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

by *Jean-Christophe LAPOUBLE**

Recognition with the ratification of 19th October 2005 of the UNESCO Convention on the fight against doping¹ shall oblige signatory States to implement the World Anti-Doping Code², which provides a series of controls outside sports competitions to detect for substances that are no longer present in the body during competitions. In Africa, 47 countries have ratified the Convention against doping. This type of control entails an obligation for national organizations to implement the whereabouts system (target group).

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

Ratifying the UNESCO Convention does not make the fight plan against doping operational. It also requires the existence of a functional national anti-doping organization. According to the World Anti-Doping Agency, the African countries who possess a National agency to fight against doping are: Benin, Burkina Faso, Burundi, Cameroon, Chad, Comoros, Congo, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Gabon, Guinea, Ivory Coast, Kenya, Libya, Malawi, Maldives, Mali, Mauritius, Niger, Nigeria, Senegal, Seychelles, South Africa, Sudan, Tunisia. Thus, it important to highlight the fact of 47 countries have ratified the UNESCO Convention but only 27 have established a national organization⁴. Does the fight against doping justifies a such breach of fundamental rights?

In fact, the introduction of such a system creates inequalities between athletes (depending on the country where they are resident) but increasingly it creates legal leak even by simple negligence. But in some countries, protection of right privacy need to respect some specific law, subject to prosecution in case of failure. It is the same for technology differences: *“Differential access to technology remains a reality that flies in the face of this morals based argument”*⁵. Furthermore, in Africa only one analytical laboratory is accredited by the World Anti-Doping Agency⁶.

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

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

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

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

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

⁶ South African Doping Control Laboratory - Bloemfontein

1. The very restrictive measures for athletes

Article 5.6 of the new World Anti-Doping Code provides the establishment of a tracking system and the implementation modalities⁷.

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

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

The violations of the location requirement are discussed in the article 7.6. If the athletes miss three controls within a period of twelve months, they will have a sanction of two-year sanction or one year if the fault is negligence⁸. In order to implement these provisions, it is necessary to analyze the International Doping Standards and the guidelines that specify this implementation. Some explanations are given to know how to choose the athletes of the Pool.

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

The Anti-Doping Administration & Management System (ADAMS), centralise and share informations about controls and whereabouts in a Registered Testing Pool¹⁰ (RTP) for each National Anti-doping Organisation (NADO). ADAMS is a clearinghouse where all data can be stored, especially informations on Anti-Doping Rules Violations. It eases sharing of informations among the Anti-Doping organizations and promotes efficiency, transparency and effectiveness in all anti-doping activities.

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

“In those rare cases where ADAMS cannot be used (e.g. online access isn’t generally available for RTP Athletes), there responsible ADO¹¹ may allow its Athletes to submit their Whereabouts Filings by post and/or fax or another approved system”¹².

⁷ Article 5.6 : Athletes Whereabouts Information

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

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

⁹ Article 8.3.1 of World Anti-Doping Agency guideline of effective testing.

