

HUMAN RIGHTS COMMITTEE

in the office of the

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

Communication on behalf of

Yuliya Stepanova and Vitaly Stepanov

v.

Russian Federation

submitted by

the International Human Rights Center
of
Loyola Law School, Los Angeles

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I - INFORMATION ABOUT THE AUTHORS OF THE COMMUNICATION

1 - AUTHORS OF THE COMMUNICATION

1) The present communication is submitted to the Human Rights Committee (HRC or Committee) by Professor Cesare Romano, Director of the International Human Rights Center of Loyola Law School, Los Angeles,¹ Faraz Shahlaei, Adjunct Professor, Juris Scientiae Doctor (J.S.D.) Candidate and Senior Fellow of the International Human Rights Center, and by Professor John Cerone, Esq., Senior Fellow at the Henry J. Leir Institute² of the Fletcher School of Law and Diplomacy (hereafter collectively “the Authors”).

2) At the International Human Rights Center, Justin Small (JD 2022) and Arianna Allen (JD 2021) helped prepare the communication. Nicoline Cu (JD 2021) helped with editing. All worked under the supervision of Prof. Romano and Prof. Shahlaei. At the Fletcher School, N. Caroline Armstrong Hall and Margaux Garcia assisted in the preparation of the communication, working under the supervision of Prof. Cerone.

3) Correspondence regarding this communication should be sent to:

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¹ The International Human Rights Center of Loyola Law School, Los Angeles is committed to achieving the full exercise of human rights by all persons and seeks to maximize the use of international and regional political, judicial and quasi-judicial bodies through litigation, advocacy and capacity building. See: (<https://www.lls.edu/academics/experientiallearning/clinics/internationalhumanrightscenter/>) [Accessed on 30 Jan. 2021].

² The Henry J. Leir Institute seeks to advance human security through pioneering research, education, and policy engagement that ensures the protection, empowerment, and well-being of all people, while promoting peace and sustainable development.

II - INTRODUCTION

1 - SUMMARY

4) In 2016, after years of suspicions and allegations, the world was shocked to discover that hundreds, if not thousands, of Russian athletes had been competing internationally for years while taking illegal Performance Enhancing Drugs (PEDs). This was not a case of a few rotten apples. It turned out that Russia had been long running a program to systematically administer PEDs to athletes competing under its flag. Several agencies of the Russian Government participated in this scheme, including Russia's secret services, which helped manipulate anti-doping samples and cover up positive results.

5) The Russian doping program was discovered after whistleblowers bravely came forward. Their allegations, documented by news reports, were investigated by the World Anti-Doping Agency (WADA) and relevant sports organizations. As a result, the International Olympic Committee (IOC) and dozens of other sports federations imposed sanctions, including suspensions and loss of medals, against culpable Russian sports organizations and scores of athletes from several disciplines who were involved in the doping program.

6) This communication concerns the violation of several rights protected under the International Covenant on Civil and Political Rights (ICCPR) of two whistleblowers of the Russian doping program: Yuliya Stepanova, a top-level runner and former member of the Russian national athletic team, and Vitaly Stepanov, her husband and a former employee of the Russian Anti-Doping Agency (RUSADA). By blowing the whistle, Yuliya and Vitaly made the discovery of the State-sponsored doping program possible. However, they also brought on themselves and their family the wrath of the Russian Government.

2 - VICTIMS

7) This communication claims a violation of the rights under the ICCPR of:

First Name: Iuliia (Yuliya)

Middle Name: Igorevna

Last Name: Stepanova (née Rusanova)

Nationality: Russian

Date and place of Birth: 3 July 1986, Kursk, Russia

Mrs. Stepanova has authorized the filing of this communication on her behalf.³

First Name: Vitaly

Middle Name: Sergeyeovich

Last Name: Stepanov

Nationality: Russian

Date and place of birth: 31 May 1982, Chelyabinsk, Russia

Mr. Stepanov has authorized the filing of this communication on his behalf.⁴

3 - STATE AND ARTICLES OF THE ICCPR CONCERNED

8) This communication concerns the Russian Federation (hereafter “Russia”). It alleges Russia violated the following articles of the International Covenant on Civil and Political Rights (ICCPR or Covenant):

- i. with regard to Yuliya Stepanova, Articles 7, first and second sentence, 8.3.a, 17.1, 17.2, 19.2, and 23.1, all in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3.
- ii. with regard to Vitaly Stepanov, Articles 17.1 and 17.2, 19.2, 23.1, in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3.

4 - REMEDIES SOUGHT

9) The Committee is respectfully requested to:

- i. Declare this communication admissible;
- ii. Find Russia in violation of the above specified articles of the ICCPR;

³ Permission to File, Annex A1.

⁴ Permission to File, Annex A2.

iii. Recommend that Russia make full reparation to the victims, including issuing an apology, and take the measures to guarantee non-repetition specified below.⁵

III - BACKGROUND AND FACTS PERTAINING TO THE COMMUNICATION

1 - BACKGROUND

A - General Background on the Doping Phenomenon

10) The term “doping” indicates the use of banned performance-enhancing drugs (PEDs) by athletes in violation of national and international law. International efforts to combat doping started in the early 1970s and gained momentum in the 1980s. The revelation that East Germany had run a State-sponsored program for years to dope its athletes in international competitions and the Olympics, as well as the discovery of several cases of individual doping amongst cyclists, led to the adoption of the first treaties to fight the plague of doping. It started out regionally, with the Council of Europe’s European Anti-Doping Convention (1989),⁶ and eventually extended globally with the UNESCO International Convention against Doping in Sport (2005).⁷ To date, 52 States have become parties to the former,⁸ while 189 States have become parties to the latter.⁹ The UNESCO International Convention against Doping in Sport is the second most ratified UNESCO treaty. Russia acceded to the European Anti-Doping Convention on 12 February 1991,¹⁰ and ratified the UNESCO Convention on 29 December 2006.¹¹

⁵ *Infra*, Section VII.

⁶ Council of Europe, *Anti-Doping Convention*, ETS No. 135 (16 Nov. 1989); available at: (<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135>) [hereinafter European Anti-Doping Convention] [Accessed on 30 Jan. 2021].

⁷ UNESCO, *International Convention against Doping in Sports*, (19 Oct. 2005); available at: (<https://unesdoc.unesco.org/ark:/48223/pf0000142594>) [hereinafter UNESCO Convention] [Accessed on 30 Jan. 2021].

⁸ Council of Europe, *Chart of Signatures and Ratifications of Treaty 135*, available at: (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/135/signatures?p_auth=QKjfS3nV) [Accessed on 30 Jan. 2021].

⁹ UN Treaty Series, *International Convention against Doping in Sport*, Ratifications: (<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280061033>)

¹⁰ *Chart of Signatures and Ratifications of Treaty 135*, *supra* note 8.

¹¹ UN Treaty Series, *supra* note 9.

11) In 1999, the International Olympic Committee (IOC), in collaboration with several States, created the World Anti-Doping Agency (WADA), a foundation based in Canada, to promote, coordinate and monitor the fight against doping in sports.¹² Over the past twenty years, WADA has become the world watchdog against doping. The connection with the IOC gives WADA investigations and reports legitimacy and credibility, as the IOC can rely on them to sanction both individual athletes and the national teams and federations.

12) WADA has adopted a series of normative instruments to fight doping, including the World Anti-Doping Code;¹³ the List of Prohibited Substances and Methods;¹⁴ the International Standard on Testing and Investigation;¹⁵ the International Standard for Laboratories;¹⁶ the International Standard for Therapeutic Use Exceptions;¹⁷ and the International Standard for Privacy and Protection of Information.¹⁸ The List of Prohibited Substances and Methods and International Standard for Therapeutic Use Exceptions are also annexes to the UNESCO Convention. In addition, WADA has issued several manuals, guidelines, protocols and rules to further expand and complement them. The UNESCO Convention was adopted to provide the WADA and its Code with the force of international law and add the support of governments.

13) All these efforts notwithstanding, the fight against doping is still an uphill struggle. In 2016, in the aftermath of the 2014 Sochi Winter Olympic games, it became clear that Russia had been long running a program to dope athletes in the national teams. Realizing that Russia had

¹² World Anti-Doping Agency, *Governance*, available at: (<https://www.wada-ama.org/en/governance>) [Accessed on 30 Jan. 2021].

¹³ World Anti-Doping Agency, *The Code*, available at: (<https://www.wada-ama.org/en/what-we-do/the-code>) [Accessed on 30 Jan. 2021].

¹⁴ World Anti-Doping Agency, *Prohibited List Documents*, (1 Jan. 2021); available at: (<https://www.wada-ama.org/en/resources/science-medicine/prohibited-list-documents>) [Accessed on 30 Jan. 2021].

¹⁵ World Anti-Doping Agency, *International Standards for Testing and Investigations*, (1 Jan. 2021); available at: (<https://www.wada-ama.org/en/resources/world-anti-doping-program/international-standard-for-testing-and-investigations-isti>) [Accessed on 30 Jan. 2021].

¹⁶ World Anti-Doping Agency, *International Standards for Laboratories*, (1 Jan. 2021); available at: (<https://www.wada-ama.org/en/resources/laboratories/international-standard-for-laboratories-isl>) [Accessed on 30 Jan. 2021].

¹⁷ World Anti-Doping Agency, *International Standard for Therapeutic Use Exemptions*, (1 Jan. 2021); available at: (<https://www.wada-ama.org/en/resources/therapeutic-use-exemption-tue/international-standard-for-therapeutic-use-exemptions-istue>) [Accessed on 30 Jan. 2021].

¹⁸ World Anti-Doping Agency, *International Standard for the Protection of Privacy and Personal Information*, (1 Jan. 2021); available at: (<https://www.wada-ama.org/en/resources/data-protection/international-standard-for-the-protection-of-privacy-and-personal>) [Accessed on 30 Jan. 2021].

hijacked international sports for years, the International Olympic Committee (IOC) started retesting the samples collected from the athletes from previous games. After finding that many resulted positive for doping, it became clear that the doping program had been in place for years.

B - Doping as a Human Rights Problem

14) Doping corrodes the principles of fairness, fair play and equality of opportunity, which are the essence of sports. It imperils the credibility of competitions. It ruins not only the careers of those who dope, but also of those who do not dope.¹⁹ When States are able to support illicit doping programs on an extensive scale with little cost, the principles of Olympic movement and sportsmanship are at risk. Other countries and athletes might then be pushed into a doping race, jeopardizing the credibility of sports in its entirety,²⁰ undermining the potential of sports to promote peace and friendship among people and nations.²¹ Ultimately, doping undermines the rule of law and nurtures corruption, which in turn, entails and enables multiple human rights violations.

15) Indeed, doping violates many human rights, in both obvious and obscure ways. For instance, it endangers the right to health.²² Doping is a never-ending race that started with taking natural substances to boost performance, evolved to include chemical substances, and is now turning to even more dangerous methods, such as blood and gene doping.²³ Many of the athletes who

¹⁹ See Faraz Shahlaei, *International Responsibility of States and Victims of State-Sponsored Doping*, Michigan State International Law Review Vol. 27.2, pp. 362-376 (2019); available at:

(<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1254&context=ilr>) [Accessed on 30 Jan. 2021].

²⁰ Before Russia, a whistleblower made allegations of State-sponsored doping against China during 1980s and 1990s. WADA was criticized for not investigating them. See Sean Ingle, *WADA is Accused of Sitting on Mass China Doping Claims for Five Years*, The Guardian (23 Oct. 2017); available at:

(<https://www.theguardian.com/sport/2017/oct/23/wada-china-doping-allegations-xue-yinxian>) [Accessed on 30 Jan.

2021]; See also Sean Ingle, *Russia's Backdoor Olympics* The Guardian (2 Feb. 2018); available at:

(<https://www.theguardian.com/sport/2018/feb/02/winter-olympics-russian-doping-ban-pyeongchang#img-1>) [Accessed on 30 Jan. 2021] (“[A]thletes now think that you are better off cheating or getting your nation to establish a doping system because even if it is discovered, the consequences are minimal.”... “[O]r, if you don’t want to cheat, avoid elite sport like the plague”).

²¹ Human Rights Council Resolution, *Promoting Human Rights through Sport and the Olympic Ideal*, U.N. Doc. A/HRC/31/L.29 (21 Mar. 2016) available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/056/22/PDF/G1605622.pdf?OpenElement> [Accessed on 12 Feb. 2021].

²² See Council of Europe, *For a Clean and Healthy Sport: the Anti-doping Convention*, (2013); available at: (<https://rm.coe.int/for-a-clean-and-healthy-sport-the-anti-doping-convention/16807314b5>) [Accessed on 30 Jan. 2021].

²³ See World Anti-Doping Agency, *Gene Doping*, available at: (<https://www.wada-ama.org/en/gene-doping>) [Accessed on 30 Jan. 2021]; See also World Anti-Doping Agency, *Gene Doping*, Play True 1 (2005); available at: (https://www.wada-ama.org/sites/default/files/resources/files/PlayTrue_2005_1_Gene_Doping_EN.pdf) [Accessed on 30 Jan. 2021]; See also UNESCO, *Universal Declaration on the Human Genome and Human Rights*, art. 1 (11 Nov.

consume PEDs end up having serious health issues in the later stages of their lives and some die prematurely. The Council of Europe Convention,²⁴ the WADA Code,²⁵ and the UNESCO Convention,²⁶ all declare that doping is a health concern both for the public and individuals. Doping undermines the dignity of athletes and, when athletes are forced to take PEDs, could amount to cruel, inhuman or degrading treatment.²⁷ Doping is a form of medical intervention or experimentation that takes place outside the scope of law and can hardly be considered voluntary or informed.²⁸ Compelling athletes to dope might also be considered a contemporary form of forced labor.²⁹ All in all, athletes are a particularly “vulnerable group”,³⁰ whose need for enhanced protection against doping and other corrupted practices is finally beginning to be acknowledged.

16) Thus, States have a duty to fight doping not only because of the specific anti-doping treaties and WADA standards, but because of the international human rights obligations they have. Specifically, when it comes to doping, States have an overarching duty to respect, protect, and fulfil human rights threatened by the practice. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. State-sponsored doping, that is to say doping that is done at the behest, with the assistance, or with the acquiescence of the government, its agencies and agents, is a violation of the duty to respect human rights. The obligation to protect requires States to protect human rights from interference by third parties. In the

1997); available at: (http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html) [Accessed on 30 Jan. 2021]: “The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.”

²⁴ European Anti-Doping Convention, *supra* note 6, preamble: “Concerned by the growing use of doping agents and methods by sportsmen and sportswomen throughout sport and the consequences thereof for the health of participants and the future of sport”.

²⁵ World Anti-Doping Agency, *World Anti-Doping Code 2015 with 2019 Amendments*, preamble (1 June 2019) available at: (https://www.wada-ama.org/sites/default/files/resources/files/wada_anti-doping_code_2019_english_final_revised_v1_linked.pdf) [Accessed on 30 Jan. 2021]; “The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are: To protect the Athletes’ fundamental right to participate in doping-free sport and thus promote health”; *See also* article 4.3.1.2: fundamental rationale for the world anti-doping code.

²⁶ UNESCO Convention, *supra* note 6, preamble: “Concerned by the use of doping by athletes in sport and the consequences thereof for their health, the principle of fair play, the elimination of cheating and the future of sport.”

²⁷ *See infra* paras. 161-169.

²⁸ *See infra* paras. 170-266.

²⁹ *See infra* Section V(2).

³⁰ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Compensation, Judgement, I.C.J. Reports 2012, Separate opinion of Judge Caçado Trindade, p. 364 para. 43; available at: (<https://www.icj-cij.org/public/files/case-related/103/103-20120619-JUD-01-01-EN.pdf>) [Accessed on 30 Jan. 2021].

case of doping, this means they must take all measures necessary to prevent doping and, when it happens, prosecute those who procure, administer and use prohibited PEDs. Lastly, the obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights, such as fostering the creation of a PEDs-free environment, where everyone can compete clean and on a level playing field.

C -The Phenomenon of State-Sponsored Doping

17) International law imposes on States a clear obligation to fight doping. If doping is a threat to sports and human rights, State-sponsored doping poses an existential threat. When a State uses its vast powers to help athletes dope, where it uses its secret services to escape detection and to cover up, where it supports the process financially, logistically and scientifically, and where it leaves athletes no option but to participate in the scheme, there is little that the international sports governing bodies can do to address this problem. They are non-governmental entities that are ill-equipped to fight State-sponsored doping. Intergovernmental organizations, such as the United Nations, need to help them. Public international law needs to come into play to attach international legal responsibility to States.

18) Mega sporting events, like the Olympics or the FIFA World Cup, give States vast audiences. States, big and small, can increase their international recognition by having their flags waved and their anthem played before billions of viewers. When their athletes win, national pride and international prestige are inflated. The stakes are high and some unscrupulous governments may decide to step in to tilt the race in favor of athletes competing under their flag.

19) During the Cold War, in the Soviet Union and the eastern bloc, “[e]xcellence in the international sporting competition was seen as a way of validating the superiority of the Socialist system over the capitalist system. It was never just sport, it was always about politics, too.”³¹ Doping at the behest and with the assistance of the governmental agencies has been “part of the fabric of

³¹ See Ben Church, *How WADA'S Doping Ban Hits Russia and Vladimir Putin Where it Hurts*, CNN (19 Dec. 2019); available at: (<https://www.cnn.com/2019/12/18/sport/russia-doping-wada-putin-spt-intl/index.html>) [Accessed on 30 Jan. 2021].

Soviet and Russian sport for decades.”³² It became rampant in the Soviet Union during the 1980s.³³ The use of anabolic steroids to increase muscle mass and strength was commonplace in the Soviet Union first, and Russia later, despite international prohibition and severe consequences for the health of athletes.³⁴

20) It was the dominant culture, enveloping the athletes like the air. “An American caught with a hand in the EPO [Erythropoietin] jar would instantly lose sponsors and suffer social shame. But ... in Russia something like this could happen to anyone. No big deal. There would be no stigma about the ban because Russians generally didn’t care, and those who did care understood that doping was a requirement of the system. What athletes put into their bodies was low on the list of national anxieties.”³⁵

21) Commenting on the 1980 Summer Olympics held in Moscow, an Australian study soberly noted: “There is hardly a medal winner at the Moscow Games, certainly not a gold medal winner, who is not on one sort of drug or another: usually several kinds. The Moscow Games might as well have been called the Chemists' Games.”³⁶

22) In 2016, documents emerged detailing the Soviet Union's plans to systematically dope track and field athletes in preparation for the 1984 Summer Olympics to be held in Los Angeles. A communication from Dr. Sergei N. Portugalov, then of the Institute for Physical Culture (the same Dr. Portugalov, Chief of the Medical Commission of the All-Russia Athletic Federation (ARAF), at

³² Grigory Rodchenkov, *THE RODCHENKOV AFFAIR: HOW I BROUGHT DOWN PUTIN’S SECRET DOPING EMPIRE*, Introduction (WH Allen, 2020).

³³ See Thomas M. Hunt, *DRUG GAMES: THE INTERNATIONAL OLYMPIC COMMITTEE AND THE POLITICS OF DOPING* (University of Texas Press, 2011).

³⁴ Rodchenkov, *supra* note 32, p. 58.

³⁵ David Walsh, *THE RUSSIAN AFFAIR: THE TRUE STORY OF THE COUPLE WHO UNCOVERED THE GREATEST SPORTING SCANDAL*, p. 209 (Simon & Schuster UK, 2016).

³⁶ Aleksei Aleksandrov *et al.*, *The 1980 Olympics are the ‘Cleanest’ in History. Athletes Recall How Moscow Cheated the System*, Radio Free Europe Radio Liberty (22 July 2020); available at: (<https://www.rferl.org/a/the-1980-moscow-olympics-rank-as-the-cleanest-in-history-athletes-recall-how-the-u-s-s-r-cheated-the-system-/30741567.html>)

[Accessed on 30 Jan. 2021].

the center of the 2016 doping scandal),³⁷ directed to the Soviet Union's head of track and field, detailed a plan to administer steroids to athletes, along with suggestions for further enhancements.³⁸

23) Another notorious case of State-sponsored doping was the one of the German Democratic Republic (GDR or East Germany). Starting in the 1960s, the government of the GDR conducted a decades-long program of coercive administration and distribution of PEDs (initially testosterone, later mainly anabolic drugs) to its elite athletes. The aim of the program was to bolster the GDR image and prestige by winning medals in international competition, such as the Olympic Games.³⁹ The doping program was extremely sophisticated and formalized, requiring the cooperation of dozens of governmental agencies and agents at all levels. It made it possible for a small country like the GDR to rival with far larger superpowers and place itself at the top of the medal charts in many disciplines, and in athletics in particular.

24) However, a high price was paid by the athletes who were doped to cover their country with glory.⁴⁰ Many faced lifelong health consequences resulting from different types of cancers, heart and kidney problems to functional impairments and major depression. “Weightlifter Roland Schmidt received massive amounts of anabolic steroids and growth hormone. Ultimately, he grew size 36DD breasts and had to have them surgically removed, as his body had stopped producing testosterone”.⁴¹ Brigit Boese, a shot putter who was given anabolic steroids by East Germany officials since she was 11, nowadays “suffers from an irregular heartbeat, high-blood pressure, diabetes, nerve damage, kidney problems, and a list of other ailments that have made her all but an invalid”. At the age of 48, she can only walk with the help of crutches.⁴² Continuous doping from a young age and for a very long time, mainly with anabolic drugs, ruined their health. The list of health

³⁷ See *infra*, para. 47.

³⁸ See Rebecca Ruiz, *The Soviet Doping Plan: Document Reveals Illicit Approach to '84 Olympics*, The New York Times (13 Aug. 2016); available at: (<https://www.nytimes.com/2016/08/14/sports/olympics/soviet-doping-plan-russia-rio-games.html>) [Accessed on 30 Jan. 2021].

³⁹ Anthony C. Hackney, *Doping, Performance-Enhancing Drugs, and Hormones in Sport: Mechanisms of Action and Methods of Detection*, Elsevier, pp. 21-22 (2017); available at: (<https://www.elsevier.com/books/doping-performance-enhancing-drugs-and-hormones-in-sport/hackney/978-0-12-813442-9>) [Accessed on 30 Jan. 2021].

⁴⁰ Jeremy Armstrong, *East Germany's Forgotten Doping Victims Tell of Illness, Infertility and Changing Sex*, The Mirror (4 Dec. 2015); available at: (<https://www.mirror.co.uk/news/uk-news/east-germanys-forgotten-olympic-doping-6949436>) [Accessed on 30 Jan. 2021].

⁴¹ Hackney, *supra* note 39, p. 22.

⁴² Kyle James, *East Germany's Doping Program Casts Long Shadow Over Victims*, Deutsche Welle (10 Jan. 2010); available at: (<https://www.dw.com/en/east-germanys-doping-program-casts-long-shadow-over-victims/a-5968383>) [Accessed on 30 Jan. 2021].

problems is long: acne, hirsutism, deep voice, muscle tension, gynaecomasty, breast cancer, bone deformation, vascular disease, and teratogenic malformations. In some cases, female athletes changed their sex as a result of the continuous intake of male hormones.⁴³

25) The GDR doping program was finally revealed in all its perversion after the fall of the Berlin Wall and the reunification. Although East Germany could win medals with the doping program, “[t]he human cost of those victories is still being felt today”⁴⁴. In June 2002, the German Federal Parliament passed a special law to compensate those athletes who had been enrolled in the State-sponsored doping program.⁴⁵ Unfortunately, the plague of State-sponsored doping did not stop with the fall of the Berlin Wall.

D - The Russian Doping Program and the Pressure to Win Medals at the Olympics

26) Russian athletes hold many records, but they are not all to be proud of. Russia has the record for athletes that have been caught for doping at the Olympic Games, with more than 200.⁴⁶ Russia has also the record of athletes stripped of Olympic medals (47 and counting) and world championships. That is more than a third of the global total and four times the number of the runner-up.⁴⁷

27) In 2008, seven Russian track and field athletes were suspended ahead of the Summer Olympics in Beijing for manipulating their urine samples.⁴⁸ Several Russian biathletes were involved in doping offences in run-up to the 2010 Winter Olympics, in Vancouver.⁴⁹ In October 2009, Mr. Pierre Weiss, the General Secretary of the International Association of Athletics Federation (IAAF),

⁴³ Jere Longman, *Drug Testing: East German Steroids' Toll: 'They Killed Heidi'*, The New York Times (26 Jan. 2004); available at: (<https://www.nytimes.com/2004/01/26/sports/drug-testing-east-german-steroids-toll-they-killed-heidi.html>) [Accessed on 30 Jan. 2021].

⁴⁴ James, *supra* note 42.

⁴⁵ Longman, *supra* note 43.

⁴⁶ *WADA Executive Committee Unanimously Endorses Four-Year Period of Non-Compliance for the Russian Anti-Doping Agency*, World Anti-Doping Agency (9 Dec. 2019); available at: (<https://www.wada-ama.org/en/media/news/2019-12/wada-executive-committee-unanimously-endorses-four-year-period-of-non-compliance>) [Accessed on 30 Jan. 2021].

⁴⁷ *Doping in Russia*, Wikipedia; available at: (https://en.wikipedia.org/wiki/Doping_in_Russia) [Accessed on 30 Jan. 2021].

⁴⁸ *Seven Russian Athletes Suspended on Doping-Related Charges*, ESPN (31 July 2008); available at: (<https://www.espn.com.au/olympics/summer08/trackandfield/news/story?id=351255>) [Accessed on 30 Jan. 2021].

⁴⁹ Katie Thomas, *In Biathlon, Concerns About Russia's Program*, The New York Times (22 Feb. 2010); available at: (<https://www.nytimes.com/2010/02/23/sports/olympics/23biathlon.html>) [Accessed on 30 Jan. 2021].

wrote Mr. Valentin Balakhnichev, the President of All-Russia Athletic Federation (ARAF), that blood samples from Russian athletes "...recorded some of the highest values ever seen since the IAAF started testing..." and that tests from the 2009 World Championships "...strongly suggest a systematic abuse of blood doping or EPO-related products".⁵⁰ In 2011, a scientific study of 7,289 blood samples from 2,737 athletes found that the number of suspicious samples from Russia far exceeded those from other countries.⁵¹ In the words of WADA investigations into the Russian doping program, "... the pursuit of medals and exploitation of athletes for financial gain is well pronounced across Russian athletics".⁵²

28) Despite strong suspicions that Russia was continuing the tradition of the Soviet Union to dope its athletes, in 2007, the IOC assigned it the organization of the 2014 Winter Olympics. Also, in 2010, FIFA, the international governing body of football (soccer), voted for Russia to host the 2018 World Cup. To Russia, hosting the Winter Olympics of 2014 and the World Cup of 2018, was a once-in-a generation major occasion to capture the world attention and impress with its capacity to organize these events. They "were not only an opportunity for thousands of fans to visit and celebrate all that's good with the country but a chance for President Vladimir Putin to meet and greet world leaders on a global stage, the epitome of what academics call "soft power."⁵³ "The Sochi project would show the world that Russia could afford to present a glorious theater of dancing white elephants if it so wished."⁵⁴ "It is impossible to overstate what the Sochi Winter Olympic Games meant to Russians and to the regime of Vladimir Putin.... Putin was on the verge of becoming president for life, and the Games were a glittering jewel in his crown"⁵⁵. As the head of WADA's Compliance Committee explained: "The reason that Russia loves these events is because they are an expression of national pride and strength ... Every official part of the stadium [...] is what they take

⁵⁰ *IAAF Knew of Russians' Rampant Doping Years Before Ban: Report*, Canadian Broadcasting Company (12 Jan. 2016); available at: (<https://www.cbc.ca/sports/olympics/summer/trackandfield/iaaf-explored-ways-to-cover-up-russian-doping-1.3400476>.) [Accessed on 30 Jan. 2021].

⁵¹ Pierre-Edouard Sottas *et. al*, *Prevalence of Blood Doping in Samples Collected from Elite Track and Field Athletes*, *Clinical Chemistry*, 57 (5): 762–9 (May 2011); available at: (<https://pubmed.ncbi.nlm.nih.gov/21427381/>) [Accessed on 30 Jan 2021].

⁵² World Anti-Doping Agency, *The Independent Commission Report: The Final Report*, p. 11. (9 Nov. 2015); available at: (https://www.wada-ama.org/sites/default/files/resources/files/wada_independent_commission_report_1_en.pdf) [hereinafter ARAF Independent Commission Report] [Accessed on 30 Jan. 2021].

⁵³ See Church, *supra* note 31.

⁵⁴ Walsh, *supra* note 35, p. 148.

⁵⁵ Rodchenkov, *supra* note 32, p. 97.

pride in. When they win the medals the anthem and the flag go up. That's what they care about, that's when you get the shot of President Putin.”⁵⁶

29) The chosen location was an unlikely place for a winter Olympics: the balmy city of Sochi, on the eastern shore of the Black Sea. “Holding the Games in Sochi was an extraordinary act of hubris, demonstrating the boundless self-confidence of Putin’s one-man rule. Sochi was a summer resort on the Black Sea with a latitude similar to the French Riviera that had since Stalin’s era earned a reputation as a beach resort for Soviet workers and Communist Party bosses. There were mountains nearby, but they were covered with wild forest. The chutzpah of staging a Winter Olympic Games at Sochi was like hosting the Iditarod dog-sledding championships in Miami Beach, and yet it happened.”⁵⁷

30) Russian athletes had to shine and win during these world events hosted on Russian soil. “[T]he Sochi Olympics would be the first Games to be held on Russian soil since the collapse of the Soviet Union in 1991. Russian memories were long enough to recall the embarrassment of the Western boycott of the Moscow Games in 1980, following the Soviet invasion of Afghanistan. The Sochi Games in 2014 would be different; Russia was a bona fide member of the world community, and every nation with a winter sports team planned to compete. It is also important to recall the Russian failure at the 2010 Winter Olympic Games in Vancouver, where [its] athletes won three gold out of 15 medals in total and failed to finish among the top ten countries on the medal table”.⁵⁸

31) High expectations put pressure on Russian athletes and their coaches and staff. It was no more just a matter of competing and doing one’s best. It was a matter of national politics and international relations. “Russian officials were under enormous pressure ahead of the Games. Sochi was to be a showcase of Russia’s resurgence as a global power, and the entire country was enlisted in the project.”⁵⁹ “This wasn’t just a sporting contest; it was a geopolitical event”.⁶⁰ In 2015, Vitaly Mutko, Russia's Minister of Sport, declared that there is no point in taking an athlete to the Olympic

⁵⁶ See Church, *supra* note 31.

⁵⁷ Rodchenkov, *supra* note 32, p. 97.

⁵⁸ *Id.*, p. 57.

⁵⁹ Rebecca Ruiz & Michael Schwirtz, *Russian Insider Says State-Run Doping Fueled Olympic Gold*, The New York Times (12 May 2016); available at: (<https://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>) [Accessed on 30 Jan. 2021].

⁶⁰ Rodchenkov, *supra* note 32, Introduction.

games if she cannot reach the finals.⁶¹ As Dr Grigory Rodchenkov, the then head of the Russian national anti-doping laboratory, wrote: “Vladimir Putin had been President of the Russian Federation for five years. ... [He] lured Fetisov from the New Jersey Devils’ front office in 2002 to be the czar of Russian sport. Russia’s mediocre medal hauls at the Winter Games in Salt Lake City in 2002 and in Athens in 2004 hung over Fetisov’s head. In Athens, around 400 Russian Olympians had passed pre-departure doping control in Moscow but were caught during the Games. When I replaced Semenov, I promised Fetisov that no Russian athlete pre-tested by my laboratory would be found positive at an Olympic Games. That proved to be true, at five consecutive Games”⁶².

32) It was in this atmosphere that Yuliya Stepanova (née Rusanova), a runner and member of the Russian national team, and Vitaly Stepanov, an anti-doping agent of RUSADA, the Russian national anti-doping agency, became whistleblowers of the Russian doping scandal.

2 - FACTS PERTAINING TO THE COMMUNICATION

A - Yuliya Rusanova’s early life and athletic career.

33) Iuliia (Yuliya) Igorevna Rusanova was born in Kursk, Russia, on 3 July 1986. Her story is better told using the words of the letter she sent to WADA on 27 February 2013.⁶³ Yuliya fell in love with competitive sports and running early in her life. As she recalls: “When I was 14 years old, I watched the 2000 Olympics in Sydney ... on TV. When I was watching Russian athletes compete, I was getting very emotional, I looked at them as gods, as the people out of this world. I was crying when they were losing and felt happiness when they were winning. I felt a lot of respect for our country and the people who compete in the Olympics. Back then I could not imagine that I can be one of the athletes representing Russia in international competitions. I was absolutely sure that to be

⁶¹ Allsport.info, *Vitaly Mutko: there is no point in leading a person to the Olympic Games so that he does not even qualify and reach the final* (Виталий Мутко: вести человека на Олимпийские игры, чтобы он даже не отобрался в квалификации и не вышел в финал, смысла никакого нет), 18.11.2015; available at <http://allsportinfo.ru/index.php?id=99356> [Last visited 15 Feb. 2021].

⁶² *Id.*, p. 57.

⁶³ See Annex B1. [hereinafter Letter to WADA]

a professional athlete you need to train since your childhood. I was 14 and passed my childhood, so I could only watch these athletic heroes”.⁶⁴

34) In 2003, at seventeen, she started competing. “When I was 17, in 2003, I was going to a college in my hometown Kursk and like many people in my physical education class had to pass running normative to pass the class. I always loved physical education classes and always did better than most of my classmates in passing running normative. I was faster. Between different colleges there was a running competition ... In these competitions, I came 3rd and did not receive a medal. Only the winner received a medal. I decided to find a coach, train, and the following year to win the same competition. This is when my sports career started. My physical education teacher from school, after listening to my plans, advised me to go to middle distance coach, Vladimir Mokhnev”.⁶⁵

35) Vladimir Mokhnev was “a member of USSR national team. Back then, they used steroids that were a lot stronger and he always told me that he is fine now and he had kids and that the use of steroids didn’t really affect his life at all”.⁶⁶ Yuliya’s relationship with her coach progressed to be more personal, and, eventually, intimate.⁶⁷

36) “I was sure that after training for one year and getting a medal I will quit training. But I started to like training. I was making new friends and I was doing well at training. As a result, I was getting faster and faster. In a year, the college competition that I was training for was cancelled, but by that time I was already a top 3 runner in my city and in my region. I started going to national competitions for my age group but was always far away from medaling. The girls from my age group were running a lot faster than I. I consoled myself with the thought that I cannot compete with those girls yet because I had not trained enough yet”.⁶⁸

37) Soon, Yuliya became ensnared in the doping culture that pervades Russian sports: “About the same time my running friends started telling me that those girls run so fast not because they are so talented, or they train more but because they take some prohibited pills that they get from their

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Walsh, *supra* note 35, pp 61-65.

⁶⁸ Letter to WADA, *supra* note 63, p 2.

coaches. In fact, all top-level athletes take those pills.”⁶⁹ They told her: “They have big-shot coaches and better running gear than you have. But those big-shot coaches give them pills to make them run faster. Wise up. It’s not just hunger. It’s pills and injections and hunger.”⁷⁰

38) “After training for 3 years and continuing losing at national competitions I started asking my coach to give me those pills as well. He was telling me that it’s too early for me because my base training is not at the necessary level yet. During my first 2 years of training I didn’t take any medicine or supplements at all. During my third year I started taking general vitamins, extra iron, B12, inosine, ascorbic acid, carnitine, actovegin, mildronat, potassium orotate, glucose. Some of those medications were injected by my coach”.⁷¹

39) In March 2006, at nineteen, Yuliya fell gravely ill with tuberculosis. “Even though many people around me were telling me that I will not be able to run again I kept dreaming that I will get healthy and will be able to run again, which by that time became something that I loved doing and could not live without. I was lucky. The doctor that was assigned to me in the hospital turned out to be a very good man and promised me that I will be fine and will be able to run again. Later my coach told me that he spoke to the doctor about giving me some prohibited substances. And the doctor answered that probably it will even help for a faster recovery. After getting out of the hospital I slowly started running again and the first 6 months or so I was training lightly and was taking only pills that were prescribed to help recover. The following winter my coach decided to give me testosterone propionate (virormone).⁷² A 2ml ampoule was divided in 7 equal parts. Each part was injected subcutaneously (under skin) every third day. I was told that it is detectable for 5 days after the last injection. In January 2011, [I was told] that testosterone injections are good only when the ampoule is opened and there was no point dividing the ampoule in 7 parts as only the first part actually did something. And testosterone is used for intramuscular injection only. So, many things that I did as my coach told me later turned out to be incorrect. And really, it’s hard to tell at some

⁶⁹ *Id.*

⁷⁰ Walsh, *supra* note 35, p 63.

