STATE-SPONSORED DOPING AND INTERNATIONAL STATE RESPONSIBILITY: CAVEATS OF THE INTERNATIONAL ANTI-DOPING SYSTEM

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ABSTRACT

This article provides an in-depth examination of the international legal implications and consequences of State-sponsored doping programs. It will investigate the process of identifying a case of state-sponsored doping within the framework of international State responsibility and discuss its consequences and importance in the fight against doping. It will conduct a comprehensive analysis of the foundational documents of both public and private anti-doping systems to evaluate their legal weight from the standpoint of public international law. The article emphasizes the shortcomings of existing legal mechanisms in effectively combating State-sponsored doping, such as the absence of robust sanctions and dispute-resolution mechanisms that can provide remedies for victims. It also proposes potential areas for improvement in anti-doping legal regimes, including the potential role of the Court of Arbitration for Sport (CAS) as a dispute resolution body for anti-doping violations of States.

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"*The sad thing about doping is how much it obscures our appreciation of greatness*".[1]

INTRODUCTION

In 2015, an independent commission set up by the World Anti-Doping Agency (WADA) uncovered evidence of systematic and State-sponsored doping within the operations of the All-Russia Athletics Federation (ARAF).[2] The commission's report detailed a "deeply rooted

1. Malcolm Gladwell and Nicholas Thompson, *Usain Bolt, a Collapse, and an Epic Beer Mile*, NEW YORKER (Aug. 27, 2015), *available at* https://www.newyorker.com/sports/sporting-scene/usain-bolt-a-collapse-and-an-epic-beer-mile (last visited Apr. 8, 2024).

2. *Independent Commission Report on All Russian Athletics Federation*, WORLD ANTI-DOPING AGENCY (Nov. 9, 2015), *available at* https://www.wada

culture of doping," exploitation of athletes, corruption, bribery, and evidence of criminal conduct.[3]

In July 2016, WADA released its first report on the systematic doping of Russian athletes during the 2014 Winter Olympics in Sochi, Russia.[4] It confirmed that Russian sport authorities, in cooperation with State officials at all levels of government, had conducted a wide-scale doping operation involving dozens of athletes, altering the outcome of several competitions in some of the most important international sporting events.[5]

After broadening the scope of its investigations, in a second report in December 2016, WADA declared that Russia has hijacked international sports for years.[6] Investigations revealed the use of different methods, including the so-called "Disappearing Positive Methodology"[7] between 2012 and 2015, under the orders of Russia's Deputy Minister of Sport.[8]

Further investigation commissioned by the Disciplinary Committee of the International Olympic Committee (IOC), known as the Schmid Commission, confirmed the findings of previous WADA reports and reaffirmed the systematic and institutionalized nature of the Russian doping program.[9]

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ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf (last visited Apr. 8, 2024) [hereinafter ARAF Report].

3. *Id.* at 9-12.

4. *McLaren Independent Investigation Report – Part I*, WORLD ANTI-DOPING AGENCY (Jul. 18, 2016), *available at* https://www.wada-ama.org/en/resources/mclaren-independent-investigation-report-part-i (last visited Apr. 8, 2024) [hereinafter First Report].

5. As the result of investigations, Russia lost a few medals from the 2014 Sochi Games. Later, as the scandal prompted a re-analysis of doping samples from the London 2012 and Beijing 2008 Summer Olympics, more podiums were toppled, hitting some big names in the history of the Games. *IOC Strips Three More Medals from 2008, 2012 Games Re-Tests*, REUTERS (Apr. 5, 2017), *available at* https://www.reuters.com/article/us-doping-olympics-idUSKBN17726B (last visited Apr. 8, 2024); *see also* Carlos Grohmann, *Bolt Loses Relay Gold after Jamaica's Carter Tests Positive*, REUTERS (Jan. 26, 2017), *available at* https://www.reuters.com/article/idUSKBN15A0ZQ/ (last visited Apr. 8, 2024).

6. *McLaren Independent Investigation Report – Part II*, WORLD ANTI-DOPING AGENCY (Dec. 9, 2016), *available at* https://www.wada-ama.org/en/resources/mclaren-independent-investigation-report-part-ii (last visited Apr. 8, 2024) [hereinafter Second Report].

7. This methodology essentially worked based on reporting positive findings of samples as negative analytical results. First Report, *supra* note 4, at 10, 27.

8. *Id.* at 39, 41.

9. *IOC's Disciplinary Commission's Report to the IOC's Executive Board*, INT'L OLYMPICS COMM. [IOC] (Dec. 2, 2017), *available at* https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/IOC-Disciplinary-

While the use of doping by States to manipulate international sports competitions is not new,[10] the extent of Russia's doping program, considering the advancement of anti-doping frameworks, shocked even the most jaded observers. Additionally, this might not be the last case of State-sponsored doping. The possibility of States manipulating international sport competitions through doping, without facing effective sanctions, could result in a never-ending escalation of doping by other States and athletes. This could potentially damage the credibility of sports and pose threats to the health of athletes.[11] As the Independent Investigator of WADA that conducted two of the above investigations remarked, the Russian doping program was an "attack [on] the principle of clean sport and clean athletes which are at the very heart of WADA's raison d'être."[12]

The Russian State-sponsored doping case became a true test of the functionality of the global anti-doping system. Russia violated two anti-doping legal regimes: the "private" one, internal to international sports governance, involving sport governing bodies (SGBs) such as the International Olympic Committee (IOC) and WADA, aiming to ensure respect of the WADA Code; and the "public" one, under public international law, comprising two treaties of international law whose goal is combating doping. These include the United Nations Economic, Scientific, and Cultural Organization's (UNESCO) Convention against Doping in Sport (UNESCO Convention),[13] and the Council of Europe's Eu-

Commission-Schmid-Report.pdf#_ga=2.104879233.385687857.1513014269-1584169185.1502791100 (last visited Apr. 8, 2024) [hereinafter Schmid Report].

10. *See generally* STEVEN UNGERLEIDER, FAUST'S GOLD: INSIDE THE EAST GERMAN DOPING MACHINE (2001).

11. "[A]thletes now think that you are better off cheating or getting your nation to establish a doping system because even if it is discovered, the consequences are minimal," … "[O]r, if you don't want to cheat, avoid elite sport like the plague." *See* Sean Ingle, *Russia's Backdoor Olympics*, The Guardian (Feb. 2, 2018), *available at* https://www.theguardian.com/sport/2018/feb/02/winter-olympics-russian-doping-ban-pyeongchang#img-1 (last visited Apr. 8, 2024). Before Russia, during 1980s and 1990s there were allegations of State-sponsored doping against China by a whistleblower. WADA has come under critique for not investigating the allegations. *See* Sean Ingle, *WADA Is Accused of Sitting on Mass China Doping Claims for Five Years*, THE GUARDIAN (Oct. 23, 2017), *available at* https://www.theguardian.com/sport/2017/oct/23/wada-china-doping-allegations-xue-yinxian#:~:text=Wada%20is%20accused%20of%20sitting%20on%20mass%20China%20doping%20claims%20for%20five%20years,-This%20article%20is&text=The%20World%20Anti%2DDoping%20Agency,by%20a%20whistleblower%20in%202012 (last visited Apr. 8, 2024).

12. First Report, *supra* note 4, at 22.

13. International Convention against Doping in Sport, Nov. 19, 2005, 201 U.N.T.S. 2419 [hereinafter UNESCO Convention].

ropean Anti-Doping Convention (European Convention).[14] These two private and public anti-doping legal regimes are deeply interwoven and there is a considerable effort to achieve synchronization between them.[15]

Despite the Russian doping program being the most brazen assault to date on the public and private anti-doping legal regimes, the reaction of the stakeholders (including States and SGBs) lacked consistency, arguably failed to detect the full extent of violations, and failed to provide remedies for the victims.[16] The sanctions imposed were primarily focused on suspending Russian SGBs, while still allowing Russian athletes to compete as neutrals under some conditions, without holding accountable the State apparatus that orchestrated and supported the doping program.

This article aims to address a gap in the existing scholarly literature on State-sponsored doping by examining the question from a public international law standpoint. However, one crucial aspect that is often overlooked is the fact that State-sponsored doping, or even doping in general, can also be a violation of international human rights law (IHRL). It violates both the rights of the athletes who were subjected to the State-sponsored doping program and the rights of those who competed against the doped athletes on the field of play. This aspect of the plague of doping has unfortunately received inadequate attention. There is a glaring lack of awareness of the intersection between doping practices and IHRL, especially in cases where doping has been orchestrated by States. Moreover, this should be considered in light of the 2020 report of the United Nations Office of the High Commissioner for Human Rights (OHCHR), which recognized that "consideration of human rights norms and standards in the resolution of sport disputes is

14. Council of Europe [CoE] Anti-Doping Convention, 1989, 135 ETS [hereinafter European Convention].

15. *See infra* Finally, the article discusses the Court of Arbitration for Sport (CAS) as the potential proper forum to adjudicate cases of State-sponsored doping. However, to enable it to do so, it would necessitate granting CAS jurisdiction over States. This can be done either in the form of an arbitration clause or by designating CAS as the dispute resolution forum for similar disputes through the adoption of an additional protocol supplementing the public international anti-doping legal regime.

16. *See infra* However, an essential question that requires attention is how effective the existing international mechanisms have been in remedying the consequences of a State's violation of international anti-doping obligations. The following section aims to address this significant question.

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limited,"[17] and that "[t]here is currently no global consensus on a consistent and comprehensive approach to the remediation of human rights abuses in sport."[18] A detailed analysis of this issue is beyond the scope of this research and warrants a separate investigation. However, this article will also examine the related issue of whether there are available avenues to provide remedies to the victims of a State-sponsored doping program, striving to identify the shortcomings of the current anti-doping system in this regard.

By applying the law of international State responsibility, this article will investigate first what international obligations States have in the fight against doping and how State-sponsored doping violates States' international obligations, is attributable to the State, and constitutes an international wrongful act (IWA). Once an IWA is established, then the State is internationally legally responsible. As a result, the State in question must cease the IWA, comply with its international obligations, and finally provide full reparations to all the affected parties. This article will specifically explore and evaluate the effectiveness of global anti-doping mechanisms to achieve these objectives, including ensuring future compliance and facilitating the provision of reparations in cases of wrongdoing.

Finally, the article discusses the Court of Arbitration for Sport (CAS) as the potential proper forum to adjudicate cases of State-sponsored doping. However, to enable it to do so, it would necessitate granting CAS jurisdiction over States. This can be done either in the form of an arbitration clause or by designating CAS as the dispute resolution forum for similar disputes through the adoption of an additional protocol supplementing the public international anti-doping legal regime.

I. STATE INTERNATIONAL OBLIGATIONS AND DOPING

In 2001, the United Nations International Law Commission (ILC) adopted the "Draft Articles on Responsibility of States for Internationally Wrongful Acts."[19] It took five Special Rapporteurs most of the sec-

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17. U.N. Office of the High Commissioner for Human Rights, *Intersection of Race and Gender Discrimination in Sport*, U.N. DOC. A/HRC/44/26 (Jun. 15, 2020), *available at* https://undocs.org/en/A/HRC/44/26 (last visited Apr. 8, 2024).

18. *Id.* ¶ 39.

19. U.N. Int'l L. Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N Doc. A/56/10 (Nov. 2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Apr. 8, 2024) [hereinafter ILC Articles].

ond half of the twentieth century, producing almost thirty reports, along with countless drafts and government comments,[20] to codify international custom in this sensitive and complex field.[21]

The ILC Articles define the rules of customary international law regarding the attribution of responsibility to States for IWAs,[22] and clarify the content of responsibility and its consequences.[23] Together, Articles 1 and 2 lay down the key constitutive elements of international responsibility: (i) a conduct (action or omission) that breaches an international obligation of a State; and (ii) the conduct is attributable to the State under the rules of international law.[24] The ILC Articles also codify the consequences of international legal responsibility in terms of providing full reparations to the victims.

According to the ILC Articles, an international obligation emanates from a binding primary rule of international law, whether contained in a bilateral treaty, multilateral treaty or "any other source of legal commitments under international law,"[25] such as customary international law.[26] The obligation must be binding and enforceable at the time of the wrongful act.[27]

Arguably, Russia violated multiple international obligations deriving from both the "private" and "public" anti-doping regimes. The "private regime," the one internal to international sports governance, comprises at a minimum (i) the World Anti-Doping Agency (WADA) Code,[28] and (ii) in the case of Russia, the bilateral agreement between Russia and the IOC regarding the hosting of the 2014 Sochi Games.

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20. James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. AUDIOVISUAL LIBR. OF INT'L L. (2012), *available at* https://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf (last visited Apr. 8, 2024).

21. *See e.g.*, ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION, 8–12, 27–30 (2017).

22. Pellet has called State responsibility "the heart of international law" and the ILC Articles as "the constitution of the international community." ALAIN PELLET, THE LAW OF INTERNATIONAL RESPONSIBILITY 3, 5–6 (James Crawford et. al. eds., 2010).

23. U.N. Int'l L. Comm'n, Rep. of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/ 10 Supp. 10 (2001), General Commentary ¶ 3(f) [hereinafter Commentary].

24. ILC Articles, *supra* note 19, art. 2.

25. Commentary, *supra* note 23, art. 12, ¶ 3.

26. *Id.* art. 2, ¶ 7.

27. *Id.* at General Commentary ¶ 5.

28. *World Anti-Doping Code*, WADA (2021), *available at* https://www.wada-ama.org/sites/default/files/resources/files/wada_2021_code_november_2019_v._wada_2021_code_june_2020_final_-_english.pdf [hereinafter WADA Code], (last visited Apr. 8, 2024).

The second regime comprises two international anti-doping treaties, one global and one regional: (iii) The International Convention against Doping in Sport,[29] adopted by UNESCO in 2005 and entered into force on February 1, 2007;[30] and (iv) the Anti-Doping Convention,[31] adopted by the Council of Europe (CoE) in 1989, and entered into force on 1 March 1990.[32] The European Convention was strengthened and expanded in 2002, by the adoption of a Protocol that entered into force in 2004.[33] At the time of the events (at least from the 2012 London Games to the 2014 Sochi Games), Russia was party to both conventions but not to the Protocol to the European Convention. It ratified the UNESCO Convention on 29 December 2006[34] and acceded to the CoE's Convention on 12 February 1991.[35]

A. The Public Anti-Doping Regime

The term "public" anti-doping regime describes the system States created under public international law to supplement the private efforts of SGBs and others in fighting doping. The parties to the treaties com-

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29. UNESCO Convention, *supra* note 13.

30. *Id.*

31. European Convention, *supra* note 14.

32. Having two international instruments on one issue with different scopes can create challenges. However, recognizing these challenges, the parties to these two treaties devised mechanisms to harmonize them, facilitating the monitoring process and creating a more effective infrastructure. *Evaluation of UNESCO's International Convention against Doping in Sport*, UNESCO's Internal Oversight Services Evaluation Office, IOS/EVS/PI/161 REV.2, ¶ 29 (Aug. 2017), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000258739.locale=en (last visited Apr. 8, 2024). [hereinafter Evaluation of UNESCO Convention]). In 2017, the sixth session of the Conference of Parties considered the possibility of stronger inter-agency collaboration between the UNESCO Convention and the Council of Europe's Monitoring Group of the Anti-Doping Convention. *See Monitoring of the International Convention Against Doping In Sport: Harmonization between UESCO, WADA and the Council of Europe*, Conference of Parties to the International Convention against Doping in Sport, ICDS/6CP/INF.1 (Sep. 1, 2017), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000258873_eng (last visited Apr. 8, 2024). Also, Conference of the Parties of the UNESCO Convention invited WADA and the CoE to attend its meetings going forward, to improve harmonization between the relevant international frameworks. *See* Evaluation of UNESCO Convention, ¶ 59.

33. *Chart of Signatures and Ratifications of Treaty 188*, COE, *available at* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=188, (last visited Apr. 8 2024).

34. UNESCO Convention, *supra* note 13.

35. *Chart of Signatures and Ratifications of Treaty 135*, COE, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135/signatures?p_auth=sbWj3zSf, (last visited Apr. 8, 2024).

prising this regime are States. These treaties create obligations primarily (but not exclusively) for States.

1. The International Convention against Doping in Sport

In 2005, UNESCO adopted the International Convention against Doping in Sport (UNESCO Convention). The UNESCO Convention is probably the most important anti-doping treaty because of its global reach and being a treaty of the United Nations system. Its aim is to ensure and protect public health, integrity of sport, and other values related to sport.[36] It is the only universal legally binding instrument against doping in sport, having been ratified to date by 191 States, including Russia.

