup>38</sup> The word itself is likely derived from the Dutch word, dop, the name of an alcoholic beverage made from grape skins and used by Zulu warriors to enhance their prowess in battle.<sup>39</sup> The term “doping” progressed into mainstream use in the early twentieth century, originally referring to drugging of racehorses.<sup>40</sup>

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<sup>37</sup>Å. Andrén –Sandberg, The History of Doping and Anti-Doping:- A Systematic Collection of Published Scientific Literature 2000-2015, (2015), p, 6 at: (<http://www.rf.se/globalassets/riksidrottsforbundet-rf-antidoping/dokument/forskning-och-statistik/the-anti-doping-library-anti-doping-history.pdf>), accessed on August, 27, 2016.

<sup>38</sup> Ibid

<sup>39</sup>R. Klaus Muller, “History of Doping and Doping Policy” in D. Thieme and P. Hemmersbach (eds.), Doping in Sports, Handbook of Experimental Pharmacology, (2010), Vol. 195, p, 1, at: (<http://www.springer.com/gp/book/9783540790877>), accessed on December, 28, 2016.

<sup>40</sup> Ibid.

The first instances of doping in modern times coincided with the revitalization of sporting events. The first documented case was in 1865, when Dutch swimmers used stimulants and not long afterwards, in the late 19th century, European cyclists were using a multitude of drugs – from caffeine to ether-coated sugar cubes to Vin Mariani, a cocaine-laced wine – in order to alleviate the pain and exhaustion resulting from their sport.<sup>41</sup> One of the most famous early cases of doping after the start of the modern Olympiad in 1896 is the case of Thomas Hicks who won the marathon in the Third Olympic Games in St. Louis in 1904.<sup>42</sup> Doctors were able to revive him after collapsing behind the finish line from eating raw eggs and taking many glasses of brandy laced with strychnine.<sup>43</sup>

A recrudescence in the use of PEDs in sports occurred after the creation of anabolic steroids or anabolic androgenic steroids (AAS) by the Nazi regime in Germany in the early 20<sup>th</sup> century.<sup>44</sup> When the Olympics were held in Nazi Germany in 1936, Germany won the overall medal count with 89 medals, and the United States came in second with 56 medals.<sup>45</sup> While there are no records confirming, or disproving, pervasive steroid use by the German team in those Olympics, circumstantial evidence argues that steroids at least played a role, particularly considering that a mere four years earlier, at the 1932 Olympics, the United States came in first with 102 medals, while Germany came in ninth, with only 20 medals.<sup>46</sup>

The post Second World War sports climate reflected the political rivalry of the Cold War between Western and Eastern bloc nations. The most cited example of systematic use of AAS in elite sports is that of the Soviet weightlifting team in the 1952 and 1956 Olympics.<sup>47</sup> The U.S. engaged in a similar practice so as not to be left behind. Dr John Ziegler, a physician associated with the US weightlifting team, learned about the use of AAS by the Soviet team at the

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<sup>41</sup> Sandberg, cited above at note 36, p. 15.

<sup>42</sup> Muller, cited above at note 37, vol.135, p. 3.

<sup>43</sup> Ibid

<sup>44</sup> Sandberg, cited above at note 37, p. 55.

<sup>45</sup> Ibid

<sup>46</sup> Ibid

<sup>47</sup> C. E. Yesalis and M. S. Bahrke, "History of Doping in Sport", *International Sports Studies*, Vol. 24, no. 1, (2002), p. 50., at: (<http://www.library.la84.org/SportsLibrary/ISS/ISS2401/ISS2401e.pdf>), accessed on December, 28, 2016.

weightlifting championships in Vienna in 1954, and experimented with testosterone on himself and other weightlifters in the York Barbell Club, New York.<sup>48</sup>

The most extreme instance of state sponsored doping in sports history is the case of East Germany. The German Democratic Republic government administered doping program to its athletes, particularly its female athletes, contributed to their domination of track & field and swimming events for the two decades spanning the 1970s and 1980s.<sup>49</sup> In the 1970s, East Germany implemented a national plan, “State Plan 14.25,” which provided top athletes with little blue pills, under the guise that they were vitamins, when in fact they were the German-manufactured steroid, Oral Turinabol.<sup>50</sup> At the 1976 Olympic Games in Montreal, the East German women’s swim team achieved unparalleled success by winning an amazing number of events, and was known as the “Wonder Girls” due to their dominance.<sup>51</sup> However, they were pumped with such a massive amount of steroids that for many of them, their voices had dropped to a baritone and the androgenization of their bodies, including facial hair and a pronounced Adam’s apple, was apparent to everyone.<sup>52</sup> The masculine appearances of a number of female track and field athletes from the Eastern bloc countries in the mid-1960s led to speculation that they were either hermaphrodites or men disguised as women and initiated a gender specific chromosome test at the European Cup in 1967.<sup>53</sup> In November 2001, the German parliament announced the establishment of a \$1.81 million fund to compensate athletes who were victims of Plan 14.25.<sup>54</sup>

Public opinion adds significant impetus in initiating and legitimizing anti-doping policies. A surge of public indignation and protest against the use of drugs by athletes was witnessed after the televised death of 29 year old English cyclist Tom Simpson. Simpson collapsed and died

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<sup>48</sup> Ibid

<sup>49</sup> E. H. Jurith and B. Koenig, “The United States’ and International Response to the Problem of Doping in Sports”, *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 12, Issue 2, Article 5, (2002), p. 465, at: (<http://ir.lawnet.fordham.edu/iplj/>), accessed on September, 25, 2016.

<sup>50</sup> Ibid

<sup>51</sup> Id, p, 466

<sup>52</sup> Ibid

<sup>53</sup> Sandberg, cited above 37, p, 57

<sup>54</sup> Jurith and Koenig, cited above at note 49, p. 465

during the 13<sup>th</sup> stage of the 1967 Tour De France.<sup>55</sup> The autopsy revealed high levels of methamphetamine in his system and he was also carrying a vial of methamphetamine on him at the time of his death.<sup>56</sup> It was following this event that the IOC introduced the testing of athletes. Another doping scandal that added fuel to the anti-doping effort in the late 1980s is the case of Ben Johnson. The Canadian 100 meter runner was able to beat his long time American competitor Carl Lewis at the 1988 Olympic Games in Seoul.<sup>57</sup> But he was stripped of his gold medal and banned for two years after testing positive for the anabolic steroid stanozolol.<sup>58</sup> Cyclist Willy Voet of the Festina team was arrested by French customs police for transporting PEDs in the 1998 Tour de France.<sup>59</sup> This arrest resulted in an extensive investigation which exposed the extent and 30+ year history of doping use in this sport and nick named the tournament Tour de Drugs and Tour of Shame.<sup>60</sup> The public scandal following from this arrest obliged the IOC to start efforts for the creation of a worldwide independent anti-doping agency which was WADA.

Yet another doping incident that provoked public sensation is the case of the cyclist Lance Armstrong. His genetic makeup and physiology (high VO<sub>2</sub>max, long femur, strong heavy build) coupled with his ambition and motivation enabled him at an early age to become one of the best 1-day cyclists in the world.<sup>61</sup> After recovering from testicular cancer, he returned to cycling and surprisingly excelled in the Tour de France, winning this hardest of endurance events 7 years running transforming from a 1-day to a 3-week endurance champion.<sup>62</sup> This dramatic transformation has led many to query how this is possible until he admitted to doping during his television interview with Oprah and was subsequently stripped of his seven Tour de France medals.<sup>63</sup>

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<sup>55</sup> Muller, cited above at note 39, vol.135, p, 7

<sup>56</sup> Ibid

<sup>57</sup> Jurith and Koenig, cited above at note 49, p, 467

<sup>58</sup> Ibid, He tested positive again in 1993 and was banned for life, Ibid.

<sup>59</sup> Sandberg, cited above 37, p, 57

<sup>60</sup> Ibid

<sup>61</sup> Id, p, 56. VO<sub>2</sub> max is the maximum capacity of an individual's body to use oxygen during activities and is the usual means to assess a person's physical fitness, Ibid.

<sup>62</sup> Ibid

<sup>63</sup> Ibid

The recent 2016 Olympics in Rio de Janeiro was eclipsed by accusations of state sponsored doping. Accusations of state-sponsored doping against Russia took center stage at this Olympics. Following suspicions regarding the involvement of the Russian government in doping operation in the country, on 19, May, 2016 the WADA appointed an Independent Person (IP), Prof. Richard McLaren, to investigate doping allegations at the 2014 Winter Olympics at Sochi.<sup>64</sup> Following the publication of the first part of the investigation report by WADA in 16, July, 2016, the IOC Executive Board (EB), in a decision passed on 24, July, 2016, considered all Russian athletes seeking entry to the 2016 Rio Olympic Games to be affected by a system subverting and manipulating the anti-doping system and set stringent requirements for all Russian athletes seeking participation in the 2016 Olympics.<sup>65</sup> It was Yulia Stepanova the Russian whistleblower who exposed the manipulation of the anti-doping system and corruption involving the WADA-accredited Moscow Anti-Doping Laboratory, the All-Russia Athletic Federation (ARAF) and the IAAF.<sup>66</sup> In a recent interview with the New York Times, the acting director of the Russian National Anti-Doping Agency referred to the Russian doping operation as an “institutional conspiracy”.<sup>67</sup>

### **2.3. Definition of Doping**

The fact that doping in sports has such a long history has not made it easy to define it. What exactly constitutes ‘doping’ is a thorny subject to address. In order to achieve excellence elite athletes push their limits by following a rigorously regimented exercise and dietary plans; consume various dietary supplements; make use of technological advances in their training and competition like sleeping in an oxygen tent, use special clothing, shoes or equipment; undergo surgeries and procedures to repair injured tendons, ligaments, and bones. But not all procedures are limited to injury repair. For example, some athletes undergo laser eye-corrective surgery (LASIK surgery) to improve their vision to better than 20/20.<sup>68</sup> When is it to be

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<sup>64</sup> (<http://www.wada-ama.org/en/resources/doping-control-process/McLaren-independent/investigation/report/part1>), last visited on 29, December, 2016.

<sup>65</sup> (<http://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016>), last visited on 29, December, 2016.

<sup>66</sup> Ibid

<sup>67</sup> (<http://mobile.nytimes.com/2016/12/27/sports/olympics/russia-doping/html>), last visited on 29, December, 2016.

<sup>68</sup> S. M. Sigman, “Are We All Dopes? A Behavioral Law and Economics Approach to Legal Regulation of

said that an acceptable means of enhancing performance has crossed the line to doping? Moreover, is establishing intent or *mens rea* required in order to say that a doping violation has been committed?