⁷¹ Letter to WADA, *supra* note 63, p 2.

⁷² Virormone Injection Testosterone is a prescription medication used to treat low testosterone levels in men who do not produce enough natural testosterone. Testosterone is the primary sex hormone and anabolic steroid in males. In male humans, testosterone plays a key role in the development of male reproductive tissues such as testes and prostate, as well as promoting secondary sexual characteristics such as increased muscle and bone mass, and the growth of body hair. Testosterone is a prohibited doping substance.

points of my career whether my result was getting better because I trained more or because I used some medicine or because I thought that I'm taking some medicine and I must be faster. Before doing testosterone injections the wrong way my [personal record] PR in 800m was 2:13; after my PR was 2:08.47".⁷³

40) The "Summer [of] 2007 was the first time when my coach gave me Oral Turinabol pills⁷⁴ and EPO injections.⁷⁵ My PR moved to 2:03.47 in 800m. I was 7th in the Nationals for my age group. ... As I was told by my coach there is always doping control and National Championships and his whole preparation (training and prohibited substances) was calculated the way that I was clean while competing".⁷⁶ In the "Winter [of] 2008, I took Oral Turinabol pills every day.... I did testosterone injections the same way as the previous winter. Also, I took non prohibited substances. My PR moved to 2.01.96. I won the National Championship at my age group and became a member of a National team (20-23 age group)".⁷⁷

41) "The following few seasons my preparation didn't change much. The new substances were Oxanabol (Oxandrolone)⁷⁸ and Parabolan.⁷⁹ The more I trained the more pharmacological help my body needed to keep improving. Sometimes from taking prohibited substances my muscles were getting very tightened and I just couldn't run. Sometimes my blood was getting very thick. I had to keep training through those problems as I thought that all athletes are going through this. And in the end, most of the times by the time when I was competing at the Nationals and I was not taking anything prohibited my body, my muscles were beginning to act normal and I was competing well. I continued preparing by taking the prohibited substances but by the time I was competing at the National Championships I was always clean, and I never failed a doping test".⁸⁰

⁷³ Letter to WADA, *supra* note 63, p. 2.

⁷⁴ Oral Turinabol is a brand name for Chlorodehydromethyltestosterone, an anabolic-androgenic steroid. It is a prohibited doping substance.

⁷⁵ EPO – Erythropoietin: a hormone produced by the kidney that promotes the formation of red blood cells by the bone marrow. It is a prohibited doping substance.

⁷⁶ Letter to WADA, *supra* note 63, p. 2.

⁷⁷ *Id.*, p 3.

⁷⁸ Oxandrolone is an "anabolic" steroid that promotes the growth of muscle tissue. It is an artificial steroid, similar to the naturally occurring steroid testosterone.

⁷⁹ Parabolan is a brand name of is a long acting-variant of Trenbolone. Trenbolone, also known as trienolone or trienbolone, is a steroid used on livestock to increase muscle growth and appetite.

⁸⁰ Letter to WADA, *supra* note 63, p 3.

42) “Sometime after the National Championships one of the coaches, while being drunk, said that I tested positive at the Nationals Of course, my coach started calling people that he was buying the prohibited substances from, who knew Mr. Rodchenkov, [the head of Russia's national anti-doping laboratory],⁸¹ to find out if the information is true. And those people and Mr. Rodchenkov decided to make some “cash” on this talk. I do not remember exactly how everything happened, as it was 2.5 years ago, but I personally took about \$1,000 to Mr. Rodchenkov’s friend and he guaranteed that I do not have anything to worry about. Later the same day Mr. Rodchenkov called to my coach directly and explained how everything happened but since we paid money nothing will come out”.⁸²

B - Yuliya Rusanova meets Vitaly Stepanov.

43) On 2 August 2009, Yuliya Rusanova met Vitaly Stepanov, an agent of the Russian Anti-Doping Agency (RUSADA). An article published in the *Sunday Times*, tells their story.⁸³ Their first date “was at a restaurant in Domodedova, a city about 25 miles south of Moscow. She was staying with relatives. He was keen. Before getting in his car to drive there, he called. Not feeling that well, she said: "Can we re-arrange for another day?" He said he was already on the road. OK, she said. Even that first evening, there was something between them. He told about the bad things he'd seen working for the Russian Anti-Doping Agency. Lies. Intimidation. Bribes. The time the vice-president of the federation told him he couldn't test an athlete due to be tested. And the coach who said to him: "This is women's weightlifting, what do you think you're doing?" when he came to collect samples. She was an elite 800m runner. He thought he was telling her stuff she didn't know. She told him he knew nothing. Doping was part of the system. Without it, you couldn't compete. Coaches supplied drugs to their runners, the chief medical officer supervised doping preparation and the national coach was involved. The tests, she said, weren't a problem. Worried about a urine sample, your coach would ring the guy at the national anti-doping lab and it went away. For a fee,

⁸¹ “Grigory Mikhailovich Rodchenkov was the former head of Russia's national anti-doping laboratory”. See *Grigory Rodchenkov*, Wikipedia; available at: (https://en.wikipedia.org/wiki/Grigory_Rodchenkov) [Accessed on 30 Jan. 2021].

⁸² Letter to WADA, *supra* note 63, p 4.

⁸³ David Walsh, *Husband and Wife Who Brought Down Russia*, *Sunday Times* (29 Nov 2015); available at: (<https://www.thetimes.co.uk/article/husband-and-wife-who-brought-down-russia-9hvkzx59l>) [Accessed on 30 Jan. 2021].

of course. He had suspicions. She had facts. He had a sense of what was going on. She knew. They talked a lot. They hit it off. He really liked her. And he couldn't help being a little seduced by what she knew. The hours passed. She had an early flight from Domodedovo Airport to some race, he doesn't remember where, but he asked if he could take her to the airport. He'd have to drive to his apartment in Moscow, which would take an hour, then another hour back at first light. "It's OK," he said, "I don't mind." She said goodnight. He parked the car near the apartment block where she was staying and slept in the back seat. It was a strange night in the life of Vitaly Stepanov. He had fallen in love with a woman. And out of love with athletics".⁸⁴

44) On 10 October 2009, Yuliya Rusanova and Vitaly Stepanov married but Yuliya kept her last name for months, as their marriage strained under the weight of the inherent contradiction: a doped athlete married to an upright anti-doping officer.

C - A Rising Star in World Athletics.

45) Yuliya continued to run and to improve. Again, in her own words: "Usually at National Championships first places get athletes from Moscow and Moscow region. Being from Kursk region, I could only dream about winning and qualifying for European or World championships. I just couldn't understand why athletes from Moscow and Moscow region are stronger than from other regions. I was taking the prohibited substances just as they were doing but I couldn't win. Everything came in place when ARAF head coaches and managers finally noticed me and decided to take me under their control".⁸⁵

46) "During the 2010 Summer National Championships, athletes were qualifying for the European Championships. Since Mariya Savinova already qualified, only two other 800m runners could qualify. I was running in the final and finished 3rd by losing just 0.01 seconds to Svetlana Klyuka. That is when the head endurance coach, Mr. Melnikov, finally started taking me seriously. About one month before the National Championships Mr. Melnikov called my coach and told us to compete at European Athletics Outdoor Classic Meeting "Znamensky Memorial" near Moscow. My

⁸⁴ *Id.*

⁸⁵ Letter to WADA, *supra* note 63, p 3.

coach answered that I'm preparing for the National Championships and will run only if Mr. Melnikov guarantees that I will not be tested."⁸⁶

47) In December 2010, Yuliya connected with Dr. Sergei Nikolayevich Portugalov,⁸⁷ the "person responsible for pharmacological (doping) preparation of most top-level athletes. Mr. Portugalov was responsible for such pharma preparation in many other sports as well. During one of my first visits to him I had to wait for a long time while he was talking to swimming coaches. Mr. Portugalov's office is in the same building with the Russian lab. My first meeting with him was a long one. ... He wanted to know exactly what I took before. He told me what to take (prohibited and not prohibited) while preparing for this winter season. Then he gave me prohibited and non-prohibited medicine and told me exactly how much I have to pay for this visit. I always paid to him in cash. Mr. Portugalov said that I can always call him on his cell phone if I have any questions of if something is going not as planned. Mr. Portugalov gave me Oxastenon. He explained that it is combined Oral Turinabol and Oxandrolone and it is detectable for about 35 days. Mr. Portugalov also told me how to take Oxastenon. He told me to start with one pill per day and if my muscles are fine then to start taking 1.5 pills. If my muscles tighten and I have hard time training then go back to taking 1 pill per day. ... Mr. Portugalov was right – 1.5 pills was too much for me as my muscles were tightening too much. I went back to less dosage and it let me train normally. My [former] coach, Mr. Mokhnev, didn't realize the previous years that some dosages were just too much for my muscles and my body".⁸⁸ "For the preparation under the supervision of Mr. Portugalov I had to pay him 5% of all the money that I earned at IAAF meetings and in the case of medaling at European or World Championships: \$1,600 for gold, \$1,000 for silver, and \$700 for bronze".⁸⁹

48) "Of course the most interesting part of the meeting with Mr. Portugalov for me was that I no longer had to be clean for the National Championships. He said that we had to make sure that I'm clean at European Championships. I could run dirty at the nationals. I guess the main reason why

⁸⁶ *Id.*

⁸⁷ Dr. Sergei Portugalov, Chief of the Medical Commission of the All-Russia Athletic Federation (ARAF), later renamed Russian Athletics Federation, is one of the main figures involved in the implementation of the Russian doping program prior to the 2016 Summer Olympics.

⁸⁸ Letter to WADA, *supra* note 63, p 4.

⁸⁹ *Id.*, p 6.

ARAF decided to give me a chance was the fact that I was able to run clean faster than dirty top Russian runners”.⁹⁰

49) “When I came back from a training camp in Portugal, in December, I met with Mr. Portugalov again. He told me to do 3 injections (1/2 ampoule each) of testosterone. I thought that this is just way too much for me, but since I always listened to what he told me, I did as he told me to. ... On February 6th, while running 600m at IAAF Permit Meeting “Russian Winter” in Moscow, I was very close to breaking a world record: 1:24.04. Later that evening Mr. Portugalov told me to do 1 ampoule of testosterone and don’t do any hard work outs for 3 days as I could tear my muscles. ... On February 16th and 17th, I competed at National Indoor Championships. I won my 800m heat with the time of 1:59.98 and won the final with 1:58.14. After the final I was tested by RUSADA [the Russian Anti-Doping Agency]. Once I exited doping control station, I sent an SMS with a number of my sample to Mr. Portugalov. I still have all pink copies from my doping controls. And as for many others that were preparing directly for the European championships my sample was clean. One week before the European Championships RUSADA tested us again. This is called “away” doping-control. It is always requested by the Russian Ministry of Sports ... to make sure that all the athletes that are going to compete internationally abroad are clean. Of course if someone for some reason is not clean at such doping-control then that person stays in Russia and doesn’t compete or that person gets tested again a few days later to make sure that he is finally clean. In France, on March 3rd, 2011, I gave blood for my blood passport [Athlete Biological Passport. A document that provides a physiological baseline on every athlete to help identify possible doping for the first time]. My results were ... abnormal results and I probably could have been or should have been sanctioned back then. But I continued competing”.⁹¹

50) “Preparing for Summer 2011 was similar to Winter 2011. I was doing everything that Mr. Portugalov and Mr. Melnikov were telling me. Oxastenon, EPO, competing dirty at National Championships. After I finished 3rd at European Championships during winter Mr. Portugalov was disappointed. I really don’t know if he was joking or not but he told me that he bet some money on me as he was sure that I will win. And I didn’t. So, for summer 2011, Mr. Portugalov didn’t really

⁹⁰ *Id.*, p 4.

⁹¹ *Id.*, p 5.

want to prepare me, but Mr. Melnikov insisted that I should be one of the 6 athletes at 800m that are being prepared for the World Championship in Daegu. The five others were – Savinova, Kosteckaya, Kotulskaya (Kofanova), Kluka, Zinurova. So, for 3 places to qualify for the World Championships were 6 runners that were able to compete dirty at the Nationals. I was 2nd in the final (1:56.99), losing only to Savinova (1:56.95). During the Summer preparation, ARAF was taking a closer look at our blood results but still didn't completely understand what the IAAF [the International Association of Athletics Federations] is looking for. As Mr. Melnikov said later, the actual time when they were able to understand blood passports results was spring of 2012".⁹²

51) "Because [Stepanova] was a medal contender at the international level, she was ... considered 'untouchable'. In Russia, that meant an athlete who was doped, with the knowledge of her coaches and sports federation, with performance-enhancing drugs like anabolic steroids and the blood-boosting agent EPO, and who was protected from drug-testing controls within her country."⁹³

D - Whistleblowing.

52) It was in February 2010, during the first days of the Vancouver winter Olympics, when Vitaly decided to blow the whistle. He met with WADA officials in private to tell them that "doping was more institutionalized than he had ever imagined: ... athletes who were present but not available for testing, and coaches who believed they could nominate who should be tested, all that was just the tip of the iceberg. ... RUSADA's habit of only looking in places where it would find nothing ... [that] if we stumble across a positive it can be disappeared for a small fee ... those who test positive are carefully chosen from the second or third tier."⁹⁴

53) In May 2010, Vitaly Stepanov began sending emails to WADA alleging that RUSADA was enabling systemic doping in athletics.⁹⁵ Over the course of the next four years, Vitaly sent more

⁹² *Id.*, p 6.

⁹³ Dionne Koller, *An Olympic Anti-Doping Champion*, The New York Times (16 June 2016); available at: (<https://www.nytimes.com/2016/06/16/opinion/an-olympic-antidoping-champion.html?action=click&module=RelatedCoverage&pgtype=Article®ion=Footer>) [Accessed on 30 Jan. 2021].

⁹⁴ Walsh, *supra* note 35, pp. 74-75.

⁹⁵ Daniel Schwartz, *Whistleblowers Yuliya and Vitaly Stepanova Describe Russia's Sports Doping System*, CBC News (13 Jan 2016); available at: (<https://www.cbc.ca/news/world/stepanov-doping-the-national-1.3402916>) [Accessed on 30 Jan. 2021]; see also Gene Cherry, *Whistleblower Nearly Aborted Efforts to Expose Russian Doping*, Reuters, (9

than two hundred emails and fifty letters to WADA.⁹⁶ On 1 March 2011 Vitaly was fired from RUSADA.

54) As soon as Yuliya's coaches realized that her husband was an upright anti-doping officer, the system started giving them the cold shoulder.⁹⁷ As Yuliya wrote: "In February 2012, after I qualified for the World Indoor Championships, Mr. Portugalov decided to stop preparing me completely. I had questions about using Altitude Sleeping Systems (Hypoxico) and he wasn't answering to me for 3 days and then I received an SMS from him that he changed his job and cannot help me anymore. It was strange and I don't know the exact reason for his action, but it could be because of my husband. He used to work at RUSADA from 2008 to 2011 and really tried fighting doping, and many people, including Mr. Portugalov, didn't like him because he did not want to be a part of corrupt doping system. Maybe Mr. Portugalov didn't want to work with me because IAAF sent the lists of athletes with abnormal blood results and I was in those lists. Anyways, he continued working with other athletes and I was the only one he stopped working with".⁹⁸

55) She continues: "In the Spring of 2012, I was injured and was not able to compete during the Summer season at all. Before the Olympics, I decided to change coach and asked Mr. Kazarin, who is a coach of Mariya Savinova, if he would take me. He said that he would gladly take me. But Mr. Melnikov and Mr. Portugalov didn't want me to change the coach before the Olympics. They told Mr. Kazarin that I'm very problematic and I have a husband who doesn't fit in our system. Mr. Kazarin apologized and told me to wait until the end of London Olympics. Mariya Savinova won the Olympics and Mr. Melnikov let Mr. Kazarin to take me in his group. Once I started training with Mr. Kazarin, we started having pharmacological preparation talks. In general, everything was the same as with Mr. Mokhnev. Only Mr. Kazarin was very surprised that I did not use any HGH (human growth hormone) under the preparation with Mr. Portugalov. Mr. Kazarin said that it could be a big plus in the future as I still have room for improvement. Unfortunately, in November [2012], when I

May 2016); available at: (<https://www.reuters.com/article/us-doping-athletics-russia-whistleblower/whistleblower-nearly-aborted-efforts-to-expose-russian-doping-idUSKCN0Y1023>) [Accessed on 30 Jan. 2021].

⁹⁶ *Id.*

⁹⁷ Koller, *supra* note 93.

⁹⁸ Letter to WADA, *supra* note 63, p. 6.

was supposed to start taking Oxanabol and Primobol tablets,⁹⁹ it turned out that my blood passport results are not very good and I could be sanctioned sooner or later. Mr. Melnikov told Mr. Kazarin not to prepare me for this winter season and see how everything turns out. In December, I got injured again. I was trying to recover as soon as possible but still every day I was nervous and uncertain about my future. From January 28th to February 8th, 2013, I was in Ukraine at a mud cure resort trying to recover from my injury. On February 5th, 2013 I called Mr. Kazarin to find out if there is any news and he informed me that I must visit Mr. Melnikov as soon as I'm in Moscow. He said that I will probably be sanctioned for 2 years".¹⁰⁰

56) On 26 February 2013, the IAAF announced that Stepanova had been banned for two years following abnormalities in her "athlete biological passport". All of her results from 3 March 2011 (European Indoor Championship, World Indoor Championship and World Championship) on were forfeited.

57) "When I came to visit Mr. Melnikov, Mr. Kazarin came to his office as well. Mr. Melnikov was being nice to me while talking, it almost sounded like that he is apologizing for the fact that I [was] sanctioned".¹⁰¹ "Mr. Melnikov told me that the best way for female athletes to go through disqualification is by getting pregnant. This way, under the Russian law, a pregnant person or a mother with a small child cannot be fired. So, it means that if I get pregnant fast enough then I can probably still receive salaries even though I'm sanctioned."¹⁰²

58) Yuliya and Vitaly, who relied on Yuliya's income, had no choice but to start a pregnancy. "Yuliya, always quick, became pregnant almost instantly".¹⁰³ As soon as the results of the pregnancy tests were confirmed, Yuliya changed her last name to Stepanova. Using the money she won competing, they decided to go and give birth to their son in the United States. On 17 November 2013, Yuliya gave birth to Robert, at the Reading Hospital, in Pennsylvania.¹⁰⁴ "As usual with Yuliya and Vitaly, nothing was simple. Vitaly was punctilious as always. He wanted everything to be right.

⁹⁹ Primobol is a brand name for metenolone enanthate, or methenolone enanthate. It is an androgen and anabolic steroid (AAS) medication that is used mainly in the treatment of anemia caused by bone marrow failure.

¹⁰⁰ Letter to WADA, *supra* note 63, p. 7.

¹⁰¹ *Id.*, p 7.

¹⁰² *Id.*, p 8.

¹⁰³ Walsh, *supra* note 35, p. 223.

¹⁰⁴ *Id.*, pp. 222-227.

Entering America, he had made sure to tell the Customs and Border Protection official at the airport that his wife was pregnant, and they furnished proof that he had the financial means to pay for the birth”.¹⁰⁵

59) “When I ... found out about being sanctioned, the world that I imagined to myself collapsed in front of my eyes, and it was very bitter to understand that I’m being sanctioned and the people that set up such doping system in Russia will not be punished at all, and will continue to prepare athletes the same way”.¹⁰⁶ “After much soul-searching, Ms. Stepanova decided to come clean. She chose not to seek a lighter punishment by invoking a provision of the World Anti-Doping Code that permits WADA to reduce sanctions for athletes who provide assistance to anti-doping efforts. Instead, she served her ban and joined her husband, Vitaly Stepanov, in the risky task of amassing evidence of officially sanctioned Russian doping. Together, they provided WADA with credible evidence of systemic cheating.”¹⁰⁷

E - The Scandal Blows Up.

60) For years, despite Vitaly’s emails and letters, WADA, refused to investigate the allegations that Russia was running a State-sponsored doping program. Instead, they forwarded the allegations to Russian sports officials for comments.¹⁰⁸ In fact, WADA had its hands tied. “Their own WADA Code had been framed to preclude them from formally investigating a country. Sport in Russia was meant to be policed by RUSADA. WADA’s hands were bound with their own silk. ... RUSADA could say their donkey was a zebra but WADA couldn’t come and check this out to its own satisfaction.”¹⁰⁹ “WADA had been created with its own assumption undermining it. There

¹⁰⁵ *Id.*, p. 225.

¹⁰⁶ Letter to WADA, *supra* note 63, p. 9.

¹⁰⁷ Koller, *supra* note 93.

¹⁰⁸ In December 2012, Darya Pishchalnikova, a discus thrower and winner of the silver medal at the 2012 Olympics, sent an email to WADA containing details of an alleged state-run doping program in Russia. According to The New York Times, the email reached three top WADA officials but the agency decided not to open an inquiry. Instead, it forwarded her email to Russian sports officials. In April 2013, having failed a doping test for the second time (after a previous two-year doping ban in 2008–2010), Pishchalnikova was banned by the Russian Athletics Federation (RusAF) for ten years, in a move that was likely in retaliation. See Rebeca Ruiz *et. al*, *Even With Confession of Cheating, World’s Doping Watchdog Did Nothing*, The New York Times (15 June 2016); available at: (<https://www.nytimes.com/2016/06/16/sports/olympics/world-anti-doping-agency-russia-cheating.html>) [Accessed on 31 Jan. 2021].

¹⁰⁹ Walsh, *supra* note 35, p. 79.

would be no more state-sponsored cheating. True? Doping had moved into the era of privatization. Governments would never travel the road, not after the fall of the German Democratic Republic's sport empire. If there was a problem anywhere in the world, WADA would alert the anti-doping authorities in the local precinct. Simple? Nobody had imagined that the anti-doping police might be as corrupt as the place they policed. Nobody had made contingencies for a rouge state."¹¹⁰

61) Eventually, then WADA's chief investigator, Jack Robertson, believing media attention was necessary to overcome institutional resistance, obtained the permission of then WADA Director-General, David Howman, to talk with Hajo Seppelt, a German journalist who had previously reported on doping in East Germany and other countries. Robertson put Seppelt in touch with Vitaly. After talking to Vitaly, Seppelt started working in earnest on a documentary, eventually titled "The Doping Secret: How Russia Makes its Winners" (*Geheimsache Doping: Wie Russland seine Sieger macht*).

62) On 23 November 2014, ten days before Seppelt's documentary was scheduled to be aired, Yuliya, Vitaly and their one-year-old son Robert, fled from Russia. They boarded a flight of Sheremetyevo Airport, Moscow, to Prague.¹¹¹ On their phones they had multiple recordings and videos that would substantiate what they'd been telling WADA for five years and that they could use to seek asylum.¹¹²

63) On 3 December 2014, the German TV channel, ARD, broadcast Seppelt's documentary.¹¹³ In this 60-minute documentary, Russian athletes and other whistleblowers testified to systematic doping in athletics and other sports in Russia. The film presented evidence for these allegations in form of footage and audio recordings secretly made by Yuliya and Vitaly as well as official documents. They were two central figures in the documentary. "In a sports world battered by wave after wave of scandal, [the doping documentary:] *Top Secret Doping – How Russia Makes Its Winners* was a bona fide tsunami."¹¹⁴

¹¹⁰ *Id.*, p. 137.

¹¹¹ Walsh, *Husband and Wife Who Brought Down Russia*, *supra* note 83.

¹¹² *Id.*

¹¹³ The English version of the documentary is available here: <https://vimeo.com/249176658>. A transcript in English of the documentary can be found here: https://presse.wdr.de/ploungue/tv/das_erste/2014/12/_pdf/English-Skript.pdf.

¹¹⁴ Walsh, *supra* note 35, p. 315.

64) The documentary attracted global media attention and was broadcast worldwide in a number of languages. Russian media portrayed the documentary as Western conspiracy and numerous allegations and threats were made against both Yuliya and Vitaly.¹¹⁵ The reaction by Russian authorities was vitriolic. A spokesman for President Putin called Yuliya a “Judas”.¹¹⁶ Russian media attacked her character, and her mother was criticized at work for raising an “unpatriotic” daughter.¹¹⁷

65) “Threats were being made on their lives.... They were constantly aware of the hatred coming at them from the flamethrower of public opinion in Russia. Never far from their thoughts either was the list of dead men and women who had died mysterious, agonizing or bizarre deaths after calling out Russia and its sins. ... In Germany there were many times when Yuliya had felt very scared. She would wake up at night, thinking she had heard movement in the apartment. Somebody had been sent from Russia to kill them.”¹¹⁸ On 10 September 2015, the Stepanovs left Germany for the United States, where they applied for asylum.

F - The Russian State-Sponsored Doping Program Is Investigated and Documented.

66) In wake of the ARD documentary, WADA formed an independent commission, headed by its former President, Mr. Richard “Dick” Pound, to investigate the matter. After almost a year, on 9 November 2015, WADA released a 335 page report detailing the results of the investigation, revealing widespread doping, large-scale cover-ups and corruption in the Russian Athletics Federation (ARAF).¹¹⁹ “It’s worse than we thought,” Dick Pound said at a news conference in a Geneva hotel. “This is an old attitude from the Cold War days.”¹²⁰

¹¹⁵ See *infra*, paras. 121-138.

¹¹⁶ Sean Ingle, *Stepanova to Compete as ‘Neutral Athlete’ in Rio*, The Guardian (1 July 2016); available at: (<https://www.theguardian.com/sport/2016/jul/01/russian-whistleblower-yulia-stepanova-cleared-neutral-athlete-rio>) [Accessed on 31 Jan. 2021].

¹¹⁷ Lucy Ash, *Yuliya Stepanova: What do Russians Think of Doping Whistleblower?*, BBC News (30 Dec. 2016); available at: (<https://www.bbc.com/news/magazine-38406627>) [Accessed on 31 Jan. 2021].

¹¹⁸ Walsh, *supra* note 35, p. 311.

¹¹⁹ See ARAF Independent Commission Report, *supra* note 52.

¹²⁰ Rebecca R. Ruiz, *Drugs Pervade Sport in Russia, World Anti-Doping Agency Report Finds*, The New York Times (9 Nov. 2015); available at: (<https://www.nytimes.com/2015/11/10/sports/russian-athletes-part-of-state-sponsored-doping-program-report-finds.html>) [Accessed on 31 Jan. 2021].

67) The report recommended that ARAF be declared in breach of the World Anti-Doping Code and suggested a provisional suspension.¹²¹ A day later, WADA suspended the Moscow Anti-Doping Laboratory, prohibiting it "from carrying out any WADA-related anti-doping activities including all analyses of urine and blood samples".¹²²

68) On 13 November 2015, the IAAF Council voted 22–1 to ban Russia from world track and field events with immediate effect and until a five-person IAAF commission could certify ARAF was clean again.¹²³ Also, Russia was prohibited from hosting the 2016 World Race Walking Team Championships and 2016 World Junior Championships.¹²⁴ ARAF accepted the indefinite suspension and did not request a hearing.

69) On 18 November 2015, WADA suspended RUSADA, meaning that Russia no longer had a valid National Anti-Doping Organization (NADO) that could validly test athletes, for any sport.¹²⁵ Starting from February 2016, the United Kingdom Anti-Doping agency was tasked to oversee testing in Russia.¹²⁶

70) During the same month, Russian authorities fired Dr. Grigory Rodchenkov, the head of Russia's national anti-doping laboratory.¹²⁷ He immediately fled Russia to the United States, where he has been living in hiding, under federal protection, since, sharing his knowledge of the Russian

¹²¹ ARAF Independent Commission Report, *supra* note 52, p. 315.

¹²² World Anti-Doping Agency, *WADA Acts Immediately to Suspend Accreditation of Moscow Laboratory*, (10 Nov. 2015); available at: (<https://www.wada-ama.org/en/media/news/2015-11/wada-acts-immediately-to-suspend-accreditation-of-moscow-laboratory>) [Accessed on 31 Jan. 2021].

¹²³ Mitch Phillips, *Russia Suspended After Overwhelming IAAF Vote*, Reuters (14 Nov. 2015); available at: (<https://www.reuters.com/article/athletics-corruption/russia-suspended-after-overwhelming-iaaf-vote-idUSKCN0T22IH20151114>) [Accessed on 31 Jan. 2021].

¹²⁴ *Id.*

¹²⁵ National Anti-Doping Organizations (NADO) are charged with testing their nation's athletes as well as running anti-doping programs for all athletes competing at events held within the national borders.

¹²⁶ *IAFF Freezing Nationality Switches, Upholding Russia Ban*, Yahoo News (6 Feb. 2017); available at: (https://www.yahoo.com/news/iaaf-freezing-nationality-switches-191331047.html?guccounter=1&guce_referrer=aHR0cHM6Ly9lbi53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAEAWtnpxVg2QyRWvSZjFhzDqrD1gKfFncXv91e0Q-xiET-hwNG1bvRTBK1_hN8c8UcNAdo8DYDzsbf_VCkD1dbvp5oLUMtr_i7Zh266iZMTMLxJ70-CFiPRQbojBh2YwhIJjPkveER0emLxXzytu99AyOHSziTuoqxNG-KqarK) [Accessed on 31 Jan. 2021].

¹²⁷ Rodchenkov, *supra* note 32, pp. 125-126.

doping program widely.¹²⁸ On 17 November 2017, Leonid Tyagachev, a top Russian Olympic official, said that Rodchenkov "should be shot for lying, like Stalin would have done".¹²⁹ It was also reported that Russian officials intensively lobbied U.S. politicians in an apparent attempt to achieve his extradition to Russia.¹³⁰

71) In February 2016, Mr. Vyacheslav Sinev (58 y/o), founding RUSADA chairman, and Mr. Nikita Kamaev (53 y/o), former head of RUSADA, died unexpectedly of massive heart attacks within 11 days of each other.¹³¹ The *Sunday Times* reported that Kamaev had approached the newspaper shortly before his death planning to publish a book on "the true story of sport pharmacology and doping in Russia since 1987".¹³² Bellingcat, a British investigative journalism website that specializes in fact-checking and open-source intelligence, suggested the Russian Federal Security Service (FSB) might have played a role in their death.¹³³

72) In March 2016, a second Seppelt's documentary was broadcast by WDR, a German TV channel. The documentary entitled "The Doping Secret: Russia's Red Herrings" (*Geheimsache Doping: Russlands Täuschungsmanöver*), alleged that athletes were alerted about testing plans and offered banned substances by individuals at RUSADA and ARAF.¹³⁴

¹²⁸ *Id.*, p. 10. Rodchenkov's revelations were the subject of the 2017 Netflix documentary ICARUS, which won the Academy Award for Best Documentary Feature at the 90th Oscars ceremony. (<https://www.netflix.com/title/80168079>).

¹²⁹ Shaun Walker, *Russian Olympic Official Says Doping Whistleblower Should Be Executed*, The Guardian (17 Nov. 2017); available at: (<https://www.theguardian.com/sport/2017/nov/17/russian-olympic-official-says-doping-whistleblower-should-be-executed>) [Accessed on 31 Jan. 2021].

¹³⁰ Liam Morgan, *IOC Accused of Cowardice for Failing to Address Russian Retaliation Against Rodchenkov*, Inside the Games (26 Dec. 2017); available at: (<https://www.insidethegames.biz/articles/1059507/ioc-accused-of-cowardice-for-failing-to-address-russian-retaliation-against-rodchenkov>) [Accessed on 31 Jan. 2021].

¹³¹ Scott Polacek, *Nikita Kamaev, Former Head of Russia's Anti-Doping Agency, Dies at 52*, Bleacher Report (15 Feb. 2016); available at: (<https://bleacherreport.com/articles/2616907-nikita-kamaev-former-head-of-russias-anti-doping-agency-dies-at-age-52>) [Accessed on 31 Jan. 2021]; See also Sarah Hurst et. al, *Suspicious Russian Deaths: Sacrificial Pawns or Coincidence?*, USA Today (2 May 2017); available at: (<https://www.usatoday.com/pages/interactives/suspicious-russian-deaths-sacrificial-pawns-or-coincidence/>) [Accessed on 31 Jan. 2021].

¹³² Nicholas Hellen, *Russian Doping Chief Wanted to Tell All*, The Sunday Times (21 Feb. 2016); available at: (<https://www.thetimes.co.uk/article/russian-doping-chief-wanted-to-tell-all-5b2xb57q0wl>) [Accessed on 31 Jan. 2021].

¹³³ Bellingcat verifies FSB "involvement" in death of two RUSADA employees (31 Jan 2021); available at <https://www.en24news.com/e/2021/01/bellingcat-verifies-fsb-involvement-in-death-of-two-rusada-employees.html> [Accessed on 15 Feb. 2021].

¹³⁴ The documentary is available at: (<https://vimeo.com/161028203>) [Accessed on 31 Jan. 2021].

73) In May 2016, Rodchenkov revealed how Russia's intelligence services set up a program to falsify the results of doping controls at the Sochi 2014 Winter Olympics by switching urine samples through a hole in the laboratory's wall.¹³⁵ WADA Started focusing on that event.

74) On 19 May 2016, WADA appointed, Richard McLaren, a Canadian jurist and attorney, to lead an investigation into the Sochi Olympics. McLaren's team moved fast conducting witness interviews, reviewing thousands of documents, analysis of hard drives, forensic analysis of urine sample collection bottles, and laboratory analysis of individual athlete samples.

75) On 18 July 2016, McLaren released a 97-page report (Independent Person Report #1).¹³⁶ The report concluded "beyond a reasonable doubt" that the Russian Ministry of Sports, the Centre of Sports Preparation of the National Teams of Russia, the Federal Security Service (FSB), and the WADA-accredited laboratory in Moscow had "operated for the protection of doped Russian athletes" within a "state-directed failsafe system" using "the disappearing positive [test] methodology" (DPM).¹³⁷ DPM is a procedure which ensures that "if anyone doped, ... their doping would be covered up at the Laboratory stage", by reporting the results as negative after receiving the orders from Russian Ministry of Sports.¹³⁸ According to the McLaren report, the DPM was used at least on 643 positive samples, from late 2011 to August 2015, to cover up positive results in a wide range of sports.¹³⁹

¹³⁵ Ruiz et. al., *supra* note 59.

¹³⁶ Richard H McLaren, *McLaren Independent Investigation Report – Part I*, World Anti-Doping Agency (18 July 2016); available at: (https://www.wada-ama.org/sites/default/files/resources/files/20160718_ip_report_newfinal.pdf) [Accessed on 31 Jan. 2021] [hereinafter McLaren's First Report].

¹³⁷ *Id.*, p. 1.

¹³⁸ *Id.*, pp. 32-36.

¹³⁹ Athletics (139); Weightlifting (117); Non-Olympic sports (37); Paralympic sport (35); Wrestling (28); Canoe (27); Cycling (26); Skating (24); Swimming (18); Ice hockey (14); Skiing (13); Football (11); Rowing (11); Biathlon (10); Bobsleigh (8); Judo (8); Volleyball (8); Boxing (7); Handball (7); Taekwondo (6); Fencing (4); Triathlon (4); Modern pentathlon (3); Shooting (3); Beach volleyball (2); Curling (2); Basketball (1); Sailing (1); Snowboard (1); Table tennis (1); and Water polo (1).