Under the UNESCO Convention, States that are a party have a general obligation to boost international cooperation between them and the WADA, in conformity with the WADA Code, to protect the athletes and the spirit of sport.[37] More specifically, the UNESCO Convention designs a system requiring public sector authorities (i.e. in areas such as public health, education, and justice) to cooperate with the private sector (e.g. sport federations, health operators, and pharmaceutical producers) to keep sports clean.[38] It requires States to take all necessary legislative and administrative measures[39] to achieve the purpose of the UNESCO Convention;[40] to cooperate in this regard;[41] to comply with internationally recognized ethical practices in conducting doping research;[42] to take measures against athlete support personnel who violate doping rules or who committed other offenses connected to doping in sports;[43] to assist sport and anti-doping organizations to implement doping control in their jurisdiction consistent with the WADA code;[44] and to facilitate doping control.[45] State parties shall ensure compliance with WADA regulations within their respective geographical borders.[46] The UNESCO Convention does not define doping or what doping substances are. It leaves it to the WADA Code—an appendix to the UNESCO

36. Evaluation of UNESCO Convention, *supra* note 32, ¶ 19.
37. *Id.* ¶ 4.
38. *Id.* ¶ 34.
39. UNESCO Convention, *supra* note 13, art. 5.
40. *Id.* art. 3.
41. *Id.* art. 5, 13, 16.
42. *Id.* art. 25(a).
43. *Id.* art. 9
44. UNESCO Convention, *supra* note 13, art. 12(a).
45. *Id.* art. 12.
46. *Id*. art. 3(a).

Convention[47]—to provide a harmonized set of rules, principles, and guidelines that govern the prevention, detection, and sanctioning of doping violations. The connection between the UNESCO Convention and the WADA Code is important for promoting uniformity and efficiency in the battle against doping, especially through the establishment of a comprehensive list of banned substances.

The body in charge of supervising the implementation of the UNESCO Convention is the Conference of the Parties (CoP), composed of the 191 States that ratified it.[48] A representative of WADA sits as an advisory member, with no vote, and representatives of other organizations (e.g. the IOC, the International Paralympic Committee, the CoE, and the Intergovernmental Committee for Physical Education and Sport (CIGEPS)) sit as observers.[49] State parties submit reports to the CoP biannually, through an online self-assessment questionnaire called the "Anti-Doping Logic System" (ADLogic questionnaire) developed in 2009.[50] It is the principal monitoring and evaluation tool of the UNESCO Convention and helps monitor "actions and measures taken by public authorities at the national level".[51] The ADLogic questionnaire asks States to answer 21 principal questions, covering the four thematic areas of the Convention: national activities to strengthen anti-doping (Articles 7-12); international cooperation (Articles 13-14 and 16); education and training (Articles 19-23); and research (Articles 24-27).[52] The report is generated automatically by the ADLogic system on the basis of responses provided by the State Party. In 2017, based on the results of the submitted reports, the CoP concluded that one of the challenges for the application of the Convention is incorporating its provisions into national frameworks, causing a lack of progress for a remarkably high number of States.[53]

Despite the above efforts, there is room for improvement for this public regime. The UNESCO Convention is the "most successful convention in the history of UNESCO in terms of rhythm of ratification after adoption" and the second most ratified UNESCO treaty.[54] However,

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47. *Id*. art. 2.
48. *Id*. art. 28.
49. UNESCO Convention, *supra* note 13, art. 29.
50. *Id.* art. 31.
51. Evaluation of UNESCO Convention, *supra* note 32, ¶ 77.
52. *Monitoring the Anti-Doping Convention*, UNESCO, *available at* https://webarchive.unesco.org/20240306173444/https://en.unesco.org/themes/sport-and-anti- doping/convention/monitoring (last visited Apr. 10, 2024).
53. *Id.* at 5-8.
54. Evaluation of UNESCO Convention, *supra* note 32, ¶ 1.

the pace and the number of ratifications of a treaty cannot be seen as indicators of success, and the effectiveness of a treaty should not be solely evaluated based on those factors.[55] For example, although the Convention is equipped with a reporting mechanism, it lacks a dispute resolution clause. We will delve into the challenges related to the implementation and enforcement of the UNESCO Convention further below.[56]

2. *The Council of Europe's Anti-Doping Convention*

In 1989, the CoE, a regional organization bringing together all States of the European continent, including Turkey and, at the time, Russia,[57] adopted the Anti-Doping Convention (European Convention).[58] This was the first international legal standard the CoE adopted on the subject of sports,[59] after nearly two decades of trying to address the problem.[60] The European Convention entered into force in 1990, and to date, it has been ratified by 52 States, including Russia.[61] Russia left the CoE in March 2022.[62] However, this does not automatically terminate the binding effect of the CoE treaties Russia previously ratified. The Committee of Ministers of the CoE passed a resolution in this regard, clarifying that:

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55. Barrie Houlihan, *Achieving Compliance in International Anti-Doping Policy: An Analysis of the 2009 World Anti-Doping Code*, 17 SPORT MMT. REV. 265, 275 (2014); Cedric Jenart, *The Binding Nature and Enforceability of Hybrid Global Administrative Bodies' Norms within the National Legal Order: The Case Study of WADA*, 24 EUR. PUB. L. 411, 419 (2018).

56. *See infra* However, an essential question that requires attention is how effective the existing international mechanisms have been in remedying the consequences of a State's violation of international anti-doping obligations. The following section aims to address this significant question.

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57. In March 2022, Russia announced its withdrawal from the CoE. *See Resolution CM/Res(2022) on the Cessation of the Membership of the Russian Federation to the Council of Europe*, THE COMM. OF MINISTERS OF THE COE (Mar. 16, 2022), *available at* https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5ee2f (last visited Apr. 10, 2024).

58. European Convention*, supra* note 14.

59. *Explanatory Report to the Anti-Doping Convention*, COE, ¶ 7 (Sep. 16, 1989) *available at* https://rm.coe.int/16800cb349 (last visited Apr. 10, 2024).

60. *For a Clean and Healthy Sport, The Anti-Doping Convention*, COE, *available at* https://rm.coe.int/for-a-clean-and-healthy-sport-the-anti-doping-convention/16807314b5 (last visited Apr. 10, 2024).

61. *Details of Treaty No. 135*, COE, *available at* https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135 (last visited Apr. 10, 2024).

62. *See* The Committee of Ministers of the CoE, *supra* note 57.

> [T]he Russian Federation ceased on 16 March 2022, to be a Contracting Party to those conventions and protocols concluded in the framework of the Council of Europe that are only open to member States of the Organisation. The Russian Federation will, however, continue to be a Contracting Party to those conventions and protocols concluded in the framework of the Council of Europe, to which it has expressed its consent to be bound, and which are open to accession by non-member States. The modalities of the Russian Federation's participation in these instruments will be determined separately for each of them by the Committee of Ministers or, when appropriate, by the State Parties.[63]

The European Convention is open to non-member States of the CoE, and therefore, as per the aforementioned resolution, it continues to be legally binding on Russia unless it explicitly follows the procedures to terminate the legal effect of the Convention. Article 18 of the European Convention provides that "Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe. … Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General."[64] As of now, there is no publicly available indication that Russia has taken such steps.

The European Convention, aiming to prevent and eliminate doping in sports,[65] was developed in response to concerns about the negative health effects of using performance-enhancing drugs (PEDs) and its damaging impact on fundamental values of sport, especially the principle of fair play.[66] It calls for more and better coordination and cooperation by each national government,[67] and between national and international sport organizations on aspects like research, education, and adopting a harmonized strategy on the list of banned substances.[68] It obliges governments to take steps to restrict access to prohibited substances and methods,[69] and encourages public funding for non-

63. *Id.*
64. European Convention*, supra* note 14, art. 18.
65. *Id.* art. 1.
66. *Id.* pmbl.
67. *Id.* art. 3.
68. *Id.* art. 7(1)(2), 8.
69. European Convention*, supra* note 14, art. 4(1)(2).

governmental organizations (NGOs) related to anti-doping efforts.[70] The European Convention also establishes a Monitoring Group to supervise its application, in which any Party can be represented with one vote.[71]

In 2002, the CoE adopted an Additional Protocol,[72] which entered into force in 2004, and to date, has been ratified by 29 States, but not by Russia.[73] The Additional Protocol added an enforcement mechanism to the European Convention.[74] An evaluation team, whose members are appointed by the Monitoring Group based on their competence in the anti-doping field,[75] studies the reports submitted by party States, conducts visits whenever necessary, and provides the Group with evaluation reports.[76] States complete and submit a detailed questionnaire annually, and the Monitoring Group conducts advisory visits as well. The questionnaire asks about anti-doping testing, monitoring, prevention, and education processes, including funding, anti-doping laws and disciplinary measures, educational programs, protection of whistleblowers, and the like.[77] A working group is in charge of revising the annual questionnaire.

At the outset, the European Convention failed to establish a clear and unified set of principles to fight doping, a problem that was addressed within the UNESCO Convention through the creation of links with the WADA Code and regulations. The European Convention initially left many key decisions to the initiative of the governments. That can potentially result in disharmony and inconsistency.[78] Nonetheless, this gap was to some extent remedied through the Additional Protocol that mandates the Parties to recognize WADA and other anti-doping organizations the power to conduct out-of-competition controls.[79] How-

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70. *Id.* art. 4, ¶ 3.

71. *Id.* art. 10-11.

72. *Details of Treaty No.188*, COUNCIL OF EUR. (2002), *available at* https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=188 (last visited Apr. 10, 2024).

73. *Chart of Signatures and Ratifications of Treaty 188*, COUNCIL OF EUR. (2002), *available at* https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=188 (last visited Apr. 10, 2024).

74. European Convention*, supra* note 14, art. 10.

75. Details of Treaty No. 188, *supra* note 72, art. 2 ¶ 1.

76. *Id.* art. 2, ¶ 2.

77. *Anti-Doping Questionnaire: Annual Reports*, COUNCIL OF EUR., *available at* https://www.coe.int/en/web/sport/adq-reports#%7B%22101769298%22:%5B0%5D%7D (last visited Apr. 1, 2024).

78. European Convention, *supra* note 14, art. 1, 4 ¶ 4.

79. Details of Treaty No. 188, *supra* note 72, art. 2 ¶ 1.

ever, because the Additional Protocol binds only those States that have ratified it (29) and not every party to the European Convention has (52), its efficacy is still limited.

B. The Private Anti-Doping Regime

The private anti-doping regime comprises the International Olympic Committee (IOC), International Federations, national anti-doping organizations, and testing laboratories.[80] The main legal instrument of this regime is the WADA Code. Additionally, in certain circumstances, other specific agreements, such as the Host City Contract (HCC) commit certain stakeholders to uphold anti-doping obligations. We call it "private" because these obligations bind mainly private actors rather than governments, and private entities and individuals (i.e., sport federations and athletes) are the only ones who might end up being sanctioned for non-compliance. We say "mainly" because, although private in nature, this legal regime also imposes some obligations on States that will be further discussed below.

1. The World Anti-Doping Agency Code (WADA Code)

WADA is a not-for-profit foundation, registered under Swiss law,[81] which was created in 1999, at the IOC initiative, to bring together private and public (i.e. state) forces fighting against doping.[82] The overall purpose of WADA is to ensure the moral and political commitment of all public and private stakeholders in the fight against doping.[83]

WADA is a *sui generis* organization of a hybrid nature[84] combining both public and private stakeholders, making it a quasi-public or

80. In certain countries, such as France (*see French Anti-Doping Agency*, AFLD, *available at* https://en.afld.fr/afld-in-short/ (last visited Apr. 10, 2024), and Italy (*see Implementation of Anti-Doping Policies in 2018- Italy, Anti—Doping Questionnaire*, CoE at 3 (2018), *available at* https://rm.coe.int/t-do-en-adq-2018-report-italy/16809e2f93 (last visited Apr. 10, 2024)). The national anti-doping organizations and laboratories operate as public entities rather than private ones. This distinction contributes to the complex interplay between private and public anti-doping systems.

81. Constitutive Instrument of Foundation of The Agence Mondiale Antidopage World Anti-Doping Agency, art. 1.

82. *Id.* art. 1.

83. *Id.* art 4 ¶ 1.

84. Lorenzo Casini, *Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA) Symposium on Global Administrative Law in the Operations of International Organizations: I. Public/Private Partnerships Involving IOs*, 6 INT'L ORG. L. REV. 421, 423 (2009); Kathryn Henne, *WADA, the Promises of Law and the Landscapes of Antidoping Regulation Research Note*, 33 POL. & LEGAL ANTHROPOLOGY R. 306, 320 (2010);

quasi-international organization.[85] Furthermore, WADA is an agency whose functions include issues of public interest.[86] The main governing bodies of WADA are the Foundation Board and the Executive Committee.[87]

The Foundation Board is composed of forty-two members, half of which are appointed by the Olympic Movement. The other half are representatives of governments, nominated by States and appointed by the WADA President, taking into account the need to ensure equitable geographic distribution,[88] and subject to certain eligibility criteria set out in the WADA Code.[89] The Foundation Board elects the President and the Vice President as well.[90] To ensure the balance of power between the two groups, the positions of the WADA President and Vice President rotate, so that neither representatives of the private and public stakeholders can occupy both positions at the same time.[91] The Executive Committee is composed of sixteen members appointed by the Foundation Board and is tasked with the actual management and running of the agency.[92]

The Executive Committee can also appoint a Director General tasked with partial or complete management of the organization.[93] Most members of the Committee are selected from the Foundation Board consisting of three independent members, one athlete council chair, five members from the Olympic movement, and five from public authorities plus the President and Vice-President. At the time of writing, seven out

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Maarten van Bottenburg, Arnout Geeraert & Olivier de Hon, *The World Anti-Doping Agency: Guardian of Elite Sport's Credibility*, 191-94, (A. Boin et al. (eds.), 2021).

85. *See* Casini, *supra* note 84, at 430-33, 39. The International Labor Organization, on the other hand, is a good example of an Inter-Governmental Organization that in its decision-making structures, also includes entities that are not subject of international law, like national trade unions.

86. Casini, *supra* note 84, at 432-33.

87. In addition to these two main organs, WADA also has five Standing Committees including an Athlete Council, ten Expert Advisory Groups, eleven working Groups, a Nomination Committee, and an Independent Ethics Board. *See Governance*, WADA, *available at* https://www.wada-ama.org/en/who-we-are/governance (last visited Apr. 10, 2024).

88. There are five regions: Africa, the Americas, Asia, Europe, and Oceania, and each region has equal representation on the Foundation Board. Each government within a region is invited to nominate a representative for the Board.

89. Constitutive Instrument of Foundation of The Agence Mondiale Antidopage World Anti-Doping Agency *supra* note 81, at art. 6 ¶ 1(2).

90. *Id.* art. 7.

91. *Id.*

92. *Id.* art. 11.

93. *Id.*

of the sixteen members were current or former international-level athletes.[94]

WADA is funded by allocations, donations, legacies, and other forms of allowance, subsidy, or other contributions from all public and private stakeholders. Governments' annual contributions are determined based on a regional allocation, and the Olympic Movement also provides matching funds that cover up to 50% percent of WADA's annual budget.[95] From a governmental perspective, contributions to WADA's funding are regionally allocated, with Africa, the Americas, Asia, Europe, and Oceania providing 0.5%, 29%, 20.46%, 47.5%, and 2.54% respectively. The specific amounts paid by each government within these regions are agreed upon internally.[96] In 2022, the Olympic Movement paid $21,412,007 and the public authorities paid $21,637,128 for their contributions to the WADA budget.[97]

WADA's functioning requires close collaboration between public and private sectors, the representatives of national and international sport organizations, and States. Thus, according to its statute, international SGBs (i.e., IOC, International Paralympic Committee, and international federations) are responsible for anti-doping testing and sanctioning violations in international competitions. National SGBs (i.e., National Olympic and Paralympic Committees and National Federations) are responsible for the same in national competitions. National anti-doping organizations (NADOs) do the testing procedures within their national borders and provide information to athletes and personnel for compliance with the WADA Code. Governments work to facilitate doping control through national policymaking. Finally, national laboratories analyze the samples in compliance with international standards.[98]

The core legal instruments of WADA are its statute and code. The statute is the constitutive instrument of the Agency. WADA statute is not a treaty. Instead, it is a legal act creating a foundation under the

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94. *See Executive Committee*, WORLD ANTI-DOPING AGENCY, *available at* https://www.wada-ama.org/en/who-we-are/governance/executive-committee (last visited Apr. 10, 2024).

95. *Funding*, WORLD ANTI-DOPING AGENCY, *available at* https://www.wada-ama.org/en/who-we-are/funding (last visited Apr. 10, 2024).

96. *Id.*

97. *Contributions to WADA's Budget 2022*, WORLD ANTI-DOPING AGENCY (Jan. 3, 2023), *available at* https://www.wada-ama.org/sites/default/files/2023-01/wada_contributions_2022_update_en.pdf (last visited Apr. 10, 2024).

98. *See Global Anti-Doping Organization Chart*, WORLD ANTI-DOPING AGENCY (Jan. 2009), *available at* https://www.wada-ama.org/sites/default/files/resources/files/WADA_PK_Global_ADO_Chart_200901_EN.pdf (last visited Apr. 10, 2024).

provisions of the Swiss Civil Code.[99] WADA's principal and official seat is in Lausanne, Switzerland, but it is also headquartered in Montreal, Canada.[100] That means that WADA operations are not regulated by international law but instead by Swiss law, and possibly also by Canadian law.

