

# INTERNATIONAL RESPONSIBILITY OF STATES AND VICTIMS OF STATE-SPONSORED DOPING

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The Russian State-sponsored doping scandal shocked the world of sports, yet from the international law perspective raises issues concerning the international responsibility of States. Whether States can administer such programs with little cost or should be responsible for their wrongful acts is the subject of this research. This article discusses how the international law of State responsibility applies to the case of State-sponsored doping and analyzes how countries who are involved in systematic doping programs are responsible under international law principles. The article concludes that individual athletes are the victims of this international wrongful act and therefore should be compensated for both material and moral damages.

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## I. INTRODUCTION

In July 2016, the World Anti-Doping Agency (WADA) released its first independent report on allegations of State-sponsored doping by Russia during the 2014 Sochi Winter Olympics in which it confirmed that Russian officials were conducting a wide scale doping program.<sup>1</sup> The second report extended the time span of this systematic doping and declared that Russia had hijacked the international sports for years.<sup>2</sup>

Subsequent investigations instructed by the Disciplinary Committee of the International Olympic Committee, known as Schmid Commission, confirmed the findings of previous reports and reaffirmed the systematic and institutionalized governmental involvement in the doping program.<sup>3</sup>

Part of the outcome was a chaos in the medal rankings; due to doping violations, Russia initially lost thirteen medals at 2014 Sochi Winter Games.<sup>4</sup> This turmoil sparked a re-analysis of doping samples from the London 2012 and Beijing 2008 Games, the results of which also toppled

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1. Richard H. McLaren, *WADA Investigation of Sochi Allegations – Part I*, WORLD ANTI-DOPING AGENCY BY INDEP. PERSON, 1 (July 18, 2016), [https://www.wada-ama.org/sites/default/files/resources/files/20160718\\_ip\\_report\\_newfinal.pdf](https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf) [hereinafter First Report].

2. Richard H. McLaren, *WADA Independent Investigation Report – Part II*, WORLD ANTI-DOPING AGENCY BY INDEP. PERSON, 74 (Dec. 9, 2016), <https://www.wada-ama.org/en/resources/doping-control-process/mclaren-independent-investigation-report-part-ii> [hereinafter Second Report].

3. *IOC Disciplinary Commission's Report to the IOC Executive Board*, INT'L OLYMPICS COMMITTEE, 24–26 (Dec. 2, 2017), [https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/IOC-Disciplinary-Commission-Schmid-Report.pdf#\\_ga=2.104879233.385687857.1513014269-1584169185.1502791100](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/IOC-Disciplinary-Commission-Schmid-Report.pdf#_ga=2.104879233.385687857.1513014269-1584169185.1502791100) [hereinafter Schmid Report].

4. See Nick Zaccardi, *List of Russia Olympic medals stripped; new Sochi medals standings*, NBC SPORTS (Nov. 27, 2017, 3:09 PM), <http://olympics.nbcsports.com/2017/11/27/sochi-olympic-medal-standings-russia-medals-stripped-doping/>; However, the Court of Arbitration for Sports reinstated seven of the thirteen medals before the 2018 PyeongChang Olympic games and lifted the ban on some of the athletes. See *Media Release: The Court of Arbitration for Sport (CAS) Delivers its Decisions in the Matter of 39 Russian Athletes v. The IOC: 28 Appeals Upheld, 11 Partially Upheld*, CAS (Feb. 1, 2018), [http://www.tas-cas.org/fileadmin/user\\_upload/Media\\_Release\\_\\_decision\\_RUS\\_IOC\\_.pdf](http://www.tas-cas.org/fileadmin/user_upload/Media_Release__decision_RUS_IOC_.pdf).

the podiums<sup>5</sup> and hit some big names in the history of the Olympics.<sup>6</sup> Investigations revealed that between 2012 and 2015, Russia used the so-called “Disappearing Positive Methodology” on 643 positive samples.<sup>7</sup> Athletes in thirty different sports have benefited from disappearing methodology whereas Athletics and weightlifting were by far the most benefited sports.<sup>8</sup>

If States are able to support illicit doping programs on an extensive scale with little cost, the whole competition and the principles of the Olympic movement and sportsmanship are at risk. In the words of the Independent Investigator: “The allegations, which we find to have been established, attack the principle of clean sport and clean athletes which are at the very heart of WADA’s *raison d’être*.”<sup>9</sup> By seeing this situation other countries may be lured into such activities, creating a controversial situation that threatens sport in its entirety.<sup>10</sup> This rippling effect

5. See, e.g., *Reanalysis Reveals Banned Substances in 23 “A” Samples From London 2012*, INT’L OLYMPIC COMMITTEE (May 27, 2016), <https://www.olympic.org/news/reanalysis-reveals-banned-substances-in-23-a-samples-from-london-2012>; See *Weightlifter set for 2012 Olympic bronze despite finishing ninth*, BBC NEWS (Sept. 15, 2016), <http://www.bbc.com/sport/olympics/37371735> (Just one group of weightlifting in London Games (men’s -94kg) shows the depth of drama when six weightlifters including all three medalists failed retests that raised fifth, eighth, and ninth ranked weightlifters to Olympic medals four years after the games.); See *IOC Sanctions Eight Athletes for Failing Anti-Doping Test at London 2012*, INT’L OLYMPIC COMMITTEE (Oct. 27, 2016), <https://www.olympic.org/news/ioc-sanctions-eight-athletes-for-failing-anti-doping-test-at-london-2012> (Following the retests, Kazakhstan lost a total of nine medals from the 2008 and 2012 games. Kazakhstan experienced its most successful Olympic appearance in London, with seven gold medals, and was suddenly stripped of three gold medals.); See also Olzhas Aueyzov, *Weightlifting: Kazakhstan’s Ilyin denies doping charges*, REUTERS (June 16, 2016), <http://ca.reuters.com/article/sportsNews/idCAKCN0Z20ZO>; See also *Public Disclosures*, INT’L WEIGHTLIFTING FED’N (July 15, 2016), <http://www.iwf.net/2016/06/15/public-disclosures/>.

6. Karolos Grohmann, *Doping – IOC strips three more medals from 2008, 2012 Games re-tests*, REUTERS (Apr. 5, 2017), <https://www.reuters.com/article/us-doping-olympics-idUSKBN17726B>.

7. First Report, *supra* note 1, at 39.

8. *Id.* at 41.

9. *Id.* at 22.

10. See Sean Ingle, *Russia’s backdoor Olympics*, THE GUARDIAN (Feb. 2, 2018), <https://www.theguardian.com/sport/2018/feb/02/winter-olympics-russian-doping-ban-pyeongchang#img-1> (A British Member of the International Olympic Committee warned:

undermines sports' potential for promoting peace and friendship among people and nations.<sup>11</sup>

State-sponsored doping in sports is reminiscent of State-sponsored terrorism in the world of politics, with similar consequences such as a sense of insecurity and fear in their respective environments. While the problem of State-sponsored terrorism was the subject of attention for the international community,<sup>12</sup> nevertheless the first investigated case of State-sponsored doping<sup>13</sup> remained unnoticed from the international law perspective. This paper demonstrates that international law can have a supportive role in the realm of sports.

In the modern structure of international sports, clean athletes deserve particular attention as a vulnerable group against doping and other corrupted practices that put their fundamental human rights at risk.<sup>14</sup> Recognizing State responsibility in the case of running a State doping machine provides a mechanism for access to justice for the victims of systematic doping and also acts as a deterrent for other countries.<sup>15</sup> Moreover, the position of sport governing bodies in imposing its goals

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“Athletes 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.”)

11. Human Rights Council Res. 31/23, U.N. Doc. A/HRC/31/L.29, at 1 (Mar. 21, 2016).

12. See, e.g., International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S 197; See also G.A. Res. 67/234B (Apr. 2, 2013), [http://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch\\_XXVI\\_08.pdf](http://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf); See also Cindy Whang, *The Challenges of Enforcing International Military-Use Technology Export Control Regimes: An Analysis of the United Nations Arms Trade Treaty*, 33 WIS. INTL. L.J. 114 (2015).

13. Cody Benjamin, *Russia banned from 2018 Winter Olympics by IOC over widespread doping*, CBS SPORTS (Dec. 5, 2017), <https://www.cbssports.com/olympics/news/ioc-bans-russia-from-2018-winter-olympics-over-doping-scandal/>.

14. See generally Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 347, ¶ 43 (June 19) (Separate Opinion of Judge Cançado Trindade).

15. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 22 (Oxford University Press, 3d ed. 2015).

and conditions on sovereign governments<sup>16</sup> can help in diminishing the traditional criticism of enforcement in international law.<sup>17</sup>

This article brings to the forefront an important intersection between international law and sports. Based on the following analysis, States that systematically support doping are responsible for their wrongdoings<sup>18</sup> and subsequently are under an obligation to provide compensation for the damages resulting from their wrongful conduct.<sup>19</sup> It briefly examines the evolution of the law of international state responsibility<sup>20</sup>, applies the rules to the facts in this doping case<sup>21</sup>, and concludes that clean athletes, as the main beneficiaries of the legal anti-doping framework, should be compensated for material and moral damages.<sup>22</sup>

## II. INTERNATIONAL RESPONSIBILITY OF STATES

Codification of State responsibility, as the last area of international law to undergo such an evolution,<sup>23</sup> was a significant movement, especially after more than half a century of being on agenda in international law.<sup>24</sup> The adoption of the Draft Articles on Responsibility of States for Internationally Wrongful Conducts<sup>25</sup> by the International Law Commission in its 53<sup>rd</sup> session in 2001 was the apogee of these

16. See, e.g., Henk Erik Meier & Borja Garcia, *Protecting Private Transnational Authority Against Public Intervention: FIFA's Power Over National Governments*, 93 PUB. ADMIN. 890, 891 (2015).

