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Oscar Pistorius and the future nature of Olympic, Paralympic and other sports

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Abstract

Oscar Pistorius is a Paralympic bionic leg runner and record holder in the 100, 200, and 400 meters who wants to compete in the Olympics. This paper provides an analysis of a) his case; b) the impact of his case on the Olympics, the Paralympics and other –lympics and the relationships between the –lympics; c) the impact on other international and national sports; d) the applicability of the UN Convention on the rights of persons with disabilities. It situates the evaluation of the Pistorius case within the broader doping discourse and the reality that new and emerging science and technology products increasingly generate internal and external human bodily enhancements that go beyond the species-typical, enabling more and more a culture of increasing demand for, and acceptance of modifications of the human body (structure, function, abilities) beyond its species-typical boundaries and the emergence of new social concepts such as transhumanism and the transhumanisation of ableism.

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1. Introduction

New and emerging science and technology products and changing social concepts and values continuously impact onto sports. Advances in science and technology lead to products that generate new sports and influence existing sports. They generate products that allow for the internal and external modification of athletes and they create external tools athletes can use, both of which influence the athlete's ability to perform. They are a key player in the dance between the athletes who are willing to use performance enhancements, to dope themselves without being detected, and the authorities who try to identify athletes who dope. New and emerging science and technology products and changing social concepts and values increasingly influence and pose challenges to the doping discourses. The appearance of internal and external enhancements of the human body in many shapes and forms that go beyond the species-typical enable a culture of increasing demand for, and acceptance of, improvements to and modifications of the human body (structure, function, abilities) beyond its species-typical boundaries and vice versa. This will further the establishment of new social concepts such as transhumanism which is a "based on the premise that the human species in its current form does not represent the end of our development but rather a comparatively early phase"¹ and "the desirability of fundamentally improving the human condition through applied reason, especially by developing and making widely available technologies to eliminate aging and to greatly enhance human intellectual, physical, and psychological capacities".² The transhumanisation of ableism,³ which is the set of beliefs, processes and practices that perceive the "improvement" of human body abilities beyond typical *Homo sapiens* boundaries as essential is another consequence.

The case of double-amputee bionic leg runner and Paralympic record holder Oscar Pistorius who expressed the wish to compete in the Beijing Olympics has grasped public attention, as has the decision by the world governing body for track and field (IAAF) not to allow Pistorius to compete in the Olympics.⁴

¹ World Transhumanist Association, "The Transhumanist FAQ – A General Introduction – Version 2.1", (2003) available at: <http://www.transhumanism.org/index.php/WTA/faq21/46/>

² Ibid.

³ See: G Wolbring, "Glossary for the 21st Century", International Center for Bioethics, Culture and Disability (2007) available at: <http://www.bioethicsanddisability.org/glossary.htm>; G Wolbring, "Why NBIC? Why human performance enhancement?", (2008) 21 (1) *Innovation; The European Journal of Social Science Research* 25-40; "NBICS, other convergences, ableism and the culture of peace", G Wolbring, *Innovationwatch.com*, 15 Apr 2007, available at: <http://www.innovationwatch.com/choiceisyours/choiceisyours-2007-04-15.htm>; G Wolbring, "New and Emerging Sciences and Technologies, Ableism, Transhumanism and Religion, Faith, Theology and Churches" (2007) 7 *Madang; International Journal of Contextual Theology in East Asia*, 79.

⁴ "IAAF Oscar Pistorius - Independent Scientific study concludes that cheetah prosthetics offer clear mechanical advantages", International Association of Athletics Federations, 14 Jan 2008, available at: <http://www.iaaf.org/news/newsId=42896.printer.html>; "IAAF rules sprinter Pistorius ineligible", R Casert, *Associated Press*, 14 Jan 2008, available at: http://news.yahoo.com/s/ap/20080114/ap_on_sp_oly_run_iaaf_pistorius; International Paralympic Committee, "International Paralympic Committee IPC Position Statement on IAAF's Commissioned Research on Oscar Pistorius", 14 Jan 2008, available at:

This paper provides an analysis of the case of Oscar Pistorius and its impact on the Olympics, the Paralympics and the relationship between these two events. It situates the evaluation within the broader doping discourse and the appearance of new and emerging science and technology human performance enhancement products and social concepts such as transhumanism and the transhumanized version of ableism and their impact on sports.

2. The case of Oscar Pistorius to date

Pistorius is a 21-year-old South African below the knee amputee who at the 2006 Paralympic Athletics World Championships won gold in the 100, 200 and 400 meter events and who is the world record holder in the 100, 200 and 400 metres track and field events of Paralympic athletes. Pistorius was regarded as being fast enough to earn a spot for the 200- and 400-meter sprints on South Africa's Olympic team.⁵ Pistorius asked to be allowed to run in the Olympics if he would qualify for his country's Olympic team. The world governing body for track and field (IAAF) ruled on 14 January 2008 – invoking its rule 144.2 which deals with technical aids – “that double-amputee sprinter Oscar Pistorius is ineligible to compete in the Beijing Olympics because his prosthetic racing legs give him a clear competitive advantage”.⁶ Athletics South Africa stated that it would immediately apply the decision, making it impossible for Pistorius to qualify for the South African Olympic team.⁷ The International Paralympic Committee (IPC) released a position statement regarding that decision on 14 January 2008, stating among others:

*After receiving and reviewing the official report, the IPC acknowledges the scientific validity of the tests conducted and the outcome of the research project. However, the use of an assistive device should not only be considered in solely biomechanical terms. It is recommended that further investigations take into consideration other aspects such as an examination of the energy loss or generation of the corresponding knee and hip joints as well as the impact of the amputation site contact with the prostheses. Rules, regulations and performance standards must be developed to ensure that equipment is safe, fair and universally accessible for athletes to achieve standards of excellence.*⁸

http://www.paralympic.org/release/Main_Sections_Menu/News/Press_Releases/2008_01_14_a.html; "Oscar Pistorius Statement", Center for the Study of Sport in Society, A Northeastern University Center, (2007), available at: <http://hdl.handle.net/2047/d10009437>; "Blind athlete leads the way", T Plougheld, *The Pulse*, 31 Oct 2007 available at: <http://www.thepulse2007.org/?p=100>

⁵ "Blade Runner", J McHugh, *Wired Magazine*, March 2007, available at: <http://www.wired.com/wired/archive/15.03/blade.html>

⁶ See both IAAF notes, see note 4.

⁷ Casert, see note 4.

⁸ International Paralympic Committee, see note 4.

Pistorius has already appealed to the Court of Arbitration for Sport.⁹ The Pistorius story is covered extensively in the public domain. Google generates 191,000 hits with the search term "Oscar Pistorius." The discourse consists of two main themes, one being whether his legs give an unfair advantage and whether the tests performed were appropriate; and the second whether he should be allowed to compete if his legs indeed give a performance advantage.¹⁰

The story of Pistorius however goes beyond bionic runners and whether he should or should not compete in the Olympics. Other issues are:

- can the UN Convention on the rights of persons with disabilities,¹¹ the newest human rights instrument for people with disabilities, give some guidance;
- the consequences of invoking rule 144.2 and dealing with technical aids for Olympic, Paralympic, other –lympic and international sport;
- the future of "enhancements" and their impact on the Olympics, Paralympics, other –lympic and international sports;
- the relationship between the Olympics, Paralympics, other –lympics and international sports.

3. UN Convention on the rights of persons with disabilities (CRPD)

3.1. The issue of sports and the CRPD

Human rights and sports have a long history of impacting each other. A conference that takes place in Canada in May 2008 "will commemorate and critique the aims and achievements of past and current human rights movements in sport"¹² and "will explore the past and reflect on current efforts at social change" and will suggest "future directions and debate the merits of including sport in campaigns for human rights."¹³ Many believe that sports as well as human rights tools are positively impacting on the quality of lives of many disabled people.¹⁴

⁹ "IAAF dismisses new tests of Pistorius", *Associated Press*, 5 March 2008, available at: <http://www.globesports.com/servlet/story/RTGAM.20080305.wsptpist5/GSStory/GlobeSportsOther/home:http://www.iht.com/articles/ap/2008/03/05/sports/EU-SPT-ATH-IAAF-Pistorius.php>

¹⁰ "An Amputee Sprinter: Is He Disabled or Too-Abled?", J Longman, *New York Times*, 15 May 2007, available at: <http://www.nytimes.com/2007/05/15/sports/othersports/15runner.html>; "Amputee sprinter treads uneven track", M Sutcliffe, *The Ottawa Citizen*, 13 Jan 2008, available at: <http://www.canada.com/ottawacitizen/columnists/story.html?id=51d55c3d-72fd-4261-b138-35a0f1709b1f&p=2>; "World champ says race against Pistorius wouldn't bother him", *Associated Press*, *USA Today*, 17 Jan 2008, available at: http://www.usatoday.com/sports/olympics/2008-01-17-564544338_x.htm

¹¹ United Nations, *Convention On The Rights Of Persons With Disabilities*, (2007), available at: <http://www.un.org/disabilities/convention/>, <http://www.un.org/esa/socdev/enable/index.html>

¹² Sport and Social Change Conference, *International Platform for Sport and Development*, (2008), available at: <http://www.sportanddev.org/en/events/sport-and-social-change-conference.htm>; <http://www.sportanddev.org/data/document/document/412.pdf>

¹³ Ibid.

¹⁴ E C Roy, "Aiming for Inclusive Sport: the Legal and Practical Implications of the United Nation's Disability Convention for Sport, Recreation and Leisure for People with Disabilities" (2008) 5 *Entertainment and Sports Law Journal*, 1; IDISWG Secretariat, Center for the Study of Sport in Society Northeastern University, "Sport in the United Nations Convention on the Rights of Persons

The latest human rights tool for people with disabilities is the UN Convention on the rights of persons with disabilities and its Optional Protocol which were adopted by the United Nations General Assembly on 13 December 2006, and opened for signature on 30 March 2007.¹⁵ As of March 2008 125 countries have signed the Convention, 71 have signed the Optional Protocol, 17 have ratified the CRPD and 11 have ratified the Optional Protocol.¹⁶ The Convention will enter into force on the thirtieth day after the 20th ratification or accession.¹⁷ The CRPD is seen as a milestone in the struggle of disabled people to achieve their human rights. More important for the theme of this paper, the CRPD is seen as important for the access of disabled people to sport activities and how sports is performed.¹⁸ Elise Roy, a lawyer, athlete and Human Rights Policy Advisor to Sport in Society at Northeastern University, USA and facilitator in the creation of article 30.5 CRPD wrote in a recent article:

*Although sport and disability are not new subjects to the United Nations, the Convention on the rights of Persons with Disabilities serves as the first legally binding instrument for protecting those with disabilities in the sporting realm. Article 30.5 is specifically devoted to addressing the rights of people with disabilities in the sport, recreation, play and leisure realms. The Convention requires all countries ratifying it to take proactive measures, including changes and/or additions to policy and legislation to enable individuals with disabilities to realize their human rights in the sporting realm.*¹⁹

A press release from the Sports in Society Center at Northeastern University at the time of the adoption of the CRPD by the United Nations highlights the importance of the CRPD:

*The adoption of article 30.5 will ensure that the international community will recognize sport as a human right for persons with disability. The treaty will solidify the human rights of persons with disabilities, which means countries that sign up to the convention will be charged with creating laws and other measures to improve disability rights and do away with legislation, customs and practices that discriminate against disabled people.*²⁰

with Disabilities - A publication of the International Disability in Sport Working Group in partnership with the United Nations Office of the Special Advisor to the Secretary-General on Sport for Development and Peace" (2007), available at: <http://www.sportanddev.org/en/articles/sport-in-the-un-convention-on-the-rights-of-persons-with-disabilities/index.htm>; www.sportanddev.org/data/document/document/336.pdf ; International Paralympic Committee (IPC) and Rehabilitation International (RI), "Disability Rights Toolkit" (2004), available at: www.sportanddev.org/data/document/document/53.pdf

¹⁵ See note 11.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See note 14.

¹⁹ Roy, see note 14.

²⁰ "UN Adopts Right to Sport and Recreation in Disability Treaty", *Sports in Society a Northeastern University Center*, 13 Dec 2006, available at: <http://www.sportinsociety.org/news.php?nid=81>

The International Disability in Sport Working Group – a network of international sport organisations, international disability rights organisations, and United Nations organisations working to advance and protect the rights of people with disabilities as they relate to sport, recently published in partnership with the United Nations Office of the Special Advisor to the Secretary-General on Sport for Development and Peace, a “collection of essays and statements addressing the significance of the right to sport in the United Nations Convention on the Rights of Persons with Disabilities [...] The contributions in this publication address (1) the meaning of the right to sport within the Convention, (2) specific recommended implementation strategies, and (3) the potential future impact within communities around the world.”²¹ One essay by Adolf Ogi United Nations Office of the Special Advisor to the Secretary-General on Sport for Development and Peace highlighted

*the recent Action Plan on Sport for Development and Peace (Report A/61/373), which was endorsed by all 192 Member States in resolution 61/10 of 3 November 2006, which encourages governments to implement the principle of “sport for all” through inclusive and coherent legislation and policies, including measures to promote participation of persons with disabilities.(point 74)*²²

Thomas Schindlmayr United Nations Secretariat for the Convention on the Rights of Persons with Disabilities sees the CRPD as the most advanced human rights tool for people with disabilities as it for the first time encourages persons with disabilities to participate in mainstream as well as disability-specific sporting activities.²³ Simon Walker from the Office of the High Commissioner for Human Rights writes, “[t]he Convention promotes a rights-based approach to disability and sport, which means not only the promotion of participation in sport but also of quality participation of persons with disabilities.”²⁴ Nerina Cevra from the Landmine Survivors Network states:

*A rights-based approach to sports means integrating human rights principles in the design, implementation, monitoring and evaluation of policies and programs related to the implementation of the right to sport as articulated in the Convention. These include: accountability, participation, inclusion, and non-discrimination.*²⁵

3.2. Oscar Pistorius, the Olympics, the Paralympics, other –lympics and the CRPD

Various articles of the CRPD might be applicable to the case of Oscar Pistorius and the relationship between the Olympics and other –lympics including the Paralympics. The following sections suggest some interpretations of the CRPD’s language and

²¹ IDISWG Secretariat, see note 14.

²² Report of the Secretary General, "Sport for Development and Peace: the way forward", United Nations, 22 Sep 2006, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N06/531/14/PDF/N0653114.pdf?OpenElement>

²³ IDISWG Secretariat, see note 14.

²⁴ Ibid.

²⁵ Ibid.

possible applicability to the case of Oscar Pistorius and the relationship between the Olympics and Paralympics and other –lympics. This section looks at four issues. Does the language in the CRPD allow for a legal claim a) that Oscar Pistorius has the right to compete directly against so called non-disabled athlete in Olympic events; b) does Oscar Pistorius have a claim for a separate bionic track event to be part of the Olympics; c) does a claim exist for moving Paralympics, other –lympics and to come –lympics events into the Olympics in general; d) does a claim exist to ask for equal support of athletes whether they are Paralympics, other –lympics, to come –lympic or Olympic athletes? This section and the paper in general is not about whether anyone can demand access to the Olympics. The author believes no such claim is possible within or outside the CRPD.

Question: Does a claim exist to ask for equal support for athletes whether they are Paralympic, Deaflympic, Special Olympic, to come other-lympic or Olympic athletes? This question could be answered with a “Yes” keeping in mind the limitations and open questions listed in 3.4.