The WADA code sets out the anti-doping rules that apply to all athletes, team managers, NADOs, and International Federations that are signatories to the WADA code, and laboratories.[101] The code is a framework that harmonizes anti-doping policies, rules, and regulations across all sports and all countries, and it provides a consistent and standardized approach to anti-doping efforts worldwide. It is adopted and periodically amended by the WADA's Foundation Board.

The linkage between the WADA code and the public anti-doping framework is established through the UNESCO Convention. Whether the code is binding on States, in what ways, and to what extent, will be further discussed below. However, the unique character of this organization and the public-private partnership that it has formed turns WADA into a potential subject of public international law.[102]

2. Specific Bilateral Agreements

SGBs are private actors. They do not have the international legal personality necessary to be parties to treaties, however, during the past decades, all sorts of non-governmental entities have gradually been recognized as falling within the scope of the rules of public international law.[103] Agreements between State and non-State actors are becoming

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99. WADA Statute, *supra* note 81, at art. 1 (2021).

100. *Id.* art. 2; *See also Governance*, WORLD ANTI-DOPING AGENCY, *available at* https://www.wada-ama.org/en/governance (last visited Apr. 10, 2024).

101. Jenart, *supra* note 55, at 422.

102. WADA Code, *supra* note 28, art. 4; "The Agency will be entitled to prepare plans and proposals in light of its conversion, if necessary, into a different structure, possibly based on international public law."

103. As the International Court of Justice recognized already in 1949, in the advisory opinion in *Reparation for Injures in the Service of the United Nations*; "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law … has already given rise to instances of action upon the international plane by certain entities which are not States." *See* 1949 I.C.J. 174,178; *See also* OLIVER DORR & KIRSTEN SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, 74 (Oliver Dorr & Kirsten Schmalenbach, eds., 2d ed., 2012).

more common.[104] SGBs are one category of private actors that enter into such agreements with States.

Anti-doping is one area of cooperation between SGBs and States. The obligation to respect anti-doping regulations is incorporated also in specific bilateral agreements. The scope of these agreements is limited to a single State, which is typically the State hosting an international sporting event. Such agreements are relevant to the Russian doping case, and therefore, it is worth discussing their legal nature and value from the perspective of international law. Indeed, international legal responsibility arises from "the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole."[105]

The first situation is when there is a bilateral agreement to enforce anti-doping obligations between an SGB and the State. For example, in 2006, Russia (i.e., a State) entered into a bilateral agreement with the IOC (i.e., an SGB) as part of the agreement to host the 2014 Sochi Games.[106] The Russian Sport Ministry, acting on behalf of the Russian Federation, directly accepted the obligation to ensure the application of the WADA code and anti-doping rules adopted by the IOC.[107] As one study on the selection of Olympic Games hosts from 2012 to 2020 revealed, the IOC, concerned with the cooperation of local and State authorities, "requires bidders to sign onto and implement the relevant provisions of the key international anti-doping instruments" and needs guarantees from the "State" in this regard.[108] These guarantees are usually specified in a separate document.[109] Since 2014, ratification of the

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104. Instances include: peace agreements between State and non-State actors (e.g. armed groups, insurgents, and the like), dispute settlement agreements between States and IGOs, or NGOs, or corporations, or agreements entered into by IGOs with private entities for the provision of services. *See* OLIVIER CORTEN & PIERRE KLEIN, THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION, 3, 18-20 (Enzo Cannizzaro ed., online ed., 2011).

105. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UNITED NATIONS, 31, 32 (2001), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited Apr. 10, 2024).

106. Schmid Report, *supra* note 9, at 6.

107. *Id.*; *See also The International Olympic Committee Anti-Doping Rules applicable to the XXII Olympic Winter Games in Sochi, in 2014*, INT'L OLYMPIC COMM., 1, 5 (July 29, 2013), *available at* https://library.olympics.com/Default/digital-viewer/c-177013 (last visited Apr. 10, 2024).

108. Ryan Gauthier, *Olympic Game Host Selection and the Law: A Qualitative Analysis*, 23 JEFFREY S. MOORAD SPORT L. J. 1, 35 (2016).

109. *Id.* at 36.

UNESCO Convention has been a required part of the bidding process, indicating the influence the IOC has on State affairs.[110]

The second situation involves the agreement to host international sporting competitions. The organization of major international sporting events requires the involvement of multiple private and public actors[111] and ultimately, the acceptance by the host in its various articulations of different obligations.[112] This multilayered relationship is governed by mutual agreements,[113] with different names. For instance, in the case of the Olympic Games, the agreement, known as the Host City Contract (HCC), entered into by SGBs on the one hand and the Organizing Committee of the Olympic Games (OCOG) for the host country on the other.[114] For brevity's sake, our focus will be solely on HCCs.[115]

The legal nature of HCCs is *sui generis*. They are not treaties of public international law concluded between States or IGOs.[116] They look like a contract between an SGB and a State, but even their true

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110. *Id.* at 37-38.

111. According to research, since 1996 the Games reached a size that their organization became heavily dependent on government involvement and support in many aspects. JEAN-LOUP CHAPPELET & BRENDA KÜBLER-MABBOTT, THE INTERNATIONAL OLYMPIC COMMITTEE AND THE OLYMPIC SYSTEM: THE GOVERNANCE OF WORLD SPORT, 80 (Thomas G. Weiss, ed., 1st ed. 2008).

112. *Id.* at 52; John G. Ruggie, *For the Game. For the World; FIFA and Human Rights*, HARV. UNIV. 1, 36 (Apr. 2016), *available at* https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Ruggie_humanrightsFIFA_reportApril2016.pdf (last visited Apr. 10, 2024).

113. Chappelet & Kübler-Mabbott, *supra* note 111, at 94.

114. In the case of the International Volleyball Federation (FIVB), this document is called the "Organiser Agreement", concluded between the FIVB and the National Federation, or the Organising Committee of volleyball competitions. *FIVB Event Regulations 2020*, FIVB art. 43.1 (Nov. 3, 2020) *available at* https://www.fivb.com/-/media/2020/fivb%20corporate/fivb/legal/event%20regulation/updated/fivb%20event%20regulations%20202020201113clean.pdf?la=en&hash=6406948D18B0915DA35E8DC9725D47AD (last visited Apr. 10, 2024).

115. *See* Arnout Geeraert & Ryan Gauthier, *Out-of-control Olympics: Why the IOC Is Unable to Ensure an Environmentally Sustainable Olympic Games*, 20 J. ENV'T POL'Y & PLAN. 16, 21 (2018). The IOC started publishing the HCCs in 2018. Additionally, earlier HCCs have been made available through a court proceeding (2010), through a watchdog group (2012), and through the Rio OCOG (2016). Therefore, it is relatively easier to make meaningful observations with respect to HCCs compared to other hosting contracts, which are often confidential and not published. It is also notable that most other hosting agreements follow the same structure and are similar to HCCs.

116. Vienna Convention on the Law of Treaties art. 1, 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, U.N. Doc. A/CONF.129/15 (Mar. 21, 1986) (Not yet in force).

contractual nature remains questionable. As Geeraert and Gauthier highlighted, "the HCC is not a contract that is negotiated at arms length and is mutually agreed upon by the parties. Instead, the IOC requires the [Host City] to sign the HCC immediately after the host is selected".[117] HCCs have been considered a forceful infringement of State sovereignty,[118] and pressure tools on host States,[119] because they are unilaterally imposed on the host State and are equipped with enforcement mechanisms such as terminating the HCC and taking away the event from the host in case of non-compliance with HCC obligations.[120]

The obligations enshrined in HCCs can be connected to States in various ways. Sometimes States are direct signatories to HCCs. In the case of the 2000 Sydney Games, the HCC was signed by the government of New South Wales.[121] Sometimes governments are required to submit a "covenant" that commits the State to support the Host City and ensure the commitment of the Host National Olympic Committee (NOC) to respect the Olympic Charter and the HCC,[122] delegating, therefore, those entities some elements of public authority.

Because of the complexity of the provisions of HCCs, or perhaps because of the requirements of national legal frameworks, sometimes HCC "provisions have to be translated in a legal language familiar to the context of the specific edition of the Games."[123] For example, in order to "comply with the HCC, the UK [Parliament] adopted the London Olympic Games and Paralympic Games Act (LOGPA) in 2006."[124] In the case of the Rio Olympics, the HCC was incorporated into Brazil's domestic law through national legislation guaranteeing that "[e]ach of the three levels of Government is fully committed to upholding the pro-

117. Geeraert & Gauthier, *supra* note 115, at 24.

118. *See* Robert Sroka, *International sporting mega-events and conditionality*, 13 INT'L J. SPORT POL'Y & POL'S. 461, 473 (2021); *see also* Antoine Duval, *From Global City to Olympic City: The Transnational Legal Journey of London 2012*, *in* RSCH. HANDBOOK ON INT'L LAW AND CITIES 293, at 299 (Helmut Philipp Aust & Janne E. Nijman eds., 2021).

119. Walker J. Ross et al., *Governance of Olympic Environmental Stakeholders*, 4 J. GLOB. SPORT MGMT. 331, 343 (2019).

120. *Id.*

121. Stephen Frawley, *Organising Sport at the Olympic Games: The Case of Sydney 2000*, 30 INT'L . J. HIS. SPORT 527, 528 (2013).

122. London 2012 HCC, Preamble(G); Tokyo 2020 HCC, Preamble(G); Paris 2024 HCC, Preamble€.

123. Duval, *supra* note 118, at 300.

124. *Id*. at 299.

visions of the Olympic Charter and the [HCC], and all the necessary guarantees, declarations and covenants."[125]

HCCs' obligations can also be attributed to States because of the structure of OCOGs. Like the HCC, the OCOG is also an unusual legal entity created ad-hoc, under the national laws of the State hosting the games, for the purpose of organizing the games and entering into an agreement with the IOC.[126] The host city and the OCOG have joint financial responsibility for the planning, organization, and staging of the Games.[127] OCOGs can take different forms depending on the legal system of the host State.[128] In most cases, public entities are represented in the OCOGs.[129] As Chappelet and Kübler-Mabbott pointed out, the OCOGs have turned into "para-public entities within which the State–in the largest sense–plays a major role."[130]

> [T]he legal form of an OCOG is increasingly becoming that of a government agency (such as for Sydney 2000), a company whose executives are appointed by a prime minister (Athens 2004), an association dominated by public authorities (Albertville 1992) or a quasi-public foundation (Turin 2006). Purely private OCOGs (such as Atlanta 1996 or Los Angeles 1984) are progressively disappearing.[131]

In the case of the Tokyo Olympic Games, the OCOG had members from both the Tokyo metropolitan government and the Japanese government.[132]

Once created, the OCOG becomes the heart of the Games' organization and the main communication channel with the IOC.[133] Given its structure, and especially considering its functions, the OCOG is a "parastatal entity". In the law of international State responsibility, "parastatal entities" are "bodies which are not State organs in the sense of Article 4 [of ILC Articles], but which are nonetheless authorized to exercise gov-

125. David McGillivray et al., *Mega Sport Events and Spatial Management: Zoning Space Across Rio's 2016 Olympic City*, 23 ANNALS LEISURE RSCH. 280, 288-89 (2020); *see also* Sroka, *supra* note 8, at 466.

126. *Id.*

127. London HCC, Basic Principles, 4; For government responsibilities, *see* basic principle 5.

128. Duval, *supra* note 118, at 299.

129. *Organising Committees for the Olympic Games*, IOC, *available at* https://olympics.com/ioc/olympic-games-organising-committees (last visited Apr. 10, 2024).

130. Chappelet & Kübler-Mabbott, *supra* note 111, at 11.

131. *Id.* at 91.

132. *Id.*

133. Chappelet & Kübler-Mabbott, *supra* note 111, at 90-91.

ernmental authority".[134] As the commentary to the ILC Articles noted, for classification of an entity as either public or private "the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, [and] the fact that it is not subject to executive control" are not decisive criteria for the purpose of attribution of the entity's conduct to the State.[135] Instead, what matters is that these entities be empowered, if only to a limited extent or in a certain context, to exercise specified elements of governmental authority.[136] "The justification for attributing to the State under international law the conduct of "parastatal" entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority."[137] OCOGs are one form of "the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs",[138] and therefore their conduct must be considered an act of the State under international law.

Organizing major international competitions, like the Olympic Games, without a certain degree of public power for the OCOG to fulfill the HCC obligations would be impossible.[139] As mentioned earlier, OCOGs are at the heart of many State obligations included in the HCCs.[140] Enforcing doping standards is one of the obligations included

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134. Corten & Klein, *supra* note 104, at 4; *see also* Markos Karavias, *Treaty Law and Multinational Enterprises: More than Internationalized Contracts?*, RESEARCH HANDBOOK ON THE LAW OF TREATIES 597, at 613 (Christian J. Tams et. al. eds., 2014).

135. ILC Articles, *supra* note 19, cmt. to art. 5, ¶ 3.

136. *Id.*

137. *Id.*

138. *Id.* cmt. to art. 5, ¶ 1.

139. FIVB regulations also state that FIVB competitions are not possible "without the collaboration, efficient support and direct effort of the Government" of the hosting country (art. 82). It requires the host National Federation to provide some guarantees before being granted the hosting of the tournament. These guarantees include: economic guarantees with the backing of sponsors or a governmental agreement (art. 82.1) the application should be presented by the National Federation and the official authority of the host city/cities (art. 82.2) a document in which the government agrees to "grant its efficient support to the realization of the competition" and "[g]rant the necessary facilities for visas, customs, security, bank transactions and exchange, communication, transport and telecommunication and, in general, make a direct effort towards an excellent running of the competition" (art. 82.3).

140. Examples include obligations regarding ensuring the security of the event. *See* London 2012 HCC, art. 23; *See also* Paris 2024 HCC, art. 17.1,17.2; Certain measures, such as applying tax exemptions and enforcing specific visa and work permit regulations. Chappelet & Kübler-Mabbott, *supra* note 111, at 91; *see also* London 2012 HCC, art. 12, 13; Ruggie, *supra* note **Error! Bookmark not defined.** at. 18; Gauthier, *supra* note **Error! Bo okmark not defined.**, at 30-4; Ross, Leopkey & Mercado, *supra* note 119, at 339-340, 344; Intellectual property rights and prevention of ambush marketing. *See also* Mark James &

in the HCCs.[141] The 2024 Paris HCC contains anti-doping obligations.[142] It also refers to operational requirements of the HCCs, which entail strict doping compliance provisions as well.[143] The Tokyo HCC provided that the OCOG would be responsible for doping control,[144] and that the City, the NOC, and the OCOG are tasked with ensuring governmental support and cooperation for enforcement of anti-doping rules.[145] For Rio 2016, "HCC requirements for doping controls led to legislative creation of the Brazilian Authority for Doping Control. . . . Through delegation of administrative powers, the Authority was responsible for implementing the WADA Code. Additionally, a Sports Anti-Doping Tribunal was created to prosecute doping violations and implement penalties".[146] The HCC for the 2012 London Games[147] and 2000 Sydney Games[148] contained the same obligations regarding doping.

Lastly, although HCCs are not strictly speaking treaties, arguably they do not fall outside the scope of public international law rules in-

Guy Osborn, *The Olympics, Transnational Law and Legal Transplants: The International Olympic Committee, Ambush Marketing and Ticket Touting*, 36 LEGAL STUD. 93 (2016); Gauthier, *supra* note **Error! Bookmark not defined.**, at 25-30.

141. FIVB, *supra* note 114 (also mentioning that "Organisers of FIVB or World Competitions are obliged to prepare and bear expenses for doping control").

142. Paris 2024 HCC, *supra* note 122, pmbl., art. 33(r).

143. *See, e.g.*, Medical services: "protect the health and safety of all Games participants, . . . The Medical Services area has two extremely important roles: providing medical care and health services … and managing the doping control programme. For this area, key success factors include an effective doping control programme" *Host City Contract - Operational Requirements*, IOC, at 104 (June 2018), *available at* https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Host-City-Contract/HCC-Operational-Requirements.pdf (last visited Apr. 10, 2024); MED 15: "Ensure that relevant Host Country Authorities … guarantee the application of, and their compliance with, the World Anti-Doping Code and the IOC Anti-Doping Rules during the Olympic Games in particular with regards to investigations and intelligence gathering activities… [e]nsure that these Host Country Authorities provide their full cooperation and support for the implementation of the IOC and IPC Anti-Doping Rules.; *Id.* at 108-09; Med 16: "Implement and deliver a doping control programme, under the authority of the IOC/IPC, in accordance with … the provisions of the World Anti-Doping Code, its international standards and the IOC Anti-Doping Rules/IPC Anti-Doping Code that will be applied at Games time … develop and provide sample collection procedures in strict accordance with the World Anti-Doping Code, the IOC Anti-Doping Rules, the IPC Anti-Doping Code and, in particular, the international standards for testing and investigations. …" *Id.* at 109.