17. ROBERT KOLB, *THE INTERNATIONAL LAW OF STATE RESPONSIBILITY: AN INTRODUCTION* 231 (Edward Elgar Publishing, 2017).

18. See *infra* Parts II, III.

19. See *infra* Part IV.

20. See *infra* Part I.

21. See *infra* Parts II, III.

22. See *infra* Parts IV, V.

23. David D. Caron, *State Crimes: Looking at Municipal Experience with Organizational Crime*, in *INTERNATIONAL RESPONSIBILITY TODAY ESSAYS IN MEMORY OF OSCAR SCHACHTER* 23, 23 (Maurizio Ragazzi ed., 2005).

24. James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. AUDIOVISUAL LIBR. OF INT'L L., 1–2 (2012), [http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa\\_e.pdf](http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf).

25. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session (*Draft articles on Responsibility of States for Internationally Wrongful Acts*), U.N. Doc. A/56/10, ch. IV.E.1 (2001), <http://www.refworld.org/docid/3ddb8f804.html> [hereinafter *Draft*].

efforts.<sup>26</sup> This body of law is the result of efforts by five Special Rapporteurs, including almost thirty reports to International Law Commission, along with the submissions of the Drafting Committee and government comments.<sup>27</sup>

Article 1 of the draft provides: “Every internationally wrongful act of a State entails the international responsibility of that State.”<sup>28</sup> In order for an act to constitute internationally wrongful conduct, it should be attributable to the State under international law and should be a violation of international obligations of that State.<sup>29</sup>

Based on this article, international responsibility is the consequence of any failure in complying with international obligations of a State committed by any of its organs.<sup>30</sup> What forms the basis of this debate is a breach of an international obligation that is attributable to the State,<sup>31</sup> regardless of other factors such as *mens rea* or legal injury.<sup>32</sup>

Therefore, realization of responsibility is rested upon two main elements: the first involves wrongful conduct by a State against its international obligations, and second, the conduct should be attributable to the State.<sup>33</sup> Thus, mental element or fault is not a precondition for the purpose of international responsibility<sup>34</sup> and is excluded from the scope of the draft. Regardless of knowledge, purpose, recklessness or negligence, “it is only the act of the State that matters, independently of any intention.”<sup>35</sup> Accordingly, once the violation is established, it does not matter if the obligation was owed to a single State, multiple other

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26. See, e.g., KOLB, *supra* note 17, at 8–12, 27–30.

27. Crawford, *supra* note 24, at 1.

28. See Draft, *supra* note 25, art. 1.

29. *Id.* art. 2.

30. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 26 (2001), *reprinted in* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 94–95, para. 4 (Cambridge University Press, 2002) [hereinafter Commentary].

31. Draft, *supra* note 25, art. 2.

32. Alain Pellet, *The Definition of Responsibility in International Law*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 3, 5–6 (James Crawford et al. eds., 2010); See also Commentary, *supra* note 30, art. 2, para. 9.

33. Commentary, *supra* note 30, art. 2, para. 9.

34. *Id.* art. 2, para. 3.

35. *Id.* art. 2, para. 10.

States, or the international community as a whole.<sup>36</sup> What matters next is that if under the rules of international law the wrongful act is imputable to a State, it then sparks a requirement for reparation.<sup>37</sup>

This institution has a close relationship with other areas of international law, especially international peace and security. Some have called State responsibility the heart of international law or the constitution of the international community.<sup>38</sup> What comes below in connection with the recent scandal in the world of sports demonstrates the central role of this body of law in the current international legal order.

Law of international responsibility of States is developing fast, with an increasing importance in the jurisprudence of the international courts and tribunals.<sup>39</sup> The case of State-sponsored doping can contribute in developing the law of international responsibility. This case is very straightforward in terms of identifying the elements of responsibility, like a puzzle that has been designed to fit the framework of international state responsibility.

### III. INTERNATIONAL WRONGFUL CONDUCT

Whether State-sponsored doping is covered by the law of international State responsibility depends on whether such programs are the breach of an international obligation enforceable at the time of the international wrongful acts or not.<sup>40</sup> Without having an international obligation and a violation, no responsibility is presumed.<sup>41</sup> The question here is an assessment between “the legal ‘ought’ and the factual ‘is.’”<sup>42</sup> The existence of an international obligation and consequently a breach will be discussed below in the Russian doping case.<sup>43</sup>

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36. *Id.* art. 1, para. 5.

37. MALCOLM N. SHAW, *INTERNATIONAL LAW* 778 (Cambridge University Press, 6th ed. 2008).

38. Pellet, *supra* note 32, at 3.

39. G.A. Res. 71/133, ¶ 1 (Dec. 19, 2016).

40. *See* Draft, *supra* note 25, arts. 2(b) & 13.

41. *See infra* Part IV.

42. KOLB, *supra* note 17, at 35.

43. *See infra* Part II.A–B.

### A. An International Obligation

In illustrating international responsibility, the first step is to analyze if there is an international legal obligation enforceable at the time of the breach.<sup>44</sup> The source of the obligation embraces both treaty and non-treaty obligations.<sup>45</sup> States can be responsible for breaches of minor or egregious obligations whether owed to multiple States or to the international community as a whole.<sup>46</sup> For example, a State can be responsible if there is a violation of preemptory norms of international human rights for which it has not ratified a treaty, but there is a presumed obligation to respect those rules.<sup>47</sup>

The point of departure for identifying the international obligation in the case of Russian State-sponsored doping is shared between two main documents. The International Convention against Doping in Sport<sup>48</sup> (Convention) adopted by United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Anti-Doping Agency Code<sup>49</sup> (WADA Code) are two prongs of this debate, containing international obligations for member States, including Russia, who has ratified the former<sup>50</sup> and is bound by the rules and regulations of the latter.<sup>51</sup> Hence, the roots of obligations in this doping case are mainly obligatory texts.

The convention is a multilateral document with 187 members<sup>52</sup> where the signatories accept commitments against other member States.<sup>53</sup> Each

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44. KOLB, *supra* note 17, at 36.

45. *See also* Commentary, *supra* note 30, art. 2, para. 7.

46. *Id.* art. 12, para. 6.

47. Draft, *supra* note 25, ch. III, art. 12, cmt. 3.

48. International Convention Against Doping in Sport, Oct. 19, 2005, 201 U.N.T.S. 2419 [hereinafter Convention].

49. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE 16 (Jan. 1, 2015), [https://www.wada-ama.org/sites/default/files/resources/files/wada\\_anti-doping\\_code\\_2018\\_english\\_final.pdf](https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2018_english_final.pdf) [hereinafter WADA Code].

50. *International Convention Against Doping in Sport*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=31037&language=E> (last visited Jan. 4, 2019) (lists the member states who have ratified or accepted the Convention, and Russia ratified it on December 29, 2006).

51. Convention, *supra* note 48, art. 4(1)(2).

52. *International Convention Against Doping in Sport*, *supra* note 50.

53. Convention, *supra* note 48, art. 3.

Member State is bound to respect the provisions of the treaty.<sup>54</sup> The Convention, among other things, provides that: “[i]n abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures. Such measures may include legislation, regulation, policies or administrative practices”<sup>55</sup> in order to achieve the purpose of the convention.<sup>56</sup>

Parties to the UNESCO Convention are required to obey multiple obligations, including full compliance with WADA regulations,<sup>57</sup> international cooperation in order to achieve the purpose of the convention,<sup>58</sup> compliance with internationally recognized ethical practices in conducting doping researches,<sup>59</sup> taking measures against athlete support personnel who violate doping rules or who commit other offences connected to doping in sports,<sup>60</sup> assisting sport and anti-doping organizations to implement doping control in their jurisdiction consistent with the WADA code,<sup>61</sup> and facilitating doping control.<sup>62</sup>

The obligations created under WADA Code can be explained as institutional obligations that, although “their legal force derives from a treaty, these obligations remain legally independent from the treaty.”<sup>63</sup> The WADA Code was in one sense an inspiration for the Convention—to incorporate a governmental force in the global fight against doping<sup>64</sup>—and an inevitable part of the legal regime created by the Convention.<sup>65</sup>

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54. *Id.*

55. *Id.* art. 5.

56. *Id.* art. 3.

57. *Id.* art. 3(a).

58. *Id.* arts. 5, 13, 16.

59. *Id.* art. 25(a).

60. *Id.* art. 9.

61. *Id.* art. 12(a).

62. *Id.* art. 12.

63. Constantin P. Economides, *Content of the Obligation: Obligations of Means and Obligations of Result*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 371, 372 (James Crawford et al. eds., 2010).

64. See PAUL DAVID, *A GUIDE TO THE WORLD ANTI-DOPING CODE* 3–6 (Cambridge University Press, 2008); See also Convention, *supra* note 48, at 1. “Bearing in mind the World Anti-Doping Code adopted by the World Anti-Doping Agency at the World Conference on Doping in Sport. . . .” *Id.*

65. Convention, *supra* note 48, art. 4(1).

The Convention in many parts relies on the framework of the WADA Code.<sup>66</sup>

These obligations were in force at the time when Russia's systematic doping program manipulated the results of international tournaments and consequently meet the requirements for the establishment of a wrongful act.<sup>67</sup> The Russian Federation ratified the Convention on December 2006 and hence obliged itself by its rules and regulations.<sup>68</sup> Furthermore, by signing an agreement in 2006, the Russian Sport Ministry, on behalf of the Russian government, accepted obligations for strict application of WADA code and Anti-Doping rules during the Sochi Games.<sup>69</sup> Therefore, the Convention and the Code simultaneously provide Russia with treaty-based obligations owed to multiple countries and at the same time the agreement creates commitments against international organizations such as IOC and WADA. These provisions were in force during the time of administering a State-run doping program, thus creating an international obligation to be respected by Russia.