It was the IOC that first attempted to provide a definition of doping that would apply to all sports under the Olympic Movement. Prior to that, the definition of doping and the contents of a doping offence varied from one sport to another as they were stipulated by each IF. It was the IAAF that first banned the use of PEDs in 1928 even though testing athletes for stimulants did not occur until 1968 at the Summer Olympic Games held in Mexico City.<sup>69</sup> Besides the decision to establish WADA, the 1999 World Conference on Doping in Sport held in Lausanne, Switzerland, revised the 1995 IOC Medical Code (MC) which was the first instrument that unified the hitherto fragmented anti-doping regulations.<sup>70</sup> The revised MC is called the Olympic Movement Anti-Doping Code (OMADC).<sup>71</sup>

Under Article 2 (1) of Chapter II of the OMADC doping is defined as “...an expedient (substance or method) which is potentially harmful to athletes’ health and/or capable of enhancing their performance”. And under Article 2(2), doping is also “the presence in the athlete’s body of a substance or evidence of the use of a method where such substance or method appears on the list annexed to the present Code”. According to this definition, doping is the use of an expedient (substance or method) which is potentially harmful to athletes’ health; the use of an expedient which is capable of enhancing performance; the presence in the athlete’s body of a substance that appears on the IOC list of prohibited class of substances and methods, and the evidence of the use of a method that appears on the IOC list of prohibited class of substances and

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Doping in Sports”, Marquette Sports Law Review, Vol. 19, Issue 1, Article 7, (2008), p, 133., at: (<http://scholarship.law.marquette.edu/sportslaw/vol19/iss1/7/>), accessed on July, 25, 2016. Tiger Woods is one of the most prominent names among the many golfers, baseball players, football players and other athletes who have undergone LASIK, *Ibid*.

<sup>69</sup> Muller, cited above at note 39, vol.135, p, 3.

<sup>70</sup> J. Soek and E. Vrijman, “The Olympic Movement Anti-Doping Code: The Shepherd’s Courage”, The International Sports Law Journal, 2002/1, (2002), p, 8., at: ([http://www.asser.nl/media/2055/cms\\_sports\\_5\\_1\\_islj2002-1.pdf](http://www.asser.nl/media/2055/cms_sports_5_1_islj2002-1.pdf)), accessed on May 7, 2015.

<sup>71</sup> The Olympic Movement Anti-Doping Code, done at Lausanne, Switzerland, August, 1999, entry into force, 1<sup>st</sup> January, 2000, available at: (<http://www.fridykning.se/freediving/features/iocdopingpolicy.pdf>), accessed on May 13, 2015.

methods.<sup>72</sup> Although this four pronged definition of doping can be said to provide a definition on what constitutes “doping”, it still does not address the issue of culpability (guilt or negligence). Moreover, adopting an abstract definition of doping under Article 2(1), as the use of substances or methods that are potentially harmful to an athlete’s health or that can enhance an athlete’s performance, substances and methods that are not proscribed, presents sporting authorities with evidentiary problems in proving the potential performance enhancement effect or the harmfulness of the substances or methods used by an athlete.

Strict liability is the pillar of anti-doping regulation. It was adopted as a response to the daunting difficulty of establishing intent of use to sanction an athlete whose blood or urine sample has tested positive for a banned substance. What strict liability means is that the mere presence of a banned substance or the marker of a prohibited method in an athlete’s blood or urine specimen is enough to constitute a doping offence without having the need to establish intent or negligence on behalf of the athlete.<sup>73</sup> Article 2 (2) of the OMADC reflects the strict liability principle. The concept of intentional doping is also included under the OMADC. Under Article 1 of Chapter I of the OMADC, “Intentional doping means doping in circumstances where it is established, or may reasonably be presumed, that any Participant acted knowingly or in circumstances amounting to gross negligence”. Thus, “*intentional doping*” precedes the general definition of doping, of which it actually is an aggravated form.<sup>74</sup> Pursuant to Article 4 (1) of Chapter II of the OMADC, intentional doping can be proved by any means whatsoever, including presumption.

The procedures of establishing a doping offence, the different thresholds of sanctions as well as the procedures for arbitration and appeal processes are also provided under the OMADC. This instrument served as a blueprint for the World Anti-Doping Code adopted by WADA. Among

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<sup>72</sup> ‘Use’ is understood to mean by the OMADC pursuant to Article. 1, Chapter 1: ‘the application, ingestion, injection, consumption by any means whatsoever of any Prohibited Substance or Prohibited Method. Use includes counseling the use of, permitting the use of or condoning the use of any Prohibited Substance or Prohibited Method. A banned substance can also enter an athlete’s body through sexual intercourse with a person who has used the banned substance and would still make the athlete strictly liable for a doping offence, Hard, cited above at note 14, Vol., 19, p 542.

<sup>73</sup> R. Connolly, “Balancing the Justices in Anti-Doping Law: The Need to Ensure Fair Athletic Competition Through Effective Anti-Doping Programs vs. the Protection of Rights of Accused Athletes”, Virginia Sports And Entertainment Law Journal, Vol. 5.2, (2006), p, 59., at: (<http://www.peacepalacelibrary.nl/ebooks/files/3313433.pdf>), accessed on July 13, 2016.

<sup>74</sup> Soek and Vrijman, cited above at note 70, p, 11



the differences between the OMADC and the Code is the detailed and expansive definition of doping provided under the Code. Article 1 of the Code provides the definition of doping. Accordingly, doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2(1) through Article 2 (10) of the Code.<sup>75</sup>

There is no fundamental concept of doping that underlines the definitions of anti-doping rule violations provided under these provisions. Rather, the Code adopts a minutely detailed definition that accomplishes the task of formulating a comprehensive, loophole free and practical definition of doping that can be adopted by every signatory of the Code without any changes as put under Article 23.2.2 of the Code. For WADA and the Code, doping is no longer considered as a specified condemnable human act or the result of such an act, but rather a violation of the rules describing that act or result: doping is the violation of an anti-doping rule.<sup>76</sup> Doping is whatever the organizing bodies, or other authorities, define as doping.<sup>77</sup> As such violations of the anti-doping rule also comprise situations which are not directly considered doping offences in the classical sense of the word.<sup>78</sup> For instance, the possession of prohibited substances by an athlete's support personnel as provided under Article 2.6.2 of the Code is very far from an actual act of doping by the athlete.

Strict liability is explicitly provided in this definition of doping (Article 2.1.1 of the Code). This provision creates a duty on each athlete to avoid any prohibited substance from entering his/her body and fault is irrelevant in proving that a doping offence has been committed. It only

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<sup>75</sup> Article 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample, Article 2.2 Use or Attempted Use of a Prohibited Substance or a Prohibited Method, Article 2.3 Evading, Refusing or Failing to Submit to Sample Collection, Article 2.4 Whereabouts Failures, Article 2.5 Tampering, or Attempting to tamper, with any part of Doping Control, Article 2.6 Possession of Prohibited Substances and Methods, Article 2.7 Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method, Article 2.8 Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition, Article 2.9 Complicity Assisting, encouraging, aiding, abetting, conspiring, covering up or any other type of intentional complicity involving an anti-doping rule violation, Attempted anti-doping rule violation or violation of Article 10.12.1 by another Person, and Article 2.10 Prohibited Association.

<sup>76</sup> J. Soek, "The WADA World Anti-Doping Code: The Road to Harmonization", *The International Sports Law Journal*, 2003/2, (2003), p, 6., at: ([http://www.asser.nl/media/2059/cms\\_sports\\_1\\_1\\_islj2003-2.pdf](http://www.asser.nl/media/2059/cms_sports_1_1_islj2003-2.pdf)), accessed on May, 7, 2015.

<sup>77</sup> Ibid

<sup>78</sup> Ibid

becomes relevant in assessing the severity of punishments provided under Articles 10.1 through 10.13 of the Code. There are two types of penalties for an anti-doping rule violation stipulated under these provisions; disqualification from a particular competition which can be followed by subsequent forfeiture of medals, points and prize money, and suspension from future competition. If a performance-enhancing substance is found in an athlete's sample during a competition, the disqualification is automatic, regardless of whether the athlete obtained that illicit competitive advantage intentionally, negligently, or without fault.<sup>79</sup> The athlete is disqualified to ensure fairness for the other athletes taking part in the competition; the athlete ought to be disqualified since he or she potentially has an unfair competitive advantage over his or her opponents.<sup>80</sup> It is the period of ineligibility pronounced as a result of a doping offence which is susceptible for mitigation for lack of fault or negligence. Only under exceptional circumstances can the absence of fault or negligence on behalf of an athlete be a cause for the elimination of period of ineligibility.<sup>81</sup> It should also be noted that the success of a substance or a method in actually enhancing performance is irrelevant for determining a violation of an anti-doping rule (Article 2.2.1 of the Code).

The substances and methods the use of which is deemed to consist of a doping offence are provided under the Prohibited List. Although Code signatories are solicited for their comments, the ultimate say of determining the content of this list is reserved for WADA. Article 4.1 of the Code stipulates that WADA shall publish the Prohibited List which constitutes of the Prohibited Substances and Prohibited Methods List not less often than annually. Consequently, WADA publishes an annual Prohibited List. Once WADA publishes the list, it cannot be challenged at any level of arbitration and should be incorporated into the doping regulations of Code signatories without any substantive changes.<sup>82</sup>

Not every power is left in the hands of WADA though. Article 4.3.1 of the Code provides the basis on which a substance or a method is included in the Prohibited List. Accordingly, a substance or a method shall be included in the Prohibited List if it fulfills two of the following

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<sup>79</sup> Connolly, cited above at note 73, Vol. 5.2, p, 59.

<sup>80</sup> Ibid

<sup>81</sup> Article 10.4 of the Code and its Commentary.

<sup>82</sup> Article 4.3.3 and Article 23.2.2 of the Code.

three criteria: Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods, has the potential to enhance or enhances sport performance and/or represents an actual or potential health risk to the athlete; and WADA's determination that the use of the substance or method violates the spirit of sport described in the introduction to the Code.

What can be easily noticed from this provision is that a substance or method can be banned even if it does not have any performance enhancing effect. The other is the question of what the spirit of sport means. The spirit of sport as provided under the introductory section of the Code is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including: ethics, fair play and honesty, health; excellence in performance; character and education, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants, courage, community and solidarity. This may be a good list of features that embody the aspirational 'spirit of sport'.<sup>83</sup> But as a way to choose which drugs to ban, it is terribly vague.<sup>84</sup> Thus, for WADA, apart from affecting an athlete's performance or health, a substance or a method shall tarnish the abovementioned values considered intrinsic to sport to be included in the Prohibited List.