144. Tokyo 2020 HCC, *supra* note 122, at art. 24(b).

145. *Id.* at art. 24(c).

146. *See* Sroka, *supra* note 118, at 465-66, 469.

147. London 2012 HCC, supra note 122, at art. 24(b).

148. *See* Frawley, *supra* note 121, at 529.

cluding customary international law and the general principles of law.[149] Indeed, general principles of law,[150] and core rules of customary international law, such as *pacta sunt servanda* and the principle of good faith, apply to these agreements, *mutatis mutandis*.[151] They are still valid and applicable "under international law independently of the [Vienna Conventions]".[152] "Good faith", a general principle of international law, is paramount in the case of agreements underpinning the organization of international sport events.[153] Good faith not only imposes a general duty of cooperation but also requires the parties to act in compliance with the object and purpose of their agreements.[154] It protects "the legitimate expectations of another subject generated through a deliberate conduct, whatever the true intentions or will of the acting subject" is.[155] Although the wording of the agreements might not include all the purposes related to the obligations, the duty of not defeating the overall purpose, the spirit, of these types of agreements "must and [does] remain presupposed."[156]

Therefore, bilateral agreements between a State and an SGB as a private party can be a source of international obligations for States. When these agreements pertain to anti-doping obligations, the violation of their provisions can establish the basis for holding States internationally accountable.

II. STATE RESPONSIBILITY FOR STATE-SPONSORED DOPING

The aforementioned obligations can serve as the foundation for international responsibility of a State in doping violations. Drawing on the example of the Russian case, this section will argue that State-sponsored doping entails international legal responsibility of the State and will examine how a doping program involving State agents can

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149. Mark E. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 104 (2009).

150. Statute of the International Court of Justice, United Nations, June 26, 1945, 33 U.N.T.S. 993 at art. 38.1(c).

151. VCLT, *supra* note 116, pmbl., art. 26.

152. Villiger, *supra* note 149, at 104; *see also* VCLT, *supra* note 116, art. 3(b).

153. Some scholars go as far as holding that the whole philosophy of legal order, including the law of international responsibility, ultimately boils down to the principle of good faith. ROBERT KOLB, GOOD FAITH IN INTERNATIONAL LAW, 183 (2017).

154. *Id.* at 67-72.

155. *Id.* at 23.

156. *Id.* at 68-69.

constitute a breach of international obligations and be attributable to States.[157]

Under international law, the conduct of State organs, meaning "all the individual or collective entities which make up the organization of the State and act on its behalf"[158], is always attributable to the State. Three key principles are relevant here. First, international law does not allow States to hide behind internal divisions, and the principle of the "unity of the State" holds that the State is a single entity, regardless of its internal structures and functions.[159] Second, even if State authorities act beyond the scope of their official powers, the State can still be held responsible for its wrongful acts.[160] Third, intention is not a condition for international responsibility.[161] Investigations into Russian doping confirmed the pivotal role played by State agents.[162] According to investigations, between 2011 and 2015, there had been:

> An institutional conspiracy. . .across summer and winter sports [involving] athletes who participated with Russian officials within the Ministry of Sport and its infrastructure, . . .[to manipulate] doping controls. The . . . athletes were not acting individually but within an organized infrastructure. . . . This systematic and centralized cover up and manipulation of the doping control process evolved and was refined over the course of its use.[163]

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157. For an in-depth discussion of questions related to breach and attribution, see *Communication on behalf of Yuliya Stepanova and Vitaly Stepanov v. Russian Federation* submitted to the UN Human Rights committee, International Human Rights Center of Loyola Law School (Feb. 24, 2021), 67-73, *available at*: https://www.lls.edu/media/loyolalawschool/academics/clinicsexperientiallearning/ihrc/Stepanovs%20v%20Russia%20(3-1-2021)%20for%20distribution.pdf (last visited Apr. 10, 2024).

158. ILC Articles, *supra* note 19, cmt. to art. 4, ¶ 1.

159. *Id.* cmt. 7 to ch. II; *id.* cmt. to art. 2, ¶ 6; *id.* art. 4; *id.* cmt. to art. 4, ¶ 6, 7; *id.* cmt. to art. 7, ¶ 2.

160. *Id.* art. 7; *id.* cmt. to ch. 2, ¶ 6.

161. *Id.* cmt. to art. 2, ¶ 3, 9, 10; Pellet, *supra* note 22, at 5–6.

162. Schmid Report, *supra* note 9, at 13; First Report, *supra* note 4, at 25; the Schmid report uses a softer tone and language in comparison to the of independent commission from the first report to the second one, towards mitigating the involvement of high-ranking officials in the doping program; s*ee e.g.*, Schmid Report, *supra* note 9, at 13-14; there are also allegations that even the Russian President was aware of the program and that he confirmed it, *Putin 'Must Have Known' Of State-Sponsored Doping, Whistle-Blower Says*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 29, 2018), *available at* https://www.rferl.org/a/russia-putin-knew-olympics-state-doping-rodchenkov-whistle-blower/29005175.html (last visited Apr. 10, 2024).

163. Second Report, *supra* note 6, at 1.

The investigations revealed that the Russian doping machine was "an intertwined network of State involvement through the Ministry of Sport and the [Russian Security Service (FSB), which are both Russian government organs,] in the operations of both the Moscow and Sochi Laboratories."[164] The Ministry of Sport was identified as the top of the command structure of the doping program, coordinating the work of a number of other organs.[165] The findings showed that the Minister of Sport, Mr. Vitaly Leontiyevich Mutko, was involved in reviewing reports from all those involved in the doping program, agreeing to bribery acts,[166] and deciding which football player should be saved from a positive doping test.[167] The Deputy Minister, Mr. Yuri Nagornykh, appointed directly by the Russian Prime Minister,[168] was the heart of the Sochi doping scheme,[169] supervising the first stage of the sample swapping process[170] and deciding what results should be covered up or reported.[171] Other State organs such as the Russian Security Service,[172] Center of Sports Preparation of National Teams of Russia (CSP), and the Russian Federal Research Center of Physical Culture and Sports (VNIIFK)[173] were involved in running the doping program.[174]

Furthermore, the actions of private entities, including the laboratories responsible for detecting doping, may also be imputed to the State, considering the level of State control over them.[175] For example, the investigations found that the Moscow Laboratory, a private organization, was acting under the orders of the Deputy Minister of Sport.[176] In the case of the Sochi Games, investigators were aghast by the "extent of

164. First Report, *supra* note 4, at 60.

165. Second Report, *supra* note 6, at 95; First Report, *supra* note 4, at 52–60.

166. First Report, *supra* note 4, at 55-56.

167. *Id.* at 38. Rodchenkov says that after the ARD channel documentary, everything was decided by Mutko, the minister of sports. GRIGORY RODCHENKOV, THE RODCHENKOV AFFAIR: HOW I BROUGHT DOWN PUTIN'S SECRET DOPING EMPIRE 63 (2020).

168. First Report, *supra* note 4, at 10.

169. *Id.* at 63.

170. Second Report, *supra* note 6, at 82.

171. First Report, *supra* note 4, at 9–11.

172. *Id.* at 12, 13, 43, 57, 58, 63; ARAF Report, *supra* note 2, at 196-97.

173. Schmid Report, *supra* note 9, at 7.

174. *Id*. at 13.

175. ILC Articles, *supra* note 19, art. 8; First Report, *supra* note 4, at 56.

176. First Report, *supra* note 4, at 35. Laboratory personnel, when inquired about who orders the manipulation of some samples stated: "there is no need [to know the names] because the instructions are directly from the Ministry of Sport. …" ARAF Report, *supra* note 2, at 195-96.

State oversight and directed control of the Moscow Laboratory in processing and covering up urine samples",[177] concluding that the "Laboratory was merely a cog in a State run machine, and not the rogue body of individuals".[178] Gregory Rodchenkov, a key figure in the scandal and the head of the Moscow laboratory, was appointed by the Minister of Sport and was under contract by the Ministry of Sport.[179]

The investigations revealed multiple breaches of anti-doping regulations, such as formulating and distributing a mouthwash doping cocktail among athletes;[180] corrupting Doping Control Officers;[181] the collusion of medical personnel with coaches to make them aware of washing periods (i.e. the period until one can have a clean test after taking a substance);[182] advance testing notice;[183] the failure to comply with WADA rules regarding the rapid enforcement of athletes biological passport;[184] intimidation of both Doping Control Officers and their families;[185] obstruction of anti-doping processes by various means;[186] surveillance of WADA accredited laboratories to cover up the doping cases;[187] finding male DNA in the urine samples of female athletes[188] indicating sample swapping;[189] bottle cap removing;[190] reporting the positive findings as negative in Anti-Doping Administration and Management System;[191] and, when all other efforts failed, disappearing positive results.[192]

These were not isolated incidents, but rather a pattern of conduct indicative of a prevailing, coordinated, and deliberate culture of doping in Russian sports. The scale of the Russian doping program required a high level of coordination and premeditated engineering with the in-

177. First Report, *supra* note 4, at 6.
178. *Id.* at 35.
179. *See* Rodchenkov, *supra* note **Error! Bookmark not defined.**, at 126.
180. First Report, *supra* note 4, at 49–51.
181. *Id.* at 8.
182. *Id.*
183. ARAF Report, *supra* note 2, at 183-84.
184. First Report, *supra* note 4, at 9.
185. ARAF Report, *supra* note 2, at 103-04.
186. *Id.* at 106-15.
187. First Report, *supra* note 4, at 8.
188. Second Report, *supra* note 6, at 19.
189. First Report, *supra* note 4, at 67-72.
190. *Id.* at 15, 47, 58.
191. *Id.* at 15, 34.
192. *Id.* at 35-42.

volvement of individuals from several governmental entities.[193] The continuing change of cover-up methods used in different tournaments, depending on the level of presence of international observers, demonstrated systematic thinking.[194] Adaptability and flexibility in such a high-profile operation[195] suggested strong governmental control and direction.[196]

WADA and IOC investigations suggest breaches of the obligations outlined in the previous section. With respect to the WADA Code, some articles were violated more conspicuously than others, as enumerated in the second report.[197] The doping program involved tampering[198] on behalf of both the officials and athletes, which is a violation of Art. 2.5 of the Code.[199] Conspiracy in the cover-up efforts, which is a violation of Art. 2.8 and 2.9 of the Code.[200] A case of reporting an adverse analytical finding as a negative test was also identified in the report as a potential violation of Art. 2.1 of the Code.[201] Furthermore, reporting the positive samples along with the identity of the athletes to Russian Deputy Ministry of Sport is a breach of the WADA International Standard for

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193. *See* First Report, *supra* note 4, at 62-63. The First Report declares that the planning of Sochi scheme started in 2010 after a poor performance by Russian athletes in Vancouver Games.

194. *See id.* at 9-17, 61, 76 for a description of changing methods from Disappearing Positive Methodology at IAAF World Championships to sample swapping during 2014 Sochi Games.

195. Rebecca R. Ruiz & Michael Schwirtz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, NEW YORK TIMES (May 12, 2016), *available at* https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer (last visited Apr. 10, 2024). ("We were fully equipped, knowledgeable, experienced and perfectly prepared for Sochi like never before," he said. "It was working like a Swiss watch.").

196. ILC Articles, *supra* note 19, cmt. to art. 7, ¶ 8.

197. Second Report, *supra* note 6, at 46-48.

198. WADA Code, *supra* note 28, app. I, definitions; The Code defines tampering as: "Intentional conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. Tampering shall include, without limitation, offering or accepting a bribe to perform or fail to perform an act, preventing the collection of a Sample, affecting or making impossible the analysis of a Sample, falsifying documents submitted to an Anti-Doping Organization or TUE committee or hearing panel, procuring false testimony from witnesses, committing any other fraudulent act upon the Anti-Doping Organization or hearing body to affect Results Management or the imposition of Consequences, and any other similar intentional interference or Attempted interference with any aspect of Doping Control."

199. Second Report, *supra* note 6, at 46.

200. *Id.* at 46-47.

201. *Id.* at 47-48. The article concerns "presence of a prohibited substance or its metabolites or markers in an athlete's sample."

Laboratories,[202] and Articles 14.1.1 and 14.1.2 of the Code, which provide that adverse analytical findings should be reported to athletes, the NADO, the international federation, and WADA.[203] Other provisions of the WADA Code that have been violated include effective collection of intelligence for targeted testing, proper investigation of passport findings and any information regarding a doping violation (Art. 5.8),[204] following procedures after an adverse analytical finding including proper notices to the athlete (Art. 7.3),[205] education and doping prevention programs (Art. 18),[206] anti-doping research (Art. 19),[207] independence of anti-doping organizations (Art. 20.5),[208] and governmental efforts in implementation of the UNESCO Convention (Art. 22).[209] Given that the HCC and the "guarantee of observance" signed by the Russian Ministry of Sport[210] included obligations to adhere to the WADA Code and IOC Anti-doping regulations, the factual circumstances of the case also constitute violations of those documents.

Arguably, multiple articles of the UNESCO Convention were also violated including: the obligation to promote the prevention of and the fight against doping (Art. 1);[211] the duty to cooperate internationally by other States and leading anti-doping organizations (Art. 3(b)(c));[212] the duty to adopt proper legislation and create adequate administrative practices to fight doping (Art. 5);[213] the requirement of domestic coordination for the application of the Convention (Art. 7).;[214] and the duty to restrict the availability of prohibited substances (Art. 8).[215] In addition, one can also discuss the violation of the duty to facilitate doping control measures by domestic anti-doping organizations and testing by foreign doping control teams (Art. 12(a)(b));[216] the duty to encourage coopera-

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202. *Id.* at 11; *see WADA International Standards of Laboratories*, WORLD ANTI-DOPING AGENCY 6.4.3, Version 9.0 2016, *available at* https://www.wada-ama.org/sites/default/files/resources/files/isl_june_2016.pdf (last visited Apr. 10, 2024).

203. WADA Code, *supra* note 28, art. 14.1.1, 14.1.2.

204. *Id.* art. 5.8.

205. *Id.* art. 7.3.

206. WADA Code, *supra* note 28, art. 18.

207. *Id.* art. 19.

208. *Id.* art. 20.5.

209. *Id.* art. 22.

210. Schmid Report, *supra* note 9, at 6.

211. UNESCO Convention, *supra* note 13, art. 1.

212. *Id.* art. 3(b)(c).

213. *Id.* art. 5.

214. *Id.* art. 7.

215. *Id.* art. 8.

216. UNESCO Convention, *supra* note 13, art. 12(a)(b).

tion between public authorities and sport and anti-doping organizations (Art. 13);[217] the duty to support WADA's mission in the international fight against doping (Art. 14);[218] and last but not least, multiple Convention obligations regarding testing with no advance notice, out of competition doping controls, timely handling of doping samples and their shipping (Art. 16).[219]

With respect to the European Convention, the violations include: the requirement to coordinate public entities for the practical application of the Convention (Art. 3),[220] adopting legislation, regulations and administrative measures to restrict availability of prohibited substances and effective application of anti-doping rules and cooperation with sport organizations (Art. 4);[221] adopting measures for establishing doping control laboratories with qualified staff (Art. 5);[222] harmonizing doping control rules and procedures and random testing without advance notice (Art. 7);[223] and promoting international cooperation both on the State level and on interorganizational level (Art. 8).[224]

On top of all these, one must also add Russia's failure to adopt proper legislative measures to comply with the WADA Code. The Conference of the Parties of the UNESCO Convention, in its 2017 compliance report, flagged the problem of integrating the WADA Code in internal laws of some countries[225] including Russia.[226]

Last but not the least, the facts suggest a violation of some fundamental principles of international law, including the *pacta sunt servan-*

217. *Id.* art. 13

218. *Id.* art. 14.

219. *Id.* art. 16.

220. European Convention*, supra* note 14, art. 3.

221. *Id.* art. 4.

222. *Id.* art. 5.

223. *Id.* art. 7. This Article reads: "1. The Parties undertake to encourage their sports organizations and through them the international sports organizations to formulate and apply all appropriate measures, falling within their competence, against doping in sport. 2. To this end, they shall encourage their sports organizations … by harmonizing there: a) anti-doping regulations on the basis of the regulations agreed by the relevant international sports organizations; b) lists of banned pharmacological classes …; c) doping control procedures; … e) procedures for the imposition of effective penalties for [those] … associated with infringements of the anti-doping regulations by sportsmen and sportswomen."

224. *Id.* art. 8.

225. Conference of Parties to the International Convention against Doping in Sport, Sep. 19, 2017, ICDS/6CP/Doc.8, ¶¶ 43-46, 50, 52 [hereinafter UNESCO Convention's CoP].