## B. Breach

The outcome of the investigations regarding the allegations of State-sponsored doping will likely establish that Russia has violated its international obligations with respect to the international doping regulations. The draft articles provide a definition for breach of an international obligation: "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."<sup>70</sup> A breach can be in the form of an act or omission.<sup>71</sup> "For example, the obligation under a treaty to enact a uniform law is breached by the failure

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66. See, e.g., *id.* art. 2 (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, and art. 27(a)(b).

67. Draft, *supra* note 25, art. 13.

68. See generally *International Convention against Doping in Sport*, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=31037&language=E1>.

69. Schmid Report, *supra* note 3, at 6.

70. Draft, *supra* note 25, art. 12.

71. See *id.* art. 2.

to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure.”<sup>72</sup>

The UNESCO Convention is a “composite’ obligation” under the conditions of Article 15 of the Draft, which requires a systematic response and policy making:<sup>73</sup> a systematic State-fueled doping program is a ‘composite breach’ within the scope the same article.<sup>74</sup> These composite obligations and breaches encompass some of the most serious wrongful acts in international law.<sup>75</sup> The acts or omissions independently constitute a breach but they might also be part of a bigger picture that establishes a different wrongful act.<sup>76</sup>

Generally, this doping scheme in all aspects is in conflict with provisions of the Convention and the Code. For instance, formulating a mouth-used doping cocktail and distributing it among athletes is an egregious breach of Article 8(1) of the Convention.<sup>77</sup> The whole doping program is an obvious contravention of the provisions of Article 7 in “ensur[ing] the application of the Convention, notably through domestic coordination.”<sup>78</sup> Inconsistencies in Russia regarding proper legislative measures to comply with the Code have been confirmed.<sup>79</sup> The second report also enumerates the violations based on the WADA Code and its provisions.<sup>80</sup>

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72. Commentary, *supra* note 30, art. 2, para. 9.

73. *Id.* art. 15, para. 3; *See also* KOLB, *supra* note 17, at 50–51.

74. Commentary, *supra* note 30, art. 15, paras. 1, 2.

75. *Id.* art. 15, para. 2.

76. KOLB, *supra* note 17, at 53.

77. *See* Convention, *supra* note 48, art. 8(1). “States Parties shall, where appropriate, adopt measures to restrict the availability of prohibited substances and methods in order to restrict their use in sport by athletes, unless the use is based upon a therapeutic use exemption. These include measures against trafficking to athletes and, to this end, measures to control production, movement, importation, distribution and sale.” *Id.*

78. *Id.* art. 7.

79. UNESCO, Anti-Doping Convention, *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*, paras. 49–50, 52, ICDS/6CP/Doc.8 (Sep. 19, 2017) [hereinafter Convention Parties Conference].

80. *See* Second Report, *supra* note 2, at 46–48.

Although “a breach may exist even if the act of the State is only partly contrary to an international obligation incumbent upon it,”<sup>81</sup> the scale of violations in the Russian doping case was so huge that the independent report recommended WADA declare the Moscow Accredited Laboratory non-compliant with the WADA Code.<sup>82</sup> “Disappearing positive Methodology”<sup>83</sup> was a practice directly in conflict with Russia’s obligations under both the Convention and the Code based on what was discussed regarding both documents.<sup>84</sup> Divulgence of male DNA in two female hockey player urine samples<sup>85</sup> is just the tip of the iceberg and an instance of the gravity of violations.

Based on the findings of the independent investigation, corruption of doping control officers, cooperation of medical personnel with coaches to make them aware of washing periods, failing to comply with WADA rules regarding the rapid enforcement of athletes biological passport, controlling WADA accredited laboratory to cover up the doping cases,<sup>86</sup> sample swapping, bottle cap removing, and when all other efforts failed, disappearing positive results, are all confirmed efforts to help Russian athletes win more medals in international tournaments.<sup>87</sup> Reporting the positive or adverse analytical findings as negative in the Anti-Doping Administration & Management System was one of the responsibilities of the conductors of the doping program.<sup>88</sup> Furthermore, reporting the positive samples along with the identity of the athletes to the Russian Deputy Ministry of Sport was a breach of the WADA International Standard for Laboratories.<sup>89</sup>

Additionally, State-sponsored doping, having a treaty ratified against the practice, also contradicts some of the fundamental principles of international law, including *pact sunt servanda* and good faith as

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81. Commentary, *supra* note 30, art. 12, para. 2.

82. First Report, *supra* note 2, at 28.

83. *See id.* at 31–42 (this methodology was designed to guarantee that if all other efforts camouflaging the doping violations failed, then the laboratory would cover up the violation).

84. *See infra* Part II.A.

85. Second Report, *supra* note 2, at 19.

86. First Report, *supra* note 1, at 8–9.

87. *Id.* at 9–12.

88. *Id.* at 34.

89. *Id.* at 11.

considered by Vienna Convention on Law of Treaties.<sup>90</sup> Although, “good faith requires conduct which is objectively compatible with meaning, object and purpose,”<sup>91</sup> nevertheless Russia failed to achieve the Convention’s goals.

The totality of the circumstances in this case defeats the object and purpose of the UNESCO convention and the WADA Code. Russia’s doping program, not only ignores the plain commitments of the Convention, but also the spirit of the laws.<sup>92</sup> This type of non-compliance with treaty-based obligations, involves international responsibility.<sup>93</sup>

#### IV. ATTRIBUTION OF THE CONDUCT

Once the international wrongful act of Russia is established, the final factor in finding responsibility would be if the conduct was attributable to the State or not. The issue of attributing conduct to a particular State is a controversial subject in the context of international law, usually raising many discussions, particularly when States are acting through proxies.<sup>94</sup>

The question of attribution primarily concerns the acts of State organs<sup>95</sup> and acts that have been performed under the direction and control of the State. The Russian State-sponsored doping case is an

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90. Vienna Convention on the Law of Treaties, art. 26, May 23, 1969, 331 U.N.T.S. 1155.

91. Guy S. Goodwin-Gill, *State Responsibility and the ‘Good Faith’ Obligation in International Law*, in 7 ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 89, 92 (Malgosia Fitzmaurice et al. eds., Hart Publishing 2004).

92. *Id.* at 89–92.

93. Commentary, *supra* note 30, art. 1, para. 2; *See also* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 1950 I.C.J. Rep. 221, 228 (July 18).

94. In that case, the effective and overall control theories are not at stake, while the International Court of Justice defends the effective control test in its case law. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27); *See also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 400 (Feb. 26); *See also* Olivier De Frouville, *Attribution of Conduct to the State: Private Individuals*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 257, 265–271 (James Crawford et al. eds., 2010).

95. Draft, *supra* note 25, art. 4.

example of the former.<sup>96</sup> However, in one aspect, the situation comes close to the provisions of Article 8 of the Draft, concerning the direction and control of a private or non-governmental entity that meets the requirements of effective control theory in all aspects.<sup>97</sup> However, considering the scale of direct governmental involvement, the latter is of less significance in this article.<sup>98</sup>

Attaching a wrongful act to the Russian State in this case is not as complicated as the case of *Corfu Channel*,<sup>99</sup> in which the disputed conduct was allegedly committed by unknown persons and individuals.<sup>100</sup> Nor does it have the complexities of cases like *Military Activities in Nicaragua* or *Application of the Convention of Genocide*, which involved the controversial application of control theories in international law.<sup>101</sup> In fact, the level of direct governmental involvement—and therefore acts of State organs—in this systematic State-run doping program was a surprise to the investigation team.<sup>102</sup>

The concept of a State organ under international law, the principle of unity of a State, and the potential knowledge of the officials are

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96. See *infra* Part III.A.

97. Draft, *supra* note 25, art. 8.

98. See generally First Report, *supra* note 1, at 1. The report finds it surprising that the “extent of State oversight and directed control of the Moscow Laboratory in processing and covering up urine samples.” *Id.* at 6. In theory, the Moscow Laboratory is an entity completely independent from the Ministry of Sport, which has met the WADA requirements. *Id.* at 56. However, “the laboratory personnel were not permitted to act independently of any instructions that were funneled down to them from the [Ministry of Sport]. The Moscow Laboratory was effectively caught up in the jaws of a vice. It was a key player in the successful operation of a State imposed and rigorously controlled program, which was overall managed and dictated by the [Ministry of Sport].” *Id.* at 29. The Moscow Laboratory “was carrying out the order given to it by the Deputy Minister of Sport.” *Id.* at 35.

99. See François Rigaux, *International Responsibility and the Principle of Causality*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 83–85 (Maurizio Ragazzi ed., 2005).

100. The *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 244, 248 (Dec. 15).

101. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 115 (June 27); See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 400 (Feb. 26).

102. First Report, *supra* note 1, at 6.

conducive in setting up the foundations for attributing the responsibility to Russia in the case of its State-run doping program.

### A. State Organs

Article 4(1) of the Draft says:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.<sup>103</sup>

Thus, the primary and simple assumption for attributing a conduct to a State is the acts of the different organs of a government.<sup>104</sup>

A State act is established when State officials are involved in the wrongful conduct. Individuals acting as representatives or agents on behalf of the State is the only form of State act.<sup>105</sup> Therefore, human involvement is a requirement for realization of an act of the State.<sup>106</sup>

For the purpose of attribution, the International Court of Justice (ICJ) has applied lower standards in more difficult situations where there were no State organs involved in the wrongful act. For example, in the case of *United States Diplomatic Staff in Tehran*, the Court held that verbal adoption and approval by State organs of the acts that could not legally be attributed to the State<sup>107</sup> could translate them into State act.<sup>108</sup> This low threshold helps in understanding attribution when conduct is carried out by State organs.