Article 2, which defines the action of discrimination, states:

Discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.²⁶

Article 4 (General obligations), Article 5 (Equality and non-discrimination) and Article 8 (Awareness-raising) highlight concrete actions state parties are required to take to eliminate discrimination. Article 8.1 and 8.1(b) state for example:

Article 8 – Awareness-raising

1. States Parties undertake to adopt immediate, effective and appropriate measures:

b) To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life;²⁷

The language of these four articles could be used to demand for example “equal” support in their respective countries for Olympic and Paralympic and other –lympic athletes. As Anita Keller from Veteran International stated:

If adopted, the article [article 30] will provide athletes with disabilities the basis for a discussion with government funding agencies about increased and potentially equal funding for disability-specific sport programming. This does not occur in most

²⁶ See note 11.

²⁷ Ibid.

*countries around the world, even those “developed” nations claiming to already have “adequate” disability legislation.*²⁸

The lack of equal support was recently the target of a law suit in the USA.²⁹ The case transcript states:

*Plaintiffs challenge the USOC’s policy of providing Athlete Support Programs only to Olympic team members, to the exclusion of Paralympic team members, as violating § 504 of the Rehabilitation Act. The district court consolidated two separate cases for oral argument which the parties and the court agreed raise identical legal issues under Title III of the Americans with Disabilities Act (“ADA”), and § 504 of the Rehabilitation Act: Hollonbeck v. USOC, No. 07-1053, on a motion to dismiss; and Shephard v. USOC, No. 07- 1056, on cross-motions for summary judgment. The district court ruled for the USOC on the Title III and § 504 claims in both cases and entered final judgment pursuant to Fed. R. Civ. P. 54(b) on those claims.*³⁰

The Plaintiffs’ lost their case. As is stated in the decision United States Court of Appeals Tenth Circuit January 16, 2008:

*We sympathize with Plaintiffs’ efforts to obtain benefits similar to those received by their Olympic counterparts. However, we cannot modify the Rehabilitation Act to reach a result in their favour absent statutory or regulatory authority to import, wholesale, Title IX regulations and precedent into § 504. See Choate, 469 U.S. at 293 n.7. Plaintiffs should seek a remedy with the legislative or executive branches.*³¹

A remedy might be that the USA signs and ratifies the CRPD which could provide a legal basis for redress. This case seems to contradict one argument used by US officials to justify them not signing:

Our view is that the US actually already has in existence on the federal level, the state level and the local level a very good framework of laws and practices to assist citizens with disabilities," Paul Denig, with the US State Department,

²⁸ IDISWG Secretariat, see note 14.

²⁹ *Hollonbeck v United States Olympic Committee*, 07-1053 and 07-1056, United States Court Of Appeals Tenth Circuit, 16 Jan 2008, available at: <http://www.foxrob.com/pleadings.asp>; <http://ca10.washburnlaw.edu/cases/2008/01/07-1053.pdf>; "Paralympic Athletes File Major Discrimination Lawsuit Against USOC", American Association of People with Disabilities, 28 Jul 2003, available at: <http://www.aapd-dc.org/News/disability/paralympicsuit.html>; "Paralympians lose appeal in discrimination case", F Cordona, *The Denver Post*, 1 Jan 2008, available at: http://www.denverpost.com/news/ci_7997870

³⁰ *Hollonbeck v United States Olympic Committee*, see note 29.

³¹ Ibid.

told The New Standard, referring to the 1990 Americans with Disabilities Act (ADA). "In our view, this treaty would not add to that."³²

Cases such as the one described in section 3.2.1. very likely will be dealt with on the national level in countries that ratify the CRPD. One has to see how national courts incorporate the CRPD into their reasoning. Cases such as the one described in section 3.2.1. could be brought directly by individuals to the Committee on the Rights of Persons with Disabilities ("the Committee") (see article 34 of the CRPD) for resolution. Article 1 of the Optional Protocol to the CRPD allows for the Committee "to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention". In accordance with article 3 of the Optional Protocol to the CRPD the Committee would bring such communications to the attention of the State Party and would expect to receive an answer by the State within six months which would clarify the matter and the remedy, if any, that may have been taken by that State. The committee can also investigate the case and make recommendations; however it has no tool to punish non-compliance with the recommendations. It is likely that in the end an entity not complying will be moved to compliance by public pressure within and outside of the country.

Question: Does a claim exist to demand the move of Paralympics, Deaflympics, Special Olympics and other –lympic events of the future into the Olympics in general; The answer is probably yes keeping in mind the limitations and open questions listed in 3.4.

Does the status quo of separate –lympics and Olympics contribute to stereotypes, prejudices and harmful practices against disabled people? If so, under Article 8, 1(b) CRPD, state parties could be seen to be impelled to act to remedy this situation. One could make a case that the –lympics do not have an "equal basis with" the Olympics. The Paralympics and the other –lympics are, for example, less covered in the public sphere than the Olympics. Separating the Olympics and Paralympics could be a cause for action under Article 2 CRPD. It could be argued that having two separate events results in segregation of disabled athletes from non-disabled athletes with the "effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others" of the sports performance and experience of the disabled athlete vis-à-vis "non-disabled" athletes – the "others" referenced in Article 2. Article 30.5 "Participation in cultural life, recreation, leisure and sport" states:

Article 30 Participation in cultural life, recreation, leisure and sport

5. With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

(a) To encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels.³³

³² "US Influences Disability Rights Treaty, but Won't Sign It", C Komp, *The New Standard*, 25 Aug 2006, available at: <http://newstandardnews.net/content/index.cfm/items/3589>