76) In light of these findings, WADA declared RUSADA in violation of the World Anti-Doping Code and recommended that Russian athletes be banned from competing at the 2016 Summer Olympics to be held in Rio, Brazil.¹⁴⁰

77) In light of the McLaren report, the IOC decided to begin re-analysis of blood and urine samples at the Sochi Olympics and launch a full inquiry into Russian athletes. It also asked sports federations to seek alternative hosts for major events that had been assigned to Russia.¹⁴¹

78) On 21 July 2016, the Court of Arbitration for Sport (CAS) rejected an appeal by the Russian Olympic Committee and 68 Russian athletes over their ineligibility for the future Olympic Games decided by the IAAF.¹⁴² On 24 July 2016, the IOC rejected WADA's recommendation to ban Russia from the 2016 Summer Olympics in Rio and announced that instead, each sport federation would decide whether to ban Russian athletes.¹⁴³ The IAAF decided to ban Russian athletes from the Rio Olympics. However, it also decided that “three or four” Russian athletes might be permitted to appear as independent competitors.

79) On 1 July 2016, the IAAF recommended that Stepanova be allowed to compete due to her "truly exceptional contribution to the fight against doping in sport" including "great personal risks".¹⁴⁴ Five days later, she competed at the European Championships but finished last in her heat with a torn ligament in her foot. On 24 July 2016, the IOC rejected the recommendation to allow

¹⁴⁰ World Anti-Doping Agency, *WADA Statement: Independent Investigation Confirms Russian State Manipulation of the Doping Control Process*, (18 July 2016); available at: (<https://www.wada-ama.org/en/media/news/2016-07/wada-statement-independent-investigation-confirms-russian-state-manipulation-of>) [Accessed on 31 Jan. 2021].

¹⁴¹ International Olympic Committee, *Statement of the Executive Board of the International Olympic Committee on the WADA Independent Person Report*, (19 July 2016); available at: (<https://www.olympic.org/news/statement-of-the-executive-board-of-the-international-olympic-committee-on-the-wada-independent-person-report>) [Accessed on 31 Jan. 2021].

¹⁴² Court of Arbitration for Sport, *Media Release: Athletics – Olympic Games Rio 2016, The Court of Arbitration For Sport (CAS) Rejects the Claims/Appeal of the Russian Olympic Committee (ROC) and of 68 Russian Athletes*, (21 July 2016); available at: (https://www.tas-cas.org/fileadmin/user_upload/Media_Release_4684_210716.pdf) [Accessed on 1 Feb. 2021].

¹⁴³ International Olympic Committee, *Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016*, (24 July 2016); available at: (<https://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016>) [Accessed on 31 Jan. 2021].

¹⁴⁴ David Walsh, *Fitting Tribute for the Whistleblower who Changed Athletics*, *The Sunday Times* (19 June 2016); available at: (<https://www.thetimes.co.uk/article/fitting-tribute-for-the-whistleblower-who-changed-athletics-z79g8vnc7>) [Accessed on 31 Jan. 2021].

Stepanova to compete at the 2016 Summer Olympics,¹⁴⁵ citing as a reason her 2013 disqualification, even though her two year suspension had expired, and even though she had not requested a reduction of her suspension, to which she was entitled as a whistleblower.¹⁴⁶ Commenting on the IOC decision on Stepanova, WADA Director General, Mr. Olivier Niggli, stated that his agency was "very concerned by the message that this sends whistleblowers for the future".¹⁴⁷

80) In August 2016, WADA reported that Yuliya's athlete account, where she enters information about her whereabouts, had been hacked. The likely culprit is a Russian cyberespionage group called Fancy Bear,¹⁴⁸ which is linked to the GRU, the Russian Military Intelligence Agency.¹⁴⁹ According to WADA, "a subsequent investigation allowed the agency to determine that no other athlete accounts on ADAMS (Anti-Doping Administration & Management System) have been accessed".¹⁵⁰ This was not the first unauthorized access to Yuliya's account. In February 2016, it had been agreed that "her ADAMS details, and most especially to her whereabouts, would be accessible only to two people: one from WADA and one from the IAAF. One day Vitaly checked her file. It had been accessed by RUSADA, IDTM and Russian Athletics. They knew where she was."¹⁵¹

¹⁴⁵ *Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016*, *supra* note 143.

¹⁴⁶ *Rio Olympics 2016: Russia Not Given Blanket Games Ban by IOC*, BBC Sport (24 July 2016); available at: (<https://www.bbc.com/sport/olympics/36878983>) [Accessed on 31 Jan. 2021].

¹⁴⁷ World Anti-Doping Agency, *WADA Acknowledges IOC Decision on Russia, Stands by Agency's Executive Committee Recommendations*, (24 July 2016); available at: (<https://www.wada-ama.org/en/media/news/2016-07/wada-acknowledges-ioc-decision-on-russia-stands-by-agencys-executive-committee>) [Accessed on 31 Jan. 2021].

¹⁴⁸ *Fancy Bear*, Wikipedia (updated 19 Dec. 2020); available at: (https://en.wikipedia.org/wiki/Fancy_Bear) [Accessed on 31 Jan. 2021].

¹⁴⁹ U.S. Department of Justice, *U.S. Charges Russian GRU Officers with International Hacking and Related Influence and Disinformation Operations*, (4 Oct. 2018); available at: (<https://www.justice.gov/opa/pr/us-charges-russian-gru-officers-international-hacking-and-related-influence-and>) [Accessed on 31 Jan. 2021]. "State-sponsored hacking and disinformation campaigns pose serious threats to our security and to our open society, but the Department of Justice is defending against them," Attorney General Jeff Sessions said. "Today we are indicting seven GRU officers for multiple felonies each, including the use of hacking to spread the personal information of hundreds of anti-doping officials and athletes as part of an effort to distract from Russia's state-sponsored doping program. The defendants in this case allegedly targeted multiple Americans and American entities for hacking, from our national anti-doping agency to the Westinghouse Electric Company near Pittsburgh. We are determined to achieve justice in these cases and we will continue to protect the American people from hackers and disinformation."

¹⁵⁰ *Rio Olympics 2016: Russian Whistleblower Yuliya Stepanova has Account Hacked*, BBC Sport (13 Aug. 2016); available at: (<https://www.bbc.com/sport/olympics/37072843>) [Accessed on 31 Jan. 2021].

¹⁵¹ Walsh, *supra* note 35, p. 311.

81) In October 2016, Russia's Minister of Sport, Mr. Vitaly Mutko, was promoted to deputy prime minister despite allegations that he had covered up the doping program.¹⁵²

82) On 3 November 2016, Russia approved a new anti-doping law. The bill was passed unanimously by the State Duma, and was rushed forward ahead of the publication of a fuller version of the WADA McLaren's report into the Russian doping program. In an attempt to deflect blame away from the State on to coaches, the law singled out coaches as the source of the doping plague.¹⁵³ It provides for prison terms for coaches found guilty of coercing young athletes into using PEDs. Also, coaches or sports officials could be liable for fines up to 300,000 rubles (\$4,700) or up to a year in prison in cases where young athletes are coerced into doping.

83) On 9 December 2016, McLaren published the second part of its report (Independent Person Report #2), concluding that Russia had hijacked international sports for years.¹⁵⁴ The second part revealed that between 2011 and 2015, more than 1,000 Russian athletes in various sports (including summer, winter, and Paralympic sports) had been part of the doping program.¹⁵⁵ It was later reported that five blind powerlifters and a fifteen-year-old competitor might have been given drugs without their knowledge.¹⁵⁶

84) In July 2016, the IOC created an independent commission, chaired by the former President of Switzerland, Samuel Schmid, to investigate the systematic manipulation of the anti-doping system in Russia, and, in particular, the manipulation at the anti-doping laboratory at the Olympic Winter Games Sochi 2014. Over 17 months of extensive work, the Schmid Commission

¹⁵² *Russian Sports Minister Vitaly Mutko Appointed Deputy Prime Minister*, Deutsche Welle (19 Oct. 2016); available at: (<https://www.dw.com/en/russian-sports-minister-vitaly-mutko-appointed-deputy-prime-minister/a-36094135>) [Accessed on 31 Jan. 2021].

¹⁵³ *Russia Approves Anti-Doping Law Targeting Coaches*, USA Today (3 Nov. 2016); available at: (<https://www.usatoday.com/story/sports/olympics/2016/11/03/russian-parliament-passes-tough-anti-doping-bill/93227110/>) [Accessed on 31 Jan. 2021].

¹⁵⁴ Richard H McLaren, *McLaren Independent Investigation Report – Part II*, World Anti-Doping Agency, p. 74 (9 Dec. 2016) available at: (<https://www.wada-ama.org/en/resources/doping-control-process/McLaren-independent-investigation-report-part-ii>) [Accessed on 31 Jan. 2021] (hereinafter McLaren's Second Report).

¹⁵⁵ *Id.*, pp. 2, 5.

¹⁵⁶ James Ellingworth, *Emails Show How Russian Officials Covered Up Mass Doping*, AP News (12 Dec. 2016); available at: (<https://apnews.com/article/8be9cb7fcb5b4d65b1031597bb9f9e5e>) [Accessed on 31 Jan. 2021].

gathered evidence and information and held hearings with all the main actors, including Vitaly Stepanov. Due process, to which every individual and every organization is entitled, was followed.¹⁵⁷

85) On 2 December 2017, the Schmid Commission released its final report, which confirmed “the systemic manipulation of the anti-doping rules and system in Russia, through the Disappearing Positive Methodology and during the Olympic Winter Games Sochi 2014, as well as the various levels of administrative, legal and contractual responsibility, resulting from the failure to respect the respective obligations of the various entities involved”.¹⁵⁸ As a consequence, the Schmid Commission recommended to the Executive Board of the IOC “to take the appropriate measures that should be strong enough to effectively sanction the existence of a systemic manipulation of the anti-doping rules and system in Russia, as well as the legal responsibility of the various entities involved” while protecting the rights of the individual Russian clean athletes.¹⁵⁹

86) On 5 December 2017, after discussing and approving the Schmid Report, the IOC Executive Board decided to: (1) suspend the Russian Olympic Committee (ROC) with immediate effect; (2) to invite individual Russian athletes to participate in the Olympic Winter Games PyeongChang 2018 under the name “Olympic Athlete from Russia”, with a uniform bearing this name, under the Olympic Flag, and with the Olympic Anthem played in any ceremony instead of the Russian; (3) not to accredit any official from the Russian Ministry of Sport for the Olympic Winter Games PyeongChang 2018; (4) to exclude the then Minister of Sport, Mr. Vitaly Mutko, and his then Deputy Minister, Mr. Yuri Nagornykh, from any participation in all future Olympic Games; (5) to withdraw Mr. Dmitry Chernyshenko, the former CEO of the Organizing Committee Sochi 2014, from the Coordination Commission Beijing 2022; (6) to suspend ROC President, Mr. Alexander Zhukov, as an IOC Member, given that his membership is linked to his position as ROC President

¹⁵⁷ International Olympic Committee, *Decision of the Executive Board*, (5 Dec. 2017); available at: (<https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Disciplinary-Commission/IOC-DC-Schmid/Decision-of-the-IOC-Executive-Board-05-12-2017.pdf>) [Accessed on 31 Jan. 2021].

¹⁵⁸ International Olympic Committee, *IOC's Disciplinary Commission's Report to the IOC's Executive Board*, pp. 24-26 (2 Dec, 2017); available at: (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) [Accessed on 31 Jan. 2021]

[hereinafter Schmid Report]

¹⁵⁹ *Id.*, p. 28.

and to reserves the right to take measures against and sanction other individuals implicated in the system.¹⁶⁰

87) The next day, Putin announced his decision "not to prevent individual Russian athletes" from participating at the 2018 Winter Games. He also stated that he was pleased that the Schmid Commission's report did not find any proof that the Russian government was involved in a doping conspiracy".¹⁶¹ However, the report of the Schmid Commission only concluded that there was not enough evidence to claim that the highest Russian state authorities were involved. The fact that Russian Ministry of Sport and Federal Security Service were part of the scheme was never in doubt and was unequivocally affirmed by the Schmid Commission report.¹⁶²

88) On 9 December 2019, after it was found that data provided to WADA had been manipulated by Russian authorities with a goal of protecting athletes involved in its doping scheme, the WADA Executive Committee issued a four year ban on Russia.¹⁶³ The ban excludes Russia from competing in the Summer Games in Tokyo (scheduled for Summer 2020 but postponed to 2021 due to the COVID-19 pandemic), the 2022 Winter Games in Beijing, the 2022 FIFA World Cup, the Youth Olympic Games, Paralympics, world championships and other major sporting events subject to World Anti-Doping Code.¹⁶⁴ Nevertheless, WADA will allow individually cleared Russian athletes to compete neutrally under a title to be determined, which may not include the name "Russia".¹⁶⁵ Russia appealed this WADA decision to the Court of Arbitration for Sport (CAS), and a CAS arbitral panel issued an award on 17 December 2020 confirming a two-year ban of Russian teams.¹⁶⁶

¹⁶⁰ *Decision of the IOC Executive Board Concerning the Participation of Russian Athletes in the Olympic Games Rio 2016*, *supra* note 143.

¹⁶¹ *Putin Considers it Important that the Conclusions of the IOC Does Not Contain Any Conclusions About State Support for Doping In Russia* (translated via Google translate), TACC (6 Dec. 2017); available at: (<https://tass.ru/sport/4790004>) [Accessed on 5 Feb. 2021].

¹⁶² Schmid Report, *supra* note 158, pp. 24-27.

¹⁶³ World Anti-Doping Agency, *WADA Executive Committee Unanimously Endorses Four-Year Period of Non-Compliance for the Russian Anti-Doping Agency*, (9 Dec. 2019); available at: (<https://www.wada-ama.org/en/media/news/2019-12/wada-executive-committee-unanimously-endorses-four-year-period-of-non-compliance>) [Accessed on 31 Jan. 2021].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Court of Arbitration for Sport, *Decision in the Arbitration WADA v. RUSADA*, (17 Dec. 2020); available at: (https://www.tas-cas.org/fileadmin/user_upload/CAS_Media_Release_6689_decision.pdf) [Accessed on 31 Jan. 2021].

G - The Life of Yuliya Stepanova, Vitaly Stepanov and Robert Stepanov Since.

89) Fearing retaliation by Russian authorities for their whistleblowing and spooked by the suspected deaths of RUSADA officials, the Stepanovs fled from Russia on 23 November 2014 to Prague, and from there, by train to Berlin. On 10 September 2015, they moved to the United States where they are now asylum seekers.

90) Yuliya continues to experience the harmful health effects caused by years of doping. In Germany, her doctor warned that the ferritin level in her blood was dangerously high. Yuliya's blood was tested again in the United States in November 2016. That test showed a ferritin level of 1126 ng/mL, far exceeding the normal range of 13-50 ng/mL.¹⁶⁷ A second test, done in January 2017, reported ferritin level of 1133 ng/mL.¹⁶⁸ Yuliya has not undergone another blood test since due to the high costs of tests for uninsured persons. The doctor in Germany told Yuliya that as long as she continues to run, the high level of ferritin in her blood would not necessarily be a problem. However, it would become a serious threat to her health if and when she stops running.

91) On 24 October 2016, the International Olympic Committee announced that it was going to help Yuliya and Vitaly for their role in exposing the Russian doping program. Namely, Yuliya was given a limited Olympic Scholarship to help her offset the costs of her training. Vitaly was retained as consultant for the IOC on doping matters.¹⁶⁹ In 2016, people supporting the Stepanovs launched a fundraising campaign. They also received some money as authors of a new published book: *“The Russian Affair”*. On a few occasions they also were paid for speaking at conferences and to students.

¹⁶⁷ Annex B2.

¹⁶⁸ Annex B3.

¹⁶⁹ *IOC Says It Is Offering Assistance to Russian Whistleblowers*, USA Today (24 Oct. 2018); available at: (<https://www.usatoday.com/story/sports/olympics/2016/10/24/ioc-says-it-is-offering-assistance-to-russian-whistleblowers/92667176/>) [Accessed on 31 Jan. 2021].

92) At the end of 2016, Stepanova was chosen as one of BBC's 100 Women, a list of the top 100 inspirational and influential women of 2016.¹⁷⁰ In 2016, she also won Germany's Doping-Opfer-Hilfe (Doping Victims Assistance) Prize.¹⁷¹

93) The efforts of the Stepanovs to unearth the secret Russian doping program have also been acknowledged by the U.S. Government. On 25 July 2018, Yuliya appeared before the U.S. Senate during a hearing for the adoption of a statute to impose criminal sanctions on those involved in international doping fraud conspiracies, to provide restitution for victims of such conspiracies, and to require sharing of information with the United States Anti-Doping Agency to assist its fight against doping.

94) Yuliya told the U.S. Congress that if a reform is going to happen, “it should start with Putin.”¹⁷² “When Vitaly and Yuliya first considered becoming whistleblowers they didn’t know the meaning of the word. Nor could they imagine the scale of the fallout from their actions. Olympic and World Championship medals would be stripped, world records vacated, bans handed out, reputations lost. The collective memory of events like the 2012 summer Olympics in London and the 2014 Winter Games in Sochi would henceforth be seen through the cloud of Russia’s state-organized cheating. ... Correcting what had gone wrong with Russian sport is a project that will require long and continuous attention. They lit a fuse and the explosion that followed would reach backwards and forwards in time.”¹⁷³

95) The U.S. Congress recognizes the crucial role of Yuliya and Vitaly in exposing the Russian doping program to the world: “After the Sochi games, whistleblowers Yuliya Stepanova ... and her husband, Vitaly Stepanov ... exposed the Russian Government’s vast state sponsored doping system, which subsequently led to further revelations by Dr. Grigory Rodchenkov, the chemist who

¹⁷⁰ *BBC 100 Women 2016: Who is on the List?*, BBC News (7 Oct. 2019); available at: (<https://www.bbc.com/news/world-38012048>) [Accessed on 31 Jan. 2021].

¹⁷¹ *Whistleblower Stepanova Awarded German Anti-Doping Prize*, Deutsche Welle (6 Dec. 2016); available at: (<https://www.dw.com/en/whistleblower-stepanova-awarded-german-anti-doping-prize/a-36661171>) [Accessed on 31 Jan. 2021].

¹⁷² Ben Nuckols, *Hearing Points to Putin’s Role in Russian Doping Scandal*, AP News (25 July 2018); available at: (<https://apnews.com/6bc6805ca91548dbbf22501ed9f0fe37/Hearing-points-to-Putin's-role-in-Russian-doping-scandal>) [Accessed on 31 Jan. 2021].

¹⁷³ Walsh, *supra* note 35, p. 314.

ran the Russian anti-doping laboratory.”¹⁷⁴ It continues that: “it is only through the efforts of principled inside informants like Ms. Stepanova that the truth can come to light. ... [these individuals] taken enormous personal risks for the cause of clean sport [and not paying attention to this] in effect, punish her for speaking the truth and upholding the World Anti-Doping Code and Olympic ideals.”¹⁷⁵ Dr. Rodchenkov became a whistleblower only after the Stepanovs accused him of being central to the doping scheme. As he acknowledged: “My main accuser was Yuliya Stepanova.”¹⁷⁶

96) The “Rodchenkov Anti-Doping Act of 2019”, as the bill was eventually named, became law in November 2020. In the preamble of the bill, the U.S. Congress acknowledged: “[I]n International sporting events, the facts of a doping fraud conspiracy may not support the use of existing laws. As is evident from the recent exposure of the doping fraud conspiracy in Russia involving the Sochi Olympic Games and other Major International Sport Competitions before and after such Olympic Games, whistleblowers, including Dr. Grigory Rodchenkov and Yuliya and Vitaly Stepanov, can play a critical role in exposing doping fraud conspiracies and other fraudulent acts in international sport. These whistleblowers, including Dr. Grigory Rodchenkov and Yuliya and Vitaly Stepanov, often expose major international doping fraud conspiracies at considerable personal risk. By criminalizing these conspiracies, such whistleblowers will be included under existing witness and informant protection laws”.¹⁷⁷

IV - JURISDICTION AND ADMISSIBILITY

1 - THE COMMITTEE HAS JURISDICTION OVER THIS COMMUNICATION

97) Article 1 of the Optional Protocol (on Individual Communications) to the ICCPR ("OP") states: “A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to

¹⁷⁴ U.S. House of Representatives, *Congressional Record*, H8339 (22 Oct. 2019); available at: (<https://www.congress.gov/116/crec/2019/10/22/CREC-2019-10-22-pt1-PgH8339-2.pdf>) [Accessed on 31 Jan. 2021].

¹⁷⁵ Koller, *supra* note 93.

¹⁷⁶ Rodchenkov, *supra* note 32, p. 115.

¹⁷⁷ *Id.*, pp. 5-6.

its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”

98) The Union of Soviet Socialist Republics (Soviet Union or USSR) ratified the ICCPR on 16 October 1973.¹⁷⁸ It acceded to the OP on 1 October 1991.¹⁷⁹ Upon deposit of the instrument ratifying the ICCPR, the USSR attached the following declaration: “The Union of Soviet Socialist Republics, pursuant to article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to the jurisdiction of the Union of Soviet Socialist Republics, in respect of situations or events occurring after the date on which the Protocol entered into force for the USSR. The Soviet Union also proceeds from the understanding that the Committee shall not consider any communications unless it has been ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the individual in question has exhausted all available domestic remedies.”¹⁸⁰ Upon deposit of the instrument ratifying the OP, the USSR attached the following declaration: “The Union of Soviet Socialist Republics declares that, pursuant to article 41 of the International Covenant on Civil and Political Rights, it recognizes the competence of the Human Rights Committee to receive and consider communications submitted by another State Party, in respect of situations and events occurring after the adoption of the present declaration, provided that the State Party in question has, not less than 12 months prior to the submission by it of such a communication, recognized in regard to itself the competence of the Committee, established in article 41, in so far as obligations have been assumed under the Covenant by the USSR and by the State concerned.”¹⁸¹ Neither declaration is relevant for this case.

¹⁷⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, U.N.T.S. Vol. 999, p. 171 (16 Dec. 1966); available at: (https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND) [Accessed on 31 Jan. 2021] [hereinafter ICCPR].

¹⁷⁹ UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, U.N.T.S. Vol. 999, p. 171 (16 Dec. 1996); available at: (https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&lang=en) [Accessed on 31 Jan. 2021] [hereinafter ICCPR OP].

¹⁸⁰ ICCPR, *supra* note 178, Declarations and Reservations.

¹⁸¹ ICCPR OP, *supra* note 179.

99) Russia succeeded to the Soviet Union in its obligations under the ICCPR and OP on 25 December 1991.¹⁸² Therefore, at the time of the relevant events detailed in the present communication, Russia was bound by the provisions of the ICCPR and the Optional Protocol.

100) This communication is submitted on behalf of two individuals, who at the time of the events were subject to Russia's jurisdiction, and of their child. It claims violation of several articles of the ICCPR: with regard to Yuliya Stepanova, Articles 7, first and second sentence, 8.3.a, 17.1, 17.2, 19.2, and 23.1, all in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3; with regard to Vitaly Stepanov, Articles 17.1, 17.2, 19.2, and 23.1, all in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3.

101) The authors would like to remind the Committee that, for the purpose of determining the admissibility of a communication, a colorable claim is sufficient to proceed. The facts presented in this communication have been confirmed by investigations of authoritative international sport governing bodies¹⁸³ and international organizations,¹⁸⁴ and they have been widely publicized in news reports, books, and scholarly articles as the footnotes to this communication show.

102) Finally, the burden of the proof, both on admissibility and merits, is always on the State. "The burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence ... [therefore,] it [is] incumbent upon the State party to refute the allegations in detail, rather than shifting the burden of proof to the author".¹⁸⁵

2 - THIS COMMUNICATION IS ADMISSIBLE

103) Under Article 3 of the OP: "The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse

¹⁸² Permanent Mission of the Russian Federation to the United Nations, *History*; available at: (https://russiaun.ru/en/permanent_mission/istorija) [Accessed on 31 Jan. 2021].

¹⁸³ See *supra* notes, 52, 136, 154, and 158.

¹⁸⁴ UNESCO, *Conference of Parties to the International Convention Against Doping in Sport*, Annex 1 (19 Sep. 2017) ICDS/6CP/Doc.8; available at: (https://unesdoc.unesco.org/ark:/48223/pf0000259026_eng) [Accessed on 4 Feb. 2021] [hereinafter CoP to the UNESCO Convention]

¹⁸⁵ Human Rights Committee, *Mukong v Cameroon*, *Comm. No. 458/91*, U.N. Doc. CCPR/C/51/D/458/1991, para 9.2 (10 Aug. 1994); available at: (<http://hrlibrary.umn.edu/undocs/html/vws458.htm>) [Accessed on 31 Jan. 2021].

of the right of submission of such communications or to be incompatible with the provisions of the Covenant”.¹⁸⁶ Under Article 5.2 of the OP: “The Committee shall not consider any communication from an individual unless it has ascertained that: (a) The same matter is not being examined under another procedure of international investigation or settlement; (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged....”¹⁸⁷

104) The Committee’s Rules of Procedure add further admissibility requirements:

“(a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Optional Protocol;

(b) That the individual claims, in a manner sufficiently substantiated, to be a victim of a violation by that State party of any of the rights set forth in the Covenant. Normally, the communication should be submitted by the individual personally or by that individual’s representative. A communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally;

(c) That the communication does not constitute an abuse of the right of submission. An abuse of the right of submission is not, in principle, a basis of a decision of inadmissibility *ratione temporis* on grounds of delay in submission. However, a communication may constitute an abuse of the right of submission, when it is submitted five years after the exhaustion of domestic remedies by the author of the communication, or, where applicable, three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, taking into account all the circumstances of the communication;

(d) That the communication is not incompatible with the provisions of the Covenant;

¹⁸⁶ ICCPR OP, art. 3.

¹⁸⁷ ICCPR OP, art. 5.2.

(e) That the same matter is not being examined under another procedure of international investigation or settlement;

(f) That the individual has exhausted all available domestic remedies”.¹⁸⁸

A - The Matter is Not Being Examined Under Another Procedure of International Investigation or Settlement

105) The authors confirm that the question of the violation of the rights of Yuliya Stepanova and Vitaly Stepanov has not been submitted to any other procedure for international investigation or settlement.

B - The Communication is Not Anonymous, nor an Abuse of the Right of Submission, nor Incompatible with the Covenant

106) This communication is not anonymous. The victims are clearly identified and they have agreed to have this communication submitted to the Committee.¹⁸⁹

107) This communication is not incompatible with the provisions of the Convention, nor can it be construed as an abuse of the right to submit a communication. It is actually an exercise of the rights contained in the Covenant and in compliance with the requirements set forth in the Optional Protocol. It stems from events that took place at a time and place over which the Committee has jurisdiction, and it puts forth well-substantiated and reasoned arguments as to why the facts described, including the background, suggest a violation of the rights of the alleged victims that are protected by the Covenant. Thus, it is neither vexatious nor frivolous.

C - Exhaustion of Domestic Remedies

108) According to Article 5(2)(b) of the OP: “The Committee shall not consider any communication from an individual unless it has ascertained that: ... (b) The individual has exhausted all available domestic remedies”. The so-called “rule of exhaustion of domestic remedies” is one of

¹⁸⁸ Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, U.N. Doc. CCPR/C/3/Rev.11, rule 99 (9 Jan 2019); available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f3%2fRev.11&Lang=en [Accessed on 31 Jan. 2021].

¹⁸⁹ See Annex A3, see also *supra* para. 7.

the fundamental principles of international procedural law. It gives States a chance to correct a potential wrongdoing before a case is brought before an international adjudicative body.¹⁹⁰ However, the rule “may be described as one that is golden rather than cast in stone”.¹⁹¹ International courts have applied the rule flexibly and “have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.”¹⁹² In the human rights context, the European Commission of Human Rights and the European Court of Human Rights have frequently underlined the need to apply the rule with some degree of flexibility and without excessive formalism ...”.¹⁹³

109) The rule is not to be applied automatically.¹⁹⁴ Rather, it must “be applied consistently with its rationale,”¹⁹⁵ and *pro homine* or *pro personae*.¹⁹⁶ It is the prevailing practice of international courts and tribunals as well as of UN treaty bodies to place the burden of proof that effective domestic remedies were available on the State. As the European Court of Human Rights held in *Vučković and Others v. Serbia*: “it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time.”¹⁹⁷ The

¹⁹⁰ Sarah Joseph & Melissa Castan, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY*, p. 121 (Oxford 2013).

¹⁹¹ European Court of Human Rights, *Practical Guide on Admissibility Criteria*, p. 25 at para. 82 (30 April. 2020); available at: (https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf) [Accessed on 31 Jan. 2021].

¹⁹² Judge Sir Hersch Lauterpacht, *Separate Opinion in Certain Norwegian Loans (France v. Norway)*, p. 34 (6 July 1957); available at: (<https://www.icj-cij.org/public/files/case-related/29/029-19570706-JUD-01-03-EN.pdf>) [Accessed on 31 Jan. 2021].

¹⁹³ European Court of Human Rights, App. No. 2614/65, *Ringeisen v. Austria*, Judgement, para. 89 (16 July 1971); available at: (<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-57565%22%7D>) [Accessed on 31 Jan. 2021].

¹⁹⁴ European Court of Human Rights, App. No. 2334/04, *Kozacıoğlu v. Turkey*, Judgement, para. 40 (19 Feb. 2009); available at: (<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-91413%22%7D>) [Accessed on 31 Jan. 2021]. See also European Court of Human Rights, App. No. 21987/93, *Aksoy v. Turkey*, Judgement, para. 53 (18 Dec. 1996); available at: (<https://www.dipublico.org/1563/case-of-aksoy-v-turkey-application-no-2198793-european-court-of-human-rights/>) [Accessed on 31 Jan. 2021].

¹⁹⁵ Silvia D’Ascoli & Kathrin Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and Its Application in the Specific Context of Human Rights Protection*, European University Institute Working Paper Law No. 2007/02, p. 15 (21 Feb. 2007); available at: (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=964195) [Accessed on 31 Jan. 2021].

¹⁹⁶ “Th[e] *pro homine* principle, that is, the notion that international human rights law must first and foremost take into account the protection of the human person is not a creation of human rights lawyers or typically human rights courts. Even at the global level, adjudicative bodies should take into account the human person”. Valerio de Oliveira Mazzuoli, and Dilton Ribeiro, *The Pro Homine Principle as a Fundamental Aspect of International Human Rights Law*, 17 *Meridiano 47: Journal of Global Studies* 1, p.1 (2016).

¹⁹⁷ European Court of Human Rights, App. Nos. 17153/11 *et. al, Vučković and Others v. Serbia*, Judgement (Preliminary Objections) para. 77 (25 Mar. 2014); available at: (<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Vu%20%26%20Dkovi%20%26%20and%20Others%20v.%20Serbi>

availability of a remedy said to exist, including its scope and application, must be clearly set out and confirmed or complemented by practice or case law.¹⁹⁸

110) The rule is not absolute either.¹⁹⁹ It has several exceptions. To begin with, according to Article 5(2)(b) of the OP, it does not apply when “the application of the remedies is unreasonably prolonged”. Also, according to the International Law Commission’s (ILC) Articles on Responsibility of States for International Wrongful Acts, “[o]nly those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State.”²⁰⁰ Article 15 of the ILC Draft Articles on Diplomatic Protection further indicates other exceptions. “Local remedies do not need to be exhausted where: (a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress; (b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible; (c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury; (d) the injured person is manifestly precluded from pursuing local remedies; or (e) the State alleged to be responsible has waived the requirement that local remedies be exhausted”.²⁰¹

111) Paragraph (a) and (b) cover circumstances in which local courts offer no prospect of redress.²⁰² Paragraphs (c) and (d) cover circumstances where it would be unfair or unreasonable to require a victim to exhaust domestic remedies.²⁰³

[a%22,%22documentcollectionid%22:\[%22GRANDCHAMBER%22,%22CHAMBER%22\],%22itemid%22:\[%22001-142199%22\]}\]](#) [Accessed on 31 Jan. 2021].

¹⁹⁸ European Court of Human Rights, App. No. 4479/03, *Mikolajová v. Slovakia*, Judgement, para. 34 (18 Jan. 2011); available at: ([https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-102842%22%7D](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-102842%22%7D)]) [Accessed on 5 Feb. 2021].

¹⁹⁹ *Kozacioğlu v. Turkey*, ECtHR, *supra* note 194 at para. 40; *see also Aksoy v. Turkey*, *supra* note 194, para. 53.

²⁰⁰ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, p. 121 art. 44, comment 5 (2001); available at: (https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [Accessed on 31 Jan. 2021] [hereinafter ILC Articles on State Responsibility].

²⁰¹ International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, art. 15 (2006); available at: (https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf) [Accessed on 31 Jan. 2021] [hereinafter ILC Articles on Diplomatic Protection].

²⁰² *Id.*, art. 15 commentary 1.

²⁰³ *Id.*

i - Availability

112) Domestic remedies must be exhausted only when they are available. Any inquiry into the availability of domestic remedies requires in essence to answer the question of whether there is “a domestic court or tribunal which will take jurisdiction in the matter”.²⁰⁴ The authors submit that domestic remedies for the human rights violated in the present case are not available in Russia or anywhere else because the Russian legal framework is insufficient to provide a remedy.

113) In 2017, the Bureau of the Conference of the Parties to the UNESCO International Convention against Doping in Sport, conducted a review of the national anti-doping policies of Russia to “evaluate the current situation and the measures announced by the Russian Federation in respect of its commitments under the Convention.”²⁰⁵ The report concluded that Russia had an ineffective legal structure to fight doping and to prosecute violations of doping regulations.²⁰⁶ It identified a series of problems in the Russian legal system that prevent Russia from complying with its obligations under the UNESCO Convention.²⁰⁷ Specifically, the report denounced “[t]he inherent complexity of Russia’s internal law [, which] makes it difficult to meet the Convention objectives in an effective manner.”²⁰⁸ It also highlighted institutional confusion and a lack of domestic coordination within Russia, which further impedes the possibility of successful legal action.²⁰⁹

114) The report also soberly concluded that “States Parties sometimes lack the political will to act. They often fail to take action until a crisis occurs and the resulting media attention then becomes a political issue that must be dealt with.”²¹⁰ The Russian state-sponsored doping program was not merely a violation of international doping regulations, as it will explained below.²¹¹ It also included several criminal acts.²¹² The Final Report of the World Anti-Doping Agency (WADA) Independent Person into the Russian doping program established the direct involvement of “Russian

²⁰⁴ David R Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, American Journal of Internal Law, Vol. 58 No. 2 (1964); available at: (<https://www.jstor.org/stable/2196218?seq=1>) [Accessed on 31 Jan. 2021].

²⁰⁵ CoP to the UNESCO Convention, *supra* note 184, Annex 1, p. 5, para. 5.

²⁰⁶ *Id.*, Annex 1, p. 10, para. 48.

²⁰⁷ *Id.*, Annex 1, p. 10, para. 49.

²⁰⁸ *Id.*

²⁰⁹ *Id.*, Annex 1, p. 11, paras. 53-4.

²¹⁰ *Id.*, Annex 1, p. 11, para 52.

²¹¹ *See infra*, Section VI.

²¹² ARAF Independent Commission Report, *supra* note 52, p. 1.

law enforcement agencies”²¹³ in the program, and that the Ministry of Sports of the Russian Federation “did nothing to investigate the serious allegations of criminal conduct on the part of Russian Sport officials.”²¹⁴ There is no indication that those who planned, instigated and carried out the myriad of illegal actions that constituted the doping program in general, nor the specific events related to the case at hand, have been investigated, prosecuted or tried.