The command structure of the State-run doping program and the links between individuals and governmental positions have been described in

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103. Draft, *supra* note 25, art. 4(1).

104. Commentary, *supra* note 30, art. 4, para. 3; See Luigi Condorelli & Claus Kress, *The Rules of Attribution: General Considerations*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 221, 229 (James Crawford et al. eds., 2010).

105. German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 22 (Sept. 10).

106. Commentary, *supra* note 30, art. 2, para. 5.

107. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 Rep. 3, ¶ 61, Judgment, 1980 I.C.J. Rep. 45 (May 24).

108. See generally *id.* ¶¶ 71–75.

detail by the Independent Report.<sup>109</sup> Accordingly, the Ministry of Sport is the center of all sport activities in Russia that use the federal budget.<sup>110</sup> The Minister conducts and supervises all aspects of sports and is governed by Russian Constitution and Russian Federal Law on Physical Culture and Sport.<sup>111</sup>

The report serves as proof of direct intervention and control by high-ranking State officials which will be further discussed.<sup>112</sup> In illustrating an “institutionalised, controlled and disciplined” doping program, the report points to the role played by the Minister of Sport and in particular, the Deputy Minister, considering their “leadership and knowledge.”<sup>113</sup> Based on the independent report, all evidence considers to be established “beyond a reasonable doubt”<sup>114</sup> that the Russian Ministry of Sport had an extensive guardianship on the systematic doping program in the form of active involvement of some State organs.<sup>115</sup> For example, the ultimate *Save* decision for soccer players rested upon the vote of the Minister of Sport, who was simultaneously heading the Russian Football Federation.<sup>116</sup> There are still allegations that even the Russian president was aware of the program and confirmed it.<sup>117</sup>

The Deputy Minister of Sport ordered whether a case should be covered up or reported.<sup>118</sup> He was the one who, in a public capacity as the representative of the government, was notified of all positive samples and decided who should be protected under the cover-up program.<sup>119</sup> The Deputy Minister, reporting to the Minister, was the captain of the Sochi doping scheme<sup>120</sup> and the one who initiated and supervised the first stage

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109. First Report, *supra* note 1, at 52–56.

110. See *Structure*, MINISTRY OF SPORT OF THE RUSSIAN FED’N, <https://www.minsport.gov.ru/en/ministry/structure/> (last visited Jan. 7, 2019).

111. Schmid Report, *supra* note 3, at 6.

112. See *infra* Part III.C.

113. Second Report, *supra* note 2, at 63.

114. First Report, *supra* note 1, at 31.

115. *Id.* at 86.

116. *Id.* at 38.

117. *Putin ‘Must Have Known’ Of State-Sponsored Doping, Whistle-Blower Says*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 29, 2018), <https://www.rferl.org/a/russia-putin-knew-olympics-state-doping-rodchenkov-whistle-blower/29005175.html>.

118. First Report, *supra* note 1, at 11.

119. *Id.*

120. *Id.* at 63.

of the sample swapping process.<sup>121</sup> The Deputy Minister was appointed directly by the executive order of the Russian Prime Minister<sup>122</sup> and was representing the State in performing his central role in coordinating the doping program.<sup>123</sup>

Officials from subdivisions of the Russian Ministry of Sport, such as Center of Sports Preparation of National Teams of Russia (CSP), were also participating in this cycle.<sup>124</sup> The CSP and the Russian Federal Research Center of Physical Culture and Sports (VNIIFK) are both government funded entities and subdivisions of Ministry of Sport.<sup>125</sup> For example, a steroid cocktail with a very short washing period was delivered to different Russian sport federations by a CSP employee.<sup>126</sup>

Under direct supervision of the Russian President, the Federal Security Service (FSB), as a federal executive body, deals with various issues from national security and information security to perform deferral security functions.<sup>127</sup> The FSB engaged in the doping process, especially in arranging and carrying out<sup>128</sup> the sample swapping and creating a bank of clean urine samples<sup>129</sup> that were key executive portions of the Russian doping program. Its agents, called “magicians,”<sup>130</sup> worked through an operation center under the name of a sleeping room on the fourth floor of the Sochi Laboratory.<sup>131</sup> The magicians, masked under the name of a plumbing employee, could sneak into the Laboratory<sup>132</sup> to perform the critical part of the scheme—namely, opening the B samples.<sup>133</sup>

The key component of the sample swapping method—which involved removing the caps of the sample bottles—was the innovation of FSB.<sup>134</sup>

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121. Second Report, *supra* note 2, at 82.

122. First Report, *supra* note 1, at 10.

123. *Id.* at 11.

124. *Id.* at 13.

125. Schmid Report, *supra* note 3, at 7.

126. First Report, *supra* note 1, at 49–50.

127. See *Federal Security Service*, RUSSIAN GOVERNMENT (last visited Nov. 16, 2018), <http://government.ru/en/department/113/>.

128. First Report, *supra* note 1, at 57.

129. *Id.* at 13.

130. *Id.* at 43.

131. *Id.* at 58.

132. *Id.* at 58.

133. *Id.* at 63.

134. *Id.* at 12.

The FSB operations extended beyond these to include surveillance of WADA employees to prevent their sample swapping agents from being caught if other employees unexpectedly came back to work.<sup>135</sup>

Another important issue in the attribution debate is whether Russian officials were acting beyond the scope of their responsibilities in this case or not. Acting beyond the scope of powers, by officials at any level of the government, cannot be a justification for denying responsibility.<sup>136</sup> The commentary on the Draft Articles says, “[n]o doubt lower level officials may have a more restricted scope of activity and they may not be able to make final decisions. But conduct carried out by them in their official capacity is nonetheless attributable to the State for the purposes of article 4.”<sup>137</sup> Therefore, even if the Russian authorities were going beyond their official powers, the State will be held responsible for their wrongful acts.

Two more instrumental principles in the debate on attribution are the principle of unity of State and the issue of knowledge. The latter was referred to by Russian officials in order to exonerate the Russian government from any connection with the scandal.<sup>138</sup>

## B. Unity of State

The unity of State is a “well-established rule, one of the cornerstones of the law of State responsibility.”<sup>139</sup> For the purpose of international responsibility, a State is a single entity,<sup>140</sup> regardless of the national structures and subdivisions that governments might use as a justification

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135. *Id.* at 58.

136. Commentary, *supra* note 30, ch. II, para. 6.

137. *Id.* art. 4, para. 7; The notion of responsibility, even in case of excess function, complies with Article 91 of the Protocol Additional to the Geneva Conventions of 12 August, 1949 and general principles of international law. *See generally id.*

138. *See, e.g.,* Andy Brown, *Russia's National Anti-Doping Plan denies institutional doping*, SPORTS INTEGRITY INITIATIVE (May 30, 2017), <http://www.sportsintegrityinitiative.com/russias-national-anti-doping-plan-denies-institutional-doping/> (denying systematic doping and any fault on behalf of the Russian Government).

139. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43, ¶ 385 (Feb. 26).

140. Commentary, *supra* note 30, art. 2, para. 6.

to escape responsibility.<sup>141</sup> In other words, in assessing State conduct, the principle of the separation of powers is irrelevant. With these boundaries fading, when any State organ acts in administering its public power—whether legislative, executive or judicial—it is the State that acting.<sup>142</sup>

Unlike municipal law, “international law permits one to consider that any institution which fulfills one of the traditional functions of the State, even if such functions have been privatized, should be considered as an organ of the State.”<sup>143</sup> According to the Draft Articles’ commentary, “there is no category of organs specially designated for the commission of internationally wrongful acts, and virtually any State organ may be the author of such an act.”<sup>144</sup> The Draft says:

The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.<sup>145</sup>

Thus, any internal divisions concerning the organs that were involved in the Russian doping program are irrelevant in dissociating the State from its international wrongful acts.

### C. Knowledge, Fault and Scope of Powers

Russian officials are grappling with denying any kind of connection with the doping program.<sup>146</sup> While admitting the existence of doping

141. *Id.* ch. II, para. 7.

142. *Id.* art. 4, para. 6; *See also* Draft, *supra* note 25, art. 4(1).

143. Brigitte Stern, *The Elements of an International Wrongful Act*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 193, 204 (James Crawford et al. eds., 2010).

144. Commentary, *supra* note 30, art. 4, para. 5.

145. *Id.* art. 7, para. 2.

146. *See* Martha Kelner, *Vitaly Mutko claims there is ‘no proof’ of systematic doping in Russia*, *THE GUARDIAN* (Dec. 1, 2017), <https://www.theguardian.com/sport/2017/dec/01/vitaly-mutko-claims-there-is-no-proof-of-systematic-doping-russia-world-cup-draw>.

among Russian athletes,<sup>147</sup> they were concentrated on denying State guilt in the doping cover-up efforts.<sup>148</sup> This raises the prospect of one of the most instrumental concepts of the law of international responsibility: the absence of fault.<sup>149</sup>

The struggle to deny knowledge and subsequent fault on behalf of Russia is likely irrelevant in denying the international responsibility resulting from the doping program since fault is not a requirement for establishing the international wrongful act.<sup>150</sup> Brownlie clarifies this concept in the best way: “The effectiveness of international duties would be much reduced if the complainant State had to prove some level of knowledge or intention at a high level of government in respect of the acts or omissions of subordinate officials.”<sup>151</sup>

The wording of the “Schmid commission” report minimizes the governmental involvement in the program.<sup>152</sup> However, Article 4 of the draft and the commentary also clarifies that “any distinction made at the level of principle between the acts of ‘superior’ and ‘subordinate’ officials” triggers the State act.<sup>153</sup> This is expressed in the phrase “whatever position it holds in the organization of the State” in Article 4 of the draft.<sup>154</sup>

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147. Nathan Hodge, *Vladimir Putin admits ‘instances of doping’ in Russian athletes*, CNN (Jan. 30, 2018), <https://www.cnn.com/2018/01/30/sport/vladimir-putin-russia-winter-olympics-doping/index.html>.