226. *Id.* ¶¶ 7, 50, 52.

da and good faith.[227] *Pacta sunt servanda*, which is a logical foundation for obligations,[228] requires that agreements are honestly and loyally fulfilled by the parties based on their real intentions.[229] "Good faith requires conduct which is objectively compatible with meaning, object and purpose,"[230] and also that the parties comply with their obligations in a way that does not defeat the aim of the agreement.[231] Russia not only ignored the plain commitments of the conventions and the WADA Code, but also their spirit.[232]

III. CONSEQUENCES OF INTERNATIONAL STATE RESPONSIBILITY

Once an IWA is established pursuant to the rules of international State responsibility, there are consequences for it. States have the obligation to: (a) cease the wrongful conduct, if it is continuing, and to offer appropriate assurances and guarantees of non-repetition, if necessary;[233] and (b) make full reparation for the injury. "Injury" includes any damage, whether material or moral, caused by the IWA.[234] The State also has a continued duty to perform the affirmative obligation breached.[235] The scope of the obligations of cessation and reparation depends on the gravity of the breach.[236] More importantly, three forms of reparations, either on their own or in combination, can remedy a breach of international obligations: restitution, compensation, and satisfaction.[237] Hence, in this section, we will discuss the potential victims of a State-sponsored doping program. Subsequently, we will explore the extent to which the existing mechanisms have been effective in holding violating States accountable for breaching their international obligations and ensuring compliance with international law, and whether there is a realistic prospect of providing effective remedies for the victims.

227. Vienna Convention, art. 26.

228. Robert Kolb, THEORY OF INTERNATIONAL LAW, 136 (2016).

229. Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 114-5 (2006).

230. Guy S Goodwin-Gill, *State Responsibility and the Good Faith Obligation in International Law*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 76 at 92 (Malgosia Fitzmaurice et. al. eds 2004).

231. Dorr & Schmalenbach, *supra* note 3, at 446.

232. *Id.* at 89–92.

233. ILC Articles, *supra* note 19, art. 30.

234. *Id.* art. 31(2).

235. *Id*. art. 29.

236. *Id.* cmt. to art. 4, ¶ 1.

237. *Id.* art. 34-38.

Identifying whose rights have been violated is central to any discussion of attribution of State responsibility.[238] Obligations and rights are two sides of the same coin. Every obligation is owed to someone,[239] whether a State, several States, or the international community as a whole.[240] It might also be owed to individuals or "entities other than States", when, for instance, the wrongful acts constitute a breach of international human rights.[241] Once the violation is established, it does not matter if the obligation was owed to a single State, or multiple States, or the international community as a whole.[242]

Three distinct categories of victims can be identified in connection with a State-sponsored doping program: States, SGBs, and individuals, including athletes.

A. States

Under Article 42 of the ILC Articles, "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached, is owed to: (a) That State individually; or (b) A group of States including that State, or (c) the international community as a whole, and the breach of the obligation: (i) specifically affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."

In this case, the obligations Russia has under the UNESCO and European conventions are not owed to any particular or specifically defined State. These Conventions are multilateral treaties, and their obligations are that of a multilateral nature[243] owed to any and all States that have ratified them.

The UNESCO Convention along with the WADA Code impose an obligation of international cooperation[244] among Member States and with sport NGOs, especially WADA,[245] to realize the aims of the Convention.[246] Fighting doping to protect public health and foster "interna-

238. ILC Articles, *supra* note 19, cmt. to pt. III, ch. 1, ¶ 2; *id.* art. 42.

239. *Id.* cmt. to art. 2, ¶ 8.

240. *Id.* art. 33(1).

241. *Id.* art. 33(2).

242. *Id.* cmt. to art. 1, ¶ 5.

243. ILC Articles, *supra* note 19, cmt. to art. 42, ¶ 10.

244. European Convention, *supra* note 14, art. 8(1); UNESCO Convention, *supra* note 13, art. 3(b).

245. UNESCO Convention, *supra* note 13, art. 3(c).

246. *Id.* art. 13.

tional understanding and peace"[247] is clearly something more than a bilateral obligation; rather, it is a common goal of all the parties.[248] If the obligations are supposed to serve the common interest of the parties, even the States who are not directly affected by the breach may invoke responsibility.[249] To the extent that the fight against doping is understood as a global obligation to protect the health of all, arguably, even States not party to the UNESCO Convention could invoke the responsibility of Russia.[250]

Moreover, the wrongful act may be a violation of a collective obligation and still have injurious effects on one or several States.[251] In the case of Russian doping, it can be argued that all States whose athletes participated in Olympic, Paralympic, and other international sports competitions where doped Russian athletes competed were specifically affected and may invoke responsibility.[252] Under the principles of international law, when conduct violates the rights of multiple States, each State can separately invoke responsibility.[253]

B. SGBs

The IOC, WADA, NOCs, and other international federations have also suffered harm as a result of the Russian doping scandal. Both the UNESCO and European Convention include a duty for State Party to cooperate with those organizations.[254] Any SGB that has entered into a hosting agreement containing doping obligations with the hosting State must also be considered an entity injured by a violation of doping standards.

However, the system for NGOs and non-State entities to invoke a State's responsibility is different from the procedures followed by injured States. According to the commentary of the ILC Draft Articles, "[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State".[255] In sports, CAS is the forum where responsibility can be

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247. *Id.* pmbl.

248. ILC Articles, *supra* note 19, cmt. to art. 48, ¶ 7.

249. *Id.* art. 48(1)(a); s*ee also id.* cmt. to art. 48, ¶ 2.

250. *Id.* cmt. to art. 48, ¶ 2.

251. *Id.* cmt. to art. 42, ¶ 12.

252. *Id.* cmt. to art. 42, ¶ 5.

253. ILC Articles, *supra* note 19, art. 46.

254. UNESCO Convention, *supra* note 13, art. 3(c), 14; European Convention, *supra* note 14, art. 7.

255. ILC Articles, *supra* note 19, cmt. to art. 33, ¶ 4.

invoked, contingent upon the presence of an arbitration clause. However, the notion of States relinquishing their sovereignty by including an arbitration clause in favor of CAS to handle cases of doping violations and award damages to victims against the State presents a challenging and difficult prospect.

C. Individuals

Individuals have been increasingly recognized as the primary beneficiaries of reparations in international law.[256] In the words of Antonio Cançado Trindade, former judge of the International Court of Justice (ICJ), "the subject of the corresponding right to reparation is a human being".[257] It is in fact an individual who copes with the consequences of the violation[258] and should be regarded as the ultimate beneficiary of reparation.[259] While IHRL is a dominant form of State obligations versus individuals, individual rights can also be considered under international law outside the framework of IHRL.[260] It is now a well-established principle that individuals as human beings can be subject to reparations not only in cases of international human rights or humanitarian law violations but also in other forms of violations of international law.[261]

The centrality of athletes as the primary beneficiaries of the protections provided by the UNESCO Convention, the European Convention, and the WADA Code is evident.[262] Similar to human rights treaties, the UNESCO Convention and the European Convention "confer rights up-

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256. CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT, 28-31 (2012).

257. *Ahmadou Sadio Diallo (Guinea v. Congo)*, Compensation, Judgment, I.C.J. Reports, Separate Opinion of Judge Cançado Trindade, at 349, ¶ 4 (2012).

258. *Id.* at 377, ¶ 77.

259. ILC Articles, *supra* note 19, cmt. to art. 33, ¶ 3; Separate Opinion of Judge Cançado Trindade, *supra* note 257, at 350; *See also* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, n. 217 at 151 ("The emergence of human rights under international law has altered the traditional State responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility".)

260. *Id.*

261. *See* ILC Articles, *supra* note 19, cmt. to art. 33, ¶ 3.

262. *Ahmadou Sadio Diallo (Guinea v. Congo)*, Compensation, Judgment, I.C.J. Reports, Separate Opinion of Judge Cançado Trindade, at 363, ¶ 24 (2012).

on individuals, [and] impose obligations upon States."[263] Provisions of the UNESCO and European conventions are inherently positive obligations or obligations of prevention,[264] which brings them closer to the structure of human rights treaties. The UNESCO Convention, particularly in its preamble, refers to "existing international instruments relating to human rights."[265] This victim-oriented perspective entails recognizing individuals as victims of international obligations in the fight against doping and, therefore, qualified for reparations.

In State-sponsored doping, athletes are the most directly adversely affected parties by unfair competition and thus the primary victims.[266] Two groups of athletes can be distinguished in this context. Russian athletes who participated in the doping program either unknowingly or knowingly, but under coercion, and clean athletes from other countries competing on the same stage against them.

By creating unequal and unfair competition, States that sponsor doping deny clean athletes the opportunity to gain their living through a work they freely choose.[267] The unjust advantage denies equality of sports participation opportunities and benefits (both tangible and intangible).[268] According to the WADA investigator's report, the Russian doping program "undoubtedly denied other competitors a level playing field which would generate an equal opportunity for a fair chance to win medals at Sochi."[269] In cases of doping, clean athletes were unjustly subjected to harm, including emotional suffering and economic loss; therefore, they are also victims of the breach of international law that Russia committed.

However, an essential question that requires attention is how effective the existing international mechanisms have been in remedying the consequences of a State's violation of international anti-doping obligations. The following section aims to address this significant question.

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263. James Crawford, *The System of International Responsibility*, THE LAW OF INT'L RESPONSIBILITY 17, 17 (2010).

264. Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations*, *in* ISSUES OF STATE RESPONSIBILITY BEFORE INT'L JUD. INS. 129, 129 (Malgosia Fitzmaurice et. al. eds 2004).

265. UNESCO Convention, *supra* note 13, pmbl.

266. Kolb, *supra* note 21, at 210.

267. *International Covenant on Economic, Social and Cultural Rights*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM'R (Dec. 16, 1996) at art. 6(1), *available at* https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights (last visited Apr. 10, 2024).

268. Daniel Moeckli, *Equality and Non-Discrimination*, INT'L HUMAN RIGHTS LAW, 157, 159 (2014).

269. Second Report, *supra* note 6, at 95.

IV. DEFICIENCIES OF LEGAL MECHANISMS AND CHALLENGES TO THEIR ENFORCEMENT

Despite the presence of international legal frameworks for anti-doping, established through treaties and agreements involving States, certain design flaws undermine their effectiveness. These flaws limit the mechanisms' ability to ensure compliance, create challenges in implementing and enforcing obligations, and hinder the prospect of effective remedies for individuals affected by State-sponsored doping. There are also challenges in terms of implementation, with inconsistencies and overlaps causing confusion and tension between the public and private anti-doping systems. While the conventions focus on public authorities and grassroots development, the Code predominantly addresses the elite sports movement. As a panel of UNESCO-appointed experts concluded, "[t]he doping crisis in Russia has revealed a lack of surveillance and monitoring policies and an absence of coordination between the major international sport organizations."[270]

In the case of the Russian doping scandal specifically, there has been a lack of effective response by the above legal frameworks, with no adequate measures taken to counter the public dimension of the doping program, which involves State organs or acts attributable to States.

A. Lack of Clear Coordination between the Private and Public Anti-Doping Systems

The global anti-doping structure is multilayered but constantly evolving to address the existing gaps. Generally speaking, the legal frameworks established by the European and the UNESCO conventions are continuously evolving and being carefully synchronized with the WADA Code and its other regulations, in an effort to ensure that they all work together seamlessly towards the common goal of eradicating doping. However, the connection between the WADA Code and the UNESCO Convention raises questions regarding the true nature of this link and the binding effect of the WADA Code on the States.

The WADA Code *per se*, is not a treaty. States are not parties to it and thus not directly bound by it. It is instead a set of internal rules of WADA, regulated under Swiss law.[271] However, States are parties to

270. UNESCO Conference of Parties to the International Convention against Doping in Sport, art. 4.1 (Sep. 26, 2017).

271. WADA Code, *supra* note 28, art. 23.1.1 1, 144 (2021) ("The following entities shall be Signatories accepting the Code: WADA, the International Olympic Committee, International Federations, the International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, and National Anti-

the UNESCO Convention, and the Convention establishes several links to the WADA Code. Namely, the UNESCO Convention relies on the WADA Code, as an appendix to the Convention, "to coordinate the implementation, at the national and international levels, of the fight against doping in sport" with a commitment that States make to the principles of the WADA Code.[272] While the appendices to the convention, including the WADA Code are not binding, the annexes to the Convention—the prohibited list and standards for therapeutic use exemption)—that are documents similarly adopted by WADA are binding on the States parties to the Convention.[273] Yet, Article 4(2) of the UNESCO Convention clearly states that the Code is not an integral part of the Convention and hence does not create direct obligations for the parties under international law,[274] a point that the ECtHR has also considered in one of its judgments. In *FNASS and Others v. France* the Court says: "the WADC is not binding on States because the instruments adopted by WADA are governed by private law, it was decided to draw up an international Convention in order to provide an internationally recognized legal framework allowing States to incorporate the Code into their domestic legislation. … Article 4 stipulates that the provisions of the WADC are not an integral part of the Convention and do not have direct effect in national law."[275]

These ambiguities over the true nature of the legal relationship between the WADA Code and the UNESCO Convention cause uncertainty and confusion regarding the enforceability of the Code and its binding nature on States. In particular, Houlihan has highlighted that the ambiguous wording of the Convention obscures the precise nature of obligations imposed on States.[276] Similarly, after discussing three approaches that make hybrid global norms such as the WADA Code binding on States,[277] Jenart raises doubts about the binding nature of the WADA Code due to the wording of the UNESCO Convention and sup-

Doping Organizations. These entities shall accept the Code by signing a declaration of acceptance upon approval by each of their respective governing bodies.").

272. UNESCO Convention, *supra* note 13, art. 4(1).

273. *Id.* art. 4(3), (implying that States are obligated to align their domestic regulations with the WADA list of banned substances and adopt the same procedures for granting therapeutic exemptions.)

274. *Id.* art. 4(2).

275. N*ational Federation of Sportspersons' Associations and Unions (fnass) and Others v. France*, ECtHR, 48151/11, 77769/13, ¶ 54 (2018).

276. Houlihan, *supra* note 55, at 267.

277. Jenart, *supra* note 55, (being direct signatories of the document, ratification of treaties, and domestic legislation. He concludes that the only way that can make the WADA Code legally binding is the latter).

ports this claim by referring to the position of the French Council of State, the highest administrative body in France.[278] At the same time, others have, for example, recognized the UNESCO Convention as conferring a "mandate based in international law" to the WADA-led regime and bestowing upon it a "moral force".[279]

The UNESCO Oversight Division acknowledged such challenges drawing attention to the problem of understanding the interaction between the WADA Code and the UNESCO Convention and the confusion about the stakeholders in the fight against doping.[280] It admits that more work is needed "for clarifying and enhancing synergy between various legal instruments in the field of anti-doping."[281]

While acknowledging the validity of this criticism, and the need for more clarity in this regard, it would be still erroneous to dismiss the WADA Code as a strictly private legal instrument. The WADA Code in relation to the UNESCO Convention can be better construed as a document of hybrid nature[282] and a set of institutional obligations whose "legal force derives from a treaty [i.e. the UNESCO Convention], [yet] remain legally independent from the treaty."[283] As Casini noted, "[t]he Code offers, in fact, a prime instance of a source of formally private source of norms that show a high degree of 'publicness'."[284] Part of its authority originates in the representation of public authorities in the WADA Foundation Board,[285] and therefore a role in the decision-making process of the organization and drafting the Code,[286] and part of it is because of the reference to the Code in the Convention.[287] The UNESCO Oversight Division also considers that the "Code does not

278. *Id.* at 417-18.

279. Eric L. Windholz, *Sports' Global Anti-Doping Regulatory Regime: The Challenges and Tensions of Polycentricity and Hybridity*, 34 BOND L. REV. 93,116 (2022).

280. Evaluation of UNESCO Convention, *supra* note 32, at ¶¶ 25, 30-35.

281. *Id.* at 6.

282. Casini, *supra* note 84, at 14.

283. CONSTANTIN P ECONOMIDES, THE LAW OF INT'L RESP., 371-72 (James Crawford ET. AL. eds., 2010). In characterizing the sources of international obligations of States the author distinguishes between five categories: peremptory obligations, conventional obligations, customary obligations, institutional obligations, and unilateral obligations. It is the institutional obligations that can be supplemented by a treaty but remain legally independent from it. The WADA Code can be considered in this context. Any obligation also can belong to one or more of these categories at the same time.

284. Casini, *supra* note 84, at 18; *see also* R. C. R. SIEKMANN, INTRODUCTION TO INT'L AND EUROPEAN SPORTS LAW, 319 (R. C. R. Siekmann ET. AL. eds. 2012).

285. Siekmann, *supra* note 284.

286. *Id.*

287. *Id.*

have much weight in itself without the leverage that the Convention provides."[288] The Convention reinforces the WADA Code[289] by requiring States to develop harmonious mechanisms based on the Code. Another factor contributing to this public character is WADA's function in advancing public goals in the fight against doping and its role as a global standard setter in this regard.[290] The WADA Code provides the Convention with a reference document to introduce some clarity and a higher degree of certainty in the fight against doping.[291]

Apparently, the system itself is conscious of this deficiency in its functions. For example, the CoP has considered providing the State parties with "model legislation and policies" that can facilitate cooperation between public and private anti-doping agencies.[292]

Lastly, the criticisms regarding the interaction between the WADA Code and the Convention should not extend to the clarity of obligations imposed on States under the Convention. The Convention outlines specific obligations of a broader nature for States, which can be interpreted to encompass numerous detailed obligations that may not be explicitly mentioned in the Convention but exist within the global anti-doping framework. As we discussed earlier, many of the facts of the Russian doping case can constitute violations of multiple articles of the Convention.