115) The authors of this communication invite the Committee to place the burden of proof of the availability of domestic remedies on Russia, in accordance with international procedural law.²¹⁵ Russia should be invited to provide examples of victims of its state-sponsored doping program who have successfully availed themselves of domestic remedies. After all, there is no shortage of victims. The investigations carried out by WADA and the International Olympic Committee (IOC) of the Russian doping program revealed that hundreds of athletes were involved.²¹⁶

116) Lastly, in considering availability of domestic remedies to the victims of the present communication, the Committee should consider that although there has been a growing trend among national jurisdictions in criminalizing doping and those who aid and abet the violation,²¹⁷ there is no indication that Russia has passed such legislation.

117) Doping cases are dealt with through arbitration tribunals and national courts have a very limited jurisdiction in these matters.²¹⁸ WADA and the Conference of the Parties of the UNESCO Convention have acknowledged the problem. “As a private institution under Swiss law, the World

²¹³ *Id.*, p. 27.

²¹⁴ *Id.*, p. 28.

²¹⁵ The European Court of Human Rights has confirmed the correctness of this approach in *Akdivar v. Turkey* it deemed significant that “the Government, despite the extent of the problem ... have not been able to point to examples of compensation being awarded in respect of allegations. See European Court of Human Rights, App. No. 21893/93, *Akdivar v. Turkey*, Judgement, para. 71 (16 Sept. 1996); available at: (<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-58062%22%7D%7D>) [Accessed on 31 Jan. 2021].

²¹⁶ “The investigations carried out by WADA and the International Olympic Committee (IOC) of the Russian doping program revealed that hundreds of athletes were involved during multiple international events (2012 London Olympic Games, 2013 Universidad Games, 2013 IAAF Moscow World Championships, 2014 Sochi Winter Olympic Games, aftermath of 2014 Sochi Games)”. McLaren’s second report, *supra* note 154, pp. 60-118.

²¹⁷ Eddie Pells, *Bill to Decriminalize Doping Schemes Passes Senate*, AP News (16 Nov. 2020); available at: (<https://apnews.com/article/united-states-doping-olympic-games-bills-laws-e92338b9a4adbc13d636716abfd46ba7>) [Accessed on 31 Jan. 2021].

²¹⁸ *Third Report on Diplomatic Protection by Mr. John Dugard Special Rapporteur*, U.N. Doc. A/CN.4/523, para. 39 (16 Apr. 2002); available at: https://legal.un.org/ilc/documentation/english/a_cn4_523.pdf [Accessed on 5 Feb. 2021] [Accessed on 31 Jan. 2021]. “It is not necessary to exhaust appellate procedures when the appeal court has limited jurisdiction”.

Anti-Doping Agency (WADA) faces a number of obstacles to putting in place an effective instrument for monitoring compliance with the World Anti-Doping Code.”²¹⁹ In fact, when public officials are involved in a doping program, as in the present case, private sport entities have no authority or jurisdiction to properly react to the situation. The only authority available to sport organizations is imposing sanctions on violators and banning the national Olympic Committee of the relevant state from Olympic activities. There are no remedies for the athletes who are the victims of such programs.

118) In sum, “[i]f it can be established that the legal system does not provide for an appropriate remedy to redress the violation incurred, be it that no adequate system of judicial protection exists at all, that no adequate remedy exists for the specific violation or that for other legal or factual reasons an abstractly existing remedy is not available to the individual in the specific circumstances of the case, the alien is not expected to exhaust the local remedies.”²²⁰ Yet, should the Committee find that there are domestic remedies available for the victims in the present case, then there is still the question of accessibility.

ii - Accessibility

119) A remedy is deemed accessible only if the victim can pursue it without excessive difficulties or unreasonable impediments. Moreover, a remedy is available only if the victim can make use of it in the circumstances of the particular case.²²¹ Although the European Court of Human Rights has held that the mere presence of borders is not per se an obstacle to the exhaustion of domestic remedies,²²² the personal circumstances of the applicant, as well as the general legal and political context, might render domestic remedies unavailable or ineffective.

²¹⁹ CoP to the UNESCO Convention, *supra* note 184, Annex 1, p. 21, para. 107.

²²⁰ Committee on Diplomatic Protection of Persons and Property, *International Law Association Reports of Conferences*, 69, 2000, pp. 604-654. *HeinOnline*, <https://heinonline.org.lib.pepperdine.edu/HOL/P?h=hein.ilarc/ilarc2000&i=622>.

²²¹ See e.g., *Rosendo Radilla Pacheco v. Mexico*, Report No. 65/05, Petition 777/01, Inter-American Commission on Human Rights, para. 20 (12 Oct. 2005): “[t]he parties’ submissions refer to the requirements set in Mexican law for amparo remedies to be filed and processed. The Inter-American Commission holds, for the purposes of admissibility, that the fact that in this specific case it was impossible to meet those requirements makes that remedy ineffective in providing the protection that it could, in other circumstances, possibly provide.” (emphasis added).

²²² “Borders, factual or legal, are not an obstacle per se to the exhaustion of domestic remedies; as a general rule, applicants living outside the jurisdiction of a Contracting State are not exempted from exhausting domestic remedies

120) “Facts that may indicate that a remedy is not accessible include: absence of the victim from the jurisdiction of the State Party, due to deportation, expulsion or refugee status, in circumstances where return to the territory of the State is prohibited or entails personal risk, where the remedies available after deportation, expulsion or displacement from the territory of the State would not be adequate for the relief sought, where counsel cannot effectively pursue the action on behalf of the victim in domestic fora or where procedural requirements cannot be met”.²²³

a - Well-founded fear of persecution

121) In general, “[o]ne is not required to pursue remedies which may foreseeably result in or exacerbate one’s victimization.”²²⁴ The Committee has consistently held that “people do not have to exhaust remedies in cases where doing so is *objectively dangerous* ...”.²²⁵ For instance, in *Avadanova v. Azerbaijan*, a case brought by an Azeri refugee in Greece, the State claimed that since the victim had not exhausted or even tried to exhaust domestic remedies in Azerbaijan, the communication was not admissible.²²⁶ The victim claimed that, for him, domestic remedies in Azerbaijan were ineffective and unavailable, “due to fears of reprisal, a lack of financial means to hire a lawyer, and partly to the alleged futility of the exercise since, in any case, the police would collectively defend itself.”²²⁷ The Committee declared the communication admissible because, “in the circumstances and in the absence of further information from the State party, it could not be held against the author that he had not raised these allegations before the State party authorities or courts for fear that this might result in his victimization and the victimization of his family”.²²⁸ The

within that State, practical inconveniences or understandable personal reluctance notwithstanding”. European Court of Human Rights, App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10300/04, 14163/04, 19993/04, 21819/04, *Demopoulos v. Turkey*, Grand Chamber Decision as to the Admissibility, para. 98 (3 Jan. 2010); available at: (<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-97649%22%7D%7D>) [Accessed on 5 Feb. 2021].

²²³ Donna J. Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, p. 20 (IWRAW 2008).

²²⁴ Joseph & Castan, *supra* note 190, p. 132.

²²⁵ *Id.*, p. 131, emphasis added, citing *Torres Ramirez v Uruguay* (4/77), *Grille Motta et al v Uruguay* (11/77), *Martinez Machado v Uruguay* (83/80), *Traore v Cote d’Ivoire* (1759/08), *Ltaief v Tunisia* (CAT 189/01), *Thabti v Tunisia* (CAT 187/01).

²²⁶ Human Rights Committee, Comm. No. 1633/2007, *Avadanova v Azerbaijan*, para 6.3 (2 Nov. 2010) U.N. Doc. CCPR/C/100/D/1633/2007; available at:

(http://www.worldcourts.com/hrc/eng/decisions/2010.10.25_Avadanov_v_Azerbaijan.pdf) [Accessed on 4 Feb. 2021].

²²⁷ *Id.*

²²⁸ *Id.* para. 6.4.

Committee also considered relevant that the author had been successful in obtaining refugee status in a third state.²²⁹

122) According to the European Court on Human Rights, domestic remedies are not accessible when there is “*risk of reprisals* against the applicants or their *lawyers if they had sought to introduce legal proceedings alleging ... [human rights violations resulting from] a deliberate State policy ...*”²³⁰ “[D]anger for life or limb to the applicant in the country where he would have to pursue the remedy” renders domestic remedies inaccessible.²³¹ “Factual denial of access to local remedies ... is probably better ... recognize[ed] ... as a special exception to the local remedies rule, as the remedy may in theory be both available and effective but will in practice be inaccessible.”²³² Again, as the commentary to the Draft Articles on Diplomatic Protection notes: “Circumstances that may manifestly preclude the exhaustion of local remedies possibly include the situation in which the injured person is prevented by the respondent state from entering its territory, either by law or *by threats to his or her personal safety.*”²³³

123) In *Akdivar*, a case against Turkey decided by the European Court of Human Rights, Turkey claimed that its courts had “profound experience” in dealing with cases similar to the one brought before the Court by the applicant,²³⁴ and that remedies had proved to be effective.²³⁵ Still, the Court concluded that the victim had well-founded fear of reprisal and therefore domestic remedies were not accessible.²³⁶

124) In *Paillalef v. Switzerland*, a communication brought before the Committee against Torture, the applicant argued she could not be expelled from Switzerland and returned to Chile due to a well-founded risk of being subject to torture and/or cruel, inhuman and degrading treatment in that country. The Committee found the communication to be admissible despite concluding that there was no consistent pattern of gross violation of human rights in Chile at that time, and that not every

²²⁹ *Id.*

²³⁰ *Akdivar v. Turkey*, ECtHR, *supra* note 215, para. 74. Emphasis added.

²³¹ Committee on Diplomatic Protection of Persons and Property, *supra* note 220, p. 624.

²³² *Third Report on Diplomatic Protection*, *supra* note 218, para. 100; *see also* Donna J. Sullivan, *Overview of the Rule Requiring the Exhaustion of Domestic Remedies under the Optional Protocol to CEDAW*, p. 20 (IWRAW 2008).

²³³ ILC Articles on Diplomatic Protection, *supra* note 201, p. 49, art. 15, commentary para. 11. Emphasis added.

²³⁴ *Akdivar v. Turkey*, ECtHR, *supra* note 215, para. 57.

²³⁵ *Id.*, para. 58.

²³⁶ *Id.*, paras. 76-7.

Chilean faced such risks.²³⁷ However, the nature of applicant's activities puts her in the same group with people who were subject to retaliation and punishment and, therefore, faced "a foreseeable and real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment".²³⁸

125) Asylum seekers and refugees are not in a position to exhaust domestic remedies in their country of origin. By definition, refugees are unable or unwilling to return to their country of origin, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion,"²³⁹ and, as such, cannot be expected to exhaust domestic remedies in the country from which they fled. The Stepanovs are asylum seekers in the United States. They have a well-founded fear of persecution in Russia, either directly at the hand of State authorities or by private parties acting with the acquiescence or pursuant to the instigation of the State.

126) The suppression of dissent and opposition in Russia is well documented. The murder of investigative journalist Anna Politkovskaya is the most notorious case among dozens of others involving Russian journalists. Many of these journalists were shot, but a surprising number of them appeared to have accidentally fallen from high windows or balconies.²⁴⁰ Other cases that caught the headlines around the world are those of Alexander Litvinenko, a former officer of the Russian Federal Security Service and KGB, who was poisoned in the UK with polonium, a highly radioactive material,²⁴¹ Sergey Skripal, a former Russian military intelligence officer, who was poisoned in the UK with nerve agents,²⁴² Alexei Navalny, the leader of the opposition to President Putin, who was

²³⁷ Committee Against Torture, Comm. No. 882/2018, *Paillalef v. Switzerland*, para 8.3 (17 Aug. 2018) U.N. Doc. CAT/C/68/D/882/2018; available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhssh2tXWBbyLwahMw00Sn91UqLfpI45zTrOxGFl6LnrV7V26pDOleSBpD3U8n4jo4JabH3377vXCedjVPMZnaE6CyXs3o17ijIkAx9yddyy%2fJuhvLsnQcskzllnkMARbnbjX9xnGbFmaueg2l5%2fvkxe2g%3d> [Accessed on 5 Feb. 2021].

²³⁸ *Id.* paras. 8.7, 8.8.

²³⁹ U.N. General Assembly, *Convention Relating to the Status of Refugees*, U.N.T.S. Vol. 189, at art. 1(a)(2) (28 July 1951); available at: (<https://www.unhcr.org/en-us/3b66c2aa10>) [Accessed on 5 Feb. 2021].

²⁴⁰ Walsh, *supra* note 35, p. 362.

²⁴¹ *Alexander Litvinenko: Profile of Murdered Russian Spy*, BBC News (21 Jan. 2016); available at: (<https://www.bbc.com/news/uk-19647226>) [Accessed on 4 Feb. 2021].

²⁴² Michael Schwartz & Ellen Barry, *A Spy Story: Sergei Skripal was a Little Fish. He had a Big Enemy*, *The New York Times* (9 Sep. 2018); available at: (<https://www.nytimes.com/2018/09/09/world/europe/sergei-skripal-russian-spy-poisoning.html>) [Accessed on 4 Feb. 2021].

poisoned on a flight in Russia,²⁴³ and Sergey Magnitsky, a Russian tax advisor and whistleblower who revealed wide-spread corruption in Russia, who died while in detention²⁴⁴ and whose case was the object of a decision of the European Court of Human Rights against Russia.²⁴⁵

127) In 2014, Amnesty International published a report on suppression of freedom of speech in Russia. “The enjoyment of the rights to freedom of expression, association and assembly has long been partial, and often perilous, for government critics in Russia”.²⁴⁶ “[T]he list of journalists physically assaulted and killed in Russia is constantly growing while those who have committed these crimes continue to enjoy impunity. Amnesty International has highlighted the cases of severely assaulted victims such as Mikhail Beketov, Oleg Kashin and Elena Milashina. In June 2012, journalist Sergei Sokolov from the independent Novaya Gazeta newspaper was reportedly taken to a forest and openly threatened by none other than the Chair of the Investigative Committee (a stand-alone agency responsible for investigation of serious crimes), Aleksandr Bastrykin. Bastrykin later acknowledged that he had “had a chat” with the journalist and apologised, following which the matter was closed”.²⁴⁷

128) As it was detailed earlier, the Stepanovs fled from Russia out of fear for their personal safety on 23 November 2014, ten days before a damning documentary that exposed the Russian doping program was scheduled to be aired.²⁴⁸ They timed their escape with the release of the documentary. Before the making of the documentary, discussing the situation with Seppelt, Vitaly acknowledged: “if we go public, we’ll be in deep trouble in Russia”.²⁴⁹ “We would have to be out of the country before your program is shown. We will need to be somewhere we can feel safe. You know how Russia works.”²⁵⁰ The Stepanovs knew that “[s]peaking from the inside was fine. Staying

²⁴³ *Alexei Navalny: Russia’s Vociferous Putin Critic*, BBC News (Updated 4 Feb. 2021); available at: (<https://www.bbc.com/news/world-europe-16057045>) [Accessed on 4 Feb. 2021].

²⁴⁴ *Magnitsky Wins Russian Rights Battle 10 Years After His Death*, BBC News (27 Aug. 2019); available at: (<https://www.bbc.com/news/world-europe-49481471>) [Accessed on 4. Feb. 2021].

²⁴⁵ European Court of Human Rights, App. Nos. 32631/09, 53799/12, *Magnitsky v. Russia*, Judgement (27 Aug. 2019); available at: (<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-195527%22%7D>) [Accessed on 4 Feb. 2021].

²⁴⁶ See Amnesty International, *Violation of the Right to Freedom of Expression, Association and Assembly in Russia*, Eur. 46/048/2014 (Oct. 2014); available at:

(<https://www.amnesty.org/download/Documents/8000/eur460482014en.pdf>) [Accessed on 4 Feb. 2021]; see also

²⁴⁷ *Id.*

²⁴⁸ *See supra*, para 0, 0.

²⁴⁹ Walsh, *supra* note 35, p. 237.

²⁵⁰ *Id.*

on the inside afterwards was not. There was an old Soviet joke that had never lost currency: ‘of course, we Russians have freedom of speech, we just have no freedom after speech.’²⁵¹ Overall, Hajo Seppelt had the "impression that he and the Stepanovs were being styled as enemies of the state".²⁵²

129) Since then, Yuliya and Vitaly have been depicted in Russia as enemies of the State. “The sportswoman who blew the whistle on doping in Russian athletics is in hiding abroad, pursued by a barrage of criticism from former colleagues and officials at home who accuse her of betraying her country.”²⁵³ Russian media portrayed the documentary as Western conspiracy.²⁵⁴ “Newspaper headlines and cartoons portray her as a self-publicist or a money -grabber. Online there are even calls for her "liquidation".”²⁵⁵ Russian media attacked Stepanova’s mother too. She was criticized for raising an "unpatriotic" daughter.²⁵⁶ Eventually, she lost her hospital job after suffering incessantly from negative sentiments and verbal attacks for Yuliya's actions.²⁵⁷

130) After the documentary was released, “Yuliya checked social media ... [L]ater on, she wished that she hadn’t. The online world was black with hatred for her. She was a villain, a whore, a traitor and a coward, a death waiting to occur. This was a far more powerful reaction than she had ever imagined, but she knew in her heart how Russia worked.”²⁵⁸ One comment on a news article titled *Does Stepanova work for foreign intelligence agencies?* says: “Traitors are shot at home, and they are despised as enemies.”²⁵⁹ The Stepanovs were called “nonhumans”²⁶⁰ who were “ready for a piece of bread and a shred of a blanket to cross out everything good in their lives and slander people

²⁵¹ *Id.*, p. 236.

²⁵² Walsh, *supra* note 83.

²⁵³ Maria Tsvetkova and Karin Strohecker, *Branded a Traitor, Russian Sports Whistleblower Hides Abroad*, Reuters (20 Nov. 2015); available at: (<https://www.reuters.com/article/us-athletics-corruption-whistleblower/branded-a-traitor-russian-sports-whistleblower-hides-abroad-idUSKCN0T91PL20151120>) [Accessed on 4 Feb. 2021].

²⁵⁴ See *supra*, IV(2)(C - Exhaustion of Domestic Remedies.

²⁵⁵ Ash, *supra* note 117.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Walsh, *supra* note 35, p. 306.

²⁵⁹ *Stepanova Works for Foreign Intelligence Services?* (Translated via Google Translate), CNOPT 3KCNPECC (20 Nov. 2015); available at: (<https://www.sport-express.ru/athletics/news/939714/>) [Accessed on 4 Feb. 2021].

²⁶⁰ In Russian the word «нелюди» (neludi) indicates those who do not deserve to be called humans and are rather seen as animals.

who have nothing to do with them”.²⁶¹ Online comments have called for stripping them of their Russian citizenship and “stab[bing] her with an ice ax in her back (hunchbacked back).”²⁶² People said that “they should be burned in hell”,²⁶³ or “Hang the Whore!”²⁶⁴, and one said: “There is enough Polonium for her as well!”²⁶⁵

131) Public figures in the Russian sports world have not been above insulting and threatening either. A spokesman for President Putin called Stepanova a “Judas”.²⁶⁶ Former IAAF treasurer and former president of the Russian Athletics Federation, Valentin Balakhnichev, dismissed the Stepanov’s evidence as “anti-Russian propaganda.”²⁶⁷ Olympic high-jump champion from the 2008 Games in Beijing, Andrey Silnov, went further: “I can tell them one thing: let them giggle around the corner, enjoy the decision, which they made. I can directly call them traitors who left and gave all kinds of information there. They said all kinds of non-sense. The traitors were always shot first in the war. Therefore, you yourself can draw conclusions”.²⁶⁸ Andrei Mitkov, the editor of the website allsportinfo.ru, a news service financed by the Russian Ministry of Sports,²⁶⁹ suggested that anyone supporting the Stepanovs was in cahoots with the doping mafia and their real intention was to take advantage of the huge Russian doping black market.²⁷⁰ Yevgeny Trofimov, coach to double Olympic champion pole vaulter Yelena Isinbayeva, wondered where the media found such naive

²⁶¹ *Mamiashvili: This Whole Situation was Arranged by Klishin, but by Non-Humans like the Stepanovs* (Translated via Google translate), *Championat* (11 July 2016); available at: (<https://www.championat.com/other/news-2517308-mamiashvili-vsju-etu-situaciju-ustroila-ne-klishina-a-ubljudki-vrode-rodchenkova.html>) [Accessed on 4 Feb. 2021].

²⁶² Stepan Chaushyan, *Runner or Fugitive? Athlete Stepanova and Her Husband Seek Asylum in Canada*, AIF (17 Nov. 2015); available at: (https://aif.ru/sport/summer/begunya_ili_beglec_legkoatletka_stepanova_s_muzhem_prosyat_ubezhishcha_v_kanade) [Accessed on 4 Feb. 2021].

²⁶³ Andrey Sidorchik, *They “Exposed” Russia. People who Robbed Us of the Olympics* (Translated via Google translate), AIF (4 Dec. 2017); available at: (https://aif.ru/sport/person/oni_razoblachili_rossiyu_lyudi_kotorye_lichili_nas_olimpiady) [Accessed on 4 Feb. 2021].

²⁶⁴ *Policy*, VK (16 Nov. 2016); available at: (https://vk.com/wall-71631912_605129) [Accessed on 4 Feb. 2021].

²⁶⁵ Stepan Chaushyan, *30 Pieces of Silver for Stepanova: “Judas” of Russian Sports are Allowed to Participate in Olympics* (Translated via Google translate), AIF (9 Mar. 2016); available at: (https://aif.ru/sport/person/30_srebrenikov_dlya_stepanovoy_iudu_sporta_rossii_puskayut_na_olimpiadu) [Accessed on 4 Feb. 2021].

²⁶⁶ Ingle, *supra* note 116.

²⁶⁷ *Official: Russia has Global Backing Against Doping Claims*, *The Moscow Times* (18 Mar. 2015); available at: (<https://www.themoscowtimes.com/2015/03/18/official-russia-has-global-backing-against-doping-claims-a44893>) [Accessed on 4 Feb. 2021].

²⁶⁸ Walsh, *supra* note 35, p. 317.

²⁶⁹ Walsh, *supra* note 83.

²⁷⁰ *Id.*

and unintelligent people as the Stepanovs.²⁷¹ One former Russian athlete said: “Stepanova did wrong to her friends, coaches and the motherland. Her fate is of a hermit, and Stepanova no longer has a way to return back to Russia.”²⁷² All in all, as BBC reports, back in Russia, “[m]entioning Yuliya Stepanova's name is not always a wise thing to do”.²⁷³

132) Dr. Grigory Rodchenkov, the former head of Russia's national anti-doping laboratory, who also blew the whistle on the doping program and has been living in the United States as an asylum seeker since, explains: “If you started telling this story inside Russia, you might not make it home alive. ... In Russia, you could die during a staged fight after a minor road accident, when some guy pulled out a hammer and crushed your skull, or when some ‘altercation’ arose on the street.”²⁷⁴ Talking about his plight: “From the late spring of 2016 until the present day, ‘normal life’ has been a luxury I am unable to enjoy.”²⁷⁵ “From the moment I broke my silence about the Sochi swapping scheme, I had been the target not only of credible death threats but also of a relentless campaign of vilification emanating from Russia. Every fact of mine that had been confirmed by Dick Pound and Richard McLaren was denounced as fiction by the Russian authorities.”²⁷⁶ “The Stepanovs understood now what it meant to be whistleblowers. They knew enough of their country’s history to know that being publicly denounced from within the Kremlin was the beginning of a process that stood no chance of ending in reconciliation and a good chance of ending in assassination.”²⁷⁷

133) After fleeing Russia, they lived for almost a year in Germany, but they felt they were not yet safe. “People were tweeting that if Yuliya Stepanova ever came back to Russia they would kill her. Fine. It was the ones they would send from Russia to kill her that she worried about. From polonium to poisoned umbrella tips, assassination was a Russian art form she didn’t want to consider. Every time she checked her computer, the hatred was more intense.”²⁷⁸ “Threats were being made on their lives in Germany. They were constantly aware of the hatred coming at them from the

²⁷¹ *Id.*

²⁷² *Expert: Betrayal in Sports is Stepanova’s Eternal Stigma* (translated via Google translate), Pravda (2 July 2016); available at: (<https://www.pravda.ru/news/sport/1305480-mishin/>) [Accessed on 4 Feb. 2021].

²⁷³ Ash, *supra* note 117.

²⁷⁴ Rodchenkov, *supra* note 32, p. 133.

²⁷⁵ *Id.*, p. 142.

²⁷⁶ *Id.*, p. 144.

²⁷⁷ Walsh, *supra* note 35, p. 318.

²⁷⁸ *Id.*, p. 306.

flamethrower of public opinion in Russia. Never far from their thoughts either was the list of dead men and women who had died mysterious, agonizing or bizarre deaths after calling out Russia and its sins. ... In Germany there were many times when Yuliya had felt very scared. She would wake up at night, thinking she had heard movement in the apartment. Somebody had been sent from Russia to kill them.”²⁷⁹

134) In 2019, Yuliya told the New York Times that: “I’ve seen comments on the internet like, ‘We should kill those traitors, we should go poison them.’”²⁸⁰ Yuliya also told AFP in an interview in August 2016 that: “she and her husband fear for their lives after an attempt was made to hack her World Anti-Doping Agency records, ... six months after two former senior officials with Russia’s Anti-Doping Agency (Rusada) died suddenly ...” she said: ““If something happens to us, you should know that it is not an accident”.”²⁸¹ Indeed, in February 2016, in the span of two weeks, two former heads of the Russian Anti-Doping Agency (RUSADA), both died in suspicious circumstances. Mr. Vyacheslav Sinev (58 y/o), founding RUSADA chairman, and Mr. Nikita Kamaev (53 y/o), former head of RUSADA, died unexpectedly of massive heart attacks within 11 days of each other.²⁸² The *Sunday Times* reported that Kamaev had approached the newspaper shortly before his death planning to publish a book on "the true story of sport pharmacology and doping in Russia since 1987".²⁸³ Bellingcat, a British investigative journalism website that specializes in fact-checking and open-source intelligence, suggested the Russian Federal Security Service (FSB) might have played a role in their death.²⁸⁴

135) The Stepanovs have been living in the United States, where they have applied for asylum, since September 2015. According to BBC, the threat on a whistleblower's life in the Russian doping case is real even in the United States.²⁸⁵ It is out of an abundance of caution and fear that the

²⁷⁹ *Id.*, p. 311.

²⁸⁰ Juliet Macur, *The Whistle-Blowers Next Door*, The New York Times (26 Dec. 2019); available at: (<https://www.nytimes.com/2019/12/26/sports/olympics/yuliya-stepanova-russia-doping.html>) [Accessed on 1 Feb. 2021].

²⁸¹ *It Won't be an Accident: Russian Doping Whistleblower Yulia Stepanova Fears for Life after WADA Hack*, South China Morning Post (16 Aug. 2016); available at: (<https://www.scmp.com/sport/other-sport/article/2004549/it-wont-be-accident-russian-doping-whistleblower-yulia-stepanova>) [Accessed on 1 Feb. 2021].

²⁸² Polacek, *supra* note 131; Hurst, *supra* note 131.

²⁸³ Hellen, *supra* note 132.

²⁸⁴ *See supra* note 133.

²⁸⁵ *The 'Real' Threat to Russia's Former Doping Mastermind*, BBC News (30 July 2020); available at: (<https://www.bbc.com/news/stories-53596997>) [Accessed on 1 Feb. 2021].

Stepanov family is living in hiding in United States. They are being interviewed by the media but they are not allowed to disclose the whereabouts of the family. This atmosphere of fear and uncertainty still haunts them in their new life in United States. When Yuliya expressed the compassion of their neighbors and their support from them, she faced a backlash by her husband. “Yuliya recalled [that] when she told Vitaly about the conversation, he snapped, “I told you not to talk to strangers.””²⁸⁶

136) Dr. Rodchenkov provides a detailed snapshot of the risks that are entangled with his daily life as a whistleblower to the Russian doping: “I am in involuntary exile from my homeland, Russia. I live in protective custody in the proverbial ‘undisclosed location’, and whenever I leave my small apartment, I am accompanied by one, or sometimes two, armed guards. On occasion, I wear a bulletproof vest. ... I fled Russia in November 2015, fearing for my life...”²⁸⁷ “After I was forced to resign from the Anti-Doping Centre, friends warned me that my life might be in danger. Facing possible expulsion from the Olympic Movement, the Putin regime was eager to identify scapegoats and pretend it was fighting against doping. ... The Sledkom, as the Investigative Committee of the Russian Federation is known, ransacked my apartment and interrogated my family ... But I feared for my life, fears that seemed justified when two of my former colleagues ... mysteriously died within 11 days of each other. They knew plenty about athletes falsifying their doping control samples by substituting thawed urine from the freezers. Nikita, a friend of mine from childhood, was a healthy sports enthusiast who exercised regularly. He supposedly succumbed to a heart attack at the age of 52 and was quickly buried with a pro forma autopsy. No one from the Ministry of Sport or the Russian Olympic Committee attended either man’s funeral. During my five years in exile, there have been credible threats on my life. Putin has declared that I’m an American intelligence agent and that I belong in jail. An arrest warrant was issued for me, and one of his allies, the former Russian Olympic Committee chief Leonid Tyagachev, stated that ‘Rodchenkov should be shot for lying, like Stalin would have done.’ My lawyers have been told that I rank among the top five on the Kremlin’s worldwide hit list”.²⁸⁸

²⁸⁶ Macur, *supra* note 280.

²⁸⁷ Rodchenkov, *supra* note 32, Introduction.

²⁸⁸ *Id.*

b - The financial situation of the victims

137) The financial situation of the victims is another factor that needs to be taken into consideration to determine whether domestic remedies are accessible. As it has been noted, “[a]vailability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances ... The scope of the need to exhaust local remedies must be considered in the light of these considerations.”²⁸⁹ The ILC Draft Articles on Diplomatic Protection provide that: “Although the injured person is expected to bear the costs of legal proceedings before the courts of the respondent State, there may be circumstances in which such costs are prohibitively high and ‘manifestly preclude’ compliance with the exhaustion of local remedies rule.”²⁹⁰ As the Arbitral Tribunal in the Finnish Ships Arbitration case said: “[it] appears hard to lay on the private individual the burden of incurring loss of money and time by going through the courts, only to exhaust what to him - at least, for the time being - must be a very unsatisfactory remedy”.²⁹¹ In discussing situations where there is no need for exhaustion of domestic remedies, the ILC includes situations where “the costs of litigation [are] prohibitive.”²⁹²

²⁸⁹ International Centre for Settlement of Investment Disputes, *The Loewen Group, Inc. and Raymond L. Loewen (Claimants) and United States of America (Respondent)*, Award, paras. 169-170 (26 June 2003); available at: (<https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf>) [Accessed on 5 Feb. 2021].

²⁹⁰ ILC Articles on Diplomatic Protection, *supra* note 201, p. 49, art. 15, commentary para. 11.

²⁹¹ *Claim of Finnish Ship Owners Against Great Britain in Respect of the Use of Certain Finnish Vessels During the War*, United Nations Reports of International Arbitral Awards, Vol. 3, p. 1497 (1934); available at: (https://legal.un.org/riaa/cases/vol_III/1479-1550.pdf) [Accessed on 5 Feb. 2021].

²⁹² International Law Commission, *Yearbook of the International Law Commission*, Vol. I, pp. 15-16 at para. 46 (2006); available at:

(https://legal.un.org/ilc/publications/yearbooks/english/ilc_2006_v1.pdf#xml=https://legal.un.org/dtSearch/dtisapi6.dll?cmd=getpdfhits&DocId=4416&Index=D%3a%5csites%5clegal%5cilc%5cdtSearch%5cIndexes%5cDocuments%2dEnglish&HitCount=148&hits=4f34+4f35+4f36+4f37+5142+5143+5144+5145+518c+518d+518e+518f+5568+5569+556a+556b+5aa3+5aa4+5aa5+5aa6+79af+79b0+79b1+79b2+85a1+85a2+85a3+85a4+8b01+8b02+8b03+8b04+8b3a+8b3b+8b3c+8b3d+8ce3+8ce4+8ce5+8ce6+8dc6+8dc7+8dc8+8dc9+a028+a029+a02a+a02b+a956+a957+a958+a959+b472+b473+b474+b475+1808e+1808f+18090+18091+180b6+180b7+180b8+180b9+1854c+1854d+1854e+1854f+18585+18586+18587+18588+19624+19625+19626+19627+19659+1965a+1965b+1965c+19701+19702+19703+19704+1973a+1973b+1973c+1973d+19757+19758+19759+1975a+1981f+19820+19821+19822+19876+19877+19878+19879+19906+19907+19908+19909+1991c+1991d+1991e+1991f+1a082+1a083+1a084+1a085+1a1ea+1a1eb+1a1ec+1a1ed+1a224+1a225+1a226+1a227+1a33d+1a33e+1a33f+1a340+1a4a2+1a4a3+1a4a4+1a4a5+1a4a6+1a4a7+1a4a8+1a4a9+47591+47592+47593+47594+48450+48451+48452+&.pdf) [Accessed on 1 Feb. 2021].

iii - Effectiveness

138) Should the Committee find that domestic remedies are available and accessible to the victims, there still remains the question of their effectiveness. Indeed, as the ILC noted in the Draft Articles on State Responsibility, “[t]he mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case... there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would have to apply can lead only to the rejection of any appeal.”²⁹³ In fact, international adjudicative bodies “should look not merely at the paper remedy but also at the circumstances surrounding the remedy”.²⁹⁴ If circumstances make remedies ineffective, then the remedy must be regarded as ineffective for the purposes of the rule.²⁹⁵ This pragmatic approach is consonant with the social function of the rule: “to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving state is reasonably capable of fulfilling its duty of providing a remedy”.²⁹⁶ Thus, the result in any particular case will depend on a balancing of factors. For example, in a situation in which the best local legal advice suggests that it is 'highly unlikely' that further resort to local remedies will result in a disposition favorable to the claimant, the correct conclusion may well be that local remedies have been exhausted,....”²⁹⁷

139) “[A] remedy should not be used unless the success it may bring is not a merely formal success, but can actually produce either the result originally required by the international obligation or, if that is no longer possible, an alternative result which is really equivalent.”²⁹⁸ If domestic

²⁹³ ILC Articles on State Responsibility, *supra* note 201, p. 121 art. 44, comment 5.

²⁹⁴ Mummery, *supra* note 204, at 400-401.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ International Law Commission, *Yearbook of the International Law Commission*, Vol. II, part 2, p. 48 para 50 (1977) available at: (https://legal.un.org/ilc/publications/yearbooks/english/ilc_1977_v2_p2.pdf) [Accessed on 1 Feb. 2021].

processes are to be “manifestly futile,” there is no requirement to recourse to them.²⁹⁹ The domestic remedies are required to be exhausted if they offer “a reasonable prospect of redress”.³⁰⁰

140) “The right to a remedy cannot be effectively guaranteed when State authorities do not investigate human rights violations seriously, deliberately skew investigations or conceal the facts.”³⁰¹ As the Inter-American Court of Human Rights declared in the seminal *Velazquez-Rodriguez v. Honduras* case: “The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty... The same is true when it allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”³⁰²

141) The European Court of Human Rights has considered that “the general reluctance of the authorities to admit that ... illicit behaviour ... had occurred”³⁰³ is a factor to be taken into consideration to determine the effectiveness of a remedy. “[A]ny impartial investigation, any offer to cooperate with a view to obtaining evidence or any ex gratia payments made by the authorities to the applicants”,³⁰⁴ are further indications of an unreasonable prospect of success of domestic remedies. Also, as the International Law Commission noted, a “general atmosphere of hostility” can put the victims in a situation that is “beyond remedy at the national level.”³⁰⁵

²⁹⁹ Human Rights Committee, Comm. No. 1184/2003, *Brough v. Australia*, U.N. Doc. CCPR/C/86/D/1184/2003, paras. 8.6, 8.12 (17 Mar. 2006), available at: (<https://juris.ohchr.org/Search/Details/1241>) [Accessed on 1 Feb. 2021]; see also Human Rights Committee, Comm. No. 1036/2001, *Faure v. Australia*, U.N. Doc. CCPR/C/85/D/1036/2001, paras. 6.1-6.2 (31 Oct. 2005), available at:

(http://www.worldcourts.com/hrc/eng/decisions/2005.10.31_Faure_v_Australia.htm) [Accessed on 1 Feb. 2021]; see also Human Rights Committee, Comm. No. 1156/2003, *Escolar v. Spain*, U.N. Doc. CCPR/C/86/D/1156/2003, paras. 5.2, 6 (28 Mar. 2006), available at:

(http://www.worldcourts.com/hrc/eng/decisions/2006.03.28_Perez_Escolar_v_Spain.htm) [Accessed on 1 Feb. 2021].