148. Zhou Xin, *Russia denies state-sponsored doping scheme alleged by WADA report*, XINHUA (Nov. 8, 2017), [http://www.xinhuanet.com/english/2017-11/08/c\\_136737570.htm](http://www.xinhuanet.com/english/2017-11/08/c_136737570.htm).

149. Commentary, *supra* note 30, art 2, paras. 3, 10.

150. *Id.* para. 10.

151. Ian Brownlie, *State Responsibility and the International Court of Justice*, in 7 ISSUES OF STATE RESPONSIBILITY before INTERNATIONAL JUDICIAL INSTITUTIONS 11, 12 (Malgosia Fitzmaurice et al. eds., Hart Publishing 2004).

152. See, e.g., Schmid Report, *supra* note 3, at 13 (where it states that most communications were with “people from other Russian entities under the responsibility of the Ministry of Sport,” as well as the part that mentions the “Save” decisions, which the First Report said the Minister was taking the final decision). *Id.* at 14 (which exonerates the Minister from any knowledge based on lack of evidence).

153. Commentary, *supra* note 30, art. 4, cmt. 7; See also Draft, *supra* note 25, art. 4.

154. Draft, *supra* note 25, art. 4(1).

The fundamental factor here is the State organ acting in its public capacity. If the organ or individual<sup>155</sup> is acting in its official capacity, even if the acts are beyond his authority, they are attributable to the government.<sup>156</sup> The Iran-United States Claims Tribunal did take note of this fact and furthered the understanding by asking whether the conduct has been “carried out by persons cloaked with governmental authority.”<sup>157</sup>

The authorities in this case were not acting in their private capacity, and their tasks regarding the anti-doping policies were a key part of their official responsibilities.<sup>158</sup> The use of the official email of Ministry of Sport as a means of communication with the Laboratory connected with the “Disappearing Positive Methodology” is also proof of their public function.<sup>159</sup>

One final element in supporting this argument is that despite the fact that knowledge and fault are not required to set in motion international responsibility, should they exist, they can build a bridge to connect an act to a State.<sup>160</sup> Some operations cannot be hidden from the governmental custody because of their scale.<sup>161</sup> This therefore infers a level of knowledge on the part of officials.<sup>162</sup>

The exclusive control of a State inside its frontiers instructs that nothing, especially on an extensive scale, can happen without government knowledge.<sup>163</sup> The presumption of official and public conduct exists when the wrongful acts are part of a “systematic or

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

156. *Id.* art. 7.

157. *Petrolane Inc. v. Islamic Republic of Iran*, No. 518-131-2, 27 Iran-U.S.C.T.R. 64, ¶ 83, Tribunal Decision (Aug. 14, 1991); *See also* Commentary, *supra* note 30, art. 4, para. 13.

158. *See* Commentary, *supra* note 30, art. 4, para. 13.

159. First Report, *supra* note 1, at 32, 33.

160. *See* Commentary, *supra* note 30, art. 16, para. 4 (Article 16 of the Commentary considers a situation where knowledge is the element for identifying responsibility of States).

161. Schmid Report, *supra* note 3, at 14 (“Even though these EDP do not include any messages sent directly by the Vice-Minister, it is impossible to conclude that he was not aware of the system in place.”).

162. *The Corfu Channel Case (Merits)*, Judgment, 1949 I.C.J. Rep. 4, 17–23 (Apr. 9).

163. *Id.* at 18.

recurrent” plan that indicates knowledge on behalf of the State.<sup>164</sup> The scale of the program implies a high level of coordination and premeditated engineering with the involvement of individuals from several governmental entities.<sup>165</sup>

The continuing change of methods in the cover-up efforts designated for each tournament, depending on the level of presence by international observers, shows a systematic pattern of putting together inventive approaches that could use all necessary organs in any moment to change the approaches and keep the doping program running.<sup>166</sup> This kind of flexibility in such a high-profile operation cannot be imagined in the absence of governmental control and direction. The regular practice or pattern of conduct that has been proven through investigations in the Russian doping case implies intent and knowledge.

#### D. Final Comments on Attribution

The principle of unity of State, along with other key arguments, together attribute responsibility to Russia for the doping scandal.<sup>167</sup> Furthermore, accepting responsibility in the absence of fault refutes all justifications for separating the Russian government from the doping program.<sup>168</sup> The process of fact finding and checking the compliance of the documents against allegations was double-investigated by the Schmid Commission with the help of the University of Lausanne School of Criminal Justice and the outcome corroborated the findings of the independent commission.<sup>169</sup>

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164. Commentary, *supra* note 30, art. 7, para. 8.

165. See First Report, *supra* note 1, at 62–63 (declaring that the planning of the Sochi scheme started in 2010 after a poor performance by Russian athletes in the Vancouver Games).

166. See *id.* at 9–17, 61, 76 (describing the changing methods of Disappearing Positive Methodology at IAAF World Championships to sample swapping during 2014 Sochi games).

167. See Djamchid Momtaz, *Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 237, 246 (James Crawford et al. eds., 2010) (for further analysis about the attribution of the conducts of State organs).

168. See *infra* Part III.C.

169. Schmid Report, *supra* note 3, at 5, 24.

Russian officials have admitted wrongful conduct by individuals from Russian institutions in violation of Russia international obligations<sup>170</sup>: public officials' involvement in systematic doping was confirmed by Schmid report,<sup>171</sup> despite the change in language of independent commission from the first report to the second one.<sup>172</sup> The Schmid commission report corroborates the conclusion that the Russian government is responsible because of failure to respect its international obligations and having a State doping program<sup>173</sup>:

The picture that emerges from all of the foregoing is an intertwined network of State involvement through the [Ministry of Sport] and the FSB in the operations of both the Moscow and Sochi Laboratories. The FSB was woven into the fabric of the Laboratory operations and the [Ministry of Sport] was directing the operational results of the Laboratories.<sup>174</sup>

Thus, it is apparent that any involvement by individuals from the Ministry of Sport, CSP, VNIIFK, and FSB is a State act from the international law perspective, whether they were on higher or lower layers of the governmental command structure or acting beyond the scope of their powers.

## V. COMPENSATION

Obligations and rights are two inevitable sides of a coin. Every obligation encompasses a right to be respected.<sup>175</sup> Once responsibility is established following the infringement of a right, reparation should be made to those who have suffered injury as the result of wrongful conduct.<sup>176</sup> Leaving violated rights unaddressed would undermine the

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170. *Id.* at 24.

171. *Id.* at 25.

172. *Id.* at 26.

173. *Id.*

174. First Report, *supra* note 1, at 60.

175. Commentary, *supra* note 30, art. 2, para. 8.

176. *Id.* art. 31, para 1.

concept of international justice and is a blow to the efforts of building trust in international law and international institutions.<sup>177</sup>

The draft discusses the duty on behalf of the responsible State to make full reparation,<sup>178</sup> which ranges from restitution to compensation and satisfaction or a combination of all these options.<sup>179</sup> The question, therefore, is what is the appropriate form of reparation in the case of State-sponsored doping?

In situations where restitution is inaccessible, the remaining methods of reparation are inevitably required.<sup>180</sup> Like many other disputes,<sup>181</sup> the nature of Sport activities preclude restoration as the primary means of reparation.<sup>182</sup> An athlete who is the victim of a dirty act of cheating in the form of a doping violation is stripped of not only his or her title, but also the delight of some matchless moments in the life of a human being. Athletes being welcomed by thousands of fans—even leaders of a nation<sup>183</sup>—is now a burned dream, time has erased the excitement of the competition moment. In other words, a fundamental change in situation<sup>184</sup> exists. Restitution in this case is materially impossible and disproportionate to the harm done.<sup>185</sup> Restoring the gold medal to the clean athlete lacks the huge media coverage and the attention of billions of people,<sup>186</sup> as nobody can travel back in the time. Therefore, the

177. CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 233 (Cambridge University Press, 2012).

178. Draft, *supra* note 25, art. 31(1).

179. *Id.* art. 34.

180. *See* Commentary, *supra* note 30, art. 35, para. 4.

181. *See* KOLB, *supra* note 17, at 155.

182. *See* Commentary, *supra* note 30, art. 35, para. 4.

183. *See* Tony Fraser, *Walcott receives hero's welcome in Trinidad*, BOSTON.COM (Aug. 13, 2012), [http://archive.boston.com/sports/other\\_sports/articles/2012/08/13/walcott\\_receives\\_heros\\_welcome\\_in\\_trinidad/](http://archive.boston.com/sports/other_sports/articles/2012/08/13/walcott_receives_heros_welcome_in_trinidad/).

184. *See* Commentary, *supra* note 30, art. 35(4).

185. BORZU SABAHI, *COMPENSATION AND RESTITUTION IN INVESTOR-STATE ARBITRATION: PRINCIPLES AND PRACTICE* 86–90 (John H. Jackson ed., Oxford University Press 2011).