Therefore, in order to enhance the effectiveness of anti-doping efforts, there is a need to clarify and strengthen the interaction between the WADA Code and the UNESCO Convention, to ensuring greater precision in what States need to do meet their obligations. This would contribute to a more efficient and harmonized approach in the fight against doping.

288. Evaluation of UNESCO Convention, *supra* note 32, ¶ 34.

289. Houlihan, *supra* note 55, at 271.

290. Siekmann, *supra* note 284, at 318.

291. *See, e.g.*, UNESCO, *International Convention against Doping in Sport*, art. 2 (the definitions); art. 3(1) (complying with the principles of the Code); art. 11(c) (complying with financial principles of the code); art.12(a); art. 16(a)(f)(g); art. 20; art. 27(a)(b); Casini, *supra* note 84, at 14.

292. *See* UNESCO Conference of Parties to the International Convention against Doping in Sport, Consideration for the Elaboration of the Model Legislative Framework, ICDS/7CP/Doc.6 (Jul. 31, 2019).

B. Lack of Effective Enforcement Measures

1. The Private System

SGBs, and particularly WADA, are the first group of stakeholders who have the duty to fight doping. Although they reacted to the unprecedented situation of State-sponsored doping by imposing a range of sanctions on Russian athletes and sport entities, they did not address the public structure behind the doping program due to a lack of necessary authority to do so.

In 2015, following the ARAF report, the former IAAF suspended ARAF for violating anti-doping rules.[293] ARAF remained suspended until March 2023, when the World Athletics Council reinstated the organization, which, in the meantime, had renamed itself to RusAF.[294] During this period, Russian athletes could still compete as "Authorized Neutral Athlete", subject to the approval of the World Athletics Doping Review Board.[295] The World Athletics also fined RusAF $10 million for breaching the anti-doping rules, but there is no sign that any portion of that money was used by World Athletics to compensate the victims.[296] Instead, some of that money was allocated to record-breakers of future games.

In the aftermath of the Schmid report, in December 2017, just before the 2018 Pyeongchang Winter Games, the IOC suspended the Russian Olympic Committee.[297] The decision left open the possibility for certain Russian athletes to participate in the games if they could "be considered clean."[298] Surprisingly, less than three months later, in Feb-

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293. IAAF, *IAAF Provisionally Suspends Russian Member Federation ARAF*, WORLD ATHLETICS (Nov. 13, 2015), *available at* https://worldathletics.org/news/press-release/iaaf-araf-suspended (last visited Apr. 10, 2024).

294. *World Athletics Council Decides on Russia, Belarus and Female Eligibility*, WORLD ATHLETICS (Mar. 23, 2023), *available at* https://worldathletics.org/news/press-releases/council-meeting-march-2023-russia-belarus-female-eligibility (last visited Apr. 10, 2024).

295. *World Athletics Council Issues Package of Sanctions in Relation to RusAF's Breach of Anti-Doping Rules*, WORLD ATHLETICS (Mar. 12, 2020), *available at* https://worldathletics.org/news/press-releases/world-athletics-sanctions-rusaf-breach-anti-d (last visited Apr. 10, 2024).

296. *Id.*

297. *IOC Suspends Russian NOC and Creates a Path for Clean Individual Athletes to Compete in PyeongChang 2018 Under the Olympic Flag*, IOC (Dec. 5, 2017), *available at* https://olympics.com/ioc/news/ioc-suspends-russian-noc-and-creates-a-path-for-clean-individual-athletes-to-compete-in-pyeongchang-2018-under-the-olympic-flag (last visited Apr. 10, 2024).

298. *Decision of the IOC Executive Board*, INT'L OLYMPIC COMM. (Dec. 5, 2017), *available at*

ruary 2018, the suspension was lifted and Russia was reinstated, allowing Russian athletes to compete under the Russian flag and wear a national team uniform.[299] Additionally, while, initially, Russia lost thirteen medals won at the 2014 Sochi Games,[300] CAS reinstated seven of the thirteen medals before the 2018 Pyeongchang Olympic Games and lifted the ban on some Russian athletes.[301]

Moreover, the IOC Executive Board sanctioned Mr. Mutko, the Russian Minister of Sport, and Mr. Nagornykh, the Deputy Minister, with a lifetime ban from participation in all future Olympic Games.[302] However, Mr. Mutko appealed the decision to CAS. A CAS panel unequivocally sided with the Russian minister, ruling in favor of Mr. Mutko and against the IOC. The CAS panel cited the IOC's "lack of authority to issue any form of disciplinary sanction against the Appellant as an individual not subject to the IOC's jurisdiction and regulations."[303] The panel upheld the appeal of Mr. Mutko and completely set aside the ban for lack of a legal basis.[304] Ironically, in October 2016, after WADA reports were released, the Russian Government promoted Mr. Mutko to Deputy Prime Minister of Russia "overseeing sports, tourism, and youth

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https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/Decision-of-the-IOC-Executive-Board-05-12-2017.pdf#_ga=2.229015772.134844882.1546924793-900081857.1545022043 (last visited Apr. 10, 2024).

299. Maria Tsvetkova & Brian Homewood, *Russian Olympic Committee Reinstated by IOC*, REUTERS (Feb. 28, 2018), *available at* https://uk.sports.yahoo.com/news/russia-says-international-olympic-committee-reinstates-membership-133141941—oly.html?guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAL4WiFDZDecouFo85LuBhiLAb-zFoDc5VUV8jgRJt___2JHrD_yWNi-yeM860Jz7M0PFuk2p75HWipf8u9AvsiYEi5OtY7Ncf-bZVEuB5_174LXsxOftJOkUMDWyuwz79Qe_x-4jPD1RsIDd-7llcxmyR3rc5veLsyVAlbddAx1Y (last visited Apr. 10, 2024).

300. Nick Zaccardi, *List of Russia Olympic Medals Stripped; new Sochi Medals Standing*, NBC SPORTS (Nov. 27, 2017, 10:09 AM), *available at* https://olympics.nbcsports.com/2017/11/27/sochi-olympic-medal-standings-russia-medals-stripped-doping/ (last visited Apr. 10, 2024).

301. *The Court of Arbitration for Sport Delivers its Decisions in the Matter of 39 Russian Athletes v. The IOC: 28 Appeals Upheld, 11 Partially Upheld*, CT. OF ARBITRATION FOR SPORT (Feb. 1, 2018), *available at* https://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf (last visited Apr. 10, 2024).

302. Int'l Olympic Comm., *supra* note 298.

303. *Vitaly Mutko v. IOC*, CAS 2017/A/5498, Arbitration Award, ¶¶ 68-69 (Ct. of Arb. for Sport, Jul. 3, 2019), *available at* https://www.tas-cas.org/fileadmin/user_upload/Award__5498__FINAL_signed_.pdf (last visited Apr. 10, 2024).

304. *Id.* ¶ 69.

affairs."[305] It seems that Mr. Nagornykh did not file an appeal. To date, these are the only Russian government officials involved in the doping program to have been sanctioned by SGBs.

WADA, which had declared RUSADA non-compliant since 2015, reinstated RUSADA in 2018, only to uncover a new set of conspiracies that led to another suspension in September 2019.[306] WADA then requested a four-year ban on Russian sport. In 2020, a CAS panel reduced the four-year ban requested by WADA to two years,[307] turning the sanction against Russian sports into a symbolic and disappointing one.[308] However, Russian athletes were still permitted to compete during this time under strict conditions. It is a major shortcoming of the system that SGBs' sanctions end up punishing the athletes more than those behind the doping scheme, letting the main players responsible go unpunished.[309]

None of those measures had a meaningful impact on the State apparatus responsible for the doping program. The IOC-appointed Schmid Commission recognized the limited capacity of SGBs to address misconduct by government officials. The commission suggested that any action against the State should be pursued by UNESCO and WADA.[310] WADA's legitimacy came under criticism following the exposure of the Russian doping program from two distinct groups of stakeholders: the intergovernmental community and the SGBs, with the

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305. Ivan Nechepurenko, *Russian Sports Official Suspended Over Doping Resigns*, N.Y. TIMES (Oct. 24, 2016), *available at* https://www.nytimes.com/2016/10/25/sports/russian-sports-official-suspended-over-doping-resigns.html (last visited Apr. 10, 2024).

306. *See WADA Compliance Review Committee Recommends Series of Strong Consequences for RUSADA Non-Compliance*, WADA (Nov. 25, 2019), *available at* https://www.wada-ama.org/en/news/wada-compliance-review-committee-recommends-series-strong-consequences-rusada-non-compliance (last visited Apr. 10, 2024).

307. *WADA v. RUSADA*, CAS, 2020/O/6689, ¶¶ 739-745 (Dec. 17, 2020).

308. *See* Tariq Panja, *Russia's Doping Ban Is Cut to a Largely Symbolic Two Years*, N.Y. TIMES (Dec. 17, 2020), *available at* https://www.nytimes.com/2020/12/17/sports/olympics/russia-doping-wada.html (last visited Apr. 10, 2024); Sean Ingle, *Decision to Halve Russia's WADA Doping Ban Met with Disbelief and Anger*, THE GUARDIAN (Dec. 17, 2020), *available at* https://www.theguardian.com/sport/2020/dec/17/russia-doping-ban-halved-but-name-and-flag-barred-from-next-two-olympics-court-of-arbitration-for-sport-world-anti-doping-agency (last visited Apr. 10, 2024).

309. Rebecca R. Ruiz et al., *Even with Confessions of Cheating, World's Doping Watchdog Did Nothing*, N.Y. TIMES (Jun. 15, 2016), *available at* https://www.nytimes.com/2016/06/16/sports/olympics/world-anti-doping-agency-russia-cheating.html?_r=0 (last visited Apr. 10, 2024).

310. IOC, IOC DISCIPLINARY COMM'N'S REP. TO THE IOC EXEC. BD. 4 (2017).

latter even calling for WADA's dissolution.[311] WADA was called a "paper tiger" and "a powerless rule maker."[312]

Although WADA is the prominent and visible face of the anti-doping system, it lacks the necessary leverage to hold States accountable. While there may be valid criticisms of WADA regarding aspects of its functioning, such as the framework for considering whistleblower reports and providing adequate protections, it would be unfair to solely place the blame on WADA for the failure to detect the State-sponsored doping program and take immediate action against it. In fact, one could observe that the measures implemented by WADA may sometimes have achieved greater success and made a more significant impact than the measures taken by the public anti-doping system. Be that as it may, as it was discussed above, even when WADA reacted, its actions were often softened by other SGBs and CAS.

In fact, WADA lacks the proper capacity to act against a State. While the WADA Code sets out some "expectations" from governments, it mentions that "[t]he Signatories are aware that any action taken by a government is a matter for that government and subject to the obligations under international law as well as to its own laws and regulations."[313] It continues that monitoring compliance with the UNESCO Convention is entrusted to the CoP of the Convention and not WADA.[314]

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311. DANIEL READ, et. AL., THE RUSSIAN OLYMPIC DOPING SCANDAL 163-7 (6th ed. 2021).

312. Antoine Duval, *Tackling Doping Seriously - Reforming the World Anti-Doping System after the Russian Scandal*, ASSER INSTITUTE POLICY BRIEF NO. 2016-02, 3 (2016), *available at* https://deliverypdf.ssrn.com/delivery.php?ID=737027111000006076122064089098094064016020050037028066000080079074126014086092083026061120060015055036110007000117097064112081108059078076004064005078093112022122080089030047002027089114115085126094065006100100009006512007406812308606509609706702111508 9&EXT=pdf&INDEX=TRUE (last visited Apr. 10, 2024); Antoine Duval, *The Russian Doping Scandal at the Court of Arbitration for Sport: Lessons for the World Anti-Doping System*, 16 INT'L SPORTS L. J. 177, 196 (2017).

313. WADA Code, *supra* note 28, art. 22.

314. WADA Code, *supra* note 28, art. 24.2; The WADA Code also adds "Failure by a government to ratify, accept, approve or accede to the UNESCO Convention may result in ineligibility to bid for and/or host Events as provided in Articles 20.1.11, 20.3.14 and 20.6.9, and the failure by a government to comply with the UNESCO Convention thereafter, as determined by UNESCO, may result in meaningful consequences by UNESCO and WADA as determined by each organization." WADA Code, *supra* note 28, art. 22.10.

WADA openly admitted its limited authority over States in the aftermath of the Russian doping scandal.[315] It acknowledged that unclear regulations had:

> …led to confusion, different interpretations among stakeholders and disagreement on what needed to be done. The end result was a set of uncoordinated decisions and actions – for example, what sanctions needed to be applied by which organizations to ensure some uniformity – which created frustration for many…[316]

It further said:

> …the challenge of detecting cheating in an environment such as the one that was prevailing in Russia at the time had never been encountered before. For [(anti-doping organizations)] and WADA, to detect cheating, which involves parties of the State such as the secret services (FSB) [Russia's principal security agency], is and will always be a difficult, if not impossible, task…[317]

To address the fast-paced developments, WADA revised its rules and regulations. In 2019, it adopted a roadmap and created the Code Compliance Monitoring Program[318] to detect cases of violation of its standards, consisting of questionnaires, audits and investigations, a taskforce, and a review committee.[319] The last step of this lengthy process is the referral of non-compliance cases of the WADA Code to CAS, an arbitration tribunal with limited powers and no jurisdiction over State agents.[320] There are also claims suggesting that WADA has been effective in enforcing and ensuring compliance with anti-doping policies.[321] However, it is very likely that such conclusions can only be applied to the private entities involved in the doping structure and should not be

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315. Ruiz & Austen, *supra* note 310.

316. *See generally Progress of the Anti-Doping System in Light of the Russian Doping Crisis*, WADA, at 2 (Jul. 2, 2019), *available at* https://www.wada-ama.org/sites/default/files/20190122_progress_of_the_anti-doping_system.pdf (last visited Apr. 10, 2024).

317. Duval, *supra* note 313 at 3-4.

318. *Id.* at 11.

319. *Id.* at 3-5.

320. *See* WADA, *Code Compliance by Signatories*, art. 1, 7.1.1, 9.3.2, 9.4, 9.5, 9.6, 11.2.2 (2021).

321. Windholz, *supra* note 279, at 115-117; van Bottenburg, et. al., *supra* note 84, at 194-198; Houlihan, *supra* note 55, at 275-76.

extended to the public structure. Whether and to what extent WADA sanctions have been successful in changing State practice cannot be accurately evaluated at this time. It requires ongoing monitoring and investigation over a long-term period.

2. *The Public System*

Public international law is perhaps where there is a stronger potential for holding State agents responsible for violations of international obligations of States. As it has been said, "[o]nly public international law could bind States from above and change domestic practices."[322] However, the public regimes of the two international anti-doping conventions, despite being potentially designed to address situations of State-sponsored doping, did no better –even worse than the private system, considering that at least some sanctions were implemented by the private system.

The UNESCO Convention suffers from a lack of specific provisions outlining sanctions or consequences that States may face in the event of non-compliance,[323] and is more focused on encouragement rather than strict requirements.[324]

After the first WADA report on Russian doping, in August 2016, the CoP of the UNESCO Convention held an extraordinary meeting and recommended an assessment of the anti-doping policies in the Russian Federation.[325] During the ordinary meeting in September 2016, the CoP hired two international and three Russian independent consultants to conduct an assessment.[326] The report of the consultants contained recommendations that were subject to a follow-up review by the CoP based on a report submitted by Russian officials. In 2019, the CoP found "significant progress" in cooperation with the Russian Federation in implementing the recommendations.[327]

In 2017, the stakeholders of the UNESCO Convention expressed concerns over the low rate of compliance, citing the lack of sanctions as

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322. Frédéric Mégret, *Nature of Obligations*, *in* INTERNATIONAL HUMAN RIGHTS LAW, 86, at 87 (Daniel Moeckli et. Al. eds.) (2018).

323. Jenart, *supra* note 55, at 417-19.

324. Houlihan, *supra* note 55, at 267, 274.

325. Conference of Parties to the International Convention Against Doping in Sport, *Review of the National Anti-doping Policy of the Russian Federation in the Context of the Policy Advice Project,* ¶¶ 1-6, ICDS/6CP/Doc.8 (2017).