In addition to these three criteria, a substance is included in the Prohibited List if it is considered as a masking agent. A masking agent is a substance or a method that has the potential to mask the use of a prohibited substance or method (Article 4.3.2 of the Code). According to Article 4.1 of the Code, the use of substances or methods under the Prohibited List is not considered a doping offence if it is justified under the International Therapeutic Use Exemption Standards (ISTUE). This is another mandatory international standard to be prepared by WADA.

Another international instrument that provides a definition of doping is the Convention. Article 2 of the Convention is the definitional part of the Convention which stipulates that the definitions provided therein shall be understood within the context of the Code, save where there is contradiction in which case the Convention prevails. Article 2(3) of the Convention adopts the

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<sup>83</sup> B. Foddy and J. Savulescu, "Ethics of Performance Enhancement in Sport: Drugs and Gene Doping", in A. R.E., (ed.), Principles of Health Care Ethics, (2<sup>nd</sup> ed., 2007), p, 513.

<sup>84</sup> Ibid

same form of defining doping as the Code; doping is defined as a violation of anti-doping rules and the provisions constituting an anti-doping rule violation are the same as the Code. Moreover, WADA's Prohibited List and the ISTUE are made binding pursuant to Article 4 (3) of the Convention.

## **2.4. Rationales for the Prohibition of Doping in Sports**

International efforts to abolish the use of PEDs by athletes have drastically changed the world of sports. In today's world of sport, a doping accusation alone converts an admired athlete into an apparent pariah.<sup>85</sup> The years an athlete spends focused on training, competing, and working with coaches and teammates hardly prepares him or her for the complex process involved in clearing his or her name, and taking on the system that could render the athlete ineligible, banned from sport, and possibly subject to national criminal liability.<sup>86</sup> In addition to the problems that can arise due to the use of strict liability principle to prove a doping offence, the Code has a strict and rigid system of penalties which raise the issue of proportionality in the sanctioning of doping offenders. As for the standard of proof, CAS requires elements of a doping offence to be established to a "comfortable satisfaction", which is less than the criminal beyond reasonable doubt standard, but more than the ordinary civil balance of probabilities standard, by the sports organization levying the accusation.<sup>87</sup> The whereabouts requirement during an out of competition test is considered to limit the right to privacy and free movement of athletes.<sup>88</sup> Another infringement of privacy occurs during sample collection which requires athletes to provide urine samples in the presence of doping control officers.<sup>89</sup> Disputes concerning doping allegations are subject to national and international sports arbitrations and an accused athlete should face sports governing bodies which are far more powerful and resourceful. Accusations regarding lack of impartiality and fair hearing in the resolution of disputes are made against sports arbitral organs.<sup>90</sup>

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<sup>85</sup> M. A. Weston, "Doping Control, Mandatory Arbitration, and Process Dangers for Accused Athletes in International Sports", *Pepperdine Dispute Resolution Law Journal*, Vol. 10: 1, (2009), p.4., at: ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1524325](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524325)), accessed on July, 13, 2016.

<sup>86</sup> Ibid

<sup>87</sup> Connolly, cited above at note 73, p. 15. Ibid.

<sup>88</sup> González, cited above at note 3, p. 16.

<sup>89</sup> M. Straubel, "The International Convention Against Doping in Sport: Is It the Missing Link to USADA Being a State Actor and WADC Coverage of U.S. Pro Athletes?", *Marquette Sports Law Review*, Vol.19, Issue, 1, Article, 5, (2008), p. 21., at: (<http://scholarship.law.marquette.edu/sportslaw/vol19/iss1/5>), accessed on December, 27, 2016.

<sup>90</sup> González, cited above at note 3, p. 3-4.

Why is all this necessary? As per the Code and the Convention, it is the preservation of the intrinsic spirit of sport which is the fundamental purpose of the world anti-doping program. The traits that the spirit of sport encompasses are listed in the Code. Doping violates each of these traits. Preserving fairness in sports, preventing health risks to the athlete and the role model arguments as well as the criticisms raised against them are selected for discussion under this sub-topic.

Preserving the level playing field is primary rationale relied upon to ban the use of PEDs by athletes. It is argued that using performance enhancing substances create unfairness in sport. Doping contorts the core trait exhibited and celebrated in sports; natural hierarchies of excellence. Posner explains how objections to doping in sport relate to the nature of sports:

The relation lies in the innate human delight, archaic as it may seem in our age rich in egalitarian pretense—in innate human hierarchies, such as hierarchies of height, strength, agility, physical coordination, beauty, brilliance, and musical talent (and the delight in animal hierarchies too, as in horse racing). . . . These attitudes inform human beings' love of sports, which isolate and exhibit innate hierarchies . . . sports are designed to highlight, isolate, and display one or more of these hierarchies and to invite our admiration for the athletes who occupy the highest rungs. They are 'a test of biological potential.' So the question of doping and other technological interventions comes down to whether the particular intervention disrupts or obscures the hierarchy.<sup>91</sup>

It would be correct to say that doping is cheating and therefore unfair if all the substances and methods in WADA's Prohibited List have actual performance enhancing effect. There is surprisingly small conclusive scientific evidence proving the performance enhancing effect of

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<sup>91</sup> R. A. Posner, "In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping", Duke Law Journal, Vol. 57, No. 6, April, (2008), p, 1729., at: (<http://www.jstor.org/stable/40040631>), accessed on July, 1, 2016.

these substances and methods.<sup>92</sup> For instance, it is not clear how taking marijuana enhances the performance of an athlete.<sup>93</sup> A CAS panel in the Andreea Raducan case found that the small amount of pseudoephedrine (a stimulant the use of which is controlled by WADA) found in the cold medication she took a day before her competition could not have enhanced her performance, but disqualified the 16 year old gymnast anyway.<sup>94</sup> Moreover, there is a high tolerance for exogenous enhancement of performance in sports. Athletes are tolerated to use increasingly sophisticated running spikes, graphite tennis rackets that make games shorter, fiber-glass pole vaults to reach new heights, and to make enhancements to their bodies by consuming medleys of concentrated and engineered vitamins, and perform altitude training.<sup>95</sup>

The dangers doping poses for the health of an athlete is one of the main arguments made against it. The likelihood of serious physical harm that can result from the use of steroids and other performance enhancing drugs is portrayed as an axiom. For instance, increased aggressiveness, increased risk of heart disease, elevated cholesterol levels, liver damage, feminization of males (such as breast development, decreased sperm counts, and shrinking of the testes), and masculinization of females (such as clitoral hypertrophy, breast atrophy, and androgen-induced amenorrhea, severe ovarian cysts), advanced liver damage, and fetal malformation among pregnant women are among the recognized side effects of steroid use.<sup>96</sup> The East German shot-putter Heidi Krieger was so changed by steroids that she could no longer identify with herself as a woman and chose to undergo sex-change surgery, he is now Andreas Krieger.<sup>97</sup> This rationale was particularly important in the 1960s, as concerns for athletes' health escalated after the deaths of a number of athletes associated with the use of performance enhancing substances.<sup>98</sup>

However, most of the substances and methods contained under the WADA's Prohibited List have not been sufficiently studied under controlled situations to know how truly dangerous they

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<sup>92</sup> A. Amos, *Anti-Doping Policy: Rationale or Rationalisation?*, A Doctoral Thesis, Faculty of Law, University of Sydney, December, (2008), P, 89., at: (<http://ses.library.usyd.edu.au/bitstream/2123/5437/am-amos-2009-thesis.pdf>) , accessed on July, 13, 2016,

<sup>93</sup> Ibid

<sup>94</sup> Connolly, cited above at note 73, p, 61., The panel also established that Raducan took the cold medicine without knowing that it contained the substance, Ibid.

<sup>95</sup> Hard, cited above at note 14, Vol., 19, p, 546

<sup>96</sup> Jurith and Koenig, cited above at note 49, Vol. 12, Issue, 2, Article, 5, p, 465.

<sup>97</sup> Ibid

<sup>98</sup> Ibid

are.<sup>99</sup> Even accepting that they pose serious health risks to user athletes, banning PEDs for this reason does not consider today's sports environment in which elite athletes train and compete. Many believe that participating in sports promotes health and fitness but overlook the fact that many sports originated in the practice of war and routinely involve stress, injury and sometimes death.<sup>100</sup> There are many permitted substances within sport which pose a danger to the health of the athlete and training techniques are also identified as presenting a danger to the health of sportspeople, yet these substances and techniques are accepted as legitimate.<sup>101</sup> Another criticism against this rationale is based on an anti-paternalistic argument. Though the argument is not extended to child athletes who are in a different category of competency, in the adult context, it is argued that prohibiting athletes from taking performance enhancing substances with the goal of protecting them from themselves, does not sit well within an otherwise liberal notion of individual freedom.<sup>102</sup>

The role model argument is another reason to ban athletes from using PEDs. The crux of this argument is that elite athletes are idolized by the young population and so should exhibit high moral and behavioral standards. The common conception of an athlete as an embodiment of health, discipline and ambition is usually the main reason why parents encourage their children to participate in sports. This image of the athlete is shattered and the positive role sport plays in the society is diminished when athletes are allowed to achieve excellence in sports through the use of PEDs.

Nevertheless, it is not clear why it is only athletes who are chosen for this esteemed role while undermining the drug usage habits of musicians, movie stars who are also idolized by the young.<sup>103</sup> Avoidance of the possible health risks to young athletes who consider a doping athlete as a role model is the center of the role model argument. However, this argument overlooks the possible health risks associated with participating in professional sports in the first place. It does not consider the dangers arising from intensive training, training while injured, and potentially

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<sup>99</sup> Hard, cited above at note 14, Vol., 19, p, 549.

<sup>100</sup> Ibid

<sup>101</sup> Amos, cited above note 92, p, 87.

<sup>102</sup> Ibid

<sup>103</sup> Id, p, 92

dangerous diets.<sup>104</sup> Given the potential danger to adolescent bodies associated with participation in elite sport, it could even be argued that young people should not be encouraged to participate in professional sports at all.