Here the key concepts are “mainstreaming” and “equality of opportunity.” Eli A Wolff, Mary A Hums & Elise C Roy Center for the Study of Sport in Society Northeastern University, interpret Article 30.5 to mean “People with disabilities have the right to participate in sport on the basis of equality of opportunity”³⁴ and Article 30.5(a) to mean mainstream sport includes many forms of sport, including sport for all or elite sport. Nerina Cevra from the Landmine Survivors Network states, “The dual-track approach of Article 30.5 on sports addresses non-discrimination by guaranteeing equal access to mainstream sporting activities.”³⁵

The concepts and wording of the listed articles suggest that if the –lympics as a group decide that they rather would like to be in the same venue at the same time as the Olympics that they have a case (keeping in mind the uncertainties outlined in 3.3) of having their events in the same venue at the same time. However that language would not entail a claim that everyone who made it into the other –lympics can directly compete against Olympic athletes.

Question: Does a claim exist that Oscar Pistorius has the right to compete directly against so called non-disabled athlete in Olympic events? The answer is probably “yes,” keeping in mind the limitations and open questions listed in 3.4.

Roy, in a recent article in the Entertainment and Sports Law Journal, stated in regards to Article 30:

*that it appears that the phrase “to the fullest extent possible” in subsection (a) is meant to encourage governments to also take affirmative measures to enable people with disabilities to participate in mainstream sport that otherwise does not result in a fundamental alteration of the sport or safety risks. These include: giving reasonable accommodations to disabled athletes such as providing interpreters for the deaf to enable them to understand and benefit from their coach; allowing a golfer who is unable to walk long distances use of a golf cart despite rules that all golfers must walk; taking measures to eliminate stereotypes held by coaches and others (such as club owners); or allowing a wheelchair track athlete to compete (but be scored on a separate basis) with able-bodied track athletes where there are no other wheelchair athletes to create a competition atmosphere for the athlete in the wheelchair.*³⁶

Oscar Pistorius could make the argument that he is outcompeting fellow bionic runners to such an extent in certain events that he experiences a lack of a competitive atmosphere and therefore he should be allowed to compete against Olympic athletes as long as it is safe to do so.

Furthermore he could use the language of Article 2 CRPD stating that the segregation of himself from non-disabled has the “effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others” of the sports performance and experience of his performance taking into account that the Paralympics are less covered than the Olympics. He could also use the language of

³³ See note 11.

³⁴ See note 14.

³⁵ Ibid.

³⁶ Roy, see note 14.

Article 8.1(b) CRPD claiming that the segregation is a “harmful practice” if the assumption holds true that top performing Olympic athletes gain more recognition and support than top performing Paralympics athletes.

Question: Does Oscar Pistorius have a claim for a separate bionic track event as part of the Olympics? The answer is probably “no,” keeping in mind the limitations and open questions listed in 3.4.

The key language is “equal basis with others” in Article 30.5. Rules govern which sports become a part of the Olympics and the other –lympics. Depending on which rules would be used to deny access for a bionic track and field event in the Olympics it might or might not violate the CRPD. Furthermore if the language of Articles 2, 8 and 30 were successful to justify a bionic track event in the Olympics this very likely would lead to a fusion of the Olympics with other –lympics as outlined above as the language of these articles is not confined to bionic track and field events.

3.3. Oscar Pistorius, the CRPD and the Court of Arbitration for Sports

In the case of Olympic issues and cases involving international-level athletes and international sports federations unresolved cases can and are brought before the Court of Arbitration for Sport (CAS).³⁷ Pistorius has already appealed to CAS.³⁸ CAS is seen by many as the leader in international sports dispute resolution.³⁹ The 2007 version of the Olympic Charter (point 59 page 104) identifies CAS as the exclusive arbitral body for Olympic disputes.⁴⁰ Rule 13.2.1 *Appeals Involving International-Level Athletes* of the 2003 World Anti-Doping Code makes CAS the place where doping decisions relating to International-Level Athletes and International events can be appealed.⁴¹ International sports federations are designating CAS as the exclusive arbitral body for their disputes.⁴² It is recognised that CAS has build a *lex sportiva*, that is, a set of guiding principles and rules in international sports law through its body of decisions.⁴³ As the CRPD is not in force as of yet it is not sure whether the CAS judges will consider the CRPD in the case of Oscar Pistorius but in the future one should expect that the CRPD will be used by athletes in a similar situation than Pistorius to make their case and one should expect that the CAS will be one body to develop a case history on the CRPD which would give an indication on the influence of the CRPD and its interpretation and limitation in the area of sports. One can envision that cases such as the ones described in 3.2 are brought in front of CAS by

³⁷ International Council of Arbitration for Sport (ICAS) and the Court of Arbitration for Sport (CAS), "Statutes of the International Council of Arbitration for Sport (ICAS) and the Court of Arbitration for Sport (CAS)" (2008) available at: <http://www.tas-cas.org/d2wfiles/document/281/5048/0/3.1%20CodeEngnov2004.pdf>

³⁸ See note 9.