³⁰⁰ Human Rights Committee, Comm. No. 437/1990, *Patino v Panama*, U.N. Doc. CCPR/C/52/D/437/1990, para 5.2. (25 Oct. 1994), available at: (<http://hrlibrary.umn.edu/undocs/html/dec437.htm>) [Accessed on 1 Feb. 2021].

³⁰¹ International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations*, p. 84 (Oct. 2018); available at: (<https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>) [Accessed on 2 Feb. 2021].

³⁰² Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgement (Ser. C), no. 4, at para. 176 (29 July 1988); available at: (http://hrlibrary.umn.edu/iachr/b_11_12d.htm) [Accessed on 2 Feb. 2021].

³⁰³ *Akdivar v. Turkey*, ECtHR, *supra* note 215, para. 71.

³⁰⁴ *Id.*

³⁰⁵ *Yearbook of the International Law Commission*, *supra* note 298 Vol. II, part 2, p. 43.

142) In *Marat Abdiev v. Kyrgyzstan*, the Committee, commenting on the question of admissibility, “observed that the domestic authorities denied that torture took place and refused to open a criminal case against the police officers. It is thus unclear on what grounds the author could have filed a civil suit for compensation, which is linked to the outcome of the criminal proceedings against the perpetrators.”³⁰⁶

143) In sum, to determine whether there are effective remedies that the victims in the present communication could have resorted to, the Committee needs to take into consideration the general legal and political context within Russia. The authors submit that the behavior of the Russian authorities (executive, judiciary and legislature), following the exposure of the State-sponsored doping program to the world, is indicative of a situation that leaves no prospect of success for domestic remedies.

144) Despite the existence of substantial evidence unearthed by investigation by international agencies, Russian officials continue to categorically deny any type of involvement in the doping program. According to Reuters: “Russian authorities have vehemently denied any state support for doping and pledged to cooperate with international sports authorities to counter the use of banned performance-enhancing drugs.”³⁰⁷ On various occasions, Russian officials at various levels have denied any link between the doping program and the State. The President of Russia, Vladimir Putin, has denied the allegations multiple times.³⁰⁸ Vitaly Mutko, the former Russian Minister of Sport and Deputy Prime Minister of Russia, categorically denies the existence of a state-run doping program.³⁰⁹ He even claimed that the State was in fact the victim, deceived by athletes and coaches.³¹⁰ After the airing of the German documentary, “Vitaly contacted a journalist from *Sovetsky Sport* and offered

³⁰⁶ Human Rights Committee, Comm. No. 2892/2016, *Marat Abdiev v Kyrgyzstan*, U.N. Doc. CCPR/C/124/D/2892/2016, para. 6.3 (3 Dec. 2018); available at:

(https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KGZ/CCPR_C_124_D_2892_2016_27979_E.pdf) [Accessed on 2 Feb. 2021].

³⁰⁷ *Russia's Mutko Denies State-Backed Doping, Slams IOC Ban*, Reuters (5 Dec. 2017); available at:

(<https://www.reuters.com/article/us-olympics-2018-russia-mutko/russias-mutko-denies-state-backed-doping-slams-ioc-ban-idUSKBN1E10R6>) [Accessed on 2 Feb. 2021].

³⁰⁸ *Putin Denies State-Sponsored Doping Programme in Russia*, Euronews (23 Dec. 2016); available at:

(<https://www.euronews.com/2016/12/23/putin-denies-state-sponsored-doping-programme-in-russia>) [Accessed on 2 Feb. 2021].

³⁰⁹ *Russia's Mutko Denies State-Backed Doping, Slams IOC Ban*, *supra* note 307.

³¹⁰ *Russia Denies Government Involvement in Doping, Blaming Rogue Athletes*, The Christian Science Monitor (15 May 2016); available at: (<https://www.csmonitor.com/World/2016/0515/Russia-denies-government-involving-in-doping-blaming-rogue-athletes>) [Accessed on 2 Feb. 2021].

an interview in the hope of creating a better understanding. ... After publication of the interview, a reporter ... called up Minister Mutko for reaction. The response was perfectly in tune with Russia's attitude – official and unofficial – to Vitaly and Yuliya. 'I know your newspaper for a long time,' Mutko said. 'This is your work. Possibly this is your priority. Why do you treat your home country like dirt?'.³¹¹ Talking of Yuliya, he said: "I always try to think well of people but there is a term "stool pigeon" [i.e. a spy sent into a group to report to the police on its activities] in anti-doping code".³¹²

145) Not only does the Russian government deny any involvement in the doping program, it has also tried to make the evidence disappear as well as falsify data and information, even after the exposure of its doping program and while it was pretending to cooperate with the investigations by WADA and IOC. Indeed, the most recent WADA investigations showed that Russia has been trying to manipulate the evidence and documents in an effort to exonerate the State from wrongful conduct.³¹³ In 2019, WADA confirmed that Russia has been fabricating new evidence to that effect.³¹⁴ The report of independent investigations of WADA says: "A strong culture of silence exists and is rigorously enforced within the circle of cheating, even among the victims of cheating."³¹⁵

146) In the present case, the victims are faraway, with no access to any documents or evidence, while Russia is actively working to make them vanish. Given the current political context in Russia, it is unlikely they or their attorneys can have access to any evidence. The Committee Against Torture has previously confirmed that "when complainants are in a situation where they cannot elaborate on their case, such as when they have demonstrated that they have no possibility of obtaining documentation relating to their allegation of torture or have been deprived of their liberty, the burden of proof is reversed, and the State party concerned must investigate the allegations and verify the information on which the communication is based."³¹⁶ Similar to persons deprived of their

³¹¹ Walsh, *supra* note 35, p. 316.

³¹² *Id.*, p. 317.

³¹³ World Anti-Doping Agency, *WADA Compliance Review Committee Recommends Series of Strong Consequences for RUSADA Non-Compliance*, (26 Nov. 2019); available at: (<https://www.wada-ama.org/en/media/news/2019-11/wada-compliance-review-committee-recommends-series-of-strong-consequences-for>) [Accessed on 2 Feb. 2021].

³¹⁴ *Id.*

³¹⁵ ARAF Independent Commission Report, *supra* note 52, p. 7.

³¹⁶ Committee against Torture. Comm. No. 818/2017, *The Complainant v. Spain*, U.N. Doc. CAT/C/86D/818/2017, para. 8.4 (15 Jan. 2020); available at: (<https://undocs.org/en/CAT/C/68/D/818/2017>) [Accessed on 2 Feb. 2021]; see also Committee against Torture, *General Comment No. 4 (2017) on the implementation of article 3 of the Convention*

liberty, those who have fled their country or became refugees, face obstacles in gathering evidence, therefore, “[i]n line with the State party’s obligation to investigate ex officio any allegation of torture or ill-treatment, it is the State authorities who bear the burden of providing the information to prove that they are not responsible for the allegations against them”.³¹⁷

147) Courts in Russia are not an effective remedy either. Alexander Zubkov, a Russian bobsledder, was stripped of his 2014 Sochi Games gold medals by the IOC because of his involvement in the doping program.³¹⁸ The decision of the IOC was subsequently confirmed by an award of the Court of Arbitration for Sports (CAS).³¹⁹ Yet, he was able to keep his medal after a Russian court did not recognize the CAS award and ruled in his favor.³²⁰ This ruling was criticized by many observers as endangering the international sport system.³²¹

148) Yuliya and Vitaly were threatened with lawsuits because of their role in exposing the Russian doping program to the world. Vladimir Kazarin, one of the coaches with a key role in the ARD Channel documentary, said that he, together with the Russian Athletics Federation, intended to sue the Stepanovs.³²² Other Russian athletes banned by sport governing bodies because of their involvement in the Russian doping program also threatened to sue them.³²³

149) On 18 June 2016, the Investigation Committee of Russia opened a criminal case against Dr. Grigory Rodchenko, who, like the Stepanovs, blew the whistle on the doping program, accusing him of abuse of authority, operating illegal businesses, forging documents and causing reputational

in the context of article 22, at para. 38 (8 Feb. 2018); available at: (<https://www.refworld.org/docid/5a903dc84.html>) [Accessed on 2 Feb. 2021].

³¹⁷ *The Complainant v. Spain*, Committee against Torture, *supra* note 316, para. 8.4.

³¹⁸ *Russian Court Says Bobsledder Can Keep Olympic Titles*, The Seattle Times (11 Jan. 2019); available at: (<https://www.seattletimes.com/sports/russian-court-says-bobsledder-can-keep-olympic-gold-medals/>) [Accessed on 2 Feb. 2021].

³¹⁹ Court of Arbitration for Sport, *Aleksandr Zubkov v. International Olympic Committee*, CAS 2017/A/5422 (23 April 2018); available at: (<http://jurisprudence.tas-cas.org/Shared%20Documents/5422.pdf#search=zubkov>) [Accessed on 2 Feb. 2021].

³²⁰ *Russian Court Says Bobsledder Can Keep Olympic Titles*, *supra* note 318.

³²¹ *Id.*

³²² Dimitriy Rogovitskiy, *Russian Coach Kazarin to Sue Over TV Doping Claims*, Reuters (23 Dec. 2014); available at: (<https://www.reuters.com/article/us-athletics-russia-doping/russian-coach-kazarin-to-sue-over-tv-doping-claims-idUSKBN0K119720141223>) [Accessed on 2 Feb. 2021].

³²³ Alec Luhn, *Russian Runners Threaten to Sue Whistleblower After IAAF Ban*, The Guardian (20 Nov. 2015); available at: (<https://www.theguardian.com/sport/2015/nov/20/russian-athletics-doping-ban-legal-action-iaaf-olympics>) [Accessed on 2 Feb. 2021].

damage to the country and its sports teams.”³²⁴ He was even charged with drug trafficking,³²⁵ and a court in Moscow court issued a warrant against him.³²⁶

150) In sum, a dispassionate assessment of the Russian legal and political context necessarily leads to the conclusion that there are no domestic remedies available to the Stepanovs that are available, accessible and effective.

D - This Communication is Timely

151) According to the Committee, “although complaints no longer enjoy unlimited freedom to submit communication at their convenience, a delay of even several years need not necessarily lead to inadmissibility of a communication.”³²⁷ It is the practice of the Committee to decide on a case-by-case basis, and as long as it is not an abuse of the communication procedure. “Cases are decided on their own merits independently in keeping with the consideration of whether a reasonable explanation to justify delay is in place.”³²⁸

152) The authors would like to remind the Committee that the facts in the present communication were determined by independent and official sources only at the end of 2016, when the WADA published the reports of the McLaren investigations.³²⁹ After that, the IOC conducted its own investigations through the Schmid Commission, who double-checked the findings of the WADA investigations, and published the report in December 2017.³³⁰ Russia continued litigating and appealing before CAS against decisions of WADA and the IOC as recently as December 2020.³³¹

³²⁴ Rodchenkov, *supra* note 32, p. 144.

³²⁵ Julia Ioffe, *Russia’s Retaliation Against a Doping Whistleblower*, The Atlantic (23 Jan. 2018); available at: (<https://www.theatlantic.com/international/archive/2018/01/russia-doping-rodchenkov/551183/>) [Accessed on 2 Feb. 2021].

³²⁶ *WADA Informant Rodchenkov Arrested in Absentia in Russia* (translated via Google Translate), Sport-Interfax (28 Sep. 2017); available at: (<https://www.sport-interfax.ru/580909>) [Accessed on 4 Feb. 2021].

³²⁷ Yogesh Tyagi, THE UN HUMAN RIGHTS COMMITTEE: PRACTICE AND PROCEDURE, p.431 (2011).

³²⁸ *Id.*

³²⁹ *Supra*, paras 74-77.

³³⁰ *Supra*, paras 84-88.

³³¹ See Court of Arbitration for Sports, *World anti-Doping Agency v. Russian Anti—Doping Agency*, CAS 2020/O/6689, (17 Dec. 2020); available at: (https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_6689.pdf) [Accessed on 11 Feb 2021]

153) Given the circumstances of the case, and considering the need to allow international investigations and judicial proceedings to take place to establish the facts at the core of the Russian doping program, this communication should be considered brought within a reasonable time.

V - ATTRIBUTION OF THE CONDUCT TO THE STATE

154) For conduct to entail the international responsibility of a state, it must be attributable to the State.³³² States are responsible for the conduct of their agents. They are also responsible for: the conduct of private parties when the State directed or controlled them;³³³ for the conduct of private parties “exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”;³³⁴ and for conduct that is not attributable to the State but that the State subsequently acknowledges and adopts as its own.³³⁵

155) Attributing conduct to a particular State can be the most difficult aspect of establishing international responsibility, since often States do not act directly through their organs but through proxies.³³⁶ Russia, in particular, has a well-established practice of hiding the actions of its agents behind a veil of “plausible deniability” to avoid international responsibility.³³⁷ Be that as it may, in the present case, attribution of the conduct alleged in the present communication to Russia is rather

³³² ILC Articles on State Responsibility, *supra* note 201, art. 4, 5; on the attribution of the conducts of State organs 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, p. 246 (James Crawford et. al. eds. 2010).

³³³ ILC Articles on State Responsibility, *supra* note 201, art. 8.

³³⁴ *Id.*, art. 9.

³³⁵ *Id.*, art. 11.

³³⁶ In that case the effective and overall control theories are at stake which International Court of Justice defends the effective control test in its case law; See International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v United States of America)*, Judgment, 1986 I.C.J. Rep. 55, at para. 115; available at: (<https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>) [Accessed on 4 Feb. 2021]; See also International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. Rep. 169, at para. 400; available at: (<https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>) [Accessed on 4 Feb. 2021]; See also Olivier De Frouville, , *Attribution of Conduct to the State: Private Individuals*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 257, pp. 265–271 (James Crawford et. al. eds. 2010).

³³⁷ Rory Cormac and Richard J Aldrich, *Grey is the New Black: Covert Action and Implausible Deniability*, International Affairs Vol. 93:3 (2018) available at: (https://warwick.ac.uk/fac/soc/pais/people/aldrich/secrets/inta94_3_01_cormac_aldrich.published.pdf) [Accessed on 4 Feb. 2021].

simple. Russian authorities did not bother covering their tracks carefully nor did they hide behind proxies, probably because they believed the power of the Russian state would shield them from legal responsibility.

1- FACTS

156) First, Dr. Portugalov, the Chief of the Medical Commission of the All-Russia Athletics Federation (ARAF), the governing body for athletics in Russia and a state-sponsored organization, was the person in control of Yuliya's doping regimen.³³⁸ This has been established by the Court of Arbitration for Sport (CAS), which, in 2017, confirmed Portugalov's disqualification for life exactly because of that.³³⁹ Second, at the time of the relevant events of this communication, although the Moscow Laboratory, the one that used to be directed by Dr. Rodchenkov, and that was at the heart of the doping program, was a private entity, it was also acting under the direction and supervision of the Ministry of Sport, and was funded by the State.³⁴⁰

157) The command structure of the Russian doping program and the links between the individuals and governmental positions have been described in detail in the First WADA independent report.³⁴¹ "[T]he 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]."³⁴² There is no doubt that the Moscow Laboratory was following the orders given to it by the Deputy Minister of Sport.³⁴³ For example, when laboratory personnel asked who ordered the manipulation of samples, they were told: "there is no need [to know the names] because the instructions are directly from the Ministry of Sport...".³⁴⁴ In many cases persons who were not

³³⁸ *Supra*, para. 47.

³³⁹ Court of Arbitration for Sport, *International Association of Athletics Federations (IAAF) v. All-Russia Athletic Federation (ARAF) and Dr. Sergei Nikolayevich Portugalov*, CAS/2016/O/4575. See Annex B6. CAS decision in IAAF v ARAF and Portugalov.

³⁴⁰ McLaren's First Report, *supra* note 136, p. 56.

³⁴¹ *Id.*, pp. 52–60.

³⁴² *Id.* p. 29.

³⁴³ *Id.* p. 35.

³⁴⁴ ARAF Independent Commission Report, *supra* note 52, pp. 195-6.

supposed to be in the laboratory, and in particular agents of the Russian federal Security Services, were keeping an eye on the technicians.³⁴⁵

158) The First WADA Report clearly illustrated the “institutionalized, controlled and disciplined” nature of the Russian doping program. It “consider[ed] to be established beyond a reasonable doubt”³⁴⁶ that the Russian Ministry of Sport had extensive control of the systematic doping program in the form of active involvement of some State organs.³⁴⁷ The Minister of Sport (then Mr. Vitaly Mutko) and his Deputy (then, Mr. Yuri Nagornykh) had “leadership and knowledge” of the program.³⁴⁸ The Deputy Minister was appointed directly by executive order of the then Russian Prime Minister,³⁴⁹ and coordinated the doping program on behalf of the State.³⁵⁰ He was the person who ordered whether a case of positive doping should be covered up or should be reported.³⁵¹ And he is the one who supervised the sample swapping process.³⁵² In the case of the Sochi games, the authors of the Second WADA Report were aghast by the “extent of State oversight and directed control of the Moscow Laboratory in processing and covering up urine samples”.³⁵³

159) Officials of various subdivisions of the Russian Ministry of Sport, such as the Center of Sports Preparation of National Teams of Russia (CSP) and the Russian Federal Research Center of Physical Culture and Sports (VNIIFK), were also participating in the doping program.³⁵⁴ For example, the CSP Deputy Director, Irina Rodionova, delivered to different Russian sport federations a steroid cocktail with a very short washing period.³⁵⁵ She also organized the buildup of a stock of clean urine samples to be used for sample swapping.³⁵⁶ Also, the Deputy Director General of VNIIFK provided athletes with PEDs, directly administering and injecting drugs himself, and was

³⁴⁵ *Id.*

³⁴⁶ McLaren’s First Report, *supra* note 136, p. 31.

³⁴⁷ *Id.* at 86.

³⁴⁸ McLaren’s Second Report, *supra* note 154, p. 63.

³⁴⁹ McLaren’s First Report, *supra* note 136, p. 10.

³⁵⁰ *Id.*, p. 11.

³⁵¹ *Id.*

³⁵² McLaren’s Second Report, *supra* note 154, p. 82.

³⁵³ *Id.*, p. 6.

³⁵⁴ *Id.* p. 13.

³⁵⁵ McLaren’s First Report, *supra* note 136, pp. 49–50.

³⁵⁶ *Id.* p. 53.

directly involved in manipulating the anti-doping efforts.³⁵⁷ Both the CSP and VNIIFK are government funded entities and subdivisions of Ministry of Sport.³⁵⁸

160) Under the direct supervision of the Russian President, the Federal Security Service (FSB), a federal executive body, assisted the doping program. FSB arranged and carried out sample swapping.³⁵⁹ It created a bank of clean urine samples.³⁶⁰ FSB agents worked from within the laboratory that was supposed to keep the Sochi Olympic Games clean. Their agents, called “magicians”,³⁶¹ operated from a sleeping room on the 4th floor of the Sochi Laboratory. Posing as plumbers, they would sneak into the Laboratory,³⁶² open the sample bottles,³⁶³ remove the caps and swap samples.³⁶⁴ The FSB operations extended beyond these sleight of hand tricks, to include surveillance of WADA employees to prevent their sample swapping agents from being caught whenever the WADA employees returned unexpectedly back to work.³⁶⁵

161) Again, a separate investigation of the systematic doping in the All-Russia Athletics Federation (ARAF) documented the role of FSB in operations of the Moscow Laboratory. The “reported presence of the security services (FSB) within the laboratory setting in Sochi and at the Moscow Laboratory, actively imposed an atmosphere of intimidation on laboratory process and staff, and supported allegations of state influence in sports events”.³⁶⁶ According to the report, laboratory employees believed that their working environment was under the surveillance of Russian intelligence services.³⁶⁷

162) Even though it was in more nuanced terms than the First WADA Report, the Schmid Report confirmed the involvement of public officials in systematic doping.³⁶⁸ For example, it points the finger straight at the Ministry of Sport. However, the Schmid report indicates “people from other

³⁵⁷ ARAF Independent Commission Report, *supra* note 52, pp. 76-77.

³⁵⁸ IOC’s Disciplinary Commission’s Report to the IOC’s Executive Board, *supra* note 158, p. 7.

³⁵⁹ McLaren’s First Report, *supra* note 136, p. 57.

³⁶⁰ *Id.* at 13.

³⁶¹ *Id.* at 43.

³⁶² *Id.* at 58.

³⁶³ *Id.* at 63.

³⁶⁴ *Id.* at 12.

³⁶⁵ *Id.* at 58.

³⁶⁶ ARAF Independent Commission Report, *supra* note 52, p. 196.

³⁶⁷ *Id.* p. 197.

³⁶⁸ *Id.* at 25.

Russian entities under the responsibility of the Ministry of Sport”.³⁶⁹ Be that as it may, the overall picture that emerged from the various international independent investigations in the Russian doping program is of “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”.³⁷⁰

2 - LAW

163) Two pivotal concepts in the law of international state responsibility need to be taken into consideration in deciding whether the conduct described in this communication is attributable to Russia: (1) the fact that the State, as a subject of international law, is responsible for the conduct of all the organs, instrumentalities and officials which form part of its organization and act in that capacity, whether or not they have separate legal personality under its internal law; (2) the fact that conduct of organs of the state is attributable to the state even if they acted *ultra vires*.

A - Unity of the State

164) The so-called principle of the ‘unity of the State’ is a “well-established rule, one of the cornerstones of the law of State responsibility”.³⁷¹ The International Court of Justice considers it a rule of customary international law.³⁷² To summarize, as far as international law is concerned, the State is a single entity regardless of the national structures and subdivisions within its borders.³⁷³ As formulated in the ILC Articles on State Responsibility: “1. 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.

³⁶⁹ IOC’s Disciplinary Commission’s Report to the IOC’s Executive Board, *supra* note 158, p.13.

³⁷⁰ McLaren’s First Report, *supra* note 136, p. 60.

³⁷¹ *Bosnia and Herzegovina v. Serbia and Montenegro*, *supra* note 336, para. 385.

³⁷² International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I. C. J. Reports, p. 62, p. 87, para 62 (1999); available at: (<https://www.icj-cij.org/public/files/case-related/100/100-19990429-ADV-01-00-EN.pdf>) [Accessed on 4 Feb. 2021].

³⁷³ ILC Articles on State Responsibility, *supra* note 201, p. 35, art. 2, commentary para. 6.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State”.³⁷⁴

165) In other words, States cannot invoke internal divisions of powers and competences to escape responsibility.³⁷⁵ According to the commentary to the ILC Articles: “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.”³⁷⁶ “It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.”³⁷⁷ “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”.³⁷⁸ This means that there is no variance between “acts of superior or subordinate officials”.³⁷⁹

166) General Comment 31 of the Human Rights Committee echoes the same: “The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’”.³⁸⁰

³⁷⁴ *Id.*, p. 40, art. 4.

³⁷⁵ *Id.*, p. 39 para. 7.

³⁷⁶ *Id.*, p. 40, art. 4, commentary para. 5.

³⁷⁷ *Id.*, p. 40, art. 4, commentary para 6.

³⁷⁸ *Id.*, p. 45, art. 7, commentary para. 2.

³⁷⁹ *Id.*, p. 41, art. 4, commentary para.7.

³⁸⁰ Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 4, CCPR/C/21/Rev.1/Add. 13, (26 May 2004) (<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjYoiCfMKoIRv2FVaV>)

167) In sum, any internal division of powers concerning the organs that were involved in the Russian doping program do not preclude the international legal responsibility of the State. It does not matter that the act was committed by the judiciary, executive or legislature. Also, no matter what the position of the agents conducting the wrongful act is within the hierarchy of the state, responsibility attaches to the state.³⁸¹

B - Actions Ultra Vires

168) Article 7 of the ILC Articles states: “The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, *even if it exceeds its authority or contravenes instructions*”.³⁸² Responsibility attaches even when the organ or entity in question has acted *ultra vires*, manifestly exceeding its competences, or overtly committed unlawful acts under the cover of its official status.³⁸³ Otherwise, States could easily preclude attribution simply by presenting a façade of formal compliance in their domestic law while routinely failing to comply with that law in practice.³⁸⁴ In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority”.³⁸⁵

169) Thus, it does not matter whether those officials preparing, procuring, and administering PEDS, and hiding the results of doping tests, did so in violation of Russian law and/or against instructions. They were still acting under color of authority of the State, by virtue of their positions, the extensive links between the Ministry and the Laboratory, and even the use of governmental communication channels. For instance, some of those involved in the tests manipulation even used

[zRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGcZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA%3D%3D](https://www.ilo.org/ilc/ILC%20Articles%20on%20State%20Responsibility%20(1978).pdf)).

³⁸¹ ILC Articles on State Responsibility, *supra* note 201, art. 4.

³⁸² *Id.*, p. 45, art. 7. [Emphasis added].

³⁸³ ILC Articles on State Responsibility, *supra* note 201, p. 45, art. 7.

³⁸⁴ *Id.* p. 45, art. 7, commentary para 2.

³⁸⁵ Iran-United States Claims Tribunal, Award No. (518-131-2) *Petrolane, Inc. v. The Government of the Islamic Republic of Iran*, 27 Iran-U.S. Cl. Trib. p. 92 (1991); *See also* ILC Articles on State Responsibility, *supra* note 201, p. 42, art. 4, commentary para. 13.

the official email of the Ministry of Sport as a means of communicating with the Laboratory in carrying out the illegal doping program.³⁸⁶

VI - MERITS

170) The authors of this Communication believe that, when the facts detailed above are considered in light of the rights recognized under the ICCPR, Russia should be found in violation, with regard to Yuliya Stepanova, Articles 7, first and second sentence, 8.3.a, 17.1, 17.2, 19.2, and 23.1, all in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3; and with regard to Vitaly Stepanov, Articles 17.1 and 17.2, 19.2, 23.1, in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3.

1 - ARTICLE 7 – THE PROHIBITION OF CRUEL, INHUMAN AND DEGRADING TREATMENT AND THE PROHIBITION OF MEDICAL EXPERIMENTATION WITHOUT CONSENT.

171) Article 7 of the Covenant provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”.³⁸⁷

172) Unlike several other rights protected in the Covenant, Article 7 does not allow for any possible restrictions or limitations. Per Article 4.2 of the ICCPR, Article 7 is non-derogable, meaning under no circumstances can a State derogate from the Article or suspend its application. Indeed, by now the prohibitions contained in Article 7 are considered peremptory norms of customary international law (*jus cogens*). As the ICJ noted in the case *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, “... the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)”.³⁸⁸

³⁸⁶ McLaren’s First Report, *supra* note 136, pp. 32-33.

³⁸⁷ ICCPR, art. 7.

³⁸⁸ ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, I.C.J. Reports 2012, p. 457, para. 99; available at: (<https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>) [Accessed on 2 Feb. 2021]. See also Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/34/54, para. 18 (14 Feb. 2017); available at: (https://www.ohchr.org/Documents/Issues/Torture/A_HRC_34_54.pdf) [Accessed on 2 Feb. 2021]; Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for*

173) Article 7 is echoed by Article 5 of the Universal Declaration of Human Rights,³⁸⁹ Article 37 of the Convention on the Rights of the Child,³⁹⁰ Article 3 of the European Convention on Human Rights and Fundamental Freedoms,³⁹¹ Article 4 of the Charter of Fundamental Rights of the European Union,³⁹² Article 5 of the African Charter of Human and Peoples' Rights,³⁹³ Article 5 of the American Convention on Human Rights,³⁹⁴ Article 8 of the (revised) Arab Charter of Human Rights, and Art. 14 of the ASEAN Declaration on Human Rights.³⁹⁵ Moreover, the prohibition is also the object of widely ratified specific treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁹⁶ the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,³⁹⁷ and the Inter-American Convention to Prevent and Punish Torture.³⁹⁸

174) The overall aim of Article 7 is “to protect both the dignity and the physical and mental integrity of the individual.”³⁹⁹ States have the duty to protect individuals regardless of whether the

National and Customary Law, European Journal of International Law, Vol. 15, at pp. 97-121(2004); available at: (<http://www.ejil.org/pdfs/15/1/349.pdf>) [Accessed on 2 Feb. 2021].

³⁸⁹ UN General Assembly, *Universal Declaration of Human Rights*, U.N. Doc. A/RES/217A(III), art. 5 (10 Dec. 1948); available at: (<https://www.refworld.org/docid/3ae6b3712c.html>) [Accessed on 5 Feb. 2021] [hereinafter UDHR].

³⁹⁰ UN General Assembly, *Convention on the Rights of the Child*, U.N.T.S. Vol. 1577, at art. 37 (2 Sep. 1990); available at: (https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) [Accessed on 5 Feb. 2021].

³⁹¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedom, as amended by Protocols Nos. 11 and 14*, ETS 5, at art. 3 (4 Nov. 1950); available at: (<https://www.refworld.org/docid/3ae6b3b04.html>) [Accessed on 5 Feb. 2021] [hereinafter ECHR].

³⁹² European Union, *Charter of Fundamental Rights of the European Union*, at art. 4 (26 Oct. 2012); available at: (<https://www.refworld.org/docid/3ae6b3b70.html>) [Accessed on 5 Feb. 2021] [hereinafter EU Charter of Fundamental Rights].

³⁹³ Organization of African Unity, *African Charter on Human and People's Rights ("Banjul Charter")*, CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58, at art. 5 (27 June 1981); available at: (<https://www.refworld.org/docid/3ae6b3630.html>) [Accessed on 5 Feb. 2021].

³⁹⁴ League of Arab States, *Arab Charter on Human Rights*, at art. 8 (22 May 2004); available at: (<http://hrlibrary.umn.edu/instree/loas2005.html>) [Accessed on 5 Feb. 2021].

³⁹⁵ Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, at art. 14 (18 Nov. 2012); available at: (https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf) [Accessed on 5 Feb. 2021].

³⁹⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*, U.N.T.S. Vol. 1465, p. 85 (10 Dec. 1984); available at: (<https://www.refworld.org/docid/3ae6b3a94.html>) [Accessed on 5 Feb. 2021] [hereinafter CAT].

³⁹⁷ Council of Europe, *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment*, ETS 126 (26 Nov. 1987); available at: (<https://www.refworld.org/docid/3ae6b36314.html>) [Accessed on 5 Feb. 2021].

³⁹⁸ Organization of American States, *Inter-American Convention to Prevent and Punish Torture*, OAS Treaty Series No. 67 (9 Dec. 1985); available at: (<https://www.refworld.org/docid/3ae6b3620.html>) [Accessed on 5 Feb. 2011].

³⁹⁹ Human Rights Committee, *General comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, para. 2 (10 May 1992); available at: (<https://www.refworld.org/docid/453883fb0.html>) [Accessed on 5 Feb. 2021].

violation was inflicted “by people acting in their official capacity, outside their official capacity or in a private capacity”.⁴⁰⁰

175) Article 7 contains two distinct but interconnected prohibitions: the prohibition of torture, cruel, inhuman or degrading treatment, and the prohibition of medical or scientific experimentation without consent of the subject. The present communication claims violation of both prohibitions. In particular, regarding the first sentence, this communication does not claim Yuliya Stepanova was subject to torture. However, it does claim she was subject to cruel, inhuman or degrading treatment, in violation of Article 7 of the Covenant, read in conjunction with the second sentence of its preamble: “Recognizing that these rights derive from the inherent dignity of the human person”.⁴⁰¹ In regard to the second sentence, the communication claims she was subject to medical intervention or scientific experimentation without her free and informed consent.

A -The Prohibition of Cruel, Inhuman or Degrading Treatment.

176) The Covenant does not define torture nor cruel, inhuman or degrading treatment. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as “...any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.⁴⁰² However, it does not define cruel, inhuman or degrading treatment.

177) Neither the Human Rights Committee nor the Committee against Torture have considered it necessary or desirable “to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.”⁴⁰³ They have given due regard to the

⁴⁰⁰ *Id.*

⁴⁰¹ ICCPR, preamble.

⁴⁰² CAT, art. 1.1.

⁴⁰³ General Comment No. 20, *supra* note 399, para. 4.

“circumstances of each case, including the nature of the treatment, the sex, age and state of health and vulnerability of the victim and any other status or factors,”⁴⁰⁴ and allowing for the evolution of standards.

178) For instance, in *Vuolanne v. Finland*, the Human Rights Committee noted that “...the assessment of what constitutes inhuman or degrading treatment ... depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim.”⁴⁰⁵ In *Viana Acosta v. Uruguay*, the Human Rights Committee concluded that the treatment of the complainant, which included psychiatric experiments and forced injection of tranquillizers against his will, constituted inhuman treatment.⁴⁰⁶ In *Llantoy-Human v. Peru* and *LMR v. Argentina*, it deemed a denial of abortion a violation of Article 7.⁴⁰⁷ In *LNP v. Argentina*, the author of the communication, a victim of rape was subjected to “distressing tests which were not necessary to determine the nature of the assault committed against her, but were instead aimed at determining whether or not she was a virgin”.⁴⁰⁸ “[A]ll the witnesses were asked whether she was a prostitute”.⁴⁰⁹ “The Court’s analysis focused on the sexual life of the author and whether or not she was a “prostitute”, and considered the author’s loss of virginity as the main factor in determining whether she consented or not to the sexual act”.⁴¹⁰ Considering the circumstances, the Committee found a violation of article 7.⁴¹¹ In concluding observations on Poland, the Committee

⁴⁰⁴ General Comment No. 4, *supra* note 316, para 17 (4 Sep. 2018); available at:

(https://www.ohchr.org/Documents/HRBodies/CAT/CAT-C-GC-4_EN.pdf) [Accessed on 5 Feb. 2021].

⁴⁰⁵ Human Rights Committee, Comm. No. 265/1987, *Vuolanne v. Finland*, U.N. Doc. CCPR/C/35/D/265/1987, para. 9.2 (2 May 1989); available at: <https://www.refworld.org/cases,HRC,50b8ee372.html> [Accessed on 5 Feb. 2021].

⁴⁰⁶ Human Rights Committee, Comm. No. 110/1981, *Viana Acosta v. Uruguay*, U.N. Doc. CCPR/C/21/D/110/1981, paras. 2.7, 14, 15 (29 March 1984); available at: (<http://hrlibrary.umn.edu/undocs/session39/110-1981.htm>) [Accessed on 5 Feb. 2021].

⁴⁰⁷ Human Rights Committee, Comm. No. 1153/2003, *Llantoy-Human v. Peru*, U.N. Doc. CCPR/C/85/D/1153/2003, para 6.3 (22 Nov. 2005); available at: (<http://hrlibrary.umn.edu/undocs/1153-2003.html>) [Accessed on 5 Feb. 2021]; Human Rights Committee, Comm. No. 1608/2007 *LMR v. Argentina*, U.N. Doc. CCPR/C/101/D1608/2007, para 9.2 (28 Apr. 2011); available at: (<https://www.escr-net.org/caselaw/2013/lmr-v-argentina-un-doc-ccpre101d16082007>) [Accessed on 5 Feb. 2021].