### Chapter Three

#### The International Anti-Doping Framework

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<sup>104</sup> Ibid



### 3.1. Introduction

The international framework for the governance and regulation of sports is essentially the result of contractual agreements that have given rise to an autonomous, hierarchical, private legal order of a transnational character. The regulatory intervention or the application of principles of public international law in the regulation of different aspects of sports has created a duality of private and public regulatory orders. Commentators have debated on the choice of a term that identifies the conceptual framework best suited to understand and describe this duality. While ‘sports law’ or ‘*lex sportiva*’ is the oldest term used to identify the discipline in general, the diverging views regarding its scope and interpretation form the structure of the debate. For instance, Nafziger limits the scope of the term ‘*lex sportiva*’ to refer to the case law developed by CAS while referring to the private international rules created by sports organizations as ‘international sports law’ that forms a branch of public international law.<sup>105</sup> He considers one of the chief aspects of international sports law to be its use of *jus commune*, that is, the general principles of public international law.<sup>106</sup> Foster proposes a distinction to be made between global and international sports law.<sup>107</sup> He suggests the term ‘global sports law’ in reference to the transnational autonomous legal order created by global private institutions that govern international sports including CAS and ‘international sports law’ to refer to the principles of public international law that are applied to the regulation of sports and that can be enforced by national courts.<sup>108</sup>

In the same lane, Latty points out the rare application of public international law in the regulation of sports and suggests that the concept ‘transnational sports law’ would best help to understand the system of relations forged between the private sporting legal order and the public legal order.<sup>109</sup> Wax on the other hand defends the importance of public international law in the regulation of sports at the international level and recommends the term ‘public international

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<sup>105</sup> R. C.R. Siekmann, “What is Sports Law? *Lex Sportiva* and *Lex Ludica*: a Reassessment of Content and Terminology”, *The International Sports Law Journal*, 2011/3-4, (2011), P, 3., at: ([http://www.asser.nl/media/2072/islj\\_20113-4.pdf](http://www.asser.nl/media/2072/islj_20113-4.pdf)), accessed on May, 17, 2016.

<sup>106</sup> Ibid

<sup>107</sup> Foster, cited above at note 2, p, 2.

<sup>108</sup> Ibid

<sup>109</sup> F. Latty, “Transnational Sports Law”, *The International Sports Law Journal*, 2003/2, (2003), p, 8., at: ([http://www.asser.nl/media/2059/cms\\_sports\\_1\\_1\\_islj2003-2.pdf](http://www.asser.nl/media/2059/cms_sports_1_1_islj2003-2.pdf)), accessed on June, 3, 2016.

sports law' to designate the public legal order.<sup>110</sup> Siekmann proposes a different approach as “an attempt to unravel the terminological knot”.<sup>111</sup> He proposes the use of the term ‘*lex sportiva*’ in reference to the public legal order which can be divided as “*lex sportiva nationalis, lex sportiva regionalis and lex sportiva internationalis*” and the term ‘*lex ludicia*’ which translates as ‘law of the game or ‘game law’ to refer to the private laws created for the regulation of sports.<sup>112</sup>

Added to this debate is the peculiar international framework put in place with the aim of abolishing doping in sports. The need to eliminate doping in sports has resulted in a greater application of public law in the regulation of sports as governments are involved in enacting anti-doping laws both at the national and international levels. The Convention and the 1989 EU Anti-Doping Convention adopted at a regional level form part of the international anti-doping framework. Nevertheless, the Code is the pillar of this framework. It is a creation of private law and as such does not have the legitimacy to demand implementation by states. However, this legal lacuna has been rectified by the adoption of the Convention. The Convention is adopted as a complementary instrument to the Code with the aim of strengthening the international anti-doping effort by creating binding responsibilities on signatory states that are in tandem with the Code. The nature of this Convention and the role it plays in the prevention of doping are discussed under this chapter. It is impossible to make these discussions without showing the interaction between the legal framework created by the Convention and the Code as well as the roles played by the Conference of Parties (COP) of the Convention and WADA. As such, the chapter illustrates these interactions by including discussions on the respective roles and mandates of the COP and WADA under the Convention and the Code.

### **3.2. The International Legal Framework: - The Convention**

The fight against doping in sports through the framework of international law initially involved discussions among governments regarding various legally non-binding resolutions and recommendations.<sup>113</sup> Regional forms of public international sports law in this area were first

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<sup>110</sup> Wax, cited above at note 8, p, 27.

<sup>111</sup> Siekmann, cited above at note 105, p, 11.

<sup>112</sup> Ibid

<sup>113</sup> Wax, cited above at note 8, p, 27

visible when the Council of Europe Anti-Doping Convention was adopted in 1989.<sup>114</sup> The law only reached a universal level when the Convention came into effect in 2007. In November 2003, the UN General Assembly made an appeal to member states to formulate an anti-doping convention at the universal level, in association with a request by UNESCO to work in cooperation with other international and regional organizations in order to coordinate the drafting of such an agreement.<sup>115</sup> The 2003 Copenhagen Declaration on Anti-Doping in Sport is the stepping stone for the Convention. In this Declaration, the states supporting the WADC (World Anti-Doping Code) made a commitment to create an intergovernmental agreement to strengthen the WADC which ultimately took the form of the International Convention against Doping in Sport initiated by UNESCO.<sup>116</sup>

Both the Convention and the 1989 EU Anti-Doping Convention indicate that, in contrast to private sports organizations that use preventive and enforcement measures to combat doping, the international community is mostly confined to schemes for prevention.<sup>117</sup> There is no provision in the Convention that imposes sanctions against doping offenders and only general obligations are imposed on signatory states. Within the scheme of taking preventive measures, the Convention recognizes the need for the existence of a harmonized international anti-doping framework that enable states to take part in the fight against doping by undertaking legislative, policy and administrative measures that only fall under their purview without creating inconsistencies with the framework created by the Code.

Examination of the provisions of the Convention reveal the fact that it is an instrument designed essentially to strengthen the international anti-doping framework centered on the Code and WADA. Under its preamble, the Convention acknowledges the complementary role played by public authorities in preventing and combating doping in sports and asserts that doping can only be effectively combated through international cooperation and the gradual harmonization of the anti-doping standards and practices of governmental authorities and private sports organizations. Article 1 of the Convention proclaims the purpose of the Convention which is to

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<sup>114</sup> Ibid

<sup>115</sup> Ibid

<sup>116</sup> Straubel, cited above at note 89, Vol.19, Issue, 1, Article, 5, p, 3.

<sup>117</sup> Id, p, 28

promote the prevention of and the fight against doping in sport, with a view to its elimination. In order to achieve this purpose, Article 3 of the Convention obliges state parties to take necessary national and international measures consistent with the principles of the Code; encourage all forms of international cooperation aimed at protecting athletes and ethics in sport and at sharing the results of research; and foster international cooperation between states parties and leading organizations in the fight against doping in sport, in particular with WADA.

These being the means to achieve the purpose of the Convention, the measures signatory states must take towards this end are provided under Article 5. Accordingly, signatory states must adopt appropriate measures which may include legislation, regulation, policies or administrative practices. Under Article 4, the Convention binds signatory states to abide by the principles of the Code while adopting these measures. It is this provision that explicitly outlines the legal relationship between the Convention and the Code. In addition to extending legal recognition to the principles of the Code, this provision establishes the binding effect of two of the WADA's international standards, the Prohibited List and the ISTUE. One of the themes of obligations the Convention creates on signatories is fostering international cooperation between anti-doping organizations, public authorities and sports organizations within and outside of their jurisdiction.<sup>118</sup> In this regard, Article 14 (2) of the Convention commands signatories to support the mission of WADA in the international fight against doping. Article 15 of the Convention also reaffirmed the principle of equal funding of WADA's budget by the Olympic Movement and government bodies as provided under its constitutive instrument.

It is important to note that Article 4 of the Convention only refers to the principles of the Code. It is with the aim of harmonizing anti-doping efforts both at the national and international levels that Article 4 of the Convention extends legal recognition to the principles of the Code. This purpose is also articulated as the fundamental objective of the Code which is the advancement of the international anti-doping effort through the universal harmonization of core anti-doping elements.<sup>119</sup> The provisions of Article 23.2.2 of the Code can illuminate what these core anti-doping elements are. Article 23.2.1 of the Code recognizes the need for flexibility and allows

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<sup>118</sup> Article 13 of the Convention.

<sup>119</sup> Introductory section of the Code.

signatories of the Code to adopt their own anti-doping measures aimed at its implementation. However, in view of the fundamental objective mentioned above, Article 23.2.2 of the Code singles out certain provisions to be mandatory provisions that should be implemented by Code signatories without undergoing any substantive changes in order to be in compliance with the Code. These provisions are Article 1 (Definition of Doping), Article 2 (Anti-Doping Rule Violations), Article 3 (Proof of Doping, Strict Liability Principle), Article 4.2.2 (Specified Substances), Article 4.3.3 (WADA's Determination of the Prohibited List), Article 7.11 (Retirement from Sport), Article 9 (Automatic Disqualification of Individual Results), Article 10 (Sanctions on Individuals), Article 11 (Consequences to Teams), Article 13 (Appeals) with the exception of 13.2.2, 13.6, and 13.7, Article 15.1 (Recognition of Arbitral Decisions), Article 17 (Statute of Limitations), Article 24 (Interpretation of the Code) and Appendix 1 (Definitions). Article 23.4 of the Code declares that, in order to be in compliance with the Code, measures by Code signatories must be taken in accordance with the provisions of Article 23.2.2. By reading Article 4 of the Convention in conjunction with Article 23.2.2 of the Code, it might be safe to conclude that the reference to the principles of the Code made under Article 4 of the Convention encompass the mandatory provisions under Article 23.2.2 of the Code.

The synergy between the Convention and the Code goes beyond this legal relationship. The Code, while recognizing that it cannot create binding obligations on governments, declares that "governments' commitment to the Code will be evidenced by the signing of the Copenhagen Declaration on Anti-Doping in Sport and by ratifying, accepting, approving or acceding to the UNESCO Convention" (Article 22 of the Code). This provision also articulates the measures expected of governments. Among them, "each government will respect arbitration as the preferred means of resolving doping-related disputes" (Article 22.3); "all other governmental involvement with anti-doping will be brought into harmony with the Code" (Article 22.4); "Each government that does not have a National Anti-Doping Organization in its country will work with its National Olympic Committee to establish one" (Article 22.6) and "Each government will respect the autonomy of a National Anti-Doping Organization in its country and not interfere in its operational decisions and activities" (Article 22.7). While the failure to meet these expectations does not entail consequences under the Code, Article 22.8 of the Code states that failure to ratify the Convention or comply with it can result in ineligibility to bid for events and

can result in additional consequences, e.g., forfeiture of offices and positions within WADA ; ineligibility or non-admission of any candidature to hold any international event in a country, cancellation of international events; symbolic consequences and other consequences pursuant to the Olympic Charter.