³⁹ E T Gilson, "Exploring the Court of Arbitration for Sport" (2006) 98 (3) *Law Library Journal* 503, available at: http://www.aallnet.org/products/pub_llj_v98n03/2006-28.pdf

⁴⁰ International Olympic Committee, *Olympic Charter* (2007), available at: http://multimedia.olympic.org/pdf/en_report_122.pdf

⁴¹ World Anti-Doping Agency, "World Anti Doping Code", (2003) available at: http://www.wada-ama.org/rtecontent/document/code_v3.pdf

⁴² Gilson, see note 39.

⁴³ Ibid.

international sports agencies, national committees and individual international athletes for mediation and remedies.

3.4. The limitation of the above interpretation of the CRDS

- 1) The CRPD has not yet entered into force and therefore no legal case history and experience exist with the CRPD.
- 2) On the international level of sports the Court of Arbitration in Sports will very likely lead the way in building up case histories and deal with cases described in sections 3.2 may be in cases where there is no resolution on the national level, however no case history exists as of yet.
- 3) Although no case history exists for the CRPD at the moment, one should expect that the implementation and interpretation of the CRPD will follow fundamental human rights principles such as those put forward at an Expert Group Meeting on International Norms and Standards relating to Disability in 1998⁴⁴ and the UN Declaration on Human Rights.⁴⁵ However in the end, laws and regulations and their implementations are only as good as the public sentiment toward them. Laws can sharpen the public consciousness. But a broad public acceptance is needed to lead to a broad implementation and adherence to any given law and regulation. One can hope that the articles of the CRPD will receive such a high acceptance in the global community that the implementation of CRPD will become customary within international and national law.

The discourse around the CRPD might lead to changes within and between the Olympics, Paralympics and other international sports. Only the future will decide the impact of the CRPD. The rest of the paper looks beyond the legal system towards the discourse around internal and external modifications of Olympic and Paralympic and other international athletes, the arguments used in the Pistorius case and their impact on the Olympics and Paralympics and their relationship.

4. The issue of illegal technical aid

The main argument against the participation of Oscar Pistorius in the able bodied sprint events of the Olympics is that the Cheetah devices he uses give him an unfair advantage⁴⁶ and therefore should be classified as illegal technical aids in accordance with rule 144.2 of the International Association of Athletics Federations (IAAF).⁴⁷ It is not surprising that the result and the design of the study used to rule against Pistorius is contested⁴⁸ as there is no golden standard test available to judge different

⁴⁴ "B. Fundamental human rights principles", Expert Group Meeting on International Norms and Standards relating to Disability, United Nations Enable, (1998), available at: <http://www.un.org/esa/socdev/enable/disberk3.htm>

⁴⁵ United Nations, *UN Declaration on Human Rights*, (1948).

⁴⁶ IAAF, see note 4.

⁴⁷ *Ibid.*

⁴⁸ A Bull, "Pistorius's unfair advantage keeps him out of Olympics", *The Guardian*, 14 Jan 2008, available at: <http://sport.guardian.co.uk/athletics/story/0,,2240569,00.html?gusrc=rss&feed=7>; "Statement by Ossur regarding bilateral amputee Oscar Pistorius' bid to participate in IAAF-sanctioned

bionic legs and compare them with “normal” legs. Indeed Pistorius commissioned another test after the one used by the IAAF which led to a different result.⁴⁹ The development of tests that are able to do so and would be accepted is one area of needed immediate action for Olympic and Paralympic officials. Other actions also would be needed to address other remaining questions about the scope and implementation of rule 144.2. These are addressed below.

4.1 Pistorius: From bionic add-ons to integrated bionics, would it make a difference?

Pistorius is seen as violating IAAF’s technical aid rule 144.2. Granted, one could perceive something that is detachable from one’s body as a tool or as an aid. What if Pistorius would have bionic legs irreversible fused to his body through neuro interphases or other means? It would be hard to classify these bionic legs as aids or as tools as they would be part of his bodily reality, his body image, and his way of life. One can expect that versions of bionic add-ons will become more commonplace in the future. As such, the IAAF and other sports linked to the Olympic and Paralympic are well advised to look beyond rule 144.2 to come up with a broader line of action and reasoning beyond the classification of something as a technical aid. This might be indeed the future intention of the IAAF and others and the tests performed so far are only the first step in developing a better and more acceptable body of tests. Nick Davies, spokesman for the Monaco-based IAAF was quoted in 2007 as saying:

Davies said the March rule had been misinterpreted. It prohibits the “use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device.” It was aimed at sophisticated gadgets manufacturers add to the shoes of top athletes.”... Banning Pistorius “was never the purpose of the rule. It was never the intention...” Davies said one of the aims was developing criteria on prosthetics and other aides. “Perhaps certain prosthetics will be allowed and others won’t,” he said.⁵⁰

4.2 The inconsistency of applying technical aid rules

Even without springs, wheels or any other element, shoes are supposed to give performance enhancement to an athlete. Shoes are seen as essential for the performing athlete⁵¹ and not everyone has access to the same quality of shoe in competition and in training. There are other inconsistencies in how the IAAF applies technical aid prohibition. For example, it permits athletes to sleep in tent-like devices designed to simulate high altitude and increase oxygen-carrying capacity and is actively opposed

events, and ultimately the Olympics”, *Ossur*, 11 Jan 2008, available at: <http://www.ossur.com/?PageID=6743>

⁴⁹ See note 4.