⁴⁰⁸ Human Rights Committee, Comm. No. 1610/2007, *LNP v. Argentina*, para. 13.3 (16. Aug. 2011) U.N. Doc. CCPR/C/102/D/1610/2007; available at: (http://www.worldcourts.com/hrc/eng/decisions/2011.07.18_LNP_v_Argentina.pdf) [Accessed on 4 Feb. 2021].

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.* paras. 3.2, 13.6.

expressed concern over the hazing of new army recruits as a breach of Article 7.⁴¹² In *Eshonov v. Uzbekistan*, the Committee deemed misrepresentation of the cause of death and improper investigation a violation of Article 7.⁴¹³ In *Quinteros v Uruguay*, it considered lack of knowledge on the whereabouts of family members a breach of Article 7.⁴¹⁴ The same was held in several other communications.⁴¹⁵ In *Sankara et al v. Burkina Faso*, the Committee found a failure to correct the cause of death in a death certificate a violation of Article 7.⁴¹⁶ In *C. v Australia*, the State's failure to prevent worsening of the mental situation of a detainee caused by the detention was held a violation of Article 7.⁴¹⁷

179) In sum, it is clear that very different types of conduct could be construed as violations of Article 7. While it takes intent, severe pain or suffering, and involvement of a State agent for a conduct to be considered torture, it does not take any of that for a conduct to be considered cruel, inhuman or degrading treatment. "No specific definition of 'cruel', 'inhuman', or 'degrading' treatment have emerged under the ICCPR and CAT ... [and] it may be possible to [even] negligently inflict such treatment."⁴¹⁸

180) The purpose of the Russian doping program was to prepare the athletes for international competitions and to win medals for the country, even if this meant jeopardizing their health. Athletes

⁴¹² Human Rights Committee, *Concluding Observations of the Human Rights Committee: Poland*, U.N. Doc. CCPR/C/79/Add.110, para. 15 (29 July 1999); available at: (<https://www.undocs.org/CCPR/C/79/Add.110>) [Accessed on 5 Feb. 2021].

⁴¹³ Human Rights Committee, Comm. No. 1225/2003, *Eshonov v. Uzbekistan*, U.N. Doc. CCPR/C/99/D/1225/2003, para. 9.10 (18 Aug. 2010); available at: (<http://hrlibrary.umn.edu/undocs/1225-2003.html>) [Accessed on 5 Feb. 2021].

⁴¹⁴ Human Rights Committee, Comm. No. 107/1981, *Quinteros v Uruguay*, U.N. Doc. CCPR/C/OP/2, para. 14 (21 July 1983); available at: (<http://hrlibrary.umn.edu/undocs/newscans/107-1981.html>) [Accessed on 5 Feb. 2021].

⁴¹⁵ Human Rights Commission, Comm. No. 886/1999, *Schedko v Belarus*, U.N. Doc. CCPR/C/77/D/886/1999, para. 10.2 (3 April 2003); available at: (<http://hrlibrary.umn.edu/undocs/886-1999.html>) [Accessed on 5 Feb. 2021]; Human Rights Committee, Comm. No. 887/1999, *Staselovich v Belarus*, U.N. Doc. CCPR/C/77/D/887/1999 (3 April 2003); available at: (http://www.worldcourts.com/hrc/eng/decisions/2003.04.03_Staselovich_v_Belarus.htm) [Accessed on 5 Feb. 2021]; Human Rights Committee, Comm. No. 1044/2002, *Shukurova v Tajikistan*, U.N. Doc. CCPR/C/86/D/1044/2002 (31 Mar. 2006); available at: (<http://hrlibrary.umn.edu/undocs/1044-2002.html>) [Accessed on 5 Feb. 2021]; Human Rights Committee, Comm. No. 1473/2006, *Torbel et al v Spain*, U.N. Doc. CCPR/C/95/D/1473/2006, para. 7.5 (24 April 2009); available at: (<https://digitallibrary.un.org/record/653528?ln=en>) [Accessed on 5 Feb. 2021].

⁴¹⁶ Human Rights Committee, Comm. No. 1159/2003, *Sankara et al v Burkina Faso*, U.N. Doc. CCPR/C/86/D/1159/2003, para 12.2 (13 March. 2006); available at: (<http://hrlibrary.umn.edu/undocs/1159-2003.html>) [Accessed on 5 Feb. 2021].

⁴¹⁷ Human Rights Committee, Comm. No. 900/1999, *C v Australia*, U.N. Doc. CCPR/C/76/D.900/1999, para 8.4 (28 Oct. 2002); available at: (<http://hrlibrary.umn.edu/undocs/900-1999.html>) [Accessed on 5 Feb. 2021].

⁴¹⁸ Joseph et. al., *supra* note 190, p. 234.

enlisted in this doping program were treated cruelly, inhumanly and degradingly. They were treated as a dispensable means to the end of State aggrandizement, not as an end in itself, as international human rights law requires. Their dignity as human beings was violated. As Stepanova declared, athletes in the doping program felt that they were treated like racehorses by the State.⁴¹⁹ Bets were placed on them by those who were supposed to care for them. As Dr. Portugalov told Yuliya before the European Championships in Paris: “in the end you should know, Yuliya, that I am making bets with my friend Grigory Rodchenkov and other people. I have bet money that you will win in Paris.”⁴²⁰ Athletes recruited in the doping program could be worked and doped to death as there was always going to be another athlete waiting to join after them. As one athlete noted: “They are playing with people’s lives”⁴²¹

181) PEDs are taking a toll on Yuliya. She is already experiencing health issues as a consequence of doping, including the prospect of kidney failure because of abnormalities in her blood.⁴²² Her blood is oversaturated with iron. To keep ferritin from poisoning her, she needs to keep running on a daily basis.⁴²³

182) Yuliya suffered also psychologically. She was crushed when she was abandoned by the State after her doping was confirmed by WADA. “They’d been abandoning her without her even noticing ... they had cared for her when she was useful and then discarded her when she wasn’t. All her life, men had used her. [Her coaches and doctors] were interested in her body or her talent. One or the other or both.”⁴²⁴ “She realized how cold the big machine could be when you are no longer deemed athletically hot”.⁴²⁵ “While she left most of her possessions in Russia when she and Vitaly ran for their lives, she did carry with her a deep sense of betrayal. It started in her childhood. Her father, who died of cancer when she was 27, beat her, her mother and her two sisters, she said, and

⁴¹⁹ Yuliya Stepanova, *Play the Game 2019: Is Blowing the Whistle Worth the Risk?*, Play the Game Conference at 1:20:00 (14 Oct. 2019); available at: (<https://www.youtube.com/watch?v=YNxuMszDwok&t=5013s>.) [Accessed on 4 Feb. 2021].

⁴²⁰ Walsh, *supra* note 35, p. 133.

⁴²¹ Nick Harris *et. al*, *REVEALED: British London 2012 Olympians were Used as Guinea Pigs for Special Forces ‘Wonder Drug’ but 40 Per Cent of Those Who Used the Supplement Ended up with Side-Effects... Including Vomiting!*, The Daily Mail (25 July 2020); available at: (<https://www.dailymail.co.uk/sport/sportsnews/article-8513525/British-2012-Olympians-guinea-pigs-Special-Forces-wonder-drug.html>) [Accessed on 4 Feb. 2021].

⁴²² *Supra.*, para 90.

⁴²³ *Id.*

⁴²⁴ Walsh, *supra* note 35, p.195.

⁴²⁵ *Id.*, p. 182.

often scolded her for having Olympic dreams. He wanted her to work on their potato farm instead. Her coaches turned on her when she received a two-year ban for blood values that indicated doping. Her teammates, even her best friend, declined to stand with her and fight the team's doping. By the time she arrived in America, she said, she had cut most ties with people outside her family. She admitted that she is cautious about forging relationships with new friends. 'I don't want anyone close to me because I could be hurt,' she said."⁴²⁶

B - The Prohibition of Medical Treatment/Experimentation Without Free and Informed Consent of the Subject

183) Article 7 of the ICCPR proclaims: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, *no one shall be subjected without his free consent to medical or scientific experimentation*”.⁴²⁷

184) The letter of the second sentence of Article 7 prohibits “medical or scientific experimentation” without “free consent”. However, since the Covenant was drafted in the early 1960s, international bioethical law (also known as international biolaw) and international human rights law have evolved considerably. The scope of the principle of consent has broadened to include medical and scientific interventions and treatments, and the requirements for consent to be valid have expanded to include, besides being free (i.e. voluntary given), to be informed, express, specific, and documented.⁴²⁸

185) For the purpose of this case it is important to realize that “[m]edical treatments of an intrusive and irreversible nature, if they lack a therapeutic purpose, constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned.”⁴²⁹

⁴²⁶ Macur, *supra* note 280.

⁴²⁷ Emphasis added.

⁴²⁸ UN General Assembly, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. A/64/272 (10 Aug. 2009); available at: (<https://undocs.org/A/64/272>) [Accessed on 5 Feb. 2021].

⁴²⁹ The Center for Human Rights & Humanitarian Law and the Anti-Torture Initiative, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report*, (March 2014); available at: (<http://antitorture.org/torture-in-healthcare-publication/>) [Accessed on 5 Feb. 2021].

186) Consent is also required by Russian law. Article 20, paragraph 1, of Federal Law N 323-FZ (Basics of Health Protection of the Citizens in the Russian Federation) provides: “A necessary precondition for medical intervention is the informed voluntary consent of a citizen or his legal representative to medical intervention on the basis of complete information about the goals, methods of providing medical care, the associated risk, possible options for medical intervention, its consequences, as well as the alleged the results of medical care provided by a medical professional in an accessible the form”.⁴³⁰

i - The Principle of Consent in Contemporary International Human Rights Law

187) Consent a cornerstone of both international biolaw and international human rights law, since both share the objective of protecting human dignity and the integrity of every person.⁴³¹ There is a vast and rapidly growing literature on the principle of consent,⁴³² and this communication is not the place to tell the story of its development over more than two centuries. However, suffice to say, by now it is widely recognized that in international human rights law, as long as the patient is not incapacitated, legally or physically, “the only accepted position is that no medical act may be

⁴³⁰ “1. Необходимым предварительным условием медицинского вмешательства является дача информированного добровольного согласия гражданина или его законного представителя на медицинское вмешательство на основании предоставленной медицинским работником в доступной форме полной информации о целях, методах оказания медицинской помощи, связанном с ними риске, возможных вариантах медицинского вмешательства, о его последствиях, а также о предполагаемых результатах оказания медицинской помощи”. Federal Law No. 323-FZ of 21 November 2011 on Basics of Health Protection of the Citizens in the Russian Federation as amended to 29 December 2015; available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=102297 [Last accessed 16 Feb. 2021]. Translation provided by the authors.

⁴³¹ On the convergence of international human rights law and bioethics law, see. Ashcroft, Richard E, “*Could Human Rights Supersede Bioethics?*”, 10 *Human Rights Law Review* (2010), pp. 639–660.

⁴³² See, *inter alia*, Faden, Ruth R. et. al., *A History and Theory of Informed Consent* (New York, 1986); Ferdinand van Oosten, *The Doctrine of Informed Consent in Medical Law* (Frankfurt am Main, 1991); Peter H. Schuck, “Rethinking Informed Consent”, 103 *The Yale Law Journal* (1994), pp. 899–959; Amedeo Santosuosso (ed.), *Il consenso informato: tra giustificazione per il medico e diritto del paziente* (Milano, 1996); Irene S. Switankowsky, *A New Paradigm for Informed Consent* (Lanham, 1998); Emmanuel Roucouas, “Le droit au consentement et ses restrictions dans la Convention sur les droits de l’homme et la biomedicine (1997)”, in R.-J. Dupuy (ed.), *Mélanges en l’honneur de Nicolas Valticos* (Paris, 1999), pp. 479–495; Jessica W. Berg, Paul S. Appelbaum, Lisa S. Parker and Charles W. Lidz, *Informed Consent: Legal Theory and Clinical Practice* (Oxford, 2nd ed., 2001); Annick Dorsner-Dolivet, “Le consentement au traitement médical: une liberté fondamentale en demi-teinte”, 19 *Revue française de droit administrative* (2003), pp. 528–535; Giovanni G. Pasinelli, *Il consenso informato: una svolta nell’etica medica* (Milano, 2004); Steve Clarke and Justin Oakley (eds.), *Informed Consent and Clinician Accountability* (Cambridge, 2007); Neil C. Manson and Onora O’Neill, *Rethinking Informed Consent in Bioethics* (New York, 2007); Carlo Casonato, “Il consenso informato: profili di diritto comparato”, 11 *Diritto pubblico comparato ed europeo* (2009), pp. 1052–1073; Alasdair R. Maclean, *Autonomy, Informed Consent and Medical Law: A Relational Challenge* (Cambridge, 2009).

performed without [the patient's] ... consent".⁴³³ It is a *conditio sine qua non* for medical practice and scientific research.⁴³⁴

188) Virtually all international agreements and declarations on ethical and legal standards in medicine and biomedical research contain provisions regarding the principle of consent.⁴³⁵ The first document to recognize internationally the principle of consent is the so-called "Nuremberg Code", adopted in the wake of the "Nazi doctors" trial before the International Military Tribunal in Nuremberg, in 1946. The very first provision of the code reads: "The voluntary consent of the human subject is absolutely essential".⁴³⁶

189) Starting from the late 1940s, the World Medical Association, an international confederation of professional medical associations representing physicians worldwide, has been adopting and revising a set of codes of conduct regulating all aspects of the medical profession and patient's rights: The International Code of Medical Ethics;⁴³⁷ the Declaration of Helsinki on Ethical Principles for Medical Research Involving Human Subjects;⁴³⁸ and the Declaration on the Rights of the Patient.⁴³⁹ These three documents are the internationally accepted guidelines for ethical medicine worldwide. Of the three, the Declaration of Helsinki is the keystone of the international biolaw edifice. It stands to international bioethics law as the Universal Declaration of Human Rights stands to international human rights law.

⁴³³ Council of Europe, Parliamentary Assembly, *Human stem cell research*, Report of 10 June 2003, Doc. 9816, para. 8 (10 June 2003); available at: (<http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10167&lang=en>) [Accessed on 5 Feb. 2021].

⁴³⁴ Stefania Negri (ed.), *Self-Determination, Dignity and End-of-Life Care*, Queen Mary Studies in International Law Vol. 7, pp. 23–72, at 25 (Feb. 2012).

⁴³⁵ See Regine Kollek, "Article 6: Consent", in H.A.M.J. ten Have and M.S. Jean (eds.), *The UNESCO Universal Declaration on Bioethics and Human Rights. Background, principles and application* (Paris, 2009), pp. 123–138, at 124.

⁴³⁶ *The Nuremberg Code*, British Medical Journal No. 7070 Vol. 313, p. 1448 (7 Dec. 1996); available at: (<http://www.cirp.org/library/ethics/nuremberg/>) [Accessed on 5 Feb. 2021].

⁴³⁷ World Medical Association, *WMA International Code of Medical Ethics*, (9 July 2018); available at: (<https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/>) [Accessed on 5 Feb. 2021].

⁴³⁸ World Medical Association, *World Medical Association Declaration of Helsinki. Ethical Principles for Medical Research Involving Human Subjects*, Bulletin of the World Health Organization 79(4), (2001); available at: (<https://apps.who.int/iris/handle/10665/268312>) [Accessed on 5 Feb. 2021].

⁴³⁹ World Medical Association, *WMA Declaration of Lisbon on the Rights of the Patient*, (Oct. 1981); available at: (<https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/>) [Accessed on 5 Feb. 2021].

191) Under the Declaration of Helsinki, consent must be not only voluntary but also informed: “[p]articipation by individuals capable of giving *informed* consent as subjects in medical research must be voluntary. [n]o individual capable of giving *informed* consent may be enrolled in a research study unless he or she freely agrees”.⁴⁴⁰ The next paragraphs elaborate on what constitutes “informed consent”: “In medical research involving human subjects ..., each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, post-study provisions and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal. Special attention should be given to the specific information needs of individual potential subjects as well as to the methods used to deliver the information. After ensuring that the potential subject has understood the information, the physician or another appropriately qualified individual must then seek the potential subject’s freely-given informed consent, preferably in writing. If the consent cannot be expressed in writing, the non-written consent must be formally documented and witnessed. All medical research subjects should be given the option of being informed about the general outcome and results of the study”.⁴⁴¹

192) The Declaration of Helsinki cautions also against situations where the subject is in a dependent relationship with the physician or might be coerced to consent: “When seeking informed consent ... the physician must be particularly cautious if the potential subject is in a dependent relationship with the physician or may consent under duress. In such situations the informed consent must be sought by an appropriately qualified individual who is completely independent of this relationship”.⁴⁴² Also: “...The refusal of a patient to participate in a study or the patient’s decision to withdraw from the study must never adversely affect the patient-physician relationship”.⁴⁴³

193) According to the International Code of Medical Ethics: “A physician shall... *respect a competent patient’s right to accept or refuse treatment*”.⁴⁴⁴ And, according to the Declaration on the

⁴⁴⁰ *World Medical Association (WMA) Declaration of Helsinki. Ethical Principles for Medical Research Involving Human Subjects*, *supra* note 438, para 25. Emphasis added.

⁴⁴¹ *Id.*, para. 26.

⁴⁴² *Id.*, para. 27.

⁴⁴³ *Id.*, para. 31.

⁴⁴⁴ *WMA International Code of Medical Ethics*, *supra* note 437. Emphasis added.

Rights of the Patient: “The patient has the right to self-determination, to make free decisions regarding himself/herself. The physician will inform the patient of the consequences of his/her decisions; A mentally competent adult patient has the *right to give or withhold consent* to any diagnostic procedure or therapy. The patient has the *right to the information necessary to make his/her decisions*. The patient should understand clearly what is the purpose of any test or treatment, what the results would imply, and what would be the implications of withholding consent; The patient has *the right to refuse to participate in research* or the teaching of medicine”.⁴⁴⁵

194) Intergovernmental organizations, too, have adopted international legal instruments codifying the principle of consent. Thus, the World Health Organization’s Amsterdam Declaration on the Promotion of Patients’ Rights in Europe announces: “3.1 The *informed consent* of the patient is a prerequisite *for any medical intervention*; 3.2 A patient has the *right to refuse or to halt a medical intervention*. The implications of refusing or halting such an intervention must be carefully explained to the patient; ... 3.10 The *informed consent* of the patient *is a prerequisite for participation in scientific research*. All protocols must be submitted to proper ethical review procedures...”. The WHO repeated the concept in the 2005 Handbook for Good Clinical Research Practice: “*Freely given informed consent* should be obtained from every subject prior to research participation.”⁴⁴⁶

195) It should be noted that, according to the WHO, the principle of consent applies not only in case of medical research and experimentation but also in case of any “medical intervention”. Second, in the case of interventions that are conducted to further research, a research protocol is required and the protocol must have been submitted to proper ethical review procedures and approved by the relevant bodies.

196) In 2016, together with the Council for International Organizations of Medical Sciences, the WHO adopted the International Ethical Guidelines for Health-Related Research Involving

⁴⁴⁵ WMA Declaration of Lisbon on the Rights of the Patient, *supra* note 439, principle 3, Emphasis added.

⁴⁴⁶ World Health Organization, *A Declaration on the Promotion of Patient’s Rights in Europe*, p.11 (28 June 1994); available at: (https://www.who.int/genomics/public/eu_declaration1994.pdf) [Accessed on 5 Feb. 2021]. Emphasis added. World Health Organization, *Handbook for Good Clinical Research Practice*, p. 59 (2005); available at: (https://apps.who.int/iris/bitstream/handle/10665/43392/924159392X_eng.pdf?sequence=1&isAllowed=y) {Accessed on 5 Feb. 2021}. Emphasis Added.

Humans.⁴⁴⁷ Guideline 4 provides: “For all biomedical research involving humans the investigator must obtain the *voluntary informed consent* of the prospective subject ... Waiver of informed consent is to be regarded as uncommon and exceptional, and must in all cases be approved by an ethical review committee”. Guideline 5 goes at great length to articulate the requirements of the principle of consent. The most relevant are: “Before requesting an individual's consent ..., the investigator must provide the following information...: 2. that the *individual is free to refuse to participate and will be free to withdraw from the research at any time without penalty or loss of benefits* to which he or she would otherwise be entitled; ... 9. *any foreseeable risks, pain or discomfort, or inconvenience* to the individual (or others) associated with participation in the research, including risks to the health or well-being of a subject’s spouse or partner”.⁴⁴⁸

197) The United Nations Educational, Scientific and Cultural Organization (UNESCO) has also issued two declarations that encapsulate the principle of consent. The first one is the 1997 Universal Declaration on the Human Genome and Human Rights, whose Article 5 proclaims: “(a) *Research, treatment or diagnosis ... shall be undertaken only after rigorous and prior assessment of the potential risks and benefits* pertaining thereto and in accordance with any other requirement of national law; (b) In all cases, the *prior, free and informed consent of the person concerned shall be obtained*. (d) *In the case of research, protocols shall ... be submitted for prior review in accordance with relevant national and international research standards or guidelines*”.⁴⁴⁹ Article 9 adds: “In order to protect human rights and fundamental freedoms, *limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the bounds of public international law and the international law of human rights*”.⁴⁵⁰

198) The second one is the 2005 Universal Declaration on the Bioethics and Human Rights, whose Article 6 provides: “1. *Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on*

⁴⁴⁷ Council for International Organizations of Medical Sciences and the World Health Organization, *International Ethical Guidelines for Health-Related Research Involving Humans*, (2016); available at: (<https://cioms.ch/wp-content/uploads/2017/01/WEB-CIOMS-EthicalGuidelines.pdf>) [Accessed on 5 Feb. 2021].

⁴⁴⁸ *Id.*, pp. 9-15.

⁴⁴⁹ UNESCO, *Universal Declaration on the Human Genome and Human Rights*, art. 5 (11 Nov. 1997); available at: (<https://www.refworld.org/docid/404226144.html>) [Accessed on 5 Feb. 2021]. Emphasis added.

⁴⁵⁰ *Id.*, art. 9. Emphasis added.

adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice; 2. Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent."⁴⁵¹

199) In Europe, the principle of consent is incorporated in three treaties. First, Article 3 of the 2000 Charter of Fundamental Rights of the European Union, entitled "Right to the integrity of the person", provides: "1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: (a) the *free and informed consent of the person concerned, according to the procedures laid down by law; ...*"⁴⁵²

200) The 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine,⁴⁵³ also known as the Convention on Human Rights and Biomedicine or, more succinctly, the Oviedo Convention, echoes the same. Article 5 provides: "An intervention in the health field may only be carried out after the person concerned has *given free and informed consent* to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time"⁴⁵⁴

201) The 2005 Additional Protocol to the Oviedo Convention concerning Biomedical Research widened the scope of the principle of consent and added much more detail.⁴⁵⁵ First, as the World Health Organization's Amsterdam Declaration on the Promotion of Patients' Rights in

⁴⁵¹ UNESCO, *Universal Declaration on Bioethics and Human Rights*, art. 6 (19 Oct. 2005); available at: (http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html) [Accessed on 5 Feb. 2021] Emphasis added.

⁴⁵² European Union, Charter of Fundamental Rights, *supra* note 392, art. 3. Emphasis added.

⁴⁵³ Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, ETS No. 164 (1997) available at: (<https://rm.coe.int/168007cf98>) [Accessed on 5 Feb. 2021].

⁴⁵⁴ Council of Europe, *Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research*, CETS No. 195, art. 13 (25 Jan. 2005); available at: (<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/195>) [Accessed on 5 Feb. 2021]. Emphasis added.

⁴⁵⁵ *Id.*, art. 13.

Europe, the Additional Protocol recognizes that the principle of consent applies not only to medical experimentation but also to any medical intervention.⁴⁵⁶ “Medical intervention” is defined as “(i) a physical intervention, and (ii) any other intervention in so far as it involves a risk to the psychological health of the person concerned”.⁴⁵⁷ Then, the Additional Protocol goes to a great lengths to spell out the elements of the principle of consent. “1) The persons being asked to participate in a research project shall be given *adequate information* in a comprehensible form. *This information shall be documented*; 2) *The information shall cover the purpose, the overall plan and the possible risks and benefits of the research project, and include the opinion of the ethics committee.* Before being asked to consent to participate in a research project, the persons concerned shall be specifically informed ...: i) of the nature, extent and duration of the procedures involved, in particular, details of any burden imposed by the research project; ii) of available preventive, diagnostic and therapeutic procedures; iii) of the arrangements for responding to adverse events or the concerns of research participants; iv) of arrangements to ensure respect for private life and ensure the confidentiality of personal data; v) of arrangements for access to information relevant to the participant arising from the research and to its overall results; vi) of the arrangements for fair compensation in the case of damage; vii) of any foreseen potential further uses, including commercial uses, of the research results, data or biological materials; viii) of the source of funding of the research project. 3) In addition, the *persons being asked to participate in a research project shall be informed of the rights and safeguards prescribed by law for their protection, and specifically of their right to refuse consent or to withdraw consent at any time without being subject to any form of discrimination, in particular regarding the right to medical care.*”⁴⁵⁸

202) Also, “1) No research on a person may be carried out ... *without the informed, free, express, specific and documented consent of the person.* Such consent may be freely withdrawn by the person at any phase of the research; 2) *Refusal to give consent or the withdrawal of consent to participation in research shall not lead to any form of discrimination against the person concerned, in particular regarding the right to medical care.*”⁴⁵⁹

⁴⁵⁶ *Id.*, art. 1.

⁴⁵⁷ *Id.*, art. 19.3.

⁴⁵⁸ *Id.*, art. 13. Emphasis added.

⁴⁵⁹ *Id.*, art. 14. Emphasis added.

203) Lastly, the United Nations Human Rights Council has also called upon all States: “*To safeguard informed consent within the health counseling, testing and treatment continuum, including in clinical practice, public health and medical research, as a critical element of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including by training health workers and by ensuring protection against abuse, particularly with regard to individuals belonging to vulnerable groups.*”⁴⁶⁰

204) To summarize this quick overview of the principle of consent in contemporary international biolaw and international human rights law, any intervention on humans, at any step of the testing-to-therapy continuum, requires the consent of the subject. To be valid, at a minimum, consent must be free (voluntary) and informed. “Freely” means that consent cannot be valid if given under duress, pressure, blackmail or due to fear of prejudice, negative consequences, loss of benefits or fear of discrimination. Also, to determine if consent was freely given, one must also take into account the specific circumstances of the subject, including any status or situation that could make them particularly vulnerable to coercion. “Informed” means that the subject must be given adequate information regarding aim of the intervention, methods, risks, and benefits. Consent must also be express, specific, prior, and documented. Finally, all medical interventions must take place in compliance with the law (national and international) and ethical standards, and they must be reviewable by professional and ethical review bodies and, ultimately, courts of law.

ii - How Russia Violated the Prohibition on Non-Consensual Medical Experimentation or Intervention in the Case of Yuliya Stepanova.

205) Yuliya Stepanova was subjected to medical experimentation or medical intervention without valid consent. Her consent was not valid because it was neither free nor informed. Moreover, the medical experimentation/intervention that she was subjected to took place outside all ethical and legal boundaries. It was in violation of both Russian law and international law, did not follow approved protocols, and was not subject to ethical review.

⁴⁶⁰ Human Rights Council Resolution, *Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, U.N. Doc. A/HRC/RES/15/22, para. 4(o) (30 Sep. 2010); available at: (https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/15/22) [Accessed on 3 Feb. 2021]. Emphasis added.

a - Yuliya Stepanova was subjected to medical experimentation.

206) First, Yuliya Stepanova was subjected to *medical experimentation*. Doping is an experimental practice almost by definition. Scientists and doctors are constantly tinkering with chemical compounds and therapies to push the envelope of sport performance and outsmart anti-doping agencies. Whenever a substance is put on the list of prohibited substances, labs and doctors start searching for alternatives. It is a race in which anti-doping agencies are always several steps behind. WADA continues to update the list of prohibited substances. As one expert on doping notes: “doping practices by athletes are constantly evolving at near light speed”.⁴⁶¹ The doping control laboratories are always behind the dopers.⁴⁶² “Athletes ... have the ongoing evolution of doping drugs on their side: WADA officials cannot test for a performance-enhancing drug they've never seen before”⁴⁶³. As Dr. Rodchenkov wrote in his book “The athletes quickly learned which anabolics had become detectable and about any increase in the detection windows. The system was perfectly efficient. The moment they or their coaches became aware of any changes in our laboratory practice, they would amend their doping regimens accordingly. We were like field marshals always condemned to fight the previous war”⁴⁶⁴.

207) Again, the Russian doping program was experimental in nature. As Dr. Rodchenkov explained: “We also agreed that I could have five top international-level athletes as my personal ‘experimental group’, a fancy term for guinea pigs. The athletes were desperate, and disappointed with hard-core and ‘handful-of-steroid-pills-a-day’ schemes, and were eager to try a new approach minimising the use of anabolic steroids”.⁴⁶⁵ As the New York Times wrote regarding Dr. Rodchenkov’s activities: “After years of trial and error, he said, he developed a cocktail of three anabolic steroids — metenolone, trenbolone and oxandrolone — that he claims many top-level Russian athletes used leading up to the London Olympics in 2012 and throughout the Sochi Games”.⁴⁶⁶ “Years of trial and error”, of medical experimentation, were not supposed to eliminate

⁴⁶¹ Hackney, *supra* note 39, p. xv.

⁴⁶² Rodchenkov, *supra* note 32, p. 33.

⁴⁶³ Brandon Specktor, *Why is it so Easy to Cheat at the Olympics?*, LiveScience (13 Feb. 2018); available at: (<https://www.livescience.com/61747-how-widespread-olympic-doping.html>) [Accessed on 3 Feb. 2021].

⁴⁶⁴ Rodchenkov, *supra* note 32, p. 35.

⁴⁶⁵ *Id.*, p. 50.

⁴⁶⁶ Ruiz et. al., *supra* note 59.

or at least decrease the possible side effects of such drugs. Instead, the purpose was to find an elixir that could win the competition, would not show on doping tests or was not banned.

208) As soon as an effective drug or treatment that has not yet been banned is found, it is administered before any research on its long-term side effects is done. These side effects can vary from very mild to detrimental to the health of the individuals, especially in the long term. “Scientific evidence is clear and unequivocal in showing that many doping agents can induce severe health consequences, possibly including premature mortality.”⁴⁶⁷ The risks of administering such substances are so grave and known that it even prevents the researcher from conducting long-term rigorous scientific studies.⁴⁶⁸

b - Yuliya Stepanova was subjected to unnecessary medical intervention.

209) Should the Committee conclude that doping practices are not a form of medical experimentation, they are “medical intervention” nonetheless, since they involve the prescription of drugs by doctors and coaches.⁴⁶⁹ As we have already seen, the contemporary understanding of the principle of consent is that it applies not only to medical experimentation but also to any type of medical intervention. Moreover, certain types of medical interventions that are not of an experimental nature but rather routine, such as sterilizations, have already been found to be in violation of the right to bodily integrity,⁴⁷⁰ the prohibition of medical experimentation without consent, and/or of the prohibition torture or to cruel, inhuman or degrading treatment or punishment.⁴⁷¹

⁴⁶⁷ Hackney, *supra* note 39, p. xvi.

⁴⁶⁸ *Id.*, p. 20.

⁴⁶⁹ The 2005 Additional Protocol to the Oviedo Convention concerning Biomedical Research defines “medical intervention” as “(i) a physical intervention, and (ii) any other intervention in so far as it involves a risk to the psychological health of the person concerned”. See *Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research*, *supra* note 454, art. 2.3.

⁴⁷⁰ Although the right to bodily integrity is not specifically recognized under the ICCPR, it has been interpreted to be part of the right to security of the person, to freedom from torture and cruel, inhuman, and degrading treatment.

⁴⁷¹ See European Court of Human Rights, App. No. 18968/07, *V.C. v. Slovakia*, Judgement (08 Nov. 2011); available at:

(<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%22V.C.%20v.%20Slovakia%22%2C%22documentcollectionid%22%3A%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%22001-107364%22%7D>) [Accessed on 5 Feb. 2021]; See also Committee on the Elimination of Discrimination against Women, Comm. No. 4/2004, *A.S. v Hungary*, (29 Aug. 2006) U.N. Doc/ CEDAW/C/36/D/4/2004; available at:

210) Thus, the authors invite the Committee to go beyond a strictly textual reading of Article 7 and not to read it in clinical isolation, but rather take into account other international human rights instruments and prevailing international practice.⁴⁷² We also invite the Committee to interpret the requirement of consent in accordance with other UN treaty bodies and regional human rights courts.

c - Yuliya Stepanova did not validly consent to have medical experimentation or intervention performed on her.

211) Regardless of if this is a case of medical experimentation or intervention, Yuliya Stepanova did not validly consent. Her consent was vitiated by the fact that it was not freely expressed and not informed.

c.1 - Free Consent

212) Consent cannot be deemed to have been freely given if it was obtained through coercion. The term coercion means: “1. The act of compelling by force of authority; 2. Using force to cause something to occur.”⁴⁷³ Thus, to determine whether consent has been coerced, one should consider: i) the degree of vulnerability of the coerced to coercion; ii) the authority of the coercer and the nature of the relationship between the coerced and the coercer; and iii) the amount and type of force used to coerce.

c.1.1 - The vulnerability of the person to coercion.

213) Certain categories of persons are more vulnerable to coercion or undue influence in the context of medical research. The Human Rights Council recognized as much when it called upon all

<https://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf>
[Accessed on 5 Feb. 2021].

⁴⁷² UN, *Vienna Convention on the Law of Treaties*, U.N.T.S. Vol. 1155, at art. 31 (23 May 1969); available at: <https://www.refworld.org/docid/3ae6b3a10.html> [Accessed on 5 Feb. 2021]: “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. ... 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.”

⁴⁷³ The Free Dictionary, Coercion, available at: <https://www.thefreedictionary.com/coercion>.

States: “To safeguard informed consent ... by ensuring protection against abuse, particularly with regard to individuals belonging to *vulnerable groups*.”⁴⁷⁴

214) The duty to ensure that individuals belonging to vulnerable groups are not coerced or pressured into giving consent was also the focus of a 2009 report by Mr. Anand Grover, the then Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health.⁴⁷⁵ In it, the Special Rapporteur flagged children, elderly persons, women, ethnic minorities and indigenous persons, persons with disabilities, persons living with HIV/AIDS, persons deprived of liberty, sex workers, and drug users as particularly vulnerable to pressure to give consent to medical intervention.

215) The fact that some categories of persons might be particularly vulnerable to pressure and, therefore, their consent be vitiated, has been recognized by the Human Rights Committee too. In the Concluding Observations on the United States, the Committee wrote: “where there is doubt as to the ability of a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual”⁴⁷⁶. With regard to minors and other persons unable to give genuine consent, “[they] may be subject to medical research under certain circumstances ... [but] even high potential value of scientific research is not used to justify severe risks to the subjects of the research”⁴⁷⁷.

216) Arguably, professional athletes, particularly those who are not practicing well-funded sports, are a group particularly vulnerable to pressure to consent to medical research and treatment.⁴⁷⁸ Professional sports is usually a career that starts when the individual is in fact a child.⁴⁷⁹ Almost all

⁴⁷⁴ Resolution A/HRC/RES/15/22, *supra* note 460.

⁴⁷⁵ *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, *supra* note 428.

⁴⁷⁶ Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, para. 31 (18 Dec. 2006) available at: (<https://undocs.org/CCPR/C/USA/CO/3/Rev.1>) [Accessed on 3 Feb. 2021].

⁴⁷⁷ Human Rights Committee, *Concluding Observations of the Human Rights Committee*, U.N. Doc. CCPR/CO/72/NET, para. 7 (27 Aug. 2001) available at: (<https://www.refworld.org/docid/3be1202a4.html>) [Accessed on 3 Feb. 2021].

⁴⁷⁸ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, *supra* note 30.