¹⁰ Registered Testing Pool

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

¹¹ Anti-Doping Organisation

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

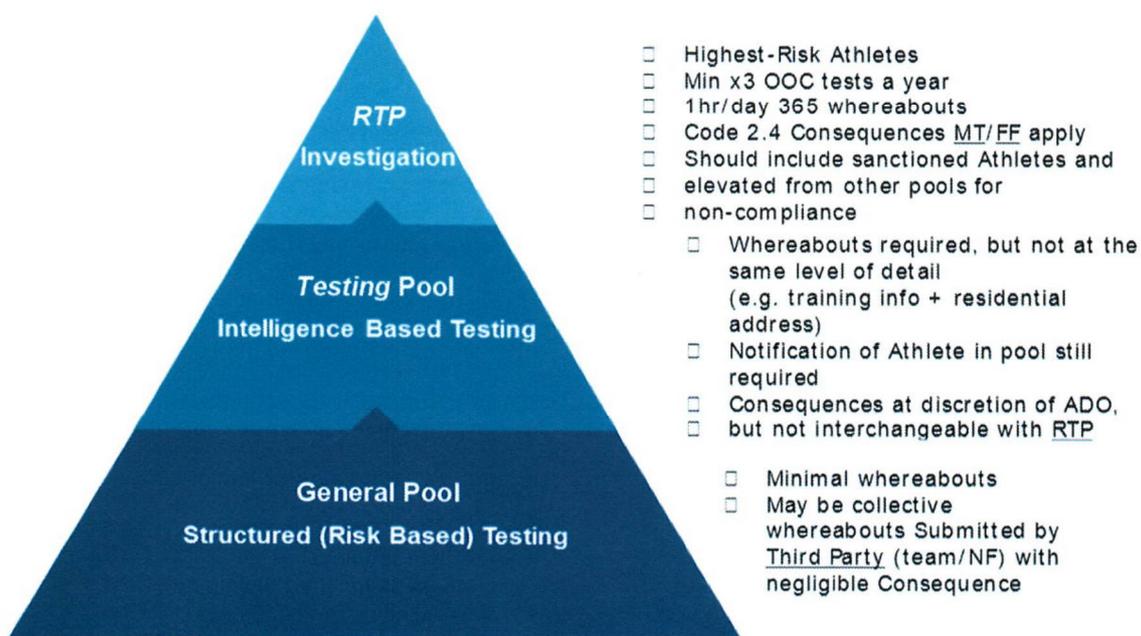
Since 2009, WADA has established an International Standard for the Protection of Personal Data in the Whereabouts system. The World Anti-Doping International Standard for the Protection of Privacy and Personal Information is a mandatory International Standard developed as part of the World Anti-Doping Program¹³. This Standard specifies how the data and samples has to be stored. Data includes as; name, birthdate, sport discipline and gender that will be kept indefinitely. Personal contact information such as address will be kept for ten years as the sample if it is not anonymous, otherwise it will be kept indefinitely. For the whereabouts data it will be store for 18 months but indefinitely in case of Anti-Doping Rule Violation (ARDV). More worryingly the International Standard states: “*Only small amount of Whereabouts is relevant to retain, but it is impossible to establish which part*”¹⁴.

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

The pyramid below shows the selection criteria :

October 2014 V. 1.0

Figure 3. Pyramid Whereabouts Model



¹² Article 8.3.3.2 of World Anti-Doping Agency guideline of effective testing.

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

¹⁴ Annex A to the International Standard on Protection of Privacy and Personnel Information.

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

To validate these new measures, a legal opinion has been asked to Mr. Jean-Paul Costa, former President of the European Court of Human Rights¹⁶. He has now validated most of the new measures. Thus, the new writing of the article 5.2 of the World Anti-Doping Code states that *"Any Athlete may be required to provide a sample at any time and in any place by an anti-doping organization"*. This therefore clearly means that an athlete may be controlled at night, including between 11 p.m. and 6 a.m.! Just during this period; athlete would be given a possible sixty minutes-slot, if an anti-doping organization has serious and specific suspicions about this sports

2. Protection of the right of privacy

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

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

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

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

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

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

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

For the European Court of Human Rights, the article 8 of the Convention *"protects the right to individual development, whether in the form of personal development ... or the aspect of personal autonomy."*¹⁸ It appears that in general the doctrine that *"In fact, any physical interference with an individual's life, especially when it is made against his will, is likely to prejudice to Article 8"*¹⁹. In France an appeal (not yet found) was filed with the European Court of Human Rights by the National Federation of Sports Unions, July 23, 2011 due to privacy violations driven by the introduction of the whereabouts system²⁰.

Storage and personal data communication as they are provided for the localization an interference with privacy²¹. Indeed, justifying such an intrusion, implies that the interference corresponds to a pressing

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

¹⁶ Costa, J.-P., Avis de droit sur le projet de révision du Code mondial antidopage, 23 juin 2013 : http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/Code_Review/Code%20Review%202015/WADC-Legal-Opinion-on-Draft-2015-Code-3.0-FR.pdf.

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

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

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

²⁰ Claim n°48151/11

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

social need, and a legitimate goal. Thus, a simple medical examination may be seen to constitute an invasion of privacy²².

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

Regarding data protection, the United Nations Guidelines for the regulation of Computerized Personal Data File²³ constitute the first effort done by The United Nations to develop concrete rules for protection of personal Data.

The African Charter on Human and Peoples' Rights (1987) also known as the "Banjul Charter" does not contain an explicit reference to the right of privacy. The State Party reporting guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted in Tunis in 2012 does not contain specific measures on the right of privacy. Some countries, as Mauritius²⁴ or South Africa²⁵ have specific texts about the protection of privacy. In these countries, the right of privacy is guaranteed by the Bill of rights of the Constitution (section 14). The Right of privacy is also protected by common law. But for some African countries, the data legislation is influenced by national laws of some members of the European Union members (e.g., Angola, Benin, Burkina-Faso, Cape Verde, Morocco, Mauritius, Senegal, and Tunisia)²⁶. For A. B. Makulilo: "... it is imperative to note than the effect of national data privacy law by an EU member country to Africa is practically the same as the (European) Directive²⁷ itself"²⁸.