As private associations sports governing bodies do not have the latitude to take all the necessary measures to prevent doping in sports. The Convention creates the legal framework for states to undertake national anti-doping measures that can only be performed by governments thereby remedying the gap. For instance, Article 8 of the Convention creates the duty of restricting the availability and use in sport of prohibited substances and methods on signatories. This can be achieved by making doping a criminal offence and by taking measures to control the production, movement, importation, distribution and sale of prohibited substances. States can also perform the duty of regulating the production, importation, marketing and sell of nutritional supplements as provided under Article 10 of the Convention. Article 11 of the Convention obliges states to facilitate doping control by providing funding for national testing programs, by withholding financial assistances from athletes or athletes support personnel during periods of ineligibility and by withholding financial or other sport-related support from sports organizations under their jurisdiction which are not in compliance with the Code. Article 18 of the Convention establishes a Voluntary Fund to provide financial support to states parties in their domestic efforts to implement the Convention. Signatories are also duty bound to make biennial reports specifying the national measures taken towards the fulfillment of their duties under the Convention (Article 31 of the Convention).

The Convention is an essential instrument that creates a unified anti-doping framework under international law. It reveals that the elimination of doping in sports can only be achieved if prevention and enforcement are coordinated worldwide.<sup>120</sup> The effective combination of anti-doping prevention and enforcement can only succeed if the international community and privately organized sports act together.<sup>121</sup> The Convention signifies a breakthrough in public

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<sup>120</sup> Wax, cited above at note 8, p, 30

<sup>121</sup> Ibid

international sports law in the field of doping in sports and the synergy between the Convention and the Code underlines the *private public partnership* (PPP) principle.<sup>122</sup>

### 3.3. COP of the Convention and WADA

Article 28 of the Convention establishes a Conference of Parties to monitor its implementation. Accordingly, it is the sovereign organ of the Convention constituted of every state party to the Convention each having one vote. The COP meets in ordinary session every two years; it may meet in extraordinary session if it so decides or at the request of at least one third of the state parties (Article 28 (2) of the Convention). The mandates of the COP as stipulated under Article 30 of the Convention include promoting the purpose of the Convention; adopting a plan for the use of the resources of the Voluntary Fund established under Article 18; examining the biennial reports submitted by state parties; examining draft amendments to this Convention for adoption; defining and implementing cooperation between states parties and WADA within the framework of this Convention and requesting a report from WADA on the implementation of the Code to each of its sessions for examination.

The COP has constant contact with WADA while performing these and other functions under the Convention and more explicitly, Article 29 of the Convention invites WADA to be present as an advisory body to each session of the COP. The existence of a uniform Prohibited List and ISTUE is sine qua non for an effective and coordinated anti-doping effort. Due to Article 4 (3) of the Convention, these two international standards by WADA are annexed as integral parts of the Convention. Article 34 of the Convention specifies special amendment procedures than those provided under Article 33 of the Convention for updating the Annexes of the Convention. As WADA annually updates the Prohibited List and the ISTUE, the Convention amends its Annexes accordingly during one of its biennial sessions or via written consultations with party states. Signatories have the right to object the amendment of these standards. They can object within 45 days of notification of the proposed amendments either in writing, in case of written consultation or at a session of the COP, and unless two thirds of the state parties express their objection, the proposed amendment shall be deemed to be approved by the COP (Article 33(2) of the Convention). At its second session, the COP, considering the fact that the Code is a live

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<sup>122</sup> Ibid

document which might undergo revisions, passed a resolution stating that any reference to the Code made under the Convention to be taken as a reference made to the latest version of the Code in force.<sup>123</sup>

The COP performs its monitoring duty by developing questionnaire to be administered and analyzed by an online system called “Anti-doping Logic” system, a system similar though not identical to the mechanism used by WADA for monitoring the implementation of the Code.<sup>124</sup> At its first session, the COP addressed the issue of concomitant reporting duties created on party states by the Convention, the 1989 EU Anti-Doping Convention and the Code.<sup>125</sup> Even though governments are not parties to the Code, their respective NADOs which are signatories to the Code have to fulfill reporting duties under it. In order to avoid unnecessary duplication of reporting expenses and considering the similar nature of the questions posed to governments by WADA, the COP during its second session decided to align its questionnaire with that of the WADA’s as much as possible.<sup>126</sup> Similar to the trend followed by WADA, various elements such as states’ experience with doping in sports, their ability to combat doping and the progress of their national measures are factored in the analysis of the information contained in states’ biennial reports to the COP.<sup>127</sup>

The questionnaire of the COP elicit information about the measures adopted by states for the implementation of their duties of undertaking national anti-doping measures which includes financing national testing programs; fostering international cooperation; promoting anti-doping education; and encouraging and sharing anti-doping research as stipulated under Articles 7-12,

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<sup>123</sup> Conference of Parties to the International Convention against Doping in Sport, Second Session, Paris, UNESCO Headquarters, October, 26-28, 2009, ICDS/2CP/Doc.13, Resolution No. 2CP/5.2, at: (<http://unesdoc.unesco.org/images/0018/002137/213751e.pdf>), accessed on September, 3, 2016. Five COP are held to date.

<sup>124</sup> Conference of Parties to the International Convention against Doping in Sport, Third Session, Paris, UNESCO Headquarters, ICDS/3CP/Inf.1, November, 14-16, 2011 at: (<http://unesdoc.unesco.org/images/0021/002137/213762e.pdf>), accessed on September, 3, 2016.

<sup>125</sup> Conference of Parties to the International Convention against Doping in Sport, First Session, Paris, UNESCO Headquarters, February, 5-7, 2007, ICDS/1CP/Doc. 5, at: (<http://unesdoc.unesco.org/images/0015/001524/152412e.pdf>), accessed on September, 3, 2016.

<sup>126</sup> Conference of Parties to the International Convention against Doping in Sport, Second Session, Paris, UNESCO Headquarters, October, 26-28, 2009, ICDS/2CP/Doc.7, at: (<http://unesdoc.unesco.org/images/0018/002344/234470E.pdf>), accessed on September, 3, 2016.

<sup>127</sup> Ibid



Articles 13-18, Articles 19-23 and Articles 24-27 of the Convention respectively. States' level of compliance can be unacceptable, acceptable/satisfactory, or high level of compliance. The COP establishes a committee whose task is to approve the use of the Voluntary Fund. Achieving a satisfactory or high level of compliance can help a state become elected as a member of this committee.<sup>128</sup>

It is important to discuss the role of WADA at this junction. Even though the Convention achieves harmonization of anti-doping efforts at the international level, as it is the case with most international conventions, it has a weak monitoring mechanism that cannot assure the full implementation of its provisions by signatories. Moreover, there are no provisions in the Convention regarding the consequence of non-compliance by the signatories. Monitoring the implementation of the Code is among the myriad of responsibilities imposed on WADA under Article 20.7 of the Code.

Before engaging into discussions about the monitoring function of WADA, it is essential to understand its organizational nature. Members of the Olympic Movement, international organizations and government representatives attended the World Conference on Doping in Sport held in Lausanne, Switzerland in 1999 and reached at a decision to establish an independent international anti-doping agency.<sup>129</sup> Following this decision, IOC which is the leader of the Olympic Movement proposed to establish the agency as a private autonomous international organ constituted of series of equal blocks of members from the IOC, the IFs, NOCs, athletes, governments and a sixth group containing representatives of sponsors, sporting goods manufacturers, event organizers and, possibly, the pharmaceutical industry.<sup>130</sup>

Government representatives present at the conference expressed their complete rejection of this proposal and proposed the agency to be established as an intergovernmental organ, a form of an

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<sup>128</sup> Conference of Parties to the International Convention against Doping in Sport, Third Session, Paris, UNESCO Headquarters, CDS/3CP/Doc.6, November, 14-16, 2011, at: (<http://unesdoc.unesco.org/images/0021/002131/213151e.pdf>), accessed on September, 3, 2016.

<sup>129</sup> L. Casini, Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA), p, 8, at: ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1520751](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1520751)), accessed on June, 15, 2016.

<sup>130</sup> R. C.R. Siekmann, "The Hybrid Character of WADA and the Human Rights of Athletes in Doping Cases (Proportionality Principle)", The International Sports Law Journal, 2011/1-2/, (2011), p, 89., at: ([http://www.asser.nl/media/2071/islj\\_2011\\_1-2.pdf](http://www.asser.nl/media/2071/islj_2011_1-2.pdf)), accessed on May, 17, 2016.

international institution most preferred by states, or at least to have equal representation in the governing organ of such an agency.<sup>131</sup> An intergovernmental agency was rejected by the other half of the conference as this form of institution ousts the Olympic Movement which also includes athletes who are private individuals from being members.<sup>132</sup> Finally it was decided that the foundation board of the agency be formed up of 50-50 representation from the Olympic movement and governments with both contributing equally to its budget.<sup>133</sup> Consequently, WADA was established as a hybrid private-public organ. However, with respect to its legal status, WADA is not an institution established under public international law. Rather it is a private foundation established pursuant to Articles 80 et. seq. of Swiss Civil law and therefore subject to oversight of Swiss authorities.<sup>134</sup> Regarding the organizational nature of WADA, Casini argues “The WADA experience is particularly useful in illustrating the development of a global administrative space, in which both public and private bodies act together in furtherance of a common goal – in this case, the fight against doping...”<sup>135</sup>

WADA’s most important activity in terms of its public function is its role as a global standard setter, the Code being its most significant creation. In the fight against doping in sport, standards and rules set by a private body have gradually been accepted as “binding” by States; a process made possible mostly as a result of the particular hybrid structure of WADA.<sup>136</sup> The Code imposes different set of obligations on its signatories. Under Article 23.5.2, the Code creates reporting duties on these signatories and stipulates that the contents and frequency of making such reports to be decided by WADA Foundation Board. Accordingly, WADA requires signatories to make biennial reports stating the measures taken in the implementation of the

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<sup>131</sup> Id, p, 90

<sup>132</sup> Ibid

<sup>133</sup> Ibid, Government representation to the 38 member WADA Foundation Board follows the five Olympic Regions: Africa, 3 members; Americas, 4 members; Asia, 4 members; Europe, 5 members; Oceania, 2 members. The Governments of each respective region are responsible for the process of electing members to the WADA Foundation Board and Executive Committee and notifying WADA of the appointments., at: (<https://www.wada-ama.org/en/government-representation>) , last visited on, January, 3, 2017. Government funding of WADA is also decided through this process with regional appropriations being, Africa, 0.5%, Americas, 29%, Asia, 20.46%, Europe, 47.5% and Oceania, 2.54% , at: (<https://www.wada-ama.org/en/government-funding>) , last visited on, January, 3, 2017.

<sup>134</sup> Casini, cited above at note 129, p, 9.

<sup>135</sup> Id, p, 18.

<sup>136</sup> Id, p, 14.