⁵⁰ “Amputee athlete to compete in international able-bodied events”, *Associated Press*, 22 June 2007, available at: <http://sports.espn.go.com/espn/wire?section=trackandfield&id=2913211>

⁵¹ “Donald Thomas is revelation of the year”, E Denman, IAAF (2008), available at: <http://www.iaaf.org/news/newsId=42751,printer.html>; IAAF, “Chapter 7 Principles Of Injury Prevention” (2007), available at: <http://www.iaaf.org/newsfiles/42034.pdf>

to their prohibitions.⁵² In the end it means that both the Paralympics and the Olympics and the sports attached to them have to apply their rules around technical aids much more consistently. It would require that every “technical aid” from shoes to bobsleigh and other aids used to perform are standardised and that every athlete who fulfils certain criteria has access to them in competition and in training. The access should not be based on what a country can afford to buy for its athletes. The requirements would impact on nearly every Olympic sport. If they do not act they are all in violation of techno doping. If it’s about the “pure” abilities of the athlete this seems to be logical that their skills are performed on the same external equipment.

4.3 From rule 144.2 to the general issue of techno doping

The inconsistency of applying rules related to techno doping is not just an issue for the IAAF. The International Convention against Doping in Sports,⁵³ the World Anti Doping Code,⁵⁴ and the Anti Doping Code of the International Paralympics Committee (IPC)⁵⁵ are supposed to give guidance about what is now seen as legal and illegal. However, there are implementation and scope problems with the above instruments. A recent UK report *Human Enhancement Technologies in Sport*⁵⁶ by the UK House of Commons Science and Technology Committee highlights a variety of shortcomings; namely, that there is little transparency in the decision-making process with regard to items placed on the Prohibited List (point 62); ambiguity as to which performance enhancement method is to be prohibited and which should not (point 63); possible misuse of the therapeutic use exemption (points 66-68); and the lack of, but the need for, an increase in foresight capacity to anticipate potential future illegal human enhancement technologies (point 98). That said, however, the report itself has problems. On the one hand, it outlines strategies to increase research and development on legal human enhancement technologies (section 8) recommending for example that the Government develop a specific funding stream for research into legal mechanisms for enhancing human performance in sport (point 122) and that significant effort be made toward the application of relevant knowledge obtained in the military for the benefit of sport (point 129). On the other hand it gives no clear guidance as to where the line should be drawn between legal and illegal human performance enhancement.

⁵² IAAF, "International Association of Athletics Federations (IAAF) Proposed ban on artificial altitude environments" (2006) available at:

http://www.gbshaun.com/altitudeforall//hypoxia_resources_iaaf.html

⁵³ UNESCO, *The International Convention against Doping in Sports* (2005), available at:

http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁵⁴ See note 41.

⁵⁵ International Paralympic Committee, "IPC Anti-Doping Code" (2006). available at:

http://www.paralympic.org/release/Main_Sections_Menu/Anti_Doping/2006_06_IPC_Anti-Doping_Code_-_January_2004_-_Revised.pdf

⁵⁶ House of Commons Science and Technology Committee, "Human Enhancement Technologies in Sport" (2007), available at:

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmsctech/67/67.pdf>

4.4 From No Olympics to No Paralympics participation?

One issue not covered in the discourse around the Olympic participation of Pistorius is what does the ruling mean for his participation in the Paralympics? Pistorius competed in the Paralympics for a long time and with great success. If his bionic legs do indeed give him an unfair advantage in the Olympics over the “normal” leg using athletes does that mean that his Cheetahs also give him also an advantage over bionic leg runners who do not use Cheetahs? That the IAAF does not let Pistorius compete does not mean that the Paralympics cannot have him compete.

As the International Paralympic Committee (IPC) in its position statement on IAAF’s commissioned research on Oscar Pistorius stated, “the IPC recognizes that each International Sport Federation has the right to define the eligibility and sport equipment rules governing its competitions.”⁵⁷

However there is the issue of standardisation of “technical aids” and consistency around ruling on “technical aids” within the IPC and sports as a whole.

As the IPC stated:

*However, equipment plays a critical role in many sports. Equipment evolves and it is the responsibility of international federations like the IPC and the IAAF to stay abreast of these developments. Rules, regulations and performance standards must be developed to ensure that equipment is safe, fair and universally accessible for athletes to achieve standards of excellence.*⁵⁸

The IPC statement suggests that there is action needed on behalf of the IPC. The Paralympics does not use standardised bionic legs for running and not every Paralympic runner has access to the Cheetahs during competition and training. Do Cheetahs give an advantage over other bionic leg models? What about future models? What if we will have neuro integrated bionics? The story around Pistorius highlights the urgency to develop standardised, multifaceted tests that allow for the comparison of different bionic legs and bionic legs with “normal” legs. The tests employed today related to bionic legs seem not to be accepted as the golden standard by the different Paralympic and Olympic players.

4.5 Not competing with the “able bodied” does not mean not being in the Olympics

People seen as “impaired” as “functioning subnormative” under a species-typical framework of reference now have the Paralympics to compete, while those seen as “functioning normative” under a species-typical framework have the Olympics. If one follows the media coverage, the Pistorius case is about him wanting to compete against the “able bodied” in the Olympics. This desire was rejected and hinges in the end on the ability of Pistorius to show or convince the IAAF that his Cheetahs are not giving him a performance advantage. Although one can question rule 144.2 and the ruling towards Pistorius and the inconsistency of the sport authorities in applying technical aids, Pistorius could still be part of the Olympics. One could have an event

⁵⁷ See note 4.