⁴⁷⁹ Human Rights Watch, “*They’re Chasing Us Away From Sport*”: *Human Rights Violations in Sex Testing of Elite Women Athletes*, p.105 (2020); available at:

professional athletes start getting prepared to be an elite athlete when they are under the age of 18. For many, becoming a professional athlete is the only option they see in front of them to have a future. When the national sports system is marred by systemic, State-sponsored doping, athletes learn - when they are still minors - that to succeed they have to take prohibited substances. It is an environment that forces those who have chosen sports as their careers to surrender to the system; a system that uses them as a means to an end and ignores their human dignity.

217) Pervasive doping creates an environment where one has no option but to accept doping as a norm. Sports, and in particular running, is an important source of income, especially for women, in many countries around the world. As a Human Rights Watch report noted: “Success in athletics can deliver material dividends for women. From scholarships to housing and food, the benefits can come rather early in an athlete’s career. Then, if the athlete is successful, she can earn income at competitions and via sponsorships. In some circumstances, success at athletics can also lead to stable employment outside sport ... Their success in athletics [becomes] a source of livelihood not only for them, but often for their extended families.”⁴⁸⁰ This has been the case for the Stepanov family. While Vitaly became unemployed after he was fired from RUSADA, for a few years, their only source of income was Yuliya’s earnings from her running career.

218) The Human Rights Watch report on sex testing in women sports, discusses also the problem of requiring athletes to undergo medical procedures: “[A]thletes impacted by the regulations are not in any meaningful way given the option of providing informed and voluntary consent to the medical intervention ... An athlete choosing between the medical interventions ... and the end of her career is not making a free choice, but rather a coerced one.”⁴⁸¹ In case of athletes with sex variations where female athletes are required to take hormone suppressants or undergo a surgery or quit what they like, researchers concluded: “The alternatives available to athletes are presented under the guise

(https://www.hrw.org/sites/default/files/media_2020/12/lgbt_athletes1120_web.pdf) [Accessed on 3 Feb. 2021]
[hereinafter HRW Sex Testing Report].

⁴⁸⁰ *Id.*, p. 10, 94.

⁴⁸¹ *Id.*, p 107.

of choice, but each option carries its own high price. The choice is to subjugate oneself to power: alter your body ... or leave. It is an impossible set of choices.”⁴⁸²

219) The Office of High Commissioner for Human Rights shares the same concerns over the issue of consent of the athletes within the sport structure: “The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, alongside other mandate holders, has emphasized that while the 2018 IAAF regulations do not force athletes to undergo any assessment or treatment, they leave athletes with the choice of either undergoing these intrusive medically unnecessary assessments or being subjected to treatments with negative impacts on their health and well-being.”⁴⁸³

220) In the words of the McLaren investigations, “...the acceptance of cheating at all levels is widespread and of long standing. Many of the more egregious offenders appear to be coaches who, themselves, were once athletes and who work in connection with medical personnel. This ‘win at all costs’ mentality was then passed to current athletes, whether willing to participate or not. An athlete’s decision not to participate is likely to leave him or her without access to top caliber coaches and thus the opportunity to excel. This acceptance and, at times, expectation of cheating and disregard for testing and other globally accepted anti-doping efforts, indicate a fundamentally flawed mindset that is deeply ingrained in all levels of Russian athletics. The mindset is “justified” on the theory that everyone else is cheating as well.”⁴⁸⁴

221) Jack Robertson, the primary investigator of the WADA investigation into the Russian doping program, found empirical evidence that “99 per cent of [Russian] national-level teammates were doping.” According to Robertson, “[WADA] has discovered that when a Russian athlete [reaches] the national level, he or she [has] no choice in the matter: [it is] either dope, or you’re

⁴⁸² Katrina Karkazis and Morgan Carpenter, *Impossible ‘Choices’: The Inherent Harms of Regulating Women’s Testosterone in Sport*, *Journal of Bioethical Inquiry* 15, pp. 579–587 (2018); available at: (<https://doi.org/10.1007/s11673-018-9876-3>) [Accessed on 3 Feb. 2021].

⁴⁸³ Human Rights Council, *Intersection of Race and Gender Discrimination in Sport*, U.N. Doc. A/HRC/44/26, para. 34(a) (15 June 2020), available at: (<https://undocs.org/en/A/HRC/44/26>) [Accessed on 3 Feb. 2021].

⁴⁸⁴ ARAF Independent Commission Report, *supra* note 52, p. 10.

done".⁴⁸⁵ At that point, they are too close to becoming an elite athlete. The only other option is to quit professional sports and search for a new career, which may take years.

222) In her 2013 statement to WADA, Yulyia Stepanova describes that she had been competing clean for a few years but could not achieve the results and records of the athletes who were already in the doping program. It was only when she submitted to the doping program that she became competitive.⁴⁸⁶

223) Because of their dependency on the state and the national federations or clubs for livelihood, professional athletes are highly vulnerable to coercion and pressure to accept treatments, licit or illicit, as it will be discussed in more detail below.⁴⁸⁷ Refusing to participate in State-sponsored doping places athletes' "lives and livelihoods and that of their families in jeopardy".⁴⁸⁸ When the choice is between accepting medical interventions, which means making the team and keeping a salary and housing, or refusing interventions and being left out of the team and losing one's source of livelihood, the choice is easy, but it is far from free.

224) Although implicit vulnerability and context do not entail coercion per se, arguably they create a rebuttable presumption of coercion. In the context of a quasi-judicial procedure, like the consideration of an individual communication, it has the effect of lowering the evidentiary threshold and the amount of force used to qualify for coercion.

c.1.2 - The authority of the coercer and the nature of the relationship between the coerced and the coercer.

225) The second element to be considered is the nature of the authority of the coercer and of the relationship between the coerced and the coercer. "Sporting cultures are intensely hierarchical, and athletes often defer considerable authority to their federations, coaches, and managers. The

⁴⁸⁵ Jack Robertson, *The 2018 Winter Olympics Are Already Tainted*, The New York Times (27 Dec. 2017); available at: (<https://www.nytimes.com/2017/12/27/opinion/2018-winter-olympics-russia.html>) [Accessed on 3 Feb. 2021].

⁴⁸⁶ Letter to WADA, *supra* note 63, pp. 1-3.

⁴⁸⁷ See *supra*, VI(1)(B)(ii)(c.1 - Free Consent; VI(2)(B - Rendered Involuntarily....

⁴⁸⁸ Hackney, *supra* note 39, p. 22.

coercion athletes experience under the regulations takes place in these already hierarchical contexts and is multifaceted, in some ways direct and in other ways more subtle.”⁴⁸⁹

226) The relation between athletes and sport governing bodies is based on a flawed consent.⁴⁹⁰ Three UN Special Rapporteurs (on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Rapporteur of the Working Group on the Issue of Discrimination Against Women), in a letter to the International Association of Athletics Federation, expressed serious concern over the issue of voluntary and informed consent in the context of medical interventions in athletes' bodies.⁴⁹¹ The United Nations High Commissioner for Human Rights have expressed similar concerns regarding free consent for athletes in their relations with sports governing bodies and recognizes athletes as a particularly vulnerable group. The report points out the power imbalances between individual athletes and sports federations and says: “[i]n sport, such power imbalances are compounded by athletes’ dependency on the sports federations requiring such medical interventions and the frequent absence of adequate and holistic support during the decision-making process”.⁴⁹²

227) Certainly, in situations where there is subjugation, there must be a presumption of coercion that can be rebutted only when the voluntary nature of consent has been carefully documented and corroborated by multiple witnesses. But even when it is, as the European Court of Human Rights said in *Juhnke v. Turkey*, “...in certain circumstances, [such as when] a person [is] in detention[, she] cannot be expected to continue to resist ..., given her vulnerability at the hands of the authorities, who exercise complete control over her throughout her detention”.⁴⁹³ Likewise, in *Y.*

⁴⁸⁹ HRW Sex Testing Report, *supra* note 479, p. 57.

⁴⁹⁰ Faraz Shalaei, *The Semenya Decision of the Swiss Federal Tribunal: Human Rights on the Bench*, ASSER International Sports Law Blog (17 Sep. 2020); available at: (<https://www.asser.nl/SportsLaw/Blog/post/the-semenya-decision-of-the-swiss-federal-tribunal-human-rights-on-the-bench-by-faraz-shalaei>) [Accessed on 3 Feb. 2021].

⁴⁹¹ *Mandates of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; The Special Rapporteur on Torture and other Cruel and Inhuman or Degrading Treatment or Punishment; and the Working Group on the Issue of Discrimination against Women in Law and in Practice*, pp. 6,8 (18 Sep. 2018) OL OTH 63/2018; available at: (<https://www.ohchr.org/Documents/Issues/Women/WG/Communications/OL-OTH-62-2018.pdf>) [Accessed on 5 Feb. 2021].

⁴⁹² *Intersection of Race and Gender Discrimination in Sport*, *supra* note 483, para. 34(c).

⁴⁹³ European Court of Human Rights, App. No. 52525/99, *Juhnke v. Turkey*, Judgement, at para. 76 (13 May 2008); available at:

(<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Juhnke%20v.%20Turkey%22%5D,%22documentcollectionid%22%22%7D>)

F. v Turkey, the Court held that “, in the circumstances, the applicant's wife could not have been expected to resist submitting to such an examination in view of her vulnerability at the hands of the authorities who exercised complete control over her throughout her detention”.⁴⁹⁴ In the case of *V.C. v. Slovakia*, a case of a Romani woman who was a victim of forced sterilization in a state hospital, the European Court of Human Rights noted that consent was not voluntary, given her vulnerable state and the circumstances in which the consent was obtained.

228) However, there does not need to be subjugation for consent to be vitiated. Arguably, where the relationship between the coercer and the coerced is one of trust, where there is an imbalance in power, prestige and knowledge between the coercer and the coerced, consent cannot be deemed to be free. In *Juhnke v. Turkey*, although the applicant had initially refused the procedure, she was eventually persuaded to go through with it by the doctor. According to the doctor himself, he told the applicant that the examination was necessary and in accordance with the law; what is more, that it was to protect her own interests.⁴⁹⁵

229) Coaches play a crucial role in the life of an athlete. They are the primary caregiver, the one who provides them with the prospect of success and therefore security. Once this trust relationship is developed, athletes are willing to take any risks to improve their performance.⁴⁹⁶ “Sport is often a pathway out of poverty for athletes, and athletes can experience intense pressure to perform. Grooming is one of the ways in which abuse happens in sport. This hierarchical coach-athlete relationship leads to exploitation at the cost of the athletes’ mental and physical health.”⁴⁹⁷ Dr. Rodchenkov explains: “All athletes are like small children, ... They’ll put anything you give

[\[:%22GRANDCHAMBER%22,%22CHAMBER%22\].%22itemid%22:\[%22001-86255%22\]}\)](#) [Accessed on 5 Feb. 2021].

⁴⁹⁴ European Court of Human Rights, App. No. 24209/94, *Y. F. v Turkey*, Judgement, at para 34 (22 July 2003); available at: ([https://hudoc.echr.coe.int/eng#%7B%22appno%22:\[%2224209/94%22\],%22itemid%22:\[%22001-61247%22\]7B%7D](https://hudoc.echr.coe.int/eng#%7B%22appno%22:[%2224209/94%22],%22itemid%22:[%22001-61247%22]7B%7D)) [Accessed on 5 Feb. 2021]. See, *mutatis mutandis*, European Court of Human Rights, App. No. 12850/87, *Tomasi v. France*, Judgment, at paras. 113-115 (27 Aug. 1992); available at: ([https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-57796%22\]7B%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-57796%22]7B%7D)) [Accessed on 5 Feb. 2021].

⁴⁹⁵ *Juhnke v. Turkey*, ECtHR, *supra* note 493, para. 45.

⁴⁹⁶ See generally Bo Hansen, *Coach-Athlete Relationships Matter*, Athlete Assessments (2008) available at: (<https://www.athleteassessments.com/coach-athlete-relationships-olympic-study/>) [Accessed on 5 Feb. 2021].

⁴⁹⁷ HRW Sex Testing Report, *supra* note 479, p. 58.

them into their mouths.”⁴⁹⁸ Discussing the role of Dr. Portugalov in Yuliya’s doping regimen, an excerpt from the book “The Russian Affair” says: “By now his word was her command.”⁴⁹⁹

230) As it was said earlier, the Declaration of Helsinki cautions against situations where the subject is in a dependent relationship with the one administering the therapy: “When seeking informed consent ... the physician must be particularly cautious if the potential subject is in a dependent relationship with the physician or may consent under duress. In such situations the informed consent must be sought by an appropriately qualified individual who is completely independent of this relationship”.⁵⁰⁰ Also: “...The refusal of a patient to participate in a study or the patient’s decision to withdraw from the study must never adversely affect the patient-physician relationship”.⁵⁰¹

231) A recent report by Human Rights Watch, whose parts have been discussed above, draws a detailed picture of how athletes are working in “coercive environments” in which they are forced to choose between their career and the framework created by sport governing bodies.⁵⁰²

232) Here, Stepanova was not in a position to decline PEDs. They were administered by people of authority and prestige. They were administered by her coaches, who were deeply involved in her life. Like many athletes, Stepanova had a close relationship with her coach, at some point even intimate.⁵⁰³ She trusted his judgement.

233) The corrupt power pyramid in Russia exacerbated the situation for all athletes including Yuliya. “Russia had, for instance, a constellation of 800 meters runners. Portugalov couldn’t offer the top eight of these runners his ‘first class plus’ service. There were only three medals to be won. Somebody was going to finish last, no matter how much help they had injected or ingested.”⁵⁰⁴ Yuliya explains the power structure above her in this way: “Mr. Maslakov is responsible for

⁴⁹⁸ Ruiz et. al., *supra* note 59.

⁴⁹⁹ Walsh, *supra* note 35, p. 131.

⁵⁰⁰ *World Medical Association Declaration of Helsinki. Ethical Principles for Medical Research Involving Human Subjects*, *supra* note 438, para 23.

⁵⁰¹ *Id.*, para. 31.

⁵⁰² HRW Sex Testing Report, *supra* note 479, p. 3.

⁵⁰³ Walsh, *supra* note 35, pp. 61-65.

⁵⁰⁴ *Id.*, p. 145.

preparing sprinters and field events. Mr. Melnikov is responsible for preparing endurance runners. Mr. Portugalov is responsible for pharmacological preparation. Usually before each season, Mr. Menikov and Mr. Maslakov decide who will be prepared for main events and those athletes will be able to compete dirty at national events. Usually, the amount of athletes that can run dirty is 5-6 for each event. But Mr. Melnikov said that this number will probably go down to 3 as it is getting harder to not get caught. Mr. Melnikov always tells his athletes to keep frozen clean urine in refrigerator, in case an unexpected doping-control comes. This is being done to make sure that the story with 7 Russian athletes from 2008 doesn't happen again".⁵⁰⁵ Therefore, "[t]he man who ran the secret pharmacy determined not just where Russians would finish against their rivals from the rest of the world, but also which Russians would finish ahead of other Russians."⁵⁰⁶

234) In August 2007, the Russian Athletics Federation suspended the head coach, Mr. Valery Kulichenko, following a doping controversy involving two leading athletes.⁵⁰⁷ According to Stepanova: "Kulichenko ... tried to control everything and he was only preparing athletes that were buying doping directly from him at very high price. He also was telling athletes when and how to use the prohibited substances and in case of doping violations he was the one who directly contacted the lab's director to make sure that bad urine sample doesn't come out. He left the team in 2007 because of a doping scandal but nothing really changed after him".⁵⁰⁸

c.1.3 - The amount and type of force used to coerce.

235) The third element that needs to be considered to determine whether consent has been validly given is the amount and type of force or pressure used to coerce. "There are documented cases where athletes who did not want to participate in 'the program' were informed they would not be considered as part of the federation's national team for competition. Also, other coercive activities

⁵⁰⁵ In 2008, seven Russian track and field athletes were suspended ahead of the Summer Olympics in Beijing for manipulating their urine samples. BBC, Dobriskey slams 'Russian seven'" (28 November 2008).

⁵⁰⁶ Walsh, *supra* note 35, p. 147.

⁵⁰⁷ *Russians Suspend Head Coach*, The Irish Times (9 Aug. 2007); available at: (<https://www.irishtimes.com/sport/russians-suspend-head-coach-1.953747>) [Accessed on 4 Feb. 2021].

⁵⁰⁸ Letter to WADA, *supra* note 63, p. 9.

were employed to gain the athletes' participation in doping activities, such as being unable to engage the highest calibre coaching assistance.”⁵⁰⁹

236) As it was said earlier, because of their dependency on the state and the national federations or clubs for livelihood, professional athletes are highly vulnerable to coercion and pressure to accept treatments. Refusing to participate in State-sponsored doping places athletes' “lives and livelihoods and that of their families in jeopardy”.⁵¹⁰

237) The Additional Protocol to the Oviedo Convention concerning Biomedical Research recognizes that pressure to consent can also manifest itself in the form of promises or financial or other kinds of rewards, when it provides that “... no undue influence, including that of a financial nature, will be exerted on persons to participate in research. In this respect, particular attention must be given to vulnerable or dependent persons”.⁵¹¹

238) In the present case, Yuliya and Vitaly would have lost their jobs and source of income if they refused to participate in the scheme. Expecting Yuliya to refuse consent is not reasonable.

c.2 - Informed Consent

239) As we have seen, under contemporary international law, consent to medical intervention must not only be free, it must also be “informed”. As the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health noted: “Informed consent is not mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, protecting the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers. Its ethical and legal normative justifications stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being”.⁵¹²

⁵⁰⁹ ARAF Independent Commission Report, *supra* note 52, p. 11.

⁵¹⁰ Hackney, *supra* note 39, p. 22.

⁵¹¹ *Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research*, *supra* note 454, art. 12.

⁵¹² *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, *supra* note 428, para. 9.

240) The Declaration of Helsinki specifies what “informed consent” entails: “In medical research involving human subjects ... each potential subject must be adequately informed of the aims, methods, sources of funding, any possible conflicts of interest, institutional affiliations of the researcher, the anticipated benefits and potential risks of the study and the discomfort it may entail, post-study provisions and any other relevant aspects of the study. The potential subject must be informed of the right to refuse to participate in the study or to withdraw consent to participate at any time without reprisal. Special attention should be given to the specific information needs of individual potential subjects as well as to the methods used to deliver the information. All medical research subjects should be given the option of being informed about the general outcome and results of the study”.⁵¹³

241) The Additional Protocol on Biomedicine to the Oviedo Convention also spells out what the duty to inform the patient entails: “Before being asked to consent ..., the persons concerned shall be specifically informed ...: i) of the nature, extent and duration of the procedures involved, in particular, details of any burden imposed by the research project; ii) of available preventive, diagnostic and therapeutic procedures; iii) of the arrangements for responding to adverse events or the concerns of research participants; iv) of arrangements to ensure respect for private life and ensure the confidentiality of personal data; v) of arrangements for access to information relevant to the participant arising from the research and to its overall results; vi) of the arrangements for fair compensation in the case of damage; vii) of any foreseen potential further uses, including commercial uses, of the research results, data or biological materials; viii) of the source of funding of the research project. 3) In addition, the persons being asked to participate in a research project shall be informed of the rights and safeguards prescribed by law for their protection, and specifically of their right to refuse consent or to withdraw consent at any time without being subject to any form of discrimination, in particular regarding the right to medical care.”⁵¹⁴

⁵¹³ *World Medical Association Declaration of Helsinki. Ethical Principles for Medical Research Involving Human Subjects*, *supra* note 438, paras. 22-26.

⁵¹⁴ *Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research*, *supra* note 454, art. 13. Emphasis added.

242) Incorrect information vitiates consent. In *Juhnke v. Turkey*, although the applicant had initially refused the procedure, the doctor persuaded her to accept it by claiming it was required by law and would protect her own interests.⁵¹⁵

243) Incomplete information also vitiates consent. In *V.C. v. Slovakia*, the European Court of Human Rights ruled that the information provided to the patient did not sufficiently disclose what she was consenting to. It concluded that the applicant had not been fully informed about the state of her health, the consequences of the procedure, nor were alternative options presented.⁵¹⁶

244) The Human Rights Watch report on sex testing in athletics elaborates on issues of informed consent. The report says: “Moreover, the impossible choices athletes face ... mean if they undergo a medical procedure to alter their naturally occurring hormones in order to continue competing per the regulation, they have not undertaken this procedure with full informed consent. Rather, it has occurred in a situation of multi-faceted coercion.”⁵¹⁷

245) “Informed consent is not just a matter of asking patients whether they are amenable to individual clinical procedures. In a situation where strong incentives to undergo otherwise medically unnecessary procedures ... exist, the line between consent and coercion is blurred.”⁵¹⁸

246) Yuliya was not administered PEDs without her knowledge. “I was lucky that my coach didn’t hide from me what I’m taking and didn’t really push me with running faster when I just started training”.⁵¹⁹ However, the authors invite Russia to explain to the Committee what information Stepanova was given when she was administered PEDs. Since the doping program was illegal, being in violation both of Russian law and the applicable international standards, one can safely assume that not all required information was provided and/or that consent was not recorded.

⁵¹⁵ *Juhnke v. Turkey*, ECtHR, *supra* note 493.

⁵¹⁶ *V.C. v. Slovakia*, ECtHR, *supra* note 471, pp. 21-22.

⁵¹⁷ HRW Sex Testing Report, *supra* note 479, p. 74.

⁵¹⁸ *Id.*, pp. 108-109.

⁵¹⁹ Letter to WADA, *supra* note 63, p. 8.

d - The Medical Experimentation/Intervention Stepanova was Subjected to was Unethical and Illegal.

247) Finally, in determining whether the rights of Yuliya protected under Article 7 of the Covenant have been violated, the Committee should take into account that the medical experimentation/intervention that Stepanova was subjected to was unethical and illegal.

248) As it was said earlier, Article 8 of the Oviedo Convention provides that: “*Any research must be scientifically justified, meet generally accepted criteria of scientific quality and be carried out in accordance with relevant professional obligations and standards under the supervision of an appropriately qualified researcher*”.⁵²⁰

249) Under Article 13 of the Additional Protocol to the Oviedo Convention: “3) ... the persons being asked to participate in a research project shall be informed of the rights and safeguards prescribed by law for their protection ...”.⁵²¹

250) Article 3 of the 2000 Charter of Fundamental Rights of the European Union provides: “2. In the fields of medicine and biology, the following must be respected in particular: (a) the *free and informed consent of the person concerned, according to the procedures laid down by law; ...*”.⁵²²

251) Article 5 of the 1997 Universal Declaration on the Human Genome and Human Rights proclaims: “(d) *In the case of research, protocols shall ... be submitted for prior review in accordance with relevant national and international research standards or guidelines*”.⁵²³ Article 9 adds: “In order to protect human rights and fundamental freedoms, *limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the bounds of public international law and the international law of human rights*”.⁵²⁴

⁵²⁰ *Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research, supra* note 454, art. 8. Emphasis added.

⁵²¹ *Id.*, art. 13.

⁵²² EU, Charter of Fundamental Rights, *supra* note 392, art. 13.

⁵²³ *Universal Declaration on the Human Genome and Human Rights, supra* note 449, art. 5.

⁵²⁴ *Id.* Emphasis added.

252) In sum, contemporary international biolaw and international human rights law require all medical experimentation and interventions to take place within the boundaries set by professional ethics and law. That is necessary to guarantee the subject's rights. Thus, regardless of whether consent was validly given or not, the prescription and administration of *illegal* performance enhancing drugs can never be considered a legitimate medical procedure, one that does not conflict with Article 7 of the ICCPR.

e - The Medical Experimentation/Intervention Stepanova Was Subjected To Was in Violation of International Law

253) The Russian State-sponsored doping program violated several international sports law instruments, including the UNESCO International Convention against Doping in Sport (2005), the European Anti-Doping Convention (1989), the World Anti-Doping Code, and the Host City Contracts with the IOC, in the case of the Sochi Winter Olympics.

254) Evidence discovered by the various investigations into the Russian doping program suggest multiple violations of Articles 1, 3.b and 3.c, 5, 7, 8, 12.a and b, 13, 14, Article 16 of the UNESCO Convention, and of Articles 3.1, 4, 5, 7, 8 of the European Anti-Doping Convention. Practices such as: formulating a mouthwash doping cocktail and distributing it among athletes,⁵²⁵ corrupting doping control officers,⁵²⁶ the collusion of medical personnel with coaches to make them aware of washing periods (i.e. the period until one can have clean test again after taking a substance),⁵²⁷ advance testing notice,⁵²⁸ the failure to comply with WADA rules regarding the rapid enforcement of athletes biological passport,⁵²⁹ intimidation of both Doping Control Officers and their families,⁵³⁰ obstruction of anti-doping processes by various means,⁵³¹ the surveillance of WADA accredited laboratories to cover up the doping cases,⁵³² sample swapping,⁵³³ bottle cap

⁵²⁵ McLaren's First Report, *supra* note 136, pp. 49–51.

⁵²⁶ *Id.*, p. 8.

⁵²⁷ *Id.*

⁵²⁸ ARAF Independent Commission Report, *supra* note 52, pp. 183-4.

⁵²⁹ *Id.*, p. 127.

⁵³⁰ *Id.*, pp. 103-4.

⁵³¹ *Id.*, pp. 106-115.

⁵³² McLaren's First Report, *supra* note 136, pp. 8-11.

⁵³³ *Id.*, pp. 67-72.

removing,⁵³⁴ reporting the positive or adverse analytical findings as negative in Anti-Doping Administration & Management System,⁵³⁵ and, when all other efforts failed, disappearing positive results,⁵³⁶ cannot be reconciled with the provisions of the UNESCO Convention and European Anti-Doping Convention and their spirit.

255) The second McLaren report enumerated the violations of World Anti-Doping Code it discovered.⁵³⁷ The doping program involved “tampering”⁵³⁸, on behalf of both the officials and athletes, which is a violation of art. 2.5 of the Code.⁵³⁹ “Conspiracy in the cover-up”, which is a violation of art. 2.8 and 2.9 of the Code.⁵⁴⁰ “Reporting an adverse analytical finding as a negative test”, which is a violation of art. 2.1 of the Code.⁵⁴¹ Other violations were found of articles 5.8, 7.3, 19, 20.5, 22, 23.2.1.

256) Finally, as to Article 18 of the Code: “The basic principle for information and education programs for doping-free sport is to preserve the spirit of sport, as described in the Introduction to the Code, from being undermined by doping. The primary goal of such programs is prevention. The objective shall be to prevent the intentional or unintentional Use by Athletes of Prohibited Substances and Prohibited Methods ... All Signatories shall within their means and scope of responsibility and in cooperation with each other, plan, implement, evaluate and monitor information, education, and prevention programs for doping-free sport.” Yet, evidence suggests that Russian athletes were educated not on WADA rules and the list of prohibited substances, but rather on how to avoid detection.⁵⁴²

⁵³⁴ *Id.*, pp. 15, 47, 58.

⁵³⁵ *Id.*, pp. 15, 34.

⁵³⁶ *Id.*, pp. 35-42.

⁵³⁷ McLaren’s Second Report, *supra* note 154, pp. 46–48.

⁵³⁸ The Code defines tampering as: “Altering for an improper purpose or in an improper way; bringing improper influence to bear; interfering improperly; obstructing, misleading or engaging in any fraudulent conduct to alter results or prevent normal procedures from occurring”; *See World Anti-Doping Code 2015 with 2019 Amendments*, *supra* note 25, Appendix I, Definitions, p 145.

⁵³⁹ McLaren’s Second Report, *supra* note 154, p. 46.

⁵⁴⁰ *Id.*, pp. 46-47.

⁵⁴¹ *Id.*, pp. 47-8.

⁵⁴² ARAF Independent Commission Report, *supra* note 52, pp. 116-7.

f - The Medical Experimentation/Intervention Stepanova was Subjected to was in Violation of Russian Law.

257) The medical intervention Yuliya Stepanova was subject was in violation of Russian law. First, article 20.1 of the Basics of Public Health Protection in the Russian Federation states that: “A necessary precondition medical intervention is to provide *voluntary informed consent* of the citizen or his legal representative for a medical intervention based on the medical worker in an accessible form *with full information about the objectives, methods of medical care and associated risk possible options for medical intervention, its consequences and the likely outcomes of medical care.*”⁵⁴³ Furthermore, article 20.7 states: “Informed voluntary consent to medical intervention or refusal of medical intervention is made *in writing, signed by a citizen*”.⁵⁴⁴ Article 20.9 provides for limited exceptions, when the patient is physically or legally incapacitated.

258) Second, after the ratification of the UNESCO Convention, on 23 November 2007 the Russian State Duma adopted the “Federal Law About Physical Culture and Sport in the Russian Federation”, law No. 329-FZ.⁵⁴⁵ The law sets the legal framework for the fight against doping with mapping the structures and defining the responsibilities of sport federations and athletes and also the role of the Russian Federation in this fight.⁵⁴⁶

259) The law provides that the “procedure of obligatory doping control is approved by the federal executive authority in physical culture and sport.”⁵⁴⁷ It also provides for the obligation of the Russian Federation to ensure financial and logistical support for anti-doping efforts⁵⁴⁸ and also “implementing measures, aimed at prevention of use of doping substances and (or) methods by members of the Russian Federation national select sport teams”.⁵⁴⁹

⁵⁴³ Federal Law No. 323-FZ of 21.11.2011 (as amended on 08.03.2015), art. 20.1. Emphasis added.

⁵⁴⁴ *Id.*, art. 20.7. Emphasis added.

⁵⁴⁵ Russian Federation, No. 329-FZ, *Federal Law about Physical Culture and Sport in the Russian Federation*, (23 Nov. 2007); available at:

(<https://www.doping.nl/media/kb/3996/Federal%20Law%20about%20Physical%20Culture%20and%20Sport%20in%20the%20Russian%20Federation%20-%202007-12-04%20No.329-FZ.pdf>) [Accessed on 5 Feb. 2021].

⁵⁴⁶ *Id.*, art. 8.4(b).

⁵⁴⁷ *Id.*, art. 26.4.

⁵⁴⁸ *Id.*, art. 38.1.1.

⁵⁴⁹ *Id.*, art. 38.1.5.

260) This law is the only anti-doping legal framework applicable in Russia prior to 2016, and it falls well short of the goals of the UNESCO Convention.⁵⁵⁰ Still, the administration of PEDs to Yuliya was in violation of Russian law, and therefore cannot be considered to have taken place legally and ethically.

2 - ARTICLE 8.3.A - THE RIGHT NOT TO BE SUBJECT TO FORCED LABOR OR SLAVERY

261) Article 8.3.(a) of the Covenant provides that: “No one shall be required to perform forced or compulsory labour”.⁵⁵¹ In the preceding section, it was demonstrated how Yuliya Stepanova’s participation in the Russian doping scheme was neither voluntary nor informed.⁵⁵² In this section, the authors submit that that the Russian doping program was also a violation of the prohibition of forced or compulsory labor.

262) Article 8.3.a is echoed by Article 23 of the Universal Declaration of Human Rights,⁵⁵³ Article 4 of the European Convention on Human Rights and Fundamental Freedoms,⁵⁵⁴ Article 5 of the Charter of Fundamental Rights of the European Union,⁵⁵⁵ Article 15 of the African Charter of Human and Peoples’ Rights,⁵⁵⁶ Article 6(2) of the American Convention on Human Rights,⁵⁵⁷ Article XIV of the American Declaration on the Rights and Duties of Man,⁵⁵⁸ Article 10(2) of the (revised) Arab Charter of Human Rights,⁵⁵⁹ and Art. 27(1) of the ASEAN Human Rights Declaration.⁵⁶⁰ Forced or compulsory labor is also prohibited under a series of dedicated international legal instruments, including the International Labour Organization’s (ILO) Forced Labour Convention

⁵⁵⁰ CoP to the UNESCO Convention, *supra* note 184, Annex 1, p. 10, para. 49-50.

⁵⁵¹ ICCPR, art. 8.3(a).

⁵⁵² *Supra*, paras. 197-231.

⁵⁵³ UDHR, art. 23.

⁵⁵⁴ ECHR, art. 4.

⁵⁵⁵ EU Charter of Fundamental Rights, *supra* note 392, art. 5.

⁵⁵⁶ African Charter on Human and People’s Rights, *supra* note 393, art. 15.

⁵⁵⁷ Organization of American States, *American Convention on Human Rights*, “*Pact of San Jose*, at art. 6(2) (22 Nov. 1969); available at: (<https://www.refworld.org/docid/3ae6b36510.html>) [Accessed on 5 Feb. 2021].

⁵⁵⁸ Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, at art. XIV (2 May 1998); available at: (<https://www.refworld.org/docid/3ae6b3710.html>) [Accessed on 5 Feb. 2021].

⁵⁵⁹ Arab Charter on Human Rights, *supra* note 394, at art. 10(2).

⁵⁶⁰ ASEAN Human Rights Declaration, *supra* note 395, at art. 27(1).

1930 (No. 29),⁵⁶¹ its Protocol of 2014,⁵⁶² the Abolition of Forced Labour Convention 1957 (No. 105),⁵⁶³ and the ILO Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203).⁵⁶⁴

263) “[A] forced labour situation is determined by the nature of the relationship between a person and an “employer” and not by the type of activity performed”⁵⁶⁵. As the Committee noted in *Faure v. Australia*, “the Covenant does not spell out ... the meaning of term ‘forced or compulsory labour’.”⁵⁶⁶ Thus, it ultimately falls on the Committee to “elaborate the indicia of prohibited conduct” in determining what constitutes “forced or compulsory labour” in each specific case.⁵⁶⁷ To that end, as forced or compulsory labor is prohibited in numerous international legal instruments besides the Covenant, the Committee has taken into account how other international organizations or international human rights bodies have interpreted and applied the concept.

264) For instance, the ILO Forced Labour Convention defines it as: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁵⁶⁸ The Human Rights Council’s Special Rapporteurs on

⁵⁶¹ International Labour Organization, *Forced Labour Convention*, (1930) No. 29; available at: (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029) [Accessed on 5 Feb. 2021].

⁵⁶² International Labour Organization, *Protocol of 2014 to the Forced Labour Convention*, (09 Nov. 2016); available at: (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029) [Accessed on 5 Feb. 2021].

⁵⁶³ International Labour Organization, *Abolition of Forced Labour Convention, 1957 (No. 105)* (25 June 1957); available at: (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C105) [Accessed on 5 Feb. 2021].

⁵⁶⁴ International Labour Organization, *Forced Labour (Supplementary Measures) Recommendations, 2014 (No.203)*, (11 June 2014); available at: (https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3174688:NO) [Accessed on 5 Feb 2021].

⁵⁶⁵ International Labour Organization, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, p. 16 (2017) available at: (https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf), [Accessed on 4 Feb. 2021].

⁵⁶⁶ *Faure v. Australia*, *supra* note 299, para. 7.5.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Forced Labour Convention*, *supra* note 561, art. 2.

Contemporary Forms of Slavery have suggested that the ILO Forced Labour Convention's definition might be the standard contemporary definition.⁵⁶⁹

265) Thus, to determine whether we are in the presence of forced or compulsory labor, three tests need to be met. First, can the conduct be construed as work or service? Second, was the work/service performed voluntarily or involuntarily? Third, was the work/service extracted under threat or penalty?⁵⁷⁰

A - Work or Service....

266) Whether a certain conduct is “work” or “service” depends on the given historical, social and economic circumstances. As the Committee on Economic, Social and Cultural Rights noted, “...the concept of work and workers has evolved from the time of drafting of the Covenant, to include new categories such as self-employed workers, workers in the informal economy, agricultural workers, refugee workers and unpaid workers.”⁵⁷¹ That being said, the authors submit that when *professional* athletes train and compete, they are working and/or providing a service to a club and a national sports federation, or to their country, when part of the national team.