Code.<sup>137</sup> Pursuant to Article 23.5.4 of the Code, a non-compliant assessment made by WADA regarding a report from a signatory shall be approved by WADA's Foundation Board after the signatory is given an opportunity to submit its written arguments to the Foundation Board. The consequences of non-compliance are listed under the Article 23.5.5 of the Code.

In addition to the direct measures taken by WADA against non-compliant signatories pursuant to the aforementioned provision, the interlocking and hierarchical structure of the Olympic Movement which is bound by the Code via its governing body, IOC, ensures the compliance of its members with the Code. For instance, if a given NF, say the Ethiopian Athletics Federation is deemed non-compliant by WADA, IAAF will impose on it sanctions proscribed under the Code and the Olympic Charter because failure to do so will in turn entail sanctions on IAAF by the IOC pursuant to the Olympic Charter and the Code. The same chain of events is triggered if a signatory NADO of a state is deemed non-compliant by WADA. In addition to WADA taking direct measures on the defaulting NADO, all NFs present in the state can be subject to sanctions from their respective IFs. The Convention on the other hand does not impose any sanctions on signatories for non-compliance. The only effect of achieving an unacceptable rate of compliance is the probability of a state not being able to be elected as a member of the COP's Voluntary Fund Approval Committee. Compared to this, the possibility of sanctions against their NFs and the possibility of their athletes being banned from Olympic Games and other international sports tournaments provide states with a stronger incentive to observe the Code and Convention.

With all the attempt of harmonization with the Code undertaken by the Convention and its COP, a great discrepancy is witnessed when it comes to assessment of compliance made by the COP of the Convention and WADA. A case in point is Russia. According to the COP, Russia is a country that has achieved high level of compliance rate, ranging from 82%-89%, in all of its sessions except for the first session where no assessment of compliance was done.<sup>138</sup> At the Fifth Session of COP held in July, 2015, Russia was deemed to be 85.7% compliant with the

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<sup>137</sup> (<https://www.wada-ama.org/en/adams>), last visited on, January, 3, 2017.

<sup>138</sup> Conference of Parties to the International Convention against Doping in Sport, Fifth Session, Paris, UNESCO Headquarters, ICDS/5CP/INF.1 REV , 29-30, October, 2015, at: (<http://unesdoc.unesco.org/images/0023/002344/234470E.pdf>), accessed on September, 3, 2016. It might be worth to note that Russia makes the highest contribution to the Voluntary Fund established under the Convention.

Convention, which is a high level of compliance rate.<sup>139</sup> However, in July, 2016, WADA's Independent Person Investigation into the doping allegations of the 2014 Winter Olympics at Sochi was able to uncover a wide-spread operation of doping in the country which led the IOC to ban the greater number of its national athletics team from the 2016 Rio Olympics.<sup>140</sup>

This incident prompted the COP of the Convention to hold an extraordinary meeting on 1, August, 2016 with delegations from the Russian Federation.<sup>141</sup> During the meeting, the Bureau of COP emphasized the relationship between the Convention and the Code and reaffirmed the duty of states to intervene in the regulation of doping in sport pursuant to the Convention.<sup>142</sup> It agreed to submit an agenda to the 6<sup>th</sup> session of COP regarding the review of the Russian national anti-doping framework; the establishment of a review commission for monitoring national public anti-doping policies of signatories; and the formation of a task force constituted of the IOC, WADA and UNESCO to address pressing issues in doping control and enhance international cooperation among stakeholders.<sup>143</sup> Another example is Kenya. The country was able to achieve an acceptable to high level of compliance in the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> COP with 46.4, 85.7 and 53.6% compatibility rate respectively.<sup>144</sup> WADA on the other hand deemed the Kenyan national anti-doping measures to be highly non-compliant with the Code and set a time frame within which the country must align its efforts with that of the Code under the pain of sanctions being imposed by IFs and the IOC which can result in the banning of the country's athletes from participating in the 2016 Olympics in Rio.<sup>145</sup>

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<sup>139</sup> Ibid

<sup>140</sup> (<http://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016>), last visited on 4, January, 2017.

<sup>141</sup> Communique of Bureau of the Conference of Parties to the UNESCO International Convention against Doping in Sport, Paris, France, August, 1, 2016, at:

(<http://www.unesco.org/new/en/media/sevices/extraordinary/meeting/of/the/bureau/of/international/anti-doping>), accessed on September, 3, 2016.

<sup>142</sup> Ibid

<sup>143</sup> Ibid.

<sup>144</sup> COP, Fifth Session, cited above at note 139.

<sup>145</sup> (<http://www.bbc.com/sport/athletics/36275649>), see also; (<http://www.theguardian.com/sport/2016/may/12/kenya/-olympic-doubt-wada-non-compliant>), (<http://www.espn.com/olympics/story/id/15519257/wada-says-kenya-agency-non-compliant>), last visited on 13, January, 2017.

This discrepancy between the COP of the Convention and WADA in the assessment of compliances leads to the conclusion that an assertion by the COP that domestic measures taken by a state are in compliance with the Convention does not tantamount to an assertion by WADA that these measures are compliant with the Code. Therefore, being deemed compliant with the Convention by the COP does not guarantee that a signatory government body of the Code can avoid sanctions by WADA.

## **Chapter Four**

### **The Ethiopian Anti-Doping Legal and Institutional Framework**

#### **4.1. Introduction**

The hierarchical structure of private sports governing institutions impacts the regulation of sports at the national level as NFs and NOCs operate within the frameworks created by their

international counterparts. Consequently, the monopolistic self-regulation of sports at the international level is propagated to the national level as well. However, the international anti-doping framework has provided governments with a platform to intervene in the regulation of sports by enacting domestic anti-doping legislations. For instance, Italy, Greece, France, Turkey and Kenya have enacted national laws to regulate doping in sports.

At the international level, Ethiopia is a signatory to the Convention and Eth-NADO is a signatory to the Code. Nevertheless, the regulation of doping in sports at the national level is given inadequate attention. The deep rooted belief that Ethiopian athletes do not use PEDs has led the government and sport institutions in the country to consider doping in sports as a non-issue.<sup>146</sup> Even though there had been doping accusations made against Ethiopian athletes over the years, the problem was not considered to be pressing enough to provoke the government to undertake concerted policy and institutional measures for the regulation of doping at the national level.<sup>147</sup>

This, however, changed when WADA visited the country on December, 14, 2015.<sup>148</sup> The delegation from WADA gave the domestic anti-doping measures in the country a rating of “zero”.<sup>149</sup> They stated that the country lacks the necessary anti-doping policy or institutional framework, does not perform testing of its athletes, does not conduct satisfactory educational and advocacy campaigns, does not take any measures regarding athletes in need of Therapeutic Use Exemptions, and concluded that the government has not shown the needed commitment to fight doping in sport and Eth-NADO has failed to comply with the Code.<sup>150</sup> Consequently, WADA instructed Eth-NADO to reform its institutional structure and perform the testing of 200 Ethiopian athletes in order to be compliant with the Code.<sup>151</sup> Following this decision by WADA and doping accusations against seven Ethiopian athletes in January, 2016, the IAAF in March, 2016, communicated that it can impose sanctions on the national athletics team if Eth-NADO is

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<sup>146</sup> Interview with Dr. Ayalew Telahun, Sport Science, Sports Medicine and Anti-Doping Directorate Director at the Ethiopian Ministry of Youth and Sports, 28, November, 2016, Addis Ababa and Interview with Ato Mengistu Abebe, Legal Affairs Directorate Director at the Ethiopian Ministry of Youth and Sports, 15, November, 2016, Addis Ababa.

<sup>147</sup> Ibid

<sup>148</sup> Ibid

<sup>149</sup> Ibid

<sup>150</sup> Interview with Dr. Ayalew Telahun, cited above at note 147.

<sup>151</sup> Interview with Dr. Ayalew Telahun, Interview with Ato Mengistu Abebe and Interview with Dr. Bezabeh Wolde, a member of the Ethiopian Athletics Federation Executive Committee and Lecturer at Addis Ababa University Sports Science Department, 16, November, 2016, Addis Ababa.

deemed non-compliant by WADA.<sup>152</sup> These threats of sanctions came at a critical time when the country was getting prepared to participate in the 2016 Rio Olympics and served as a wake-up call for the government to elevate its domestic efforts to the standards set by the Code and the Convention.

This chapter, therefore, deals with how doping in sports is regulated in Ethiopia by examining the country's national legal framework created for the regulation of doping and discusses the work of the focal governmental body that has the mandate to deal with the issue. It assesses the adequacy of the domestic measures the country has taken to uphold its commitments under the Convention. It also contains discussions on the measures taken by the country in response to accusations of non-compliance by WADA.

#### **4.2. The National Anti-Doping Legal Framework**

Article 9 (4) of the Ethiopian Constitution makes international agreements ratified by the country integral part of the law of the land.<sup>153</sup> The country has ratified the Convention in 2007 via Proclamation No. 554/2007 (hereinafter the Proclamation) hence, the Convention forms part of the country's domestic anti-doping legal framework. In addition to ratifying the Convention, Article 3 of the Proclamation instructs the Ministry to take all the necessary measures required for the implementation of the Convention. The Convention demands any domestic measures, which can be legislative, policy or administrative measures, adopted for its implementation to be in compliance with the principles of the Code (Article 4(1) of the Convention). Therefore, any domestic anti-doping legislations intended for the implementation of the Convention should be consistent with the Code, particularly must be observant of Article 23.2.2 of the Code.

Additionally, after signing the Convention in 2005, Ethiopia has made doping a criminal offence under Article 526 of the Criminal Code.<sup>154</sup> This provision was included in the Criminal Code while the ratification of the Convention was still underway. Dr. Ayalew Telhaun, who was a member of the Ethiopian delegation that signed the Convention in Paris, claims that it was he who suggested the inclusion of a provision dealing with doping in sports in the Criminal Code

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<sup>152</sup> Ibid

<sup>153</sup> Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Neg. Gaz. 1<sup>st</sup> Year, No. 1.

<sup>154</sup> The Criminal Code of the Federal Democratic Republic of Ethiopia, cited above at note 27.

which was being reformed at the time.<sup>155</sup> His suggestion was taken up by the drafters and one provision dealing with doping in sports was included in the Criminal Code.<sup>156</sup>

This provision provides an abstract definition of doping. The essence of doping under this provision is consuming substances which help to enhance performance in sports. Thus, the potential performance enhancement effect of substances needs to be proved in order to say that there is a doping offence. Under the Convention and the Code, the Prohibited List proscribes certain substances and methods as doping agents thus avoiding the need for such proof. The provision also demands intent or negligence to be proved for there to be a doping offence. The use as well as the production, importation, sells, possession or distribution of manufactured substances constitutes a doping offence under the provision. These substances can be legally unauthorized harmful substances or authorized substances which are used for the purpose of enhancing performance in sport. Only manufactured substances are designated as means of enhancing performance under the provision. Doping methods that can be used to enhance performance in sport and naturally occurring substances that can have the same effect are not included under it.