326. *Id.*

327. Conference of Parties to the International Convention Against Doping in Sport, *Report of the COP6 Bureau on the Review of the National Anti-doping Policy of the Russian Federation in the Context of the Policy Advice Project*, ¶ 3, ICDS/7CP/Doc.17 (2019).

one of the reasons.[328] This concern was later emphasized by the President of WADA who drew attention to the absence of an effective system of consequences for States, highlighting the lack of "real penalt[ies] for Governments that choose not to play by the rules" as one of the challenges of anti-doping systems.[329]

In light of such concerns, the CoP started working on the adoption of the "Operational Guidelines" to better implement the UNESCO Convention.[330] The Guidelines were eventually approved in October 2021. They establish two categories of non-compliance. The first includes "non-compliant non-responsive States." These are States that have failed to submit their national reports within the required timeframes. The second includes non-compliant States "below the . . . threshold of 60%," which refers to States whose submitted national reports do not meet the threshold of 60% of the ADLogic self-assessment questionnaire.[331]

The consequences for non-compliance are very mild. According to the Guidelines, a case of non-compliance "means that the State Party's implementation of the Convention in terms of national policies, legislation or operational programs can be improved."[332] The follow-up process in a non-compliance case includes the implementation of a "Corrective Action Plan" by the State.[333] The background work on the Guidelines indicates that their purpose is more focused on assisting non-compliant States to achieve compliance, rather than imposing sanctions or other punitive measures.[334] A type of positive intervention in the

328. Evaluation of UNESCO Convention, *supra* note 32, at 22, 34.

329. *WADA President Calls on Governments to Implement Sanction Framework for UNESCO's International Convention Against Doping in Sport*, WADA (Oct. 26, 2021), *available at* https://www.wada-ama.org/en/news/wada-president-calls-governments-implement-sanction-framework-unescos-international-convention (last visited Apr. 10, 2024).

330. See *Operational Guidelines and A Framework for Strengthening the Implementation of the International Convention against Doping In Sport*, CoP (Oct. 2021) *available at* https://unesdoc.unesco.org/ark:/48223/pf0000381120/PDF/381120eng.pdf.multi (last visited Apr. 10, 2024) [hereinafter Operational Guidelines].

331. *See Id.* at 5; States Parties' Non-Compliance 2020-2021, CoP, ICDS/8CP/Inf.3, 2-3 (Jan. 7, 2023).

332. Operational Guidelines, *supra* note 330, at 5.

333. *Id.* ¶ 78-82.

334. *See Draft of Operational Guidelines*, CoP ICDS/7CP/Doc.5, ¶ 5, 37, 38 (Aug. 2, 2019), *available at* https://unesdoc.unesco.org/ark:/48223/pf0000370457/PDF/370457eng.pdf.multi (last visited Apr. 10, 2024).

form of capacity building and persuasion that was recognized earlier by other commentators as a weakness of the anti-doping system.[335]

Despite the alarming revelations of the Russian doping program and the significant level of State involvement, generally speaking, the approach of the UNESCO Convention continues to focus on assisting States in overcoming their "difficulties" in complying with the Convention without adequately addressing cases of intentional violation. Seemingly, the same challenges that earlier observers highlighted—"the Convention creates weak obligations to deliver imprecise objectives through a vague implementation framework"[336]—persist about a decade later. This lack of "palpable ramifications from a public international law point of view" has been highlighted by another observer who, with respect to the UNESCO Convention, said that "[a] treaty obligation that is binding, but that has no effective enforcement mechanisms, remains weak."[337]

A few reasons may account for this deficiency. It appears that UNESCO and the Member States were under the impression "that anti-doping would not be a crucial political issue for member States and therefore the Convention needed to be 'designed in such a way as to not be a burden'".[338] This could help secure more ratifications for the Convention under the "impression that the rapidity of ratification is seen as the primary indicator of success."[339] Also, it seems that the system of questionnaires employed by the Convention is focused on getting a good response rate as an indicator of commitment by the UN, as one senior UNESCO official has confirmed.[340] This observation suggests that the survey system may not accurately measure the true rate of compliance with anti-doping obligations, as the survey is believed to be more effective in assessing "breadth of commitment rather than depth of commitment."[341] The UNESCO Oversight Division shares the same concern over the reliability of the self-assessment system in accurately assessing the effectiveness of anti-doping efforts.[342] In addition, the stakeholders have emphasized the necessity to ensure that the question-

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335. Houlihan, *supra* note 55, at 272.

336. *Id.*

337. Jenart, *supra* note 55, at 418.

338. Houlihan, supra *note* 55, at 270.

339. *Id.* at 273-74.

340. *Id.*

341. *Id.* at 272-74.

342. Evaluation of UNESCO Convention, *supra* note 32, ¶ 84; Houlihan, *supra* note 55, at 272.

naire remains up-to-date and effective in identifying the areas that need attention based on the rapid evolution of anti-doping methods.[343]

The critique of the UNESCO Convention's approach can also be examined in light of the general mission and policies of UNESCO as an educational organization and a "disseminator of knowledge" that primarily "assumes responsibility for education, prevention, cooperation, and information relating to sport" rather than "prohibitionist policies" of WADA.[344] This approach is clear in the *travaux préparatoires* of the UNESCO Convention: "Since the urgent need to combat dope-taking is now abundantly clear and punitive measures have proved to be ineffective, UNESCO would seem to provide a suitable worldwide framework for cooperation between States on research, information exchange, education, and prevention."[345]

The European Convention exhibits similar deficiencies. Despite having monitoring mechanisms in place and the adoption of an additional Protocol in 2002, the European Convention is still impotent in implementing deterrent measures. According to the database of the Monitoring Group of the Convention, Russia underwent evaluation visits on three occasions in 2001, 2013, and 2021.[346] The 2013 visit took place two months before the Sochi Games, during a time when the doping program was evidently at its peak, and ironically, the visit was started at the Russian Ministry of Sports "with an introductory meeting with Deputy Minister Mr. Yuri Nagornyh."[347] The report made some recommendations and concluded that Russia had fulfilled its commitments under the European Convention "in a very good way."[348] The 2021 report, after making some recommendations, also confirmed Russia's fulfillment of all its commitments under the Convention.[349]

In 2021, the Monitoring Group of the Convention published a document outlining its mission, vision, and long-term strategy, which nota-

343. Evaluation of UNESCO Convention, *supra* note 32, ¶¶ 77-79.

344. Scott R. Jedlicka & Thomas M. Hunt, *The International Anti-Doping Movement and UNESCO: A Historical Case Study*, 30 THE INT'L J. OF THE HIST. OF SPORT 1523, at 1524-27 (2013).

345. Records of the General Conference: Resolutions, UNESCO (27 C/Resolutions, Paris, October 25–November 16, 1993), 71.

346. *See Monitoring Reports*, COUNCIL OF EUR. PORTAL, *available at* https://www.coe.int/en/web/sport/monitoring-reports (last visited Apr. 10, 2024)

347. Report by the evaluation team of Anti-Doping Convention (T-Do), CoE, T-DO (2014) 05, at 18 (May 8, 2014).

348. *Id.* at 35.

349. Evaluation Report of the Monitoring Group (T-DO) Evaluation visit to the Russian Federation 21-23 September 2021, CoE, T-DO (2021) 43 Final, at 4-36 (Jan. 1, 2022).

bly lacks any indication of sanctioning capacities or legal consequences for potential violations.[350] The 2023 Rules of Procedure of the Monitoring Group have an article on non-compliance. In a case of non-compliance, notifications will be sent to the Head of the Delegation of the State in the Monitoring Group, asking for corrective action. If non-compliance persists, notifications will be sent to the Permanent Representation of the party to the CoE. At this point, "no representative of the [State] Party may be eligible for the position of Chair or Vice-Chair of the Monitoring Group, the Advisory Groups, ad-hoc groups, or the [The Ad Hoc European Committee for the World Anti-Doping Agency (CAHAMA)] or for the position of European Representative in the Foundation Board or Executive Committee of WADA." The party's non-compliance will then be reported to the Committee of Ministers of the CoE, which "may take additional actions in its discretion."[351] There are very mild consequences for actions that can undermine a whole legal regime. Notably, a committee's collection of documents on the topic of doping does not include any references to the Russian State-sponsored doping program.[352]

In conclusion, the international anti-doping structure still relies on "naming and shaming" as its main sanctioning tool.[353] Addressing the issue of inadequate consequences for intentional violations of anti-doping provisions remains a critical challenge for the international community.[354]

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350. *Strategy of the Monitoring Group of the Anti-Doping Convention (T-DO)*, CoE (Jun. 10, 2021).

351. *Rules of Procedure of the Monitoring Group of the Anti-Doping Convention*, art. 18 (Jan 31, 2023). In July 2022, after cessation of Russian Federation's membership in the CoE, the Council of Ministers of the CoE confirmed the loss of rights of participation of the Russian Federation and Belarus in the intergovernmental work of the Ad hoc European Committee for the World Anti-Doping Agency; *see* Ad hoc European Committee for the World Anti-Doping Agency (CAHAMA), Committee of Ministers of the Council of Europe, CM/Del/Dec(2022)1440/8.1 (Jul. 13, 2022).

352. *See Committee of Ministers*, COUNCIL OF EUR. PORTAL, *available at* https://search.coe.int/cm#title=Doping#k=*#f=%5B%7B%22p%22%3A%22CoECMTopics%22%2C%22i%22%3A1%2C%22o%22%3A1%2C%22ix%22%3A1%2C%22value%22%3A%22doping%22%7D%5D. (last visited Apr. 10, 2024).

353. Houlihan, *supra* note 55, at 272; *see also* HANDBOOK OF INT'L ADJUDICATION (Cesare PR Romano et. Al. eds. 2014); I.C.J. Statute, art. 36(2).

354. Yaël Ronen, FORUM PROROGATUM, Max Planck Encyclopedias of International Law (Jun. 2020).

C. Lack of a Dispute Resolution Mechanism to Provide Reparations

Another critical factor that exacerbates the dearth of effective measures in combating State-sponsored doping is the absence of a forum that can resolve disputes and provide remedies to victims. The choice of forum for resolving disputes in international law depends on various factors, including the nature of the dispute, the parties involved, and the availability of mechanisms for dispute resolution. Potential litigants must carefully consider their options and weigh the potential benefits and drawbacks of each forum before deciding on a course of action. In this case, the choice of the forum might be different based on the type of victim that raises a claim, be it a State, an SGB, or an individual.

1. State-Related Mechanisms

Neither the UNESCO Convention nor the European Convention has a dispute settlement clause. This, *per se,* can result in a lack of effective remedies in cases where non-compliance has resulted in damages to victims. The absence of a dispute settlement clause can lead to uncertainty, inconsistency, and limited enforcement of the Convention's provisions. It can also create a dead end for victims who have suffered material or moral damages due to breaches of anti-doping obligations.

Although the UNESCO Convention has not designated a forum to adjudicate claims of violation, certain international adjudicative fora may have jurisdiction, nonetheless. One of these is the ICJ, the principal judicial organ of the United Nations,[355] and the highest dispute resolution body between States in international law. However, the ICJ does not have compulsory jurisdiction. States must consent to jurisdiction. This can be done in four ways: by ad hoc agreement; by a com promissory clause in a treaty or convention previously ratified by the States in the dispute; by an optional declaration of acceptance of the jurisdiction of the ICJ, under Article 36 of its Statute;[356] or by *forum prorogatum,* which means if "a State that has not recognized the jurisdiction of the tribunal at the time when an application instituting proceedings against it is filed, may subsequently consent to such jurisdiction and enable the

355. I.C.J. Statute, art. 1.

356. Sean D Murphy, INT'L JUDICIAL BODIES FOR RESOLVING DISPUTES BETWEEN STATES, 181, at 187-8 in OXFORD HANDBOOK OF INT'L ADJ. (Cesare PR Romano et. Al. eds. 2014); I.C.J. Statute, art. 36(2).

tribunal to entertain the case."[357] The ICJ cannot hear a case of State-sponsored doping unless both the applicant and the respondent State have accepted its jurisdiction, in one of these four ways.[358] In the Russian case, none of these conditions seems to be present, and there is no information available to confirm any other State's actions based on potential mutual treaties with Russia.

States can also have recourse to arbitration. Arbitration has the advantage over recourse to the ICJ because it can be used by international organizations and individuals, not just States, to resolve disputes. Arbitration can be *ad hoc*, where the parties agree on the rules and procedures that will govern the arbitration, or it can be conducted under the auspices of an arbitral institution, such as the Permanent Court of Arbitration.[359] However, arbitration still requires consent by both parties, which might be nonexistent, and the powers of the tribunal will depend on the provisions of the arbitration clause.

The lack of any international court or arbitral tribunal with clear jurisdiction probably explains why, to date, no State has brought a case against Russia to recover for harm caused by its doping scandal in any international forum. In addition, the lack of awareness regarding how State-sponsored breaches of doping obligations can result in violations of human rights or cause damages may be another reason for the absence of litigation in this regard. Likely, States may not fully comprehend the legal implications and potential consequences of State-sponsored doping programs, which can extend beyond sporting issues and engage with human rights questions. Enhancing awareness and understanding of the legal framework surrounding anti-doping efforts, including the human rights dimension, could play a crucial role in promoting accountability and seeking appropriate remedies.

One potential solution to address this deficiency in the governance of the above conventions is the adoption of an additional protocol. This protocol could supplement the provisions of the conventions by establishing a dispute resolution mechanism and recognizing the jurisdiction of an international court, such as the ICJ, or an arbitral tribunal, such as

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357. Yaël Ronen, *Forum Prorogatum*, Max Planck Encyclopedias of International Law (Jun. 2020).

358. *See* Christian Tomuschat, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, 613-616 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., Christian J. Tams & Tobias Thienel Ass. Eds.) (2006).

359. Commentary to I.C.J. Statute, art. 33, ¶ 4.

CAS, to enable athletes and others to access effective remedies.[360] This would provide a more robust framework for addressing disputes and promoting compliance with the convention.

2. Mechanisms Related to the IOC

According to the commentary of the ILC Draft Articles "[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its account and without the intermediation of any State."[361] The mechanism for resolving disputes regarding the HCC is arbitration under Swiss law. In the HCC of the 2012 London Games, the IOC and CAS were chosen to settle disputes arising between the hosting entities on one side, and the Olympic family on the other.[362] The HCC, which is governed by Swiss law,[363] excludes the jurisdiction of the national courts of Switzerland and of the host country and gives CAS exclusive jurisdiction over any dispute.[364] The arbitration clause of the 2012 London HCC provides:

> This Contract is governed by Swiss law. Any dispute concerning its validity, interpretation or performance shall be determined conclusively by arbitration, to the exclusion of the ordinary courts of Switzerland or of the Host Country, and be decided by the [CAS]… in accordance with the Code of Sports-Related Arbitration of the said Court.

In addition, the clause includes an important provision removing immunity of the parties in case of a potential dispute:

> The City, the NOC and the OCOG hereby expressly waive the application of any legal provision under which they may claim immunity against any lawsuit, arbitration or other legal action (i) initiated by the IOC, (ii) initiated by a third party against the IOC, particularly as per Section 9 above, or (iii) initiated in relation to the commitments undertaken by the Government and its regional and local authorities as reflected in Section 5 above. Such waiver shall apply not only to the

360. *See* Pavel Šturma, Dispute Settlement Provisions in the International Law Commission's (ILC) Codification Projects, Max Planck Encyclopedias of International Law (Jul. 2020).

361. Commentary to I.C.J. Statute, art. 33, ¶ 4.

362. London 2012 HCC, *supra* note 122, art. 71.

363. *Id.* art. 72.

364. *Id.*; *see also* Tokyo 2020 HCC, *supra* note 122, art. 74, 87.

> jurisdiction but also to the recognition and enforcement of any judgment, decision or arbitral award.

Similarly, Section 51.3 of the 2024 Games' HCC says:

> The Host City, the Host NOC, and the OCOG hereby expressly waive the application of any legal provision under which they may claim immunity against any lawsuit, arbitration or other legal action … Such waiver shall apply not only to the jurisdiction but also to the recognition and enforcement of any judgment, decision or arbitral award.

Since States enjoy jurisdictional immunity,[365] this waiver of immunity is a crucial factor if the IOC decides to initiate legal action against Russian State entities.[366]

The Sochi HCC is not publicly available but considering that most HCCs are designed in the same format and contain the same provisions, the Sochi HCC can be the source of contractual liability of the Sochi OCOG. As a party to the Sochi HCC and representing other SGBs and athletes, the IOC can bring claims against the organizing authorities of the Sochi Games for violating contractual anti-doping obligations. CAS will then adjudicate the case under its rules of procedure. As athletes are not parties to the HCC and lack standing to bring a case to CAS on this basis, it falls upon the IOC to fulfill its responsibility by providing compensation to athletes who have suffered damages due to Russia's IWA.

However, the IOC has not initiated any claims against the OCOG before CAS seeking damages on behalf of itself, other SGBs, or athletes. They have not effectively defended the rights of athletes who competed in their tournaments. This could be attributed to perceiving doping as a mere administrative and disciplinary infraction rather than an offense with financial ramifications or a violation of the rights of other athletes.

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365. A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State.

366. *See United Nations Convention on Jurisdictional Immunities of States and Their Property (art. 5)*, GEN. ASSEMBLY OF THE U.N. (Dec. 2, 2004), *available at* https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf (last visited Apr. 10, 2024).