186. *See How Do We Know That Rio 2016 Was A Success*, INT'L OLYMPICS COMMITTEE (Dec. 6, 2016), <https://www.olympic.org/news/how-do-we-know-that-rio-2016-was-a-success> (for example, 3.6 billion people—about half the population of the world—watched coverage of the 2016 Rio Olympics, which consisted of 350,000 hours of television and digital coverage). *See also* *2014 FIFA World Cup reached 3.2 Billion*

possibility of full reparation,<sup>187</sup> in the form of restitution in the case of State-sponsored doping or other wrongful conducts with regard to international sport obligations, is ruled out.

However, full reparation<sup>188</sup> in sports can be assumed in the framework of the principle of proportionality.<sup>189</sup> In this context, first, cessation is the primary automatic duty of the violating State<sup>190</sup>; hence, complete reparation includes measures to ensure the non-repetition of the wrongful conduct.<sup>191</sup> Second, are sanctions, part of the reparation in doping cases is the reaction by sport governing bodies in suspending the national federations of the responsible State,<sup>192</sup> or like IOC, in stripping the cheating athletes from their titles and awarding the medals to the following clean athletes.<sup>193</sup> The waiver of “presumption of innocence” for Russian athletes before the 2016 Rio Games,<sup>194</sup> the ban on all Russian

viewers, one billion watched final, FIFA (Dec. 16, 2015), <http://www.fifa.com/worldcup/news/y=2015/m=12/news=2014-fifa-world-cuptm-reached-3-2-billion-viewers-one-billion-watched--2745519.html> (compared to the 2014 FIFA World Cup, which was watched by 3.2 billion people around the world).

187. See Draft, *supra* note 25, art. 31, cmt. 3 (“In other words, the responsible State must endeavor to ‘wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.’”).

188. See, e.g., *Factory at Chorzow (Claim for Indemnity) (The Merits)* (Germ. V. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 17, at 4, 20 (Sept. 13).

189. See Draft, *supra* note 25, art. 34, cmt. 5.

190. KOLB, *supra* note 17, at 149.

191. See Julio Barboza, *Legal injury: The Tip of the Iceberg in the Law of State Responsibility*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 7, 16 (Maurizio Ragazzi ed., 2005).

192. IAAF Provisionally Suspends Russian Member Federation ARAF, INT’L ASS’N OF ATHLETICS FED’N (Nov. 13, 2015), <https://www.iaaf.org/news/press-release/iaaf-araf-suspended>.

193. See IOC DISCIPLINARY COMMISSION, DECISION REGARDING ILYA ILIN 8 (2016),

[https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/BRT-III-013-Decision-of-the-Disciplinary-Commission-Ilya-ILIN.pdf#\\_ga=2.133748110.1493824571.1545022043-900081857.1545022043](https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/BRT-III-013-Decision-of-the-Disciplinary-Commission-Ilya-ILIN.pdf#_ga=2.133748110.1493824571.1545022043-900081857.1545022043); See also WADA Code, *supra* note 49, art. 9 (the article reads: “An anti-doping rule violation in *Individual Sports* in connection with an *In-Competition* test automatically leads to *Disqualification* of the result obtained in that *Competition* with all resulting *Consequences*, including forfeiture of any medals, points and prizes.”).

194. Schmid Report, *supra* note 3, at 4.

athletes to participate in the following tournament,<sup>195</sup> and the prohibition in having the Russian flag or Russian anthem<sup>196</sup> all can be a part of the full reparation.<sup>197</sup>

However, the distinction between “sanction” and “reparation” implies that simply banning the Russian athletes is not enough.<sup>198</sup> Restoring justice and bringing satisfaction to the injured subject is a necessity.<sup>199</sup> Compensation, is the most frequently used form of reparation among all other frameworks.<sup>200</sup> Compensation is an automatic result of responsibility.<sup>201</sup>

The Draft provides that: “1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”<sup>202</sup> Compensation is a monetary remedy aimed at indemnifying the damages and losses suffered by a State or individual as the result of a violation of international obligations.<sup>203</sup> Therefore, compensation in the form of financial payments as the first available option after restitution is the appropriate reparation method for victims of State-sponsored doping. Moreover, the possibility of punitive damages against the violating State in these circumstances cannot be ruled out.<sup>204</sup>

195. *Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016*, INT’L OLYMPICS COMMITTEE (Jul. 24, 2016), <https://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016>.

196. Christopher Clarey, *Russian Doping: The Case of Barring Russia Entirely*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/sports/olympics/russia-doping-olympics.html>.

197. *See* Convention Parties Conference, *supra* note 79, para. 108 (however these kinds of collective punishments go against the general principles of law).

198. *See* Barboza, *supra* note 191, at 10.

199. *Id.*

200. *See generally* Draft, *supra* note 25, art. 36, para 2.

201. The Corfu Channel Case (Merits), Judgment, 1949 I.C.J. Rep. 4, 23–24 (Apr. 9).

202. Draft, *supra* note 25, art. 36.

203. *Id.*

204. KOLB, *supra* note 17, 166–67.

The following analysis lays the foundations to accept that athletes who lost a medal during the competition as the result of a doping violation fueled by State actions are the main individual beneficiaries of the compensation process. Moreover, the distinction between material and moral damages can be something that properly fits the boundaries of sport doping violations.

#### A. Individual Compensation

The nature of doping regulations and the principle of remedies in international human rights warrants a finding that clean athletes, as the victims of doping violations, should be the subject of compensation. Either the State or individuals if damaged can be the subject of compensation.<sup>205</sup> Individuals have been increasingly recognized as the primary beneficiaries of reparation issues in international law.<sup>206</sup> In the words of the Judge Cañado Trindade, “the subject of the corresponding right to reparation is a human being.”<sup>207</sup>

Modern doctrines in international law acknowledge that individuals are right holders and “bearers of obligations” as subjects of international law,<sup>208</sup> and therefore are logically entitled to reparations.<sup>209</sup> The Draft Articles cover the damage to nationals of a State as the financially assessable damages under the law of international State responsibility.<sup>210</sup>

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205. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 347, ¶ 29 (June 19) (Separate Opinion of Judge Cañado Trindade).

206. EVANS, *supra* note 177, at 28–31.

207. Guinea v. Dem. Rep. Congo, 2012 I.C.J. at 349, ¶ 5.

208. *Id.* at 351–52, ¶¶ 11–12.

209. EVANS, *supra* note 177, at 30; *See also* U.N. Secretary-General, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 151 n.217 (Jan. 25, 2005) (“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.”).

210. Draft, *supra* note 25, art. 36.

For this purpose, the methods of reparation should be tailored down to meet the athlete's needs, difficulties and endeavors<sup>211</sup> to respect the human "condition of spiritual being"<sup>212</sup>:

Reparations for human rights breaches are, in fact, directly and ineluctably linked to the condition of the victims and their next of kin, who occupy in it a central position herein. Reparations are to be constantly reassessed as from the perspective of the integrality of the personality of the victims themselves, bearing in mind the fulfillment of their aspirations as human beings and the restoration of their dignity.<sup>213</sup>

Compensation for personal injury has been considered by courts and tribunals,<sup>214</sup> while individuals as well as States have been subject to compensation and remedies in the jurisprudence of the ICJ<sup>215</sup> and other human rights bodies such as the European Court of Human Rights<sup>216</sup> and the Inter-American Court of Human Rights.<sup>217</sup> The United Nations Compensation Commission is another forum with a prehistory of evaluating individual damages in different cases.<sup>218</sup>

Accordingly, it is a well-established principle that individuals as human beings—not only in case of international human rights or

211. *Guinea v. Dem. Rep. Congo*, 2012 I.C.J. at 367, ¶ 51.

212. *Id.* at 367, ¶ 52.

213. *Id.* at 368, ¶ 54.

214. *See* Commentary, *supra* note 30, art. 36, para. 17.

215. *See* Malcom Shaw, *The International Court, Responsibility and Remedies*, in 7 ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 19, 30 (Malgosia Fitzmaurice et al. eds., Hart Publishing 2004) ("The Court may also interpret a relevant international legal provision so that individual rights as well as State's rights are recognised in a particular case, thus opening the door to a claim for damages on behalf of the former by the national State where there has been a breach of such rights."); *See also* *Guinea v. Dem. Rep. Congo*, 2012 I.C.J. at 350, ¶ 9 ("The fact that the mechanism for dispute-settlement by the ICJ is, as disclosed by its *interna corporis*, an inter-State one, does not mean that the Court's findings and its corresponding reasoning, ought to be invariably limited to a strict inter-State approach. Not at all; in their contents, cases vary considerably, and, throughout the last decades, some of them have directly concerned the condition of individuals.")

216. *See* SHELTON, *supra* note 15, 205–19; *See also* *Guinea v. Dem. Rep. Congo*, 2012 I.C.J. at 374–76, ¶¶ 71–73.

217. *See* SHELTON, *supra* note 15, 224–32; *See also* *Guinea v. Dem. Rep. Congo*, 2012 I.C.J. at 372–74, ¶¶ 65–70.

218. *See* EVANS, *supra* note 177, 139–44.

international humanitarian law breaches, but also in other forms of violation of international law rules—deserve compensation.<sup>219</sup> This “victim-oriented perspective,”<sup>220</sup> implies that since violation of international doping standards is a violation of international law provisions,<sup>221</sup> then its individual victims are qualified for reparations.<sup>222</sup>

The type of wrongful acts under international law that cause injury to aliens are conceptually and practically the “closest to modern international human rights violations.”<sup>223</sup> State-sponsored doping is similar to human rights cases due to the fact that individuals are the primary objects and victims of the wrongful conduct and are the subject of protection by international legal standards.<sup>224</sup>

Like human rights treaties, sportive international documents such as the UNESCO Convention or WADA Code, formulate protections for individual athletes. Similar to human rights treaties context, the UNESCO Convention “confer[s] rights upon individuals, [and] impose[s] obligations upon States.”<sup>225</sup> Provisions of the Convention are inherently “positive obligation[s],”<sup>226</sup> which brings it closer to the structure of human rights treaties. The convention refers to “existing international instruments relating to human rights.”<sup>227</sup> Moreover, problems such as the health risk of using performance-enhancing drugs and eliminating cheating in order to respect fair play and equality are some of the concerns addressed by the Convention.<sup>228</sup> In particular, the health of individuals who participated in the sport activities was highlighted by the Convention.<sup>229</sup>

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219. See Commentary, *supra* note 30, art. 33, para. 3.