The definition of doping under this provision is markedly different from the definitions provided under the Convention and the Code. As noted above, the Convention adopts a similar definition of doping as provided under Article 2 of the Code and Article 23.2.2 of the Code designates the provisions of Article 2 to be mandatory provisions. There is no domestic legislation or anti-doping policy adopted to ensure the implementation of the Convention or the Code other than the

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<sup>155</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe, cited above at note 147.

<sup>156</sup> Article 526:- Doping:-

1. Whoever intentionally:

a. produces, imports, sells, keeps professionally or distributes harmful manufactured substances prohibited by law, which help to achieve physical and psychological superiority in sports by temporarily boosting the physical fitness acquired by nature and through training; or

b. makes use of or causes to be used unlawfully the substances mentioned in (a) above, is punishable with simple imprisonment or fine, or, where the act has caused grave injury, with rigorous imprisonment not exceeding five years.

2. Whoever, with intent to employ a legally authorized drug for the purpose specified in sub-article (1), prescribes, gives or makes use of it improperly or outside the purpose for which it has been made, is punishable with simple imprisonment or fine,

3. Where one of the acts specified in sub-article (1) or (2) above is committed negligently, the punishment shall be simple imprisonment not exceeding three months, or fine not exceeding five thousand Birr.



Proclamation and this criminal provision, and there have not been any accusations made pursuant to this provision so far.<sup>157</sup>

The criminal prosecution of doping can be effective to punish intentional offenders and the threat of incarceration as a result of a criminal conviction can have a strong deterrence effect. It can also be effective to restrict the availability of doping substances in the country by punishing their importation, production, distribution or sale. However, it should be noted that the Code is a private regulatory framework having its own sample collection procedures and alternative adjudication mechanism, arbitration where CAS is the ultimate adjudicatory body, and the procedures for establishing a doping offence under this system are not the same as the procedures that must be followed by courts for a criminal conviction. Athletes agree to be bound by the Code and submit to the ultimate jurisdiction of CAS when they become members of NFs. This contractual association forces them to waive the full protection of their personal freedoms and rights as well as due process guarantees. Courts must be cognizant of the elements and procedures of this private regulatory order and must examine them against fundamental constitutional rights and principles of criminal law while prosecuting athletes for a doping offence. For instance, Article 2.3 of the Code requires athletes to submit to random sample collections for an out of competitions test with failure without compelling cause constituting an anti-doping rule violation. Moreover, an anti-doping rule violation can be established after an analysis is made on such a sample submitted by an athlete. Even after considering the fact that the athlete has submitted to such a test willingly via a contractual agreement with his/her sports organization, admitting the result of this sample analysis as evidence in a subsequent criminal trial is contrary to the probable cause requirement and the right against self-incrimination principle under criminal law. Therefore, a comprehensive national anti-doping legislation must be adopted in order to harmonize the duties created by the Convention and the Code with the country's domestic legal framework.

#### **4.3. The National Institutional Framework**

A national institution is necessary to ensure the implementation of the Convention by signatory states. In Ethiopia, the Ministry is empowered to undertake this function by Article 3 of the

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<sup>157</sup> Interview with Ato Mengistu Abebe and Interview with Dr. Ayalew Telahun.

Proclamation. Moreover, Article 37 (1(i) of Proclamation No. 916/2015 empowers the Ministry to adopt systems necessary to prevent doping in sports.<sup>158</sup> While there are some sport ministries, government bodies that are signatories to the Code are mostly National Anti-Doping Organizations (NADO) of states.<sup>159</sup> NADOs are government funded institutions established by states to oversee the implementation duties under Article 20.5 the Code.<sup>160</sup> However, NADOs are obliged to be independent in carrying out their functions and governments are expected to respect their autonomy and not to interfere in their decision making process (Article 20.5.1 and Article 22.7 of the Code). The roles and responsibilities of NADOs listed under Article 20.5 can be categorized as adopting anti-doping policies that implement the Code domestically; performing testing of athletes under their jurisdiction; promoting domestic anti-doping research and education; investigating doping allegations and enforcing sanctions on doping offenders; withholding funding from any athlete or athlete support personnel during period of ineligibility and cooperating with WADA and other signatories of the Code within and outside their jurisdiction.<sup>161</sup> These functions of NADOs are designated as duties of signatory states under Article 7 through Article 27 of the Convention.

The Ethiopian Anti-Doping Office (Eth-NADO) is designated as the national anti-doping organization of the country and it is Eth-NADO that is a signatory to the Code.<sup>162</sup> Eth-NADO is also a member of Zone 5 of African RADO.<sup>163</sup> But Eth-NADO exists only in name as no such institution is actually established. Rather, the Ministry is the only governmental organ responsible for overseeing the implementation of the Convention and the Code in the country, the Sport Science, Sport Medicine and Anti-Doping Directorate being the focal department under the Ministry that deals with the issue of doping in sports thus assuming the functions of a NADO.<sup>164</sup>

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<sup>158</sup> Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 916/2015, Federal Negarit Gazette, 22<sup>nd</sup> Year, No.12

<sup>159</sup> (<https://www.wadaama.org/en/what-we-do/the-code/signatories>), last visited on January, 21, 2017.

<sup>160</sup> (<https://www.wadaama.org/en/what-we-do/the-code/signatories/nados>), last visited on January, 21, 2017.

<sup>161</sup> The commentary to this provision provides a possibility for small countries to delegate the functions their NADOs to the relevant Regional Anti-Doping Agency (RADO). RADOs are associations of NADOs created to coordinate and assist the implementation of the Code at a regional level. There are five RADOs, Asia, Africa, America, Europe and Oceania and each RADO is divided into different Zones., at: (<https://www.wada-ama.org/en/regional-anti-doping-organizations-rado>), last visited on January, 25, 2017.

<sup>162</sup> (<https://www.wadaama.org/en/what-we-do/the-code/signatories>), last visited on January, 21, 2017.

<sup>163</sup> (<https://www.wada-ama.org/en/regional-anti-doping-organizations-rado>), last visited on January, 25, 2017.

<sup>164</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe, cited above at note 147.

In 2011, Ethiopia received a financial assistance of 10,000USD from the Voluntary Fund of Convention for establishing an autonomous NADO within five years.<sup>165</sup> In 2013, the Directorate assigned a committee comprised of twelve members to oversee the establishment of an independent national anti-doping institution.<sup>166</sup> However, the committee was dissolved before accomplishing the task and the Ministry remained the only governmental institution that implements the Convention and the Code.<sup>167</sup> The measures taken by the Ministry in this regard are restricted to undertaking anti-doping education campaigns, submitting biennial reports to the COP of the Convention and WADA and making annual financial contributions to the budget of WADA, which is around 3,000USD.<sup>168</sup> Two Ethiopian senior doping control officers, a male and a female, were also trained and accredited by African RADO in 2013, and since then have performed testing of around 100 Ethiopian Athletes.<sup>169</sup> The costs of these tests were covered not by the Ministry but by the RADO from funds allocated by WADA.<sup>170</sup>

In its assessment of signatories' biennial reports, the COP of the Convention found the country's domestic anti-doping measures to be 46.4%, 42.9% and 64.3% compliant, an acceptable level of compliance, with the Convention in the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> sessions held in 2009, 2013 and 2015 respectively.<sup>171</sup> However, this assessment was not shared by WADA. The primary objection of WADA was regarding Eth-NADO.<sup>172</sup> It requested Eth-NADO to be actually established as an autonomous governmental organ and the Ministry to allocate the money necessary for testing 200 athletes.<sup>173</sup> Consequently, in December, 2015, the Ministry mustered efforts to establish an independent NADO that implements the Convention and the Code domestically and take over the responsibilities of the Ministry in this regard.<sup>174</sup> It engaged in the

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<sup>165</sup> COP, Third Session, cited above at note 129.

<sup>166</sup> Interview with Dr. Ayalew Telahun, cited above at note 147.

<sup>167</sup> Ibid

<sup>168</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe, cited above at note 147.

<sup>169</sup> Interview with W/ro Meseret Teshome, Doping Control Officer in Zone 5, Africa RADO and Lecturer at Addis Ababa University Sports Science Department, 16, November, 2016, Addis Ababa.

<sup>170</sup> Ibid

<sup>171</sup> COP, Fifth Session, cited above at note 139. The country has not submitted a report to the 3<sup>rd</sup> COP held in 2011.

<sup>172</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe, cited above at note 147.

<sup>173</sup> Interview with Dr. Ayalew Telahun, Interview with Dr. Bezabeh Wolde, and Interview with Ato Mengistu Abebe, cited above at note 152.

<sup>174</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe, cited above at note 147.

preparation of a draft regulation for the establishment of Eth-NADO in consultation with WADA, secured a budget of 2 million Ethiopian Birr (ETB) from the government, a financial assistance of 2 million ETB from the Ethiopian Athletics Federation and 2 million ETB from the Ethiopian Olympic Committee, assigned office space and a Director for the institution within six weeks of WADA's visit.<sup>175</sup>

Cognizant of the obligations the country has assumed under the Convention, the preamble of the draft regulation proposes Eth-NADO to be established by the Council of Ministers.<sup>176</sup> According to Article 3 of the draft regulation, Eth-NADO shall be established as an independent federal office accountable to the Ministry but shall have functional independence and carry out the powers and duties bestowed upon it independently, without interference from any governmental organ or sport association in the country. It shall be governed by a Board and will initially be constituted of three main committees, The Committee for Therapeutic Use Exemptions, The Committee for Testing and Result Management and The Committee for Research and Education.<sup>177</sup> These committees will perform their duties in accordance with standards set by the Code and the Convention (Article 6 of the draft regulation). Coordinating nation-wide anti-doping efforts and enhancing anti-doping education and advocacy programs are designated as objectives of Eth-NADO under Article 5 (1&3) of the draft regulation. Undertaking doping tests on all athletes who are nationals, residents, license holders or members of sport organizations in Ethiopia or who are present in Ethiopia is also among the objectives of Eth-NADO under Article 5 (2) of the draft regulation. This sample collection jurisdiction of Eth-NADO is in line with the sample collecting jurisdiction NADOs have under Article 5.2.1 of the Code.