3. Mechanisms Related to Athletes

Given that both States and SGBs have been ineffective in remedying violations of their rights (much less individual athletes), the next question is whether athletes currently have available a court that has jurisdiction and authority to provide them with effective relief for harm caused by State-sponsored doping.

Individuals may face unique obstacles when it comes to accessing justice under international law. One of the main challenges is the lack of standing before many international courts and tribunals. In the case of adjudicative bodies that can hear only disputes between States, such as the ICJ, the only way in which their claims can be litigated is by securing the diplomatic protection of their State.[367]

The possibility of allowing individuals to invoke the international legal responsibility of States directly, as opposed to through the medium of diplomatic protection, was considered by Garcia Amador, one of the ILC Special Rapporteurs who worked on the drafting of the ILC Articles, but it was not accepted by the ILC at the end.[368] However, subsequent developments in IHRL and the creation of multiple forums where individuals directly can allege a violation of their human rights have made it possible for individuals not to have to rely on diplomatic protection to vindicate their rights.

Nowadays, in cases involving violations of IHRL, individuals can bring claims before regional or global human rights bodies such as the Inter-American Commission on Human Rights or the UN Human Rights Committee (HRC). However, international human rights litigation is not without its challenges, and one of the most significant hurdles is often the question of admissibility. Some of the most important and common admissibility criteria include establishing jurisdiction, exhaustion of domestic remedies, standing, timeliness, and the plausibility of the claims. In the Russian case, there are at least two, if not three, forums where athletes might try (or, better to say, should have tried, since time limits might have expired) to bring their cases.[369]

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367. James R Crawford, *State Responsibility*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L LAW (Sept. 2006), at ¶ 1, *available at* https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1093 (last visited Apr. 10, 2024) (whether diplomatic protection is the right of the State, or the right of the individual is still a source of controversy); Pellet, *supra* note 22, at 88–89.

368. Solomon T Ebobrah, INTERNATIONAL HUMAN RIGHTS COURTS, OXFORD HANDBOOK OF INT'L ADJ., 225, at 231 (Cesare PR Romano et. Al. eds. 2014).

369. Many international human rights mechanisms impose time limits for filing a claim, with some of them having limited windows. For instance, the ECtHR requires that a complaint be filed within four months of the final ruling at the national level. *See The Time-*

One is the ECtHR. The ECtHR occupies a distinguished position in international human rights architecture. In the most judicialized continent in the world, the ECtHR is one of the judicial pillars of the new construction of Europe after WWII, with a wider jurisdiction than the Court of Justice of the European Union.[370] Its jurisprudence is influential, shaping IHRL both globally and regionally. Moreover, its decisions are legally binding for the States that are parties to the disputes.[371] ECtHR's rulings are the lowest common denominator of European public policy and the constitutional order of CoE member States.[372] This encourages the potential disputants to seek remedies in front of the ECtHR rather than, say, UN treaty bodies, which do not issue binding decisions. The ECtHR can be an appropriate forum for lodging claims of human rights violations against States that are parties to the ECHR or its optional protocols.[373] However, the situation becomes more complicated in the case of Russia, as it has already ceased its membership in the CoE,[374] but, as it was already explained, that would be no bar.[375]

In 2021 alone, the Russian Federation paid nearly 12 million euros for damages under the judgments of the ECtHR, which by far stands as the highest amount of just satisfaction payments made by any State.[376] Also, in 2020 and 2021, Russia resolved 174 and 221 cases respectively

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Limit for Applying to the European Court of Human Rights Is Four Months From the Date of the Final Domestic Decision, ECTHR PRESS RELEASE (Feb. 1, 2022) *available at* https://www.coe.int/en/web/portal/-/time-limit-for-echr-applications-reduced-to-4-months (last visited Apr. 10, 2024).

370. Cesare PR Romano, *The Shadow Zones of International Judicialization*, OXFORD HANDBOOK OF INT'L ADJ., 90 at 96 (Cesare PR Romano et. al. eds.) (2014).

371. ECHR, art. 46 which reads: "Binding force and execution of judgments 1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution…"; As Tomuschat says: "Of all the specialized regional courts for the protection of human rights, the [ECtHR] is the most important institution not only because of its long existence … and its large membership … but also mainly because of its widely extended case law and the effectiveness of its implementation mechanism." *See* Christian Tomuschat, Human Rights: Between Idealism and Realism, 286 (2014).

372. Jernej Letnar Černič, *Emerging Fair Trial Guarantees Before the Court of Arbitration for Sport*, SSRN (Dec. 7, 2014), *available at* https://ssrn.com/abstract=2546183 (last visited Apr. 10, 2024).

373. Solomon T. Ebobrah, *International Human Rights Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, 225, at 231 (Cesare PR Romano et. Al. eds. 2014).

374. *See* The Comm. Ministers of the CoE, *supra* note 57.

375. *Id.*

376. This amount stands at 11.5 million euros in 2020. *See Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights*, COE COMMITTEE OF MINISTERS, 69 (2021) *available at* https://rm.coe.int/2021-annual-report/1680a9c848 (last visited Apr.10, 2024).

through friendly settlements with the applicants.[377] Furthermore, in 2021, the highest percentage of cases under enhanced supervision procedures for urgent implementation belonged to Russia, with 16 percent.[378] However, these numbers should be interpreted cautiously, as Russia currently has the second-highest number of pending cases in front of the ECtHR after Türkiye, with 16,742 cases by 2022.[379]

A second forum is the HRC, the monitoring body of the ICCPR.[380] While the decisions of the treaty bodies of the United Nations are not binding *per se*, their views carry significant authority in terms of setting standards and interpreting the rules of human rights treaties. Therefore, any actions taken here, especially against Russia, are unlikely to result in compensation but rather aim to contribute to the development and strengthening of the human rights aspects of the issues at hand. However, when the first individual communication of its kind was brought before the HRC by Yuliya and Vitaly Stepanov, a Russian athlete and her husband who were the first whistleblowers of the Russian doping program,[381] the difficulties of international human rights litigation for individuals became evident.

The complaint regarding Yuliya Stepanova, as an athlete affected by the Russian doping program, claimed that several articles of the ICCPR had been violated, including articles that prohibit cruel, inhuman, and degrading treatment, medical experimentation without free consent, forced labor, interference with privacy, freedom of expression, and family life.[382] Regarding Vitaly, allegations of infringements on the right to privacy, freedom of expression, and non-interference with family life were made.[383] The Committee denied the communication registration, stating that the claims were not sufficiently substantiated. While admis-

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377. *Id.* at 74.

378. *Id.* at 63.

379. *Annual Report 2022 of the European Court of Human Rights*, COUNCIL OF EUR. (2023), *available at* https://www.echr.coe.int/annual-reports (last visited Apr. 10, 2024).

380. *View the ratification status by country or by treaty*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R (2023), *available at* https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=144&Lang=en (last visited Feb. 15, 2023).

381. *Communication on behalf of Yuliya Stepanova and Vitaly Stepanov v. Russian Federation* submitted to the UN Human Rights committee, International Human Rights Center of Loyola Law School (Feb. 24, 2021), 67-73, *available at*: https://www.lls.edu/media/loyolalawschool/academics/clinicsexperientiallearning/ihrc/Stepanovs%20v%20Russia%20(3-1-2021)%20for%20distribution.pdf (last visited Apr. 10, 2024).

382. *Id.* at 74-125.

383. *Id.*

sibility criteria such as exhaustion of domestic remedies is always a hurdle in human rights litigation, it is not clear, in addition to challenges with the substance, to what extent the above factors have influenced the Committee's decision.

A third possible forum is the United Nations Human Rights Council. In 2007, the Council instituted a complaint procedure.[384] The purpose of the procedure is "to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances."[385] The admissibility criteria before the Council is akin to those of other human rights procedures, including requirements that cases not be purely political, be consistent with human rights instruments, and have exhausted domestic remedies.[386] There are two separate working groups. The Working Group on Communications and the Working Group on Situations are responsible for respectively examining written communications and bringing consistent patterns of gross violations of human rights to the attention of the Council.[387] Since the proceedings are confidential to enhance cooperation with the State concerned,[388] it is hard to speculate on whether the Russian doping scandal has already been brought before the Council.

Despite the existence of the above potential forums, several factors could explain the historical lack of effective relief provided by any of them. A major problem bringing action in front of all the above forums is the exhaustion of local remedies, stipulating that individuals or States must first pursue and exhaust all available legal avenues and remedies within their domestic legal system before seeking recourse at the international level.[389] This principle is founded on the idea of respecting the sovereignty of States and allowing them the opportunity to resolve disputes or violations of rights through their own legal systems before seeking external intervention.[390]

384. U.N Human Rights Council: Institution-Building, U.N. HUMAN RIGHTS COUNCIL (June 18, 2007), *available at* https://ap.ohchr.org/documents/dpage_e.aspx?si=a/hrc/res/5/1 (last visited Apr. 10, 2024).

385. *Id.* ¶ 85.

386. *Id.* ¶ 87(a).

387. *Id.* ¶¶ 89-99.

388. *Id.* ¶ 86.

389. U.N. Human Rights Council, *supra* note 384, ¶ 87(g).

390. *See generally* Silvia D'Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, 2007/02 EUR. UNIV. INST. DEPT. OF LAW 1, 15 (Feb. 2007).

Notwithstanding the general rule, exceptions exist, as elucidated by established principles of international procedural law and the prevailing practice of international courts and tribunals. In situations where domestic legal proceedings are unduly prolonged, unlikely to provide effective relief, are not available, or are not accessible for the victims, the principle of exhaustion of domestic remedies may be subject to exceptions.[391] For instance, ILC Articles notes that "[o]nly those local remedies which are 'available and effective' have to be exhausted before invoking the responsibility of a State."[392] Moreover, the ILC Draft Articles on Diplomatic Protection add two additional exceptions to the rule: (i) in circumstances when there is no "relevant connection" between the injured person and the State alleged to be responsible,[393] and (ii) when the injured person is "manifestly precluded from pursuing local remedies."[394]

Another limitation of human rights litigation in international courts and tribunals is the lengthy and time-consuming nature of the legal processes if the case can successfully overcome the admissibility hurdles. For athletes, following a path to take their case to a human rights court means the premature termination of their professional careers, or at the very least, the loss of a significant portion of their livelihood as athletes.

The backlog of cases before human rights courts can also contribute to their reluctance to accept cases related to human rights violations resulting from sport as opposed to cases involving, for example, torture, deprivation of life, unlawful detention, and other similar violations.

Other contributing factors can be the limited human resources of human rights courts to process cases, potential financial restrictions, limited knowledge about the existence of such proceedings on behalf of the victims, or challenges in accessing victims by lawyers who can effectively engage with these mechanisms. Eventually, a common issue that might be evident here as well, is a lack of awareness about the nature of human rights violations related to doping.

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391. Donna J. Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, 1 OP-CEDAW TECH. PAPERS 1 (2008).

392. *Draft Articles on Diplomatic Protection with commentaries*, YEARBOOK OF THE INT'L LAW COMM'N (2006), *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (last visited Apr. 10, 2024).

393. *Id.* at cmt. to art. 15(c).

394. *Id.* at cmt. to art. 15(d).

CONCLUSION

Russia may not be the only country with covert doping programs, and there may be other cases warranting similar scrutiny.[395] It is, therefore, essential for all stakeholders in the anti-doping field, including States and SGBs, not to overlook the chance to strengthen the frameworks that can help address potential future situations. This article highlighted that State-sponsored doping is a violation of the international obligations of States under the two private and public anti-doping frameworks, however, it identified caveats that undermine the effectiveness of anti-doping measures against States.

The existing legal regimes of the two public anti-doping conventions were caught off-guard by the Russian program. Not only did they fail to detect the State-sponsored program's existence, but they also lacked effective measures to remedy its harm and to impose meaningful sanctions on the involved Russian government organs and officials. These mechanisms still rely on assistive measures to help violating States improve their anti-doping structures without any substantial system of penalties. Even in the aftermath of the Russian case, progress in developing better structures for the enforcement of conventional provisions has been slow. The global anti-doping system still lacks sufficient power to address the issues effectively or impose effective consequences for non-compliance. The response by the SGBs has primarily focused on non-State entities and individual athletes due to their lack of capacity to take action against States but has left the State apparatus behind the doping program largely untouched.

Another significant challenge is the absence of a dispute settlement body with jurisdiction over States, either through public forums established by State agreements and treaties or through private arbitration mechanisms. The lack of effective dispute resolution mechanisms has hindered the ability to address breaches and provide effective remedies to potential victims. Access to all existing fora that could potentially have been used is limited. Considering the problems of litigating in front of international courts such as the ICJ and the ECtHR, the choice of arbitration might be more justifiable. However, the scope of arbitration is limited to the terms agreed upon by the parties. This means that there may be complications in utilizing arbitration to resolve certain types of disputes.

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395. *Independent Commission Investigation*, WADA (Nov. 9, 2015), *available at* https://www.wadaama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf (last visited Apr. 10, 2024).

Modifying the jurisdiction of a specialized arbitral tribunal with relevant expertise, which might be CAS in this case, can help create a clear path for victims in their right to an effective remedy. CAS, which currently serves as an interpreter of the WADA Code[396] and holds a pivotal position in rule enforcement in the private anti-doping structure,[397] can be granted an additional responsibility to fulfill the same role within the public anti-doping domain. States could negotiate and adopt protocols to the two anti-doping conventions giving CAS compulsory jurisdiction at least over similar violations committed by States. This process may face challenges such as the need for States to agree and ratify such protocols. Given the diversity of perspectives and interests among member states and concerns about the potential overreach of an arbitral tribunal into areas that are traditionally within the purview of national sovereignty, the obstacle might be daunting. However, one should not underestimate the potential of SGBs to put pressure on States to join such instruments by imposing bans from hosting or participating in sporting events under their national flag or setting pre-conditions in this regard.

Another option would be the adoption of an international convention for the resolution of disputes between States, SGBs, and even athletes, whereby States voluntarily accept the jurisdiction of the CAS to resolve potential disputes like those discussed in this article. Given its history of collaborating with SGBs, UNESCO could be the framework under whose aegis such a convention could be negotiated. Yet, this approach faces the same challenges as the previous one.

Alternatively, the arbitration clause in HCCs could be modified to enhance the protection of athletes in the face of egregious violations of international law or IHRL by the host officials. The most propitious approach would probably be an ad hoc arbitration agreement, entered before any given dispute, in which the State explicitly consents, independently from the HCC, to resolve disputes before CAS and to waive its sovereign immunity from damages claims in foreign tribunals. The waiver of immunity is a significant move in such contracts and can be a huge step toward holding States responsible for reparations. One of the main advantages of this approach is its potential feasibility, as it only requires the consent of the single State involved and does not depend on a broader consensus among other States. However, there is no guarantee that the State will agree to such a provision, especially if it is unwilling to be held responsible for reparations. Again, a State may be willing

396. Houlihan, *supra* note 55, at 267.
397. Windholz, *supra* note 279, at 104-05.

to acquiesce if doing so is a condition of hosting Olympic and other international sporting events as well as entering a national team in these athletic competitions.[398]

If States are going to accept the jurisdiction of CAS, arguably they will want to have a say in who is going to be included in the list of potential arbitrators, and possibly in their selection. This could ensure a balanced and inclusive arbitration process that takes into consideration the interests of all parties involved. Such reforms could ensure the inclusion and use of arbitrators with relevant expertise in legal intricacies involved in such disputes including human rights complexities. This will guarantee that the arbitration process is conducted in a manner that is fair, efficient, and effective. Therefore, it will be necessary to revisit questions of CAS's institutional structure.[399]

Finally, this article discussed that whenever States dope, the international anti-doping structure falls significantly short in its ability to ensure compliance by providing adequate compensatory and punitive remedies. Despite the evolution of the anti-doping system in the past years, the current legal regimes in place to fight doping are still in need of a fundamental overhaul to equip them with effective sanctions and avenues to provide effective remedies for athletes and other potential victims.

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398. Be that as it may, there is one common issue underlying all these scenarios. They all depend on CAS being an impartial and independent forum. Should the tribunal be seen as favoring the interests of the international sports community, any effort to designate CAS to such a role is doomed to fail. *See e.g.*, Grit Hartmann, *Tipping the Scales of Justice: The Sport and Its "Supreme Court,"* PLAY THE GAME (Nov. 2021), *available at* https://www.playthegame.org/publications/tipping-the-scales-of-justice-the-sport-and-its-supreme-court/ (last visited Apr. 10, 2024).

399. Apart from the theme of this article, it is important to highlight another intriguing aspect that warrants separate consideration but a comprehensive analysis of it is beyond the scope of this article. The above ideas may involve the establishment of a system in which sporting sanctions play a more prominent role in enforcing rules and regulations of public international law by putting pressure on sovereign States to join the international law instruments on sporting issues. If this happens then SGBs will be another step closer towards full recognition as subjects of international law.