220. G.A. Res. 60/147, annex, at 4 (Mar. 21, 2006).

221. See *supra* Part II.

222. G.A. Res. 60/147, annex, at 7–9, paras. 15–23 (Mar. 21, 2006).

223. See SHELTON, *supra* note 15, at 35.

224. See KOLB, *supra* note 17, at 210.

225. James Crawford, *The System of International Responsibility*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 17, 17 (James Crawford et al. eds., 2010).

226. Benedetto Conforti, *Exploring the Strasbourg Case-Law: Reflections on State responsibility for the Breach of Positive Obligations*, in *7 ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS* 129, 129 (Malgosia Fitzmaurice et al. eds., Hart Publishing 2004).

227. Convention, *supra* note 48, at 1.

228. *Id.*

229. *Id.* art. 3(b).

The WADA Code starts with this key assumption: “The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are: [t]o protect the *Athletes*’ fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide.”<sup>230</sup> Athletes in the case of State-sponsored doping are victims of organized crime<sup>231</sup> and abuses of power,<sup>232</sup> yet are widely neglected. They have been unjustly subjected to damage,<sup>233</sup> emotional suffering, and economic loss,<sup>234</sup> and are therefore entitled to be compensated. After all, law needs innovation based on the new requirements that emerge from various horizons.<sup>235</sup>

International law is unceasingly evolving with the changing political and moral landscape.<sup>236</sup> The law of State responsibility itself is a response to the necessities of the modern world to avoid hiding behind static dogmas.<sup>237</sup> In fact, these are human beings—individual, not States—who have to suffer when years of hard training and investing for one goal has been swiped out by a cheater who was supported by systematic efforts of a government.<sup>238</sup> Individuals who have decided to be professional clean athletes need protection and should enjoy non-interference to their rights as a sign of respect “for the inherent dignity of all persons.”<sup>239</sup>

The possibility of raising direct claims by individuals was considered by Garcia Amador, the ILC Special Rapporteur, but was not accepted by

230. WADA code, *supra* note 49, at 11.

231. Maureen Weston, *The Regulation of Doping in U.S. and International Sports*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 83, 102–03 (Michael A. McCann ed., 2018).

232. *See generally* G.A. Res. 40/34 (Nov. 29, 1985).

233. *Id.*

234. *Id.* annex, ¶ 1.

235. *See* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 347, ¶ 52 (June 19) (Separate Opinion of Judge Cançado Trindade).

236. James Crawford & Jeremy Watkins, *International Responsibility*, in THE PHILOSOPHY OF INTERNATIONAL LAW 283, 298 (Samantha Besson et al. eds., 2010).

237. Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, 287, ¶ 301 (Feb. 3) (Cançado Trindade, J., dissenting).

238. *Id.* at 269, ¶ 252; *See also* Guinea v. Dem. Rep. Congo, 2012 I.C.J. at 365, ¶¶ 47–48.

239. SHELTON, *supra* note 15, at 20.

the ILC at the end.<sup>240</sup> However, diplomatic protection can be the key to raise a claim in front of international tribunals like the ICJ.<sup>241</sup> The ICJ is a proper forum, especially if the parties to this dispute cannot reach an agreement on reparations.<sup>242</sup> Based on article 36(2)(d) of the ICJ Statute, the Court has jurisdiction over cases that trigger questions of responsibility.<sup>243</sup>

Diplomatic protection is an institution that allows States to raise claims on behalf of its nationals who have incurred injury as the result of an international wrongful act.<sup>244</sup> However, whether diplomatic protection is the right of the State or the right of the individual is still a source of controversy.<sup>245</sup>

## B. Material Damage

In compensation, the primary issue is remedying actual material damages to property or other interests of the State and its nationals that is assessable in financial terms.<sup>246</sup> Sports turned into a big industry at the

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240. See Daniel Müller, *The Work of García Amador on State Responsibility for Injury Caused to Aliens*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 69, 69–72 (James Crawford et al. eds., 2010).

241. See Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session (*Draft Articles on Diplomatic Protection*), U.N. Doc. A/61/10, art. 1 (2006); See also Annemarieke Vermeer-Künzli, *Diplomatic Protection as a Source of Human Rights Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW*, 250, 251–52 (Dinah Shelton ed., 2013).

242. See *The Corfu Channel Case (Merits)*, Judgment, 1949 I.C.J. Rep. 4, 26 (Apr. 9); See also *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 3, ¶ 95(5)–(6) (May 24).

243. Gilles Cottureau, *Resort to International Courts in Matters of Responsibility*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 1115, 1117, 1118–23 (James Crawford et al. eds., 2010).

244. James R. Crawford, *State Responsibility*, *MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L.*, para. 59 (Sept. 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>.

245. Alain Pellet, *The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 75, 88–89 (James Crawford et al. eds., 2010).

246. Commentary, *supra* note 30, art. 31, para. 5.

start of the new century.<sup>247</sup> Although athletes may not get paid for being in international events, that stage is a unique chance to change their whole life, but only if they step up the podium.<sup>248</sup>

In the case of athletes who have been deprived of their titles as a result of State-sponsored doping, compensation may cover actual damage, lost earnings, and profits.<sup>249</sup> Having responsibility established, lost profit is a financially assessable damage,<sup>250</sup> because at the end, “[r]emedies aim to place an aggrieved party in the same position as he or she would have been had no injury occurred.”<sup>251</sup>

Calculating the actual material damage in a doping case is likely not a difficult task since there are dispositive evidences, such as official announcements of monetary prizes for the winning athletes<sup>252</sup> that help to enlighten the aspects of the financial damage. Many countries publicly announce the rewards for their medalists before the games,<sup>253</sup> which in some cases can be a six figure reward for a gold medal.<sup>254</sup> The financial bonanza sometimes might be reinforced by private businesses, who are interested in bringing into sharp focus the connection between their

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247. JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 10–11, 167–175 (2d ed. 2004).

248. See Kathleen Elkins, *Here’s how much US Olympic medalists get paid*, CNBC (Feb. 17, 2018), <https://www.cnbc.com/2018/02/16/how-much-olympic-athletes-get-paid.html>.

249. See John Barker, *The Different Forms of Reparation: Compensation*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* 599, 604–05 (James Crawford et al. eds., 2010).

250. Draft, *supra* note 25, art. 36(2).

251. SHELTON, *supra* note 15, at 19.

252. Christy Leung, *Which country rewards athletes best for Olympic success?*, CNN (Aug. 19, 2016), <https://edition.cnn.com/2016/08/19/sport/olympic-rewards-by-country/index.html>.

253. See, e.g., *Multi-Million Dollar Awards Program*, SING. NAT’L OLYMPIC COUNCIL (2017–2020), <http://www.singaporeolympics.com/multi-million-dollar-awards-programme-map/>; see also *Kazakh athletes to get USD 250,000 for Rio-2016 gold medal*, KAZINFORM (Feb. 16, 2016), <http://www.inform.kz/eng/article/2871303>; see also *Rio Olympics 2016: Cash prizes will motivate Indian players to win medals, says Akshay Kumar*, INDIAN EXPRESS (Aug. 8, 2016), <http://indianexpress.com/sports/rio-2016-olympics/cash-prizes-will-motivate-indian-players-to-win-medals-says-akshay-kumar-2958174/>.

254. Leung, *supra* note 252.

products and a successful athlete,<sup>255</sup> so the issue of endorsement deals and sponsorships by big brands and companies can be an enormous source of income for athletes.<sup>256</sup> In addition, compensation also should cover the athlete support personnel and coaches if they were supposed to receive a money prize in the case of success. In some cases, the coaches are awarded better than the medalists.<sup>257</sup>

The ICJ has considered the claim of “potential earnings” by claimants.<sup>258</sup> The ICJ has declared that generally, remedying lost income is an appropriate form of compensation for the victims.<sup>259</sup> The burden of proof here will be on athletes to provide the court or tribunal with an estimate of the losses they have incurred as the result of being unfairly deprived of their titles.<sup>260</sup>

In calculating the financial damages to victims of State-sponsored doping, the subjective method or the differential method is primarily used to determine the financial situation of the victim in the absence of the international wrongful conduct.<sup>261</sup> For this purpose, after assessing the financial situation of the victim had the act not occurred, the

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255. See Rachel Axon, *Medals Are Nice, but Sometimes Not Enough For Olympic Athletes Seeking Sponsors*, USA TODAY (Dec. 20, 2017), <https://www.usatoday.com/story/sports/olympics/2017/12/20/medals-nice-but-sometimes-not-enough-olympic-athletes-seeking-sponsors/970736001/>; see also *Forget gold, do it for sausage*, SYDNEY MORNING HERALD (Aug. 8, 2018), <https://www.smh.com.au/news/off-the-field/forget-gold-do-it-for-sausage/2008/08/08/1218139077406.html>.