Article 2 of the draft regulation adopts a similar definition of doping as stipulated under Article 2 of the Code. The powers and duties Eth-NADO shall have are provided under Article 6 (1) through Article 6 (29) of the draft regulation. These powers and duties can be categorized into four general themes. The first relates to enhancing awareness about doping in sports among the sports community and the society at large by encouraging anti-doping research and by undertaking nation-wide anti-doping education and advocacy campaigns. The second theme

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<sup>175</sup> *Ib*, Article 9.

<sup>176</sup> Ethiopia National Anti-Doping Office Establishment Council of Ministers Draft Regulation.

<sup>177</sup> *Ibid*

relates to Eth-NADO's power to issue a national anti-doping directive that is in compliance with the Code and the duty to adopt and implement international standards issued or updated by WADA. The third theme of functions relate to Eth-NADO's duty to submit all the necessary reports required under WADA's Anti-Doping Administration and Management System (ADAMS) and foster cooperation with WADA, RADOs and sports organizations in the country.

The fourth theme relate to Eth-NADO's power to collect samples from athletes in order to conduct both in and out of competitions testing in accordance with the Code; investigate doping allegations made against athletes and athletes support personnel under its jurisdiction; pass decisions regarding any therapeutic use exemption requests made by athletes pursuant to WADA's ISTUE; ensure that financial and other sport related supports are withheld from athletes and sports organizations that are in violation of the Code and prosecute athletes and athletes support personnel who have committed anti-doping rule violations. In this regard, Article 6 (2) provides that Eth-NADO shall "*penalize any athlete and athlete support personnel who commit doping crimes* provided for under Article 2, 10 and 23.2.2 of the WADC", italics added. The Amharic version of this provision is more accurate than the English version which denotes doping as a crime and which suggests athletes to be penalized. According to the Amharic version, Eth-NADO "shall impose sanctions against athletes and athletes support personnel who violate anti-doping rules based on Articles 2, 10, 23.2.2 of the Code".

The objectives and mandate of Eth-NADO as provided under the draft regulation are compatible with the Code and, together with a national anti-doping policy, will enable it to implement the duties imposed on NADOs by the Code and the duties imposed on the country by the Convention. However, during the time of writing this thesis, this draft regulation has not been promulgated by the Council of Ministers even if it has been approved by WADA.<sup>178</sup> The constituent organs of Eth-NADO are still under formation and recruitment of the necessary staff has not been started so far.<sup>179</sup>

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<sup>178</sup> Interview with Dr. Ayalew Telahun, Interview with Ato Mengistu Abebe and Interview with Ato Mekonen Yedersal, Director of Ethiopian Anti-Doping Office, December, 4, 2016, Addis Ababa.

<sup>179</sup> Ibid

In addition to laying the foundation for the formation of Eth-NADO, the Ministry embarked upon a wide reaching anti-doping education campaigns and covered the cost of testing 127 samples of athletes selected to participate in the 2016 Rio Olympics.<sup>180</sup> The delegation from WADA returned in June, 2016 to assess the country's progress and found these measures to be promising.<sup>181</sup> Consequently, questions concerning the participation of the national athletics team in the 2016 Rio Olympics were cleared up.<sup>182</sup>

The measures the Ministry took in response to WADA's non-compliance allegations are indeed promising. However, this enthusiasm does not represent the Ministry's overall dedication to combat doping in sports and uphold its commitments under the Code. In fact, until 2016, the only obligation the Ministry was dedicated to uphold was the duty of conducting nationwide anti-doping education and advocacy programs.<sup>183</sup> Even these education programs were done sporadically.<sup>184</sup> Moreover, its initial conviction about the necessity of establishing an autonomous NADO seems to be waning since the draft regulation to establish Eth-NADO has not yet been enacted even if it has been approved by WADA. This poses a question on whether or not the Ministry needs to be cornered by WADA in order take the measures necessary for the implementation of the Code. This question is warranted because the failure of the Ministry to uphold its commitments under the Code can result in IFs imposing sanctions on NFs in the country thereby jeopardizing the eligibility of Ethiopian athletes to participate in sporting events including Olympic Games.

The case of Ethiopia is another example of the discrepancy observed in the assessment of compliance made by the COP of the Convention and WADA. The fact that the country has achieved an acceptable compliance rate with the Convention did not interpret as being in compliance with the Code and did not enable it to avoid threat of sanctions by WADA. As discussed above, the COP of the Convention noticed this discrepancy following the Russian doping scandal and has passed a resolution which proposes the formation of a review committee

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<sup>180</sup> Interview with W/ro Meseret Teshome, Interview with Dr. Ayalew Telahun, Interview with Ato Mengistu Abebe and Interview with Dr. Bezabeh Wolde, .

<sup>181</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe, cited above at note 147.

<sup>182</sup> Ibid

<sup>183</sup> Ibid

<sup>184</sup> Interview with Dr. Ayalew Telahun.

that monitors national public anti-doping policies of signatories. Even though there are no provisions under the Convention that impose sanctions on non-compliant signatories, the establishment of this committee can strengthen the COP in monitoring the proper implementation of the Convention by signatories and can help bridge this discrepancy.

The country faces various challenges in fulfilling its duties under the Convention and the Code. The financial cost associated with testing athletes is the primary challenge.<sup>185</sup> Performing testing is financially demanding as the test of one urine sample costs 500 USD and a blood sample test costs 1, 200 USD.<sup>186</sup> Moreover, testing and analysis of samples must be done by WADA accredited or approved laboratories (Article 6.1 of the Code). There are no such laboratories in Africa and the closest WADA accredited laboratory which was in Doha, Qatar was closed leaving only laboratories in Europe and Asia.<sup>187</sup> Lack of experts on the area of doping regulation and obtaining sustainable government support for the efforts initiated by the Ministry are also identified as challenges.<sup>188</sup>

## **Chapter Five**

### **Conclusion and Recommendations**

#### **5.1. Conclusion**

The need to eradicate doping from sports has brought about a greater cooperation between private sports institutions and public authorities both at the international and national levels. The Convention which sets an international legal anti-doping framework that is in harmony with the rules created by the Code is the hall mark of this cooperation. The hybrid public-private

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<sup>185</sup> Interview with Dr. Ayalew Telahun, Interview with Ato Mengistu Abebe and Interview with Ato Mekonen Yedersal.

<sup>186</sup> Interview with Dr. Ayalew Telahun.

<sup>187</sup> Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe.

<sup>188</sup> Interview with Ato Mekonen Yedersal, Interview with Dr. Ayalew Telahun and Interview with Ato Mengistu Abebe.

organizational structure of WADA which is the leader of the world anti-doping program also plays a determinant role for the legal recognition the Convention bestows on the Code and other international standards set by it. The Convention suffers from the main drawback of regulating a problem through the framework of international law, ensuring enforcement of obligations by signatories. It does not impose sanctions on non-compliant signatories and has a weak monitoring mechanism that does not ascertain its proper implementation by signatories. On the other hand, the hierarchical structure of the IOC and the hybrid public-private structure of WADA have enabled the Code to have a strong monitoring and enforcement mechanisms. This has both exposed the weakness of the Convention's monitoring mechanism and has provided signatory states with a strong incentive to observe their duties under the Convention.

Although Ethiopia is among the early nations to ratify the Convention and criminalize doping, the country's experience with doping had made it reluctant to adopt comprehensive domestic anti-doping policy and establish an autonomous anti-doping institution. The Convention and Article 526 of the Criminal Code set up the domestic anti-doping legal framework and the Ministry is the national institution that leads the country's anti-doping efforts and that has a mandate to implement the Convention. The definition of doping formulated under Article 526 of the Criminal Code is not in conformity with the definitions provided under the Code and the Convention. For instance, as per the provision of the Criminal Code, moral culpability is one of the elements of the provision that must exist in order to punish a person for doping offence. But for the Code, the rule is strict liability and moral culpability is not an element for establishing doping but only for assessing liability.

The measures taken by the Ministry for the implementation of the Convention has enabled the country to uphold its commitments under it. Nonetheless, these measures did not enable the Ministry to fulfill the obligations it has assumed under the Code and avoid threat of sanctions by WADA and IAAF. In response to these threats, the Ministry has initiated efforts to establish an autonomous anti-doping organization, Eth-NADO. This requires the Ministry to strive to elevate its efforts to the standards required by the Code. This is particularly imperative because failure of the Ministry in this regard can expose NFs in Ethiopia to sanctions by IFs thus exposing Ethiopian athletes to be ineligible to participate in international sports competitions.



## **5.2. Recommendations**

On the basis of the above conclusions and discussions made under the main part of the paper, the following are possible recommendations for future course of action:

- The establishment of a review committee that monitors domestic anti-doping policies of signatories can help strengthen the monitoring mechanism of the Convention and can attenuate the discrepancy observed between assessments performed by the COP of the Convention and WADA, thus harmonizing anti-doping efforts globally. Therefore, the

COP of the Convention shall pass a resolution for the establishment of this committee during its 6<sup>th</sup> session.

- Ethiopian athletes might find it hard to understand the complex set of anti-doping rules and procedures provided under the Code as well as the contents of the annually updated Prohibited List. Thus, effective, periodical and wide-reaching anti-doping education programs must be designed and implemented by the Ministry.
- Encouraging researches to be made on the area of doping in sport and providing anti-doping trainings to stakeholders can help to overcome the lack of experts on the area of doping regulation. Therefore, the Ministry should allocate the necessary resources and work in coordination with sports organizations in the country to perform these activities.
- The existence of a WADA accredited laboratory in Africa will help cut the costs associated with performing national testing programs. Therefore, Ministry should work with members of African RADO and WADA to this end.
- The country's national anti-doping framework will be robust and the Ministry will be able to avoid possible sanctions from WADA if Eth-NADO is established and if it exercises its power to issue a national anti-doping directive. Thus, the Ministry should take all the necessary measures to ensure that the draft regulation for the establishment of Eth-NADO is enacted by the Council of Ministers.
- A comprehensive national anti-doping legislation that harmonizes the duties created by the Convention and the Code with the country's domestic legal framework must be adopted.
- Such national anti-doping legislation should ensure athletes' fair hearing and due process rights. To this end, any national anti-doping directive must at least incorporate the basic principles of fair hearing recognized under the Code.
- The standards and procedures followed by the Code for determining an anti-doping rule violation must be assessed before subsequent criminal prosecutions are instituted against athletes pursuant to Article 526 of the Criminal Code. Rather than criminally prosecuting athletes, imposing administrative sanctions can be an effective domestic measure.
- On the other hand, Article 526 of the Criminal Code should be applied to prosecute individuals engaged in the production, importation, sell or distribution of doping substances in the country.

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