267) Since the birth of competitive sport, athletes have become workers “selling [their] labor ... to the highest bidder”.⁵⁷² There is no doubt that contemporary professional athletes are workers in a multi-billion-dollar industry. As the Director General of the ILO explained: “...sport was what you did when you were not working; it was literally a recreation from the rigors of work. Bit by bit since then, with the professionalization of work and the rise of mega sporting events, sport has

⁵⁶⁹ See Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Slavery including its causes and consequences, Gulnara Shahinian*, U.N. Doc. A/HRC/12/21, para. 31 (10 July 2009) (https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/12/21) [Accessed on 5 Feb. 2021], citing the *Forced Labour Convention*, *supra* note 561, art. 2; See also UN General Assembly, *Contemporary Forms of Slavery, Including its Causes and Consequences*, (16 July 2020) U.N. Doc. A/75/166; available at: (<https://www.undocs.org/A/75/166>) [Accessed on 5 Feb. 2021].

⁵⁷⁰ See International Labour Organization, *ILO Standards on Forced Labour: The New Protocol Recommendations at a Glance*, p. 5 (2016); available at: (https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_508317.pdf) [Accessed on 4 Feb. 2021].

⁵⁷¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 23 (2016) on the Right to just and favorable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, at para. 4 (27 April 2016) U.N. Doc. E/C.12/GC/23; available at: (<https://www.refworld.org/docid/5550a0b14.html>) [Accessed on 4 Feb. 2021].

⁵⁷² Marc Perelman, *BARBARIC SPORT: A GLOBAL PLAGUE*, 61 (2012).

become work. And so now we have to look at the rights attached to sport, just as we do in every other area of activity.”⁵⁷³

268) The work of professional athletes is best characterized as “non-standard employment”, which the ILO defines as “work that falls outside the realm of the ‘standard employment relationship.’”⁵⁷⁴ The ILO identifies four main types of non-standard employment: “temporary employment”, “part-time and on-call work”, “multi-party employment relationship” and “disguised employment/dependent self-employment”.⁵⁷⁵ According to the ILO, there is “multi-party employment relationships” “[w]hen workers are not directly employed by the company to which they provide their services, their employment falls under contractual arrangements involving multiple parties.”⁵⁷⁶ A “disguised employment/dependent self-employment” happens when a worker is engaged through “a civil, commercial or cooperative contract instead of an employment contract and at the same time [her work is] direct[ed] and monitor[ed] ... in a way that is incompatible with the worker’s independent status.”⁵⁷⁷

269) Russian national team athletes, like Stepanova, are in a “multi-party employment relationship” and in a “disguised employment/dependent self-employment” situation. Typically, they receive multiple salaries, from one or more of the eighty-five federal subjects making up the Russian Federation. Another is paid by the Centre of Sports Preparation, an organization funded by the Russian Ministry of Sports and that finances Russian national teams competing in the Olympics and other competitions. Finally, many athletes also wear a uniform of the police (State or Federal) or the Armed Forces, and consequently receive a salary for that too. Those who do not, get a salary from a State-owned company like Gazprom.⁵⁷⁸

⁵⁷³ *Fair Play Without Human Rights Violations*, International Labour Organization (26 Feb. 2018) available at: (https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_618605/lang--en/index.htm) [Accessed 12 Feb 2021].

⁵⁷⁴ International Labour Organization, *Non-Standard Employment Around the World*, p. 7 (2016) available at: (https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_534326.pdf) [Accessed 4 Feb. 2021].

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*, p. 9.

⁵⁷⁷ *Id.*

⁵⁷⁸ Hughes Rob, *Price Paid for Foreigners Upsetting Some Russian Soccer Players*, *The New York Times* (28 Sep. 2012); available at: (<https://www.nytimes.com/2012/09/29/sports/soccer/29iht-soccer29.html>) [Accessed on 5 Feb. 2021].

270) This is how Stepanova described conditions of employment for top level athletes like her: “Top level athletes usually receive monthly salaries at 3-7 different places. It is just plain salary as being athlete-instructor and does not include bonuses for winning medals. Each salary varies from \$500 to \$3,000. So, the total amount can go from \$1,500 to \$12,000 monthly. Those places are: 1) 1 or 2 or 3 regions that they compete for at national competitions. It is strange – but yes! – an athlete can compete for 3 regions at the same time. It’s called parallel point system. So, if an athlete gets first place and it’s worth 15 points, all 3 regions get 15 points each. Supposedly it was made this way in the 90s by Rossport [i.e. the government agency charged with overseeing Russia's athletic development], so good athletes don’t run away from poor regions to rich regions. They were just able to continue to compete for a poor region, while getting a salary from poor and rich region. So, it was made to balance things but instead, just like many things in Russia it turned into a corrupt scheme. The way it works now, if top level athlete goes to a national team training camp then ARAF pays for it. Coaches or other “managers” from the regions that this athlete competes for still organize the same training camp for the same athlete and just keep the money and provide fake documents. There are different ways that coaches and “managers” can do it, but this is basically how it works. 2) Center of Sports Preparation under the Ministry of Sports. 3) Police or Army or Gazprom or all three at the same time. In my case, I compete for 2 regions and receive a salary from the Police and from the Center of Sports Preparation”.⁵⁷⁹

271) In any event, “non-standard employment” falls within the scope of the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105). Neither excludes it and according to the ILO, “non-standard employment” is still work or labor and falls within the scope of the prohibition of forced or compulsory labor.⁵⁸⁰

B - Rendered Involuntarily....

272) The ILO defines “voluntary labour” as work or services that are performed with “free and informed consent.”⁵⁸¹ Thus, “involuntary labour” is work or services that are performed *without*

⁵⁷⁹ Letter to WADA, *supra* note 63, p 7-8.

⁵⁸⁰ *Non-Standard Employment Around the World*, *supra* note 574, p. 215.

⁵⁸¹ *ILO Standards on Forced Labour: The New Protocol Recommendations at a Glance*, *supra* note 570, p. 5.

“free and informed consent.” While Yuliya chose to become a professional athlete and to run, the hazardous conditions in which Russia forced her to work were far from “free and informed”.⁵⁸²

273) Sport is an important source of income, especially for women, in many countries around the world.⁵⁸³ “[I]f the athlete is successful, she can earn income at competitions and via sponsorships. In some circumstances, success at athletics can also lead to stable employment outside sport ... Their success in athletics [becomes] a source of livelihood not only for them, but often for their extended families.”⁵⁸⁴ Running is a sport that is particularly attractive for women from a background of poverty. “The economic barriers to entry in athletics are lower than in some other sports, largely because running requires less equipment than, for example, some team sports that use more costly devices and facilities. This makes it possible for a significant number of women from backgrounds of poverty to compete in athletics.”⁵⁸⁵

274) As the WADA investigations concluded: “... the pursuit of medals and exploitation of athletes for financial gain is well pronounced across Russian athletics”.⁵⁸⁶ All sport governing bodies have “an exclusive grip on power over women’s participation in elite international athletics ... these regulations also have a downstream impact on how national sport governing bodies behave towards women athletes.”⁵⁸⁷ At the same time, “[e]conomic security ... is highly dependent on performance ... when athletes ascend in competitions and begin earning per diem and prize money, often that money is shared with their families, for whom it can become a vital source of support. In some cases, athletes who achieve a certain level of success are rewarded with a permanent non-sporting job, which can significantly secure their and their family’s economic stability.”⁵⁸⁸

275) For Yuliya, as for many Russian athletes, self-identity, livelihood, and doping were all strictly intertwined. “Running was the life-support system for her dreams. She felt like a real person.”⁵⁸⁹ In Russia, “[w]inners [a]re appreciated and well rewarded ... especially Olympic gold

⁵⁸² *Supra*, paras 197-231.

⁵⁸³ *Supra*, para 202.

⁵⁸⁴ HRW Sex Testing Report, *supra* note 479, pp. 10, 94.

⁵⁸⁵ *Id.*, p. 93.

⁵⁸⁶ ARAF Independent Commission Report, *supra* note 52, p. 11.

⁵⁸⁷ HRW Sex Testing Report, *supra* note 479, p. 115.

⁵⁸⁸ *Id.*, p. 94.

⁵⁸⁹ Walsh, *supra* note 35, p. 202.

medalists. There was a top of the range car, a classy apartment in Moscow, a good pension, sometimes a substantial one-off bonus.”⁵⁹⁰ “[T]he better you were, the more protection you got from them. The more protection you got, the more chemical assistance you could take....”⁵⁹¹

276) The only way Yuliya could compete at a top level was to take part in the Russian doping program. That made her work and service as an athlete far from voluntary. “[T]here was no way to escape the system, if you wanted to compete internationally.”⁵⁹² As it was explained, Yuliya’s career began to take off when she was noticed by the head coaches of the All-Russian Athletics Federation (ARAF) and they decided to take her under their control.⁵⁹³ Mr. Kulichenko, one of the coaches prepping Olympic athletes “was only prepping athletes buying doping directly from him.”⁵⁹⁴ She continued her doping regimen because “all athletes were going through this.”⁵⁹⁵ Stepanova did everything her coaches told her to, including taking all of the prohibited substances.⁵⁹⁶ She could avoid detection of her doping because the State apparatus was helping her hide it. She was allowed to compete in National Championships despite having “abnormal results” on her blood passport.⁵⁹⁷

C - Under Threat or Penalty.

277) According to the ILO, indicia of forced labor or service are “threats of penalty”, “deception ... intimidation ...[and] abusive working and living conditions.”⁵⁹⁸

278) While interpreting Article 4.2 of the European Convention on Human Rights, which prohibits “forced or compulsory” labour, the European Court of Human Rights established that in the context of forced labor, “threat or penalty” are “to be understood in a broad sense.”⁵⁹⁹ In *Van*

⁵⁹⁰ *Id.*, p. 111.

⁵⁹¹ *Id.*, pp. 127-8.

⁵⁹² Yuliya Stepanova, *Play the Game 2019: Opening Session: Athlete Power on the Rise*, Play the Game Conference, at 33:00- 33:06 (13 Oct. 2019); available at: (<https://www.youtube.com/watch?v= ighAhVePEI&feature=youtu.be>) [Accessed on 4 Feb. 2021].

⁵⁹³ See Letter to WADA, *supra* note 63, pp. 1-4.

⁵⁹⁴ *Id.*, p. 8.

⁵⁹⁵ *Id.*, p. 3.

⁵⁹⁶ *Id.*, pp. 1-6.

⁵⁹⁷ *Id.*, p. 5-7.

⁵⁹⁸ International Labour Organization, *Combating Forced Labour a Handbook for Employer’s & Business: (2) Employer’s Frequently Asked Questions*, p. 8 (2015); available at: (https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101171.pdf) [Accessed on 4 Feb. 2021].

⁵⁹⁹ European Court of Human Rights, App. Nos. 57818/10, 57822/10, 57825/10, 57827/10, 57829/10, *Mentes et al. v. Turkey*, European Court of Human Rights, Judgment, at para. 67 (24 Oct. 2017); available at:

who refused, the threat of losing their careers and financial ruin forced them to keep their mouths shut. In Yuliya’s case, “[t]he system that had once promised to cradle her, she now saw as a heartless exploitation factory. When you offered the system something, you received love, rewards and drugs. When your stupid human needs outstripped your potential, the system spat you out.”⁶⁰⁵ Yuliya lost the protection that the system gave to all doped athletes once she and Vitaly decided to blow the whistle.

280) Finally, to determine whether Yuliya Stepanova was subjected to “forced or compulsory” labor or service, it is necessary to take into account that the Russian doping program had no legitimate nor lawful goal. It was a criminal enterprise to “win at all cost... in the pursuit of medals and the exploitation of athletes for financial gain.”⁶⁰⁶ It was a subversion of international sports, and in blatant violation of international sports law and human rights law.

3 - ARTICLE 19.2 – THE RIGHT TO FREEDOM OF EXPRESSION – WHISTLEBLOWERS.

281) Article 19.2 of the Covenant provides: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁶⁰⁷ It echoes article 19 of the Universal Declaration of Human Rights, which proclaims: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

282) As the Committee noted, the right to freedom of expression “protects all forms of expression and the means of their dissemination.”⁶⁰⁸ The freedom of expression is not absolute. It can be limited. Article 19.3 of the Covenant provides for some limited situations, such as protecting national security or public health, none of which are applicable in the present case.

⁶⁰⁵ Walsh, *supra* note 35, p. 264.

⁶⁰⁶ ARAF Independent Commission Report, *supra* note 52, pp. 10-11.

⁶⁰⁷ ICCPR, art. 19.2.

⁶⁰⁸ Human Rights Committee, *General Comment No. 34*, U.N. Doc. CCPR/C/GC/34, para. 12 (12 Sep. 2011); available at: (<https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>) [Accessed on 4 Feb. 2021].

283) The obligation to respect the freedom of expression is binding on a State as a whole. It extends to all branches of the state, including “semi-State entities.”⁶⁰⁹ It requires States to ensure that “persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression.”⁶¹⁰

284) Freedom of expression, and its companion freedom of opinion, are “indispensable conditions for the full development of the person.”⁶¹¹ They are essential components of democratic societies. When it comes to “information and ideas about public and political issues...”,⁶¹² they become particularly vulnerable to attack, even more so when they are used to bring illegal behavior to the attention of national and international authorities.

285) Whistleblowers are persons “who expose information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety.”⁶¹³ Whistleblowers often take great personal risks. As the most recent Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Mr. David Kaye, noted: “Governments, international organizations and private entities often target persons disclosing secret information, in particular when they bring to light uncomfortable truths or allegations.”⁶¹⁴ It is not infrequent for whistleblowers to be subject to harassment, intimidation, investigation, prosecution and other forms of retaliation for disclosing,⁶¹⁵ even when laws protect them. Indeed, as Kaye noted, “[a]ll too often, States and organizations implement the protections only in part or fail to hold accountable those who retaliate against whistleblowers.”⁶¹⁶

⁶⁰⁹ *Id.* at para. 7.

⁶¹⁰ *Id.*

⁶¹¹ Human Rights Committee, Comm. No. 2260/2013, *Andrei Strizhak v. The Republic of Belarus*, U.N. Doc. CCPR/C/124/D2260/2013, para. 6.3 (13 Dec. 2018).

⁶¹² Human Rights Committee, *General Comment No. 34*, *supra* note 608, para. 13.

⁶¹³ UN General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, para. 28 (8 Sep. 2015) U.N. Doc. A/70/361; available at: (https://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361) [Accessed on 4 Feb. 2021].

⁶¹⁴ *Id.*, para. 2.

⁶¹⁵ *Id.*, para. 26.

⁶¹⁶ *Id.*

286) Russia has an unfortunate history of targeting whistleblowers, through both direct and indirect means.⁶¹⁷ In a report on whistleblowing in Russia, the Council of Europe found “no convincing system for whistleblowing [protection] in the country.”⁶¹⁸ Among the deficiencies, the report noted there was nobody tasked with protecting civil servants who are willing to blow the whistle.⁶¹⁹ Amnesty International notes that, “the list of journalists physically assaulted and killed in Russia is constantly growing while those who have committed these crimes continue to enjoy impunity.”⁶²⁰

287) As it was detailed earlier, Vitaly and Yuliya were essential to the discovery of the Russian doping program.⁶²¹ Between 2010 and 2013, Vitaly alerted WADA about the program.⁶²² Yuliya came forward in 2013 and told all she knew about it to WADA.⁶²³ Their testimony was central to Hajo Seppelt documentary.⁶²⁴ In 2017, the Stepanovs and Seppelt won the Danish Institute for Sport Studies’ Play the Game award, a prize that pays tribute to those who have made an outstanding effort to strengthen the basic ethical values of sport, for exposing the Russian doping program to the world.⁶²⁵ The contribution of Yuliya and Vitaly to the discovery of the Russian doping program was acknowledged by U.S. Congress when it passed the “Rodchenkov Anti-Doping Act of 2019”, a federal statute whose goal is not only to criminalize doping but also to provide protection for whistleblowers in doping cases. In the words of the U.S. Congress: “This bill also would provide much needed protection and support for brave whistleblowers, such as Dr. Rodchenkov, who appeared here in the United States before the Helsinki Commission, and the Stepanovs, who have

⁶¹⁷ See *Violation of the Right to Freedom of Expression, Association and Assembly in Russia*, supra note 246.

⁶¹⁸ Council of Europe, *Whistleblower Protection in the Russian Federation*, p. 8 (2014) ECCU-PRECOP-TP-3&4/2014; available at: (<https://rm.coe.int/16806eedb3>) [Accessed on 4 Feb. 2021].

⁶¹⁹ *Id.*, p. 34.

⁶²⁰ See *Violation of the Right to Freedom of Expression, Association and Assembly in Russia*, supra note 246, p. 3.

⁶²¹ *Supra*, Section III.2.D, E, and F.

⁶²² *Supra*, Section III.2.D.

⁶²³ *Ibid.*

⁶²⁴ *Supra*, Section III.2.D.

⁶²⁵ *The Stepanovs and Hajo Seppelt Receive the Play the Game Award*, Play the Game (29 Nov. 2017); available at: (https://playthegame.org/news/news-articles/2017/0412_the-stepanovs-and-hajo-seppelt-receive-the-play-the-game-award/) [Accessed on 4 Feb. 2021].

blower's motivations at the time of the disclosure [is] immaterial to an assessment of his or her protected status,"⁶³² their motive was to expose corruption and usher in transparency to Russian sports. They have not received any personal gain from what they did, and only suffered considerably because of it. Fourth, any damage incurred by Russia as a result of the discovery of the doping program is far outweighed by the larger international public interest in knowing that the Russian government was endorsing a program that circumvented its international obligations.

291) Moreover, it should be noted that what has happened to Stepanovs after their whistleblowing is also a violation of Russia's international obligations under the UN's Convention against Corruption,⁶³³ which contains provisions regarding protection of whistleblowers,⁶³⁴ and which Russia ratified on 9 May 2006.⁶³⁵

4 - ARTICLE 23. 1- RIGHTS OF THE FAMILY

292) Article 23.1 of the Covenant provides: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". The culture of doping, created and fueled by Russian authorities, has impacted the life of thousands of athletes, coaches, physicians and anti-doping agents throughout Russia. Arguably, it has also impacted the life of everyone who competed fairly against them.

293) There is no doubt that the Russian doping program devastated the Stepanov family. Vitaly was an anti-doping officer, while Yuliya was an athlete who had to dope to compete. Returning from their honeymoon trip, "Vitaly prepared to go back to his own job but the fundamental

⁶³² See Open Society Justice Initiative, *Global Principles on National Security and the Right to Information*, p. 50, principle 38 (12 June 2013) available at: (<https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf>) [Accessed on 5 Feb. 2021]; see also UN General Assembly, *Promotion and Protection of the Right to Freedom of Opinion and Expression*, *supra* note 613, para. 31.

⁶³³ UN General Assembly, *Convention against Corruption*, U.N.T.S. Vol. 2349, p. 41 (14 Dec. 2005) U.N. Doc. A/58/422; available at: (https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) [Accessed on 5 Feb. 2021].

⁶³⁴ Article 33 of the Convention provides: "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention." *Id.* at art. 33.

⁶³⁵ UN General Assembly, *Convention against Corruption Ratification Status*, (as of 6 Feb. 2020) U.N. Doc. A/58/422; available at: (<https://www.unodc.org/unodc/en/corruption/ratification-status.html>) [Accessed on 5 Feb. 2021].

problem still grew in his mind. He was returning to RUSADA to do his anti-doping work. He was kissing his wife goodbye as she headed off to her job as a fully doped athlete.”⁶³⁶ The disconnect between Vitaly’s job and commitment to fight doping versus the system’s use of Yuliya as a subject of doping put their marriage in peril. Yuliya’s marriage to Vitaly, the “uncooperative” anti-doping agent, was an obstacle in her career. The coaches and doctors were refusing to work with Yuliya because of her husband’s job.⁶³⁷ It was only when they decided to blow the whistle and speak out against the State-sponsored doping program, and then flee the Russian Federation, that they were able to connect again and preserve their marriage. In sum, the doping program and Yuliya’s coerced participation in it made it impossible for her and her husband to live a normal family life.

294) Second, it will be recalled that when Yuliya’s biological passport indicated the use of doping substances and was disqualified, her coaches told her that the way to keep her salary while she was not running was to get pregnant.⁶³⁸ Yuliya and Vitaly did not plan to have children, at least not at that stage in their life. In General Comment No. 28, the Committee directly connected women’s right to privacy with their “reproductive functions.”⁶³⁹ In *LNP v. Argentina*, the Committee noted that enquiries by social workers and medical personnel “into the author’s sexual life ... constituted arbitrary interference” and therefore violated Article 17 of the Covenant.⁶⁴⁰ The Russian doping program interfered with Yuliya’s privacy as she was directed to get pregnant. Her freedom to choose if and when to have children was taken away from her.

295) “When Yuliya left Russia five years ago, she thought she would return soon. She ended up leaving a great deal behind. Friends. Family, including one sister with kidney cancer that appears to have spread. She said she Skypes with her relatives about once a month. She knows she may never again see the sentimental items she didn’t bother to take with her: photos of family and friends; her grandfather’s World War II medals; the silver cup Vitaly’s parents gave to Robert when he was born.”⁶⁴¹

⁶³⁶ Walsh, *supra* note 35, p. 70.

⁶³⁷ *See supra*, paras. 54-55.

⁶³⁸ Letter to WADA, *supra* note 63, p. 8.

⁶³⁹ Human Rights Committee, *General Comment No. 28 Article 3*, para. 20, CCPR/C/21/Rev.1/Add.10, (29 Mar, 2000) (<https://www.refworld.org/docid/45139c9b4.html>).

⁶⁴⁰ *LNP v. Argentina*, *supra* note 408, para. 13.7.

⁶⁴¹ Macur, *supra* note 280.

296) Robert Stepanov, Vitaly and Yuliya's child has also been a victim of the violation of his family rights. Besides Article 23.1, the protection of the rights of the child "as such or as a member of a family" are also protected in Article 24.⁶⁴² Article 16 of the Convention on the Rights of the Child protects the child's right not to "... be subjected to arbitrary or unlawful interference with his or her ... family".⁶⁴³ A child has the right to the preservation of their family environment. As the CRC Committee said, "[p]reservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places."⁶⁴⁴ Since the Stepanovs fled from Russia, Robert has been able to see the members of his extended family only online.

297) Finally, it should be recalled that the threats that had been made against the Stepanovs after the doping program was exposed also targeted Yuliya's mother, who was eventually forced to quit her hospital job.⁶⁴⁵

5 - ARTICLE 17.1 AND 17.2 - THE RIGHT NOT TO BE SUBJECT TO ARBITRARY OR UNLAWFUL INTERFERENCE WITH PRIVACY AND FAMILY, OR ATTACKS ON HONOR AND REPUTATION.

298) Article 17 of the Covenant provides that "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks."⁶⁴⁶

299) According to the Committee, the term "unlawful interference" in Article 17 refers to any interference that is not "envisaged by law."⁶⁴⁷ The term "arbitrary" refers to interferences that

⁶⁴² Human Rights Committee, *General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, at para. 1 (27 July 1990) available at: (<https://www.refworld.org/docid/45139bd74.html>) [Accessed on 5 Feb. 2021].

⁶⁴³ Convention on the Rights of the Child, *supra* note 390, art. 16.

⁶⁴⁴ Committee on the Rights of the Child, *General Comment No. 13 (2011) Article 19: The Right of the Child to Freedom from all Forms of Violence*, para. 59, U.N. Doc. CRC/C/GC/13(18 Apr. 2011).

⁶⁴⁵ Ash, *supra* note 117.

⁶⁴⁶ ICCPR, art. 17.

⁶⁴⁷ Human Rights Committee, *General Comment No. 16 Article 17 (Right to Privacy)*, para. 3 (8 Apr. 1988); available at: (<https://www.refworld.org/docid/453883f922.html>) [Accessed 4 Feb. 2021].

are “envisaged by law”, but which “...should be, in any event, reasonable in the particular circumstances.”⁶⁴⁸ Unlawful or arbitrary interferences with the rights protected in Article 17 are violations “whether they emanate from State authorities or from natural or legal persons.”⁶⁴⁹ “The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right”.⁶⁵⁰

A - Privacy

300) It is axiomatic that any medical experimentation or intervention without the free and informed consent of the subject is not only a violation of Article 7 of the Covenant, but also it a violation of the right to privacy under Article 17. The Committee has previously made it clear that: “to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy, and may amount to an unlawful attack on his or her honour and reputation.”⁶⁵¹ The right to privacy protects the individual against interferences “within the private sphere”, and one's own body is the ultimate “private sphere”. Therefore, should the Committee find the rights of Yuliya Stepanova protected by Article 7, first or second sentence, were violated, it should also find a violation of Article 17.

B - Family

301) “International human rights instruments have long recognized that the family is a fundamental unit of society, which performs valuable functions for its members and for the community as whole. For these reasons, it is widely recognized that States bear the primary

⁶⁴⁸ *Id.*, para. 4.

⁶⁴⁹ *Id.*, para. 1.

⁶⁵⁰ *Id.*

⁶⁵¹ Human Rights Committee, Comm. No. 1482/2006, *MG v. Germany*, para. 10.1 (23 July 2008) U.N. Doc. CCPR/C/93/D/1482/2006; available at: (<http://hrlibrary.umn.edu/undocs/1482-2006.pdf>) [Accessed on 4 Feb. 2021]; See also Human Rights Committee, Comm. No. 242/1987, *Tshisekedi wa Mulumba v. Zaire*, paras. 12.7, 13 (2 Nov. 1989) U.N. Doc. CCPR/C/37/D/242/1987; available at: (<http://hrlibrary.umn.edu/undocs/session37/241-1987.html>) [Accessed on 4 Feb. 2021].

obligation to provide protection and assistance to the family so it can fully assume these functions.”⁶⁵²

302) The Committee has found that relationships to “husbands clearly belong to the area of ‘family’ as used in article 17(1).”⁶⁵³ In clarifying the scope of family within article 17(1), the Committee established its view in *Aumeeruddy-Cziffra et al v. Mauritius* that “the common residence of husband and wife has to be considered as the normal behavior of the family.”⁶⁵⁴ In *Aumeeruddy-Cziffra*, the Committee found the State had interfered with the author’s family in part because the relevant immigration law “rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life...”⁶⁵⁵ The issue of violation of family life has been further discussed in this communication under article 23.

C - Honor and Reputation

303) Third, Article 17 also provides protections for individuals against unlawful attacks on their honour and reputation.⁶⁵⁶ This communication has already discussed how Yuliya and Vitaly were subjected to vilifications and threats without being protected by their government.⁶⁵⁷ After Hajo Seppelt’s documentary was aired, the Stepanovs were subjected to an intense public smear campaign. Instead of lauding them for exposing the illicit doping program, as a law-abiding nation would arguably do, they have been portrayed as traitors and liars who have betrayed their people, their country and their heroes. There is no evidence Russia took any step, at any point, to protect the Stepanovs from the attacks on their reputation and honor. To the contrary, they were called traitors and Judas, often by State officials, and the motives for exposing the Russian doping program were

⁶⁵² Human Rights Council, *Protection of the Family: Contribution of the Family to the Realization of the Right to an Adequate Standard of Living for its Members, Particularly through its Role in Poverty Eradication and Achieving Sustainable Development*, para. 22 (29 Jan. 2016) U.N. Doc. A/HRC/31/37; available at: (https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/37) [Accessed on 4 Feb. 2021].

⁶⁵³ Human Rights Committee, Comm. No. 35/78, *Aumeeruddy-Cziffra et al v. Mauritius*, para. 9.2 (b)2(i)1 (9 Apr. 1981) U.N. Doc. CCPR/C/12/D/35/1978; available at: (<https://www.refworld.org/cases,HRC,3f520c562.html>) [Accessed 4 Feb. 2021].

⁶⁵⁴ *Id.*

⁶⁵⁵ *Id.*

⁶⁵⁶ General Comment No. 16, *supra* note 647, para. 11.

⁶⁵⁷ *See supra*, paras. 121-136.

questioned. Therefore, it is here submitted that Yuliya and Vitaly's right to honor and reputation, protected under Article 17, has been violated too.

6 - ARTICLE 2.2 AND 2.3 – DUTY TO RESPECT AND GIVE EFFECT TO THE COVENANT

304) The above mentioned violations of Articles 1, 8.3.a., 17, 19 and 23.1 of the Covenant have taken place in conjunction with a violation of Articles 2.2 and 2.3 of the Covenant. In addition to the obligations to respect and ensure rights set forth in Article 2(1), Articles 2(2) and 2(3) of the Covenant also require the adoption of measures of implementation to give effect to the Covenant within the State Party's domestic legal system.

305) Article 2.2 of the Covenant provides, “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant”.

306) Article 2.3 provides: “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”

307) Article 2 is pivotal to the enforcement of the Covenant. Indeed, the Committee deems reservations to Article 2 to be invalid, since they would defeat the purpose and object of the Covenant.⁶⁵⁸ In the case of the present communication, the State has plainly failed to “take the necessary steps ...to adopt such laws or other measures as may be necessary to give effect to the

⁶⁵⁸ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, at para. 5 (26 May 2004) U.N. Doc. CCPR/C/21/Rev.1/Add.13; available at: <https://www.refworld.org/docid/478b26ae2.html> [Accessed on 4 Feb. 2021].

rights recognized in the present Covenant”. Although the scandal of the doping program broke out four years ago, Russia still has not equipped itself with effective anti-doping legislation.

308) As noted earlier, a review of the national anti-doping policies of Russia to implement its obligations under the UNESCO International Convention against Doping in Sport concluded that the Russian legal structure to fight doping and to prosecute violations of doping regulations is ineffective.⁶⁵⁹ UNESCO identified a series of problems in the Russian legal system that prevent Russia from complying with its obligations.⁶⁶⁰ The review denounced “[t]he inherent complexity of Russia’s internal law [, which] makes it difficult to meet the Convention objectives in an effective manner.”⁶⁶¹ It also highlighted institutional confusion and a lack of domestic coordination within Russia.⁶⁶² The review soberly concluded that “States Parties sometimes lack the political will to act. They often fail to take action until a crisis occurs and the resulting media attention then becomes a political issue that must be dealt with.”⁶⁶³

309) Article 2.3 requires States to provide effective remedies for the victims of human rights violations, including investigating the violations, identifying the perpetrators and imposing proper punishments, guarantees of cessation and non-repetition and finally reparations to the victims. As the Committee noted in General Comment 31, “[i]n general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant.”⁶⁶⁴

310) Not only is the Russian legal system inadequate to prevent the human rights violations detailed in the present communication, as Article 2.2 requires, but what little there is was also blatantly ignored by all those involved in the doping conspiracy. On 21 November 2018, The Moscow City Court ruled that a Court of Arbitration ruling upholding the disqualification of Alexander Zubkov, who carried the Russian flag at the opening ceremony of the 2014 Winter

⁶⁵⁹ CoP to the UNESCO Convention, *supra* note 184, Annex 1, p. 10, para. 48.

⁶⁶⁰ *Id.*, Annex 1, p. 10, para. 49.

⁶⁶¹ *Id.*

⁶⁶² *Id.*, Annex 1, p. 11, paras. 53-4.

⁶⁶³ *Id.*, Annex 1, p. 11, para. 52.

⁶⁶⁴ General Comment No. 31, *supra* note 658, para. 17.

Olympics in Sochi, was not enforceable in Russia, and, therefore, he should still be considered an Olympic champion.⁶⁶⁵

311) Lastly, the State has not only failed to investigate, prosecute and try those responsible, as Article 2.3 of the Covenant requires, but it has also been busy trying to deny the facts, threaten whistleblowers, and conceal evidence.

VII - REMEDIES

312) Based on the facts and the legal arguments presented in the previous sections, the authors respectfully request the Committee to establish the Russian Federation's responsibility for violations of the Covenant, to ensure the non-repetition of such violations, and to recommend the following measures.

1 - DECLARATION OF RESPONSIBILITY

313) The authors request the HRC Committee to declare the Russian Federation responsible for violations of:

- i. Articles 7, first and second sentence, 8.3.a, 17.1, 17.2, 19.2, and 23.1, all in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3, with regard to Yuliya Stepanova.
- ii. Articles 17.1 and 17.2, 19.2, 23.1, in conjunction with the preamble, second paragraph, and articles 2.2 and 2.3, with regard to Vitaly Stepanov.

2 - REPARATION

314) According to the commentary to the ILC Articles on State Responsibility, “[t]he core legal consequences of an internationally wrongful act ... are the obligations of the responsible State to cease the wrongful conduct ... and to make full reparation for the injury caused by the

⁶⁶⁵ *Russian Court Blocks Doping Ruling Against Alexander Zubkov*, ESPN (22 Nov. 2018); available at: (https://www.espn.in/olympics/story/_/id/25348063/russian-court-blocks-doping-ruling-olympic-champion-alexander-zubkov) [Accessed on 3 Feb. 2021].

internationally wrongful act.”⁶⁶⁶ Article 31 of the Articles on State Responsibility provides that: “1. The responsible State is under an obligation to make full reparation for the injury caused by the intentionally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”⁶⁶⁷ Under Article 34, “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction as required by the circumstances.”⁶⁶⁸ Thus, the Committee should consider measures of restitution, compensation and satisfaction that will “make full reparation for the injury caused by the internationally wrongful act”⁶⁶⁹ to Yuliya Stepanova and Vitaly Stepanov.

315) Should the Committee conclude the State had violated the victims’ rights protected under the ICCPR, then they are clearly entitled to compensation for both material and moral damages. However, the victims are not advancing any claim of financial compensation in this case, nor desire to receive compensation. Should the Committee recommend it nonetheless and Russia act on the recommendation, the victims will donate any compensation to charity or to a suitable non-profit organization.

3 - CESSATION AND NON-REPETITION

316) Article 30 of the ILC Articles on State Responsibility reads: “the State responsible for the internationally wrongful act is under an obligation; (a) to cease that act, if continuing; (b) to offer appropriate assurances and guarantees of non-repetition.”⁶⁷⁰ The obligation of cessation extends to all wrongful acts of a State, “regardless of whether conduct of a State is an action or an omission.”⁶⁷¹

317) The authors of the communication respectfully ask the Committee to recommend Russia to cease any and all pending investigation, prosecution or litigation against Yuliya Stepanova and Vitaly Stepanov and to take all appropriate measures within its jurisdiction to stop the attacks on their name and honor.

⁶⁶⁶ ILC Articles on State Responsibility, *supra* note 201, art. 31, commentary para. 4.

⁶⁶⁷ *Id.*, art. 31.

⁶⁶⁸ *Id.*, art. 34.

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.*, art. 30.

⁶⁷¹ *Id.*, p. 88, art. 30 para. 2.

318) Also, recalling Special Rapporteur David Kaye’s report on whistleblower protections “[w]hen attacks are condoned or perpetrated by authorities in leadership positions they consolidate a culture of silence, secrecy and fear ... deterring future disclosures.”⁶⁷² To protect whistleblowers like the Stepanovs from future reprisal, the Committee should ask the Russian Federation to provide adequate assurances that it will not take acts of reprisals against the victims represented in this communication, and, more generally, provide for more adequate and robust protection of whistleblowers in sports.

4 - SATISFACTION AND APOLOGY

319) Finally, Article 37 of the ILC Articles on State Responsibility declares: “the State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury ... satisfaction may consist in an acknowledgement of the breach, expression of regret, a formal apology or another appropriate modality.”⁶⁷³ Thus, the authors of the communication respectfully ask the Committee to recommend the Russian Federation issue a public apology, to be widely publicized, in a form acceptable to Yuliya Stepanova and Vitaly Stepanov, and in a place deemed safe by them. Finally, the Committee should ask that its Views on the merits of this communication be published on widely accessible media.

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⁶⁷² *Promotion and Protection of the Right to Freedom of Opinion and Expression*, supra note 613, para. 66.

⁶⁷³ ILC Articles on State Responsibility, art. 37.