256. Matthew Michaels, *Meet the richest American athletes competing in the Winter Olympics*, BUS. INSIDER (Feb. 2, 2018), <http://www.businessinsider.com/winter-olympics-richest-american-athletes-net-worth-2018-2/#6-gus-kenworthy-1>.

257. *S. Korea to give record rewards to medal winners in Rio*, KOREA TIMES (Feb. 19, 2016), [http://www.koreatimes.co.kr/www/news/sports/2016/05/136\\_198460.html](http://www.koreatimes.co.kr/www/news/sports/2016/05/136_198460.html).

258. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324, ¶ 51 (June 19).

259. *Id.* ¶ 40 (“The Court observes that, in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation.” This method was utilized by the European Court of Human Rights in *Teixeira de Castro v. Portugal*). However, in this specific case the Court did not find sufficient factual backgrounds to ultimately rule in favor of it. *Id.* ¶¶ 49–50.

260. See Barker, *supra* note 249, at 602.

261. IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 35–36 (Loukas Mistelis ed., 2009).

estimates are compared with the realities of the present day.<sup>262</sup> This approach also applies to those who have been demoted to a lower ranking but still had some benefits from their achievement;<sup>263</sup> the difference of the earnings for the previous ranking and the new position will be calculated. The date of the valuation, and not the wrongful conduct, is the basis of estimating the damages.<sup>264</sup>

The next issue revolves around the outer limits of compensation plans as to what events and which athletes should be subjected to compensation. Article 14(3) of the Draft provides that: “The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”<sup>265</sup> Therefore, the compensation can extend to all tournaments that have been organized during the period of time that Russian athletes were participating with positive doping results.<sup>266</sup>

Estimating the damages will be a case-by-case assessment. Sometimes a moment of heroism by the athlete changes the history of a country and may meaningfully increase the chance of getting additional awards, like national monuments named for the athlete.<sup>267</sup> Hence, the principle of *equity*, particularly when the appraisal is on a case-by-case basis, and the economic situation of the injured individual can be used as supplemental tools for the assessment of financial damages.<sup>268</sup>

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262. *Id.* at 36.

263. *See id.* at 83–91 (discussing the application of this theory in various courts and tribunals in different situations to demonstrate the efficiency of calculating the compensation in those circumstances).

264. *Id.* at 139.

265. Draft, *supra* note 25, art. 14(3).

266. *See* First Report, *supra* note 1, at 82–85 (the report states that the cover-up efforts were used during the 2012 London Olympic games, 2013 Kazan World university games, 2013 World IAAF Championships, and 2014 Sochi Winter Games).

267. James Riach, *Trinidad and Tobago medalist has lighthouse named after him*, GUARDIAN (Aug. 14, 2012), <https://www.theguardian.com/sport/2012/aug/14/trinidad-tobago-lighthouse-kehorn-walcott>.

268. *See generally* MORABE, *supra* note 261, at 143–52.

### C. Moral Injury

Here, the issue is whether athletes who have suffered moral damages should be subjected to financial compensation as a result of the unfair advantage that doping provides. Moral injury is part of bringing satisfaction to the injured, in which “a monetary value can be put only in a highly approximate and notional way.”<sup>269</sup> The person who should cope with the distressing feeling of the painful moments of the life is a human being, not a legal personality of a State or an organization.<sup>270</sup> In some cases, such as grave human rights violations, the moral damage is more important than any other damage.<sup>271</sup> According to the Draft, moral damage, like material damage, is normally financially assessable, and therefore covered by efforts for compensation.<sup>272</sup> Article 31(2) of the Draft says: “Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”<sup>273</sup>

The psychological trauma of wrongful conduct has been addressed by international courts and tribunals in the past, especially regarding human rights violations.<sup>274</sup> In the compensation case *Guinea v. Congo*, the court points out that mental or moral injury are the sufferings of an entity or individual other than material injuries,<sup>275</sup> and thus do not necessarily need evidence establishing them.<sup>276</sup> Mental injury can include mental suffering, injury to feelings, humiliation, shame, degradation, loss of loved ones, loss of enjoyment of life, loss of companionship, loss of social position, or injury to credit or reputation.<sup>277</sup>

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269. Commentary, *supra* note 30, art. 36, para 4 & art. 37, para 3.

270. Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), Judgment, 2012 I.C.J. Rep. 347, ¶ 77 (June 19) (Separate Opinion of Judge Cañado Trindade).

271. *See id.* at 376–78, ¶¶ 74–80.

272. Draft, *supra* note 25, art. 36(2); *See also* G.A. Res. 60/147, ¶ 20(d) (Mar. 21, 2006).

273. Draft, *supra* note 25, art. 31(2).

274. *See* Barker, *supra* note 249, at 605.

275. Ahmadou Sadio Diallo (*Guinea v. Dem. Rep. Congo*), Judgment, 2012 I.C.J. Rep. 324, ¶ 18 (June 19).

276. *Id.* at 334, ¶ 21.

277. U.N., *Reports on Int’l Arbitral Awards: Op. in Lusitania Cases*, vol. VII, at 40 (Nov. 1, 1923); Commentary, *supra* note 30, art. 26, para. 19; *See also id.* art. 31, para. 5.

To be realistic, the suffering of an athlete is not comparable with victims of torture, genocide, or war crimes, but by the same token, athletes can be subject to compensation because of their mental trauma. The significance of psychological aspects for athletes is clarified by categorizing sport psychology as a distinguished area “that uses psychological knowledge and skills to address optimal performance and well-being of athletes, developmental and social aspects of sports participation, and systemic issues associated with sports settings and organizations.”<sup>278</sup>

In this case, the Russian doping program caused both material and moral injury.<sup>279</sup> Many athletes invest a huge amount of time, money, and exercise to make a living for their future with an Olympic title, and in fact, this is the attractive financial perspective of sport that raises challenges like doping in Sports.<sup>280</sup> The prospect of a financially comfortable life is an incentive that pushes athletes beyond the boundaries of ordinary people to have extraordinary performances.<sup>281</sup> This rare opportunity that could have had the power of a Midas touch<sup>282</sup> for a human being was unfairly taken away from the athlete. He was not only robbed of his property<sup>283</sup> by a cheater, but also of his fame, his social position, and more. This could inflict immense mental pressure on the individual. Right from the beginning, clean athletes were playing in an unequal field without knowing the stage has been set up to rob them of their dreams. Russian athletes were enabled “to compete dirty while enjoying certainty that their anti-doping samples would be reported clean.”<sup>284</sup>

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278. *Sport Psychology*, AM. PSYCHOL. ASS'N (2018), <http://www.apa.org/ed/graduate/specialize/sports.aspx>.

279. See generally Barboza, *supra* note 191, at 8–10, 17–19.

280. See Weston, *supra* note 231, at 83–84.

281. *The Psychology of Financial Incentives in Sports*, SCI. IN OUR WORLD: CERTAINTY & CONTROVERSY (Oct. 19, 2015), <https://sites.psu.edu/siowfa15/2015/10/19/financial-incentives/>.

282. Belinda Goldsmith, *Gold Medals Can Give Athletes the Midas Touch*, REUTERS (July 30, 2012), <https://www.reuters.com/article/us-oly-goldvalue-day3/gold-medals-can-give-athletes-the-midas-touch-idUSBRE86T0K820120730>.

283. See Weston, *supra* note 231, at 101 (discussing how athletes are victims of a crime named sporting fraud).

284. First Report, *supra* note 1, at 15.

The creativity that exists in the form of reparations in human rights cases<sup>285</sup> can be considered in the sport context. The principle of equity, is a central tenet in evaluating the moral damages.<sup>286</sup> Nevertheless, there are complications in quantifying moral injury, like duplicate damages,<sup>287</sup> that should be taken into consideration.

One last element to consider in regard to the mental trauma of the athletes is that after all, “money is an ill substitute” for what was lost.<sup>288</sup> The bitter reality is that dollars cannot compensate that unique moment of glory when an athlete turns into a hero and wins the hearts of millions of fans during the live broadcast of an exciting competition.

## VI. CONCLUDING REMARKS

It is important to hold States responsible for reparations in cases of violations of individuals’ rights<sup>289</sup> because “States are the principal bearers of international obligations.”<sup>290</sup>

Sport governing bodies confirmed that the involvement of the Russian Ministry of Sport in the systematic doping scheme was out of the scope of its powers, and therefore was left to UNESCO and WADA to deal with it.<sup>291</sup> In addition, years of administrative fighting with doping has practically failed, with retests from Beijing and London Olympics showing that athletes were at least ten years ahead of sport officials. International law framework can be a radically different approach in the fight against the plague of doping. This article demonstrates that it is better to leave the problem of State-sponsored doping in the hands of the law of international State responsibility.<sup>292</sup>

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285. KOLB, *supra* note 17, at 212.

286. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324, ¶ 24 (June 19).

287. See SABAHI, *supra* note 185, at 137–38, 141–44, 185–86.

288. Michael Lenard, *The Future of Sports Dispute Resolution*, 10 PEPPERDINE DISP. RESOL. L. J., 173, 175 (2009).

289. EVANS, *supra* note 177, at 236.

290. Crawford, *supra* note 244.

291. Schmid Report, *supra* note 3, at 4.

292. See G.A. Res. 40/34, ¶ 5(d) (Nov. 29, 1985).

Indeed, what ultimately matters is the “realization of justice at national and international levels.”<sup>293</sup> Based on the foregoing, Russia is responsible for its state-sponsored doping program and violating international obligations under the UNESCO Convention and the WADA code. The doping violations are attributable to Russia as the acts of State organs. These infringements render Russia responsible to provide monetary compensation for individual athletes who have been the victims of this systematic violation.

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293. *Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99, ¶ 254 (Feb. 3) (Cançado Trindade, J., dissenting).