For K. Reddy : "*Privacy is the right of individuals to control both information about themselves and their boundaries during interactions with others*"²⁹. For this author³⁰, the fair information principles are:

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

Such principles correspond to what is provided in in the article 5.6 of the World Anti-Doping Code, but it is not certain that such a level of data protection can be ensured throughout the African continent. Indeed, as the protection of privacy is not explicitly guaranteed by an international Convention at the continental level, it refers to the protection existing in each country. Now there are two types of pitfalls; the existence of an effective legal system protecting privacy and the ability of National anti-doping organizations to protect the informations they have about the athletes. As there are only 27 national anti-doping organizations in Africa, it must be inferred in the other countries the introduction out of competition testing is not legally possible, unless they are organized by WADA. Out of the 27 countries, only South Africa appears to us to organize such controls in the international standards³¹. For the athletes, the system may be unfair, because only a few countries have implemented it and many athletes can train without the legal obligation to be localised. In fact, in Africa such obligations would be very difficult to develop for several reasons. First, the existence of a law does not necessarily guarantee a good protection because the means of protection and control must be effective. Second, organizing of a doping control out of competition requires infrastructure that

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

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

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

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

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

²⁷ European Data Protection Directive 95/46/EC.

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

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

³⁰ Idem p. 22.

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

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

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

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

3. The risks of poor data protection

Article 14.6 of the World Anti-Doping Code states:

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

Although there is a right of complaint to formulate nearby National Anti-Doping Organization, the risk is important even if some countries provides an act for this right. In fact, the ADAMS system allows the transfer of informations and recognizes that the quality of data protection cannot be guaranteed³⁵ :

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

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

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

To finally find a remedy against errors that may be contained in the ADAMS file, it must turn to Canadian law. This suggests that it is, the Committee on Access to Information in Quebec which is competent under the law on the protection of personal information in the private sector and in particular article 28 which provided within thirty days to refuse an appeal before the commission³⁷. In practice, the consequences of a malfunction in the file can be extremely serious. Supposing that data about the private life of an athlete may be revealed in a country where there is no text on data protection or no effective protection, the damage would never be compensated. There are even more worrying unannounced checks may that lead to the disclosure of the sexual preferences of an athlete.

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

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

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

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

<https://wada-main->

prod.s3.amazonaws.com/resources/files/WADA%20ADAMS%20User%20Agreement%20%28ADO%20version%29.pdf

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

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

But homosexuality is penalized in 76 countries³⁸, including in African countries, presented an extreme risk posed by whereabouts. Homosexual acts are legal in only 19 countries in Africa³⁹. The Special Rapporteur on Human Rights Defenders in Africa, Commissioner Reine Alapini-Gansou, received an information that on 24th February 2014, “*The Anti-Homosexuality Act, 2014*” was promulgated in the Republic of Uganda and considers that this act shall be cancelled⁴⁰. This shows that the risk for athletes is real and not merely theoretical⁴¹. So the African Commission on Human and Peoples’ Rights in Luanda, has adopted , (28 April to 12 May 2014)⁴² during the 55th Ordinary Session, a Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity which :

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

The same reasoning can be applied to countries that provide criminal sanctions for adultery⁴³. Even if in South Africa, on 25 September 2014, the Supreme Court of Appeal (SCA) ruled that one could no longer claim compensation for damages as a result of adultery⁴⁴.

Conclusion

Given the new features introduced in the 2015 WADA Code version, the abuses should be easier in terms of invasion of privacy, especially since they are justified by the effectiveness of anti-doping measures. However, doping is not considered by most State legislations as a crime which could justify such measures and it is also possible to consider according J. Kosiewicz⁴⁵, than fighting doping cannot be based on moral arguments. Others⁴⁶ consider that the fight against doping must sign a more comprehensive system because doping is a culture, this is what justifies the increasingly stringent texts but:

“The disparities of privacy in different national laws, sub-regional and regional in Africa are bound to produce far reaching consequences⁴⁷”

In order to fight doping, there is the establishment of a system that is similar to the fight against serious crime: *«The sporting exception that do exist are not absolute or unconditional. The courts have, to date, been very careful to not give governing bodies in sport an open exception from treaties, law and legislation⁴⁸»*

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

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

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

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

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

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

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

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

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

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

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