⁵⁸ Ibid.

of bionic runners in the Olympics. While men and women do not compete against each other at the Olympics, they both participate in the Olympic competitions. So why not do the same with Pistorius? His is another case in point against segregation. Although he might not be allowed to compete against biological runners in the Olympics, why should he and other bionic runners not have a bionic running event as a discipline in the Olympics? There are two types of Olympic events. Some are based mainly on the biological performance of the athlete (e.g. the high jump) while others depend on external tools (e.g. the pole vault, skiing, bobsleigh, to just name a few). One could compare bionic and wheelchair racing with the pole vault and other sports where athletes use external tools to move beyond species-typical functioning and biological racing with the high jump. As one has high jump and pole jump in the Olympics it is logical to have bionic, wheelchair and biological running in the Olympics. Why should a bionic runner or a wheelchair athlete not have the same exposure and respect as a pole vault athlete? One might be tempted to use numbers here to justify the non-inclusion. However if an event is seen as suitable for the Paralympics meaning that Paralympic officials feel that enough people perform the sport to make it worthwhile for the Paralympics, so it should be enough to allow them into the Olympics as a sport.

One could conclude the paper here by asking for standardised tests, consistency in applying the technical aid rule and the concept of techno doping, and that many if not all Paralympics events are added to the Olympics. However, there is more to the Pistorius story, i.e. are his bionic legs enhancements or are they therapeutic and does this distinction matter?

5. Human enhancement, human therapy

*The I.A.A.F. must objectively define when prosthetic devices “go from therapy to enhancement,” Schneider said. The danger of acting hastily, she said, is “you deny a guy’s struggle against all odds — one of the fundamental principles of the Olympics.”*⁵⁹

If one reads the IAAF ruling against Pistorius it all sounds simple. His legs are a technical aid and they lead to an unfair performance advantage over “normal” legs. In other words; his bionic legs are illegal bodily enhancements if compared to the “normal” leg athlete. But what kind of enhancement are they; therapeutic or non-therapeutic? Does it matter if his legs would be classified as therapeutic devices? The quote from Schneider suggests that one can make a distinction between therapy and enhancement and that that would matter. However to draw a line between therapy and enhancement seems to be impossible for various reasons.⁶⁰ How would that work? The legs would be classified as therapeutic if they perform up to species-typical functioning and as enhancements if they go beyond? Would not any bionic leg be therapeutic for the person without legs even if the properties outdo the “normal” legs? The legal system in every country classifies people without legs as impaired making it logical to classify bionic legs in general as therapeutic devices. Pistorius sees bionic

⁵⁹ See note 10.

⁶⁰ G Wolbring, Alberta Heritage Foundation for Medical Research, Health Technology Assessment Unit, "HTA Initiative #23 The triangle of enhancement medicine, disabled people, and the concept of health: a new challenge for HTA, health research, and health policy" (2005) available at: <http://www.ihe.ca/documents/hta/HTA-FR23.pdf>

legs as a tool for walking.⁶¹ The bionic legs are the therapy for his state of not being able to walk.

The question is whether it makes a difference whether the therapy label is attached to them i.e. could the IAAF not use rule 144.2 to prevent Pistorius from competing against able-bodied runners in the Olympics? Annex II Standards for Granting Therapeutic Use Exemption of the International Convention against Doping in Sports – reproducing the World Anti-Doping Agency’s “International Standard For Therapeutic Use Exemptions” – states among others:

*4.3. The therapeutic use of the Prohibited Substance or Prohibited Method would produce no additional enhancement of performance other than that that might be anticipated by a return to a state of normal health following the treatment of a legitimate medical condition.*⁶²

This rule was not written with a case like Pistorius in mind, however the language has implications. As society defines people with no legs as impaired, as having a medical condition, the bionic legs could be seen as a therapeutic device. Furthermore the bionic legs could be defined as the state of normal health. Having them is as near to the “normal legs” as one can get as a person without legs (again assuming that the state of no legs means one is not healthy whereby impairment is linked to the term health) and therefore it would not produce an additional enhancement other than that that might be anticipated by a return to a state of normal health as the bionic legs are the “normal health” (this argument becomes even more convincing when the move from bionic legs as add-ons to integrated bionic legs happens).

Many disabled people without legs do not believe that they have a medical condition and many others including Pistorius might not agree with labelling the no-leg-state as a medical condition. However the term “legitimate medical condition” is just a place holder for the reality that that person does not perform in species-typical parameters. This interpretation stretches of course the intent of the rule and none of the modifications Paralympics athletes are using in the open are on the Doping list of course. However rule 4.3 and contemporary shifts in the understanding of health, disease, therapy and enhancement⁶³ raise questions. If there is a therapeutic exemption to doping as rule 4.3 provides, should a similar exemption apply to the technical aid rule 144.2? Would that mean Pistorius could compete against the “normal” leg runners after all?

The next section looks beyond the species-typical discourse of which Pistorius and disabled people, especially Paralympics athletes, are part of, even if they do not realise it yet.

⁶¹ See note 10.

⁶² UNESCO, International Convention Against Doping in Sports, Annex II – Standards for Granting Therapeutic Use Exemption (reproducing the World Anti-Doping Agency's "International Standard For Therapeutic Use Exemptions") (2005), available at: http://www.wada-ama.org/rtecontent/document/international_standard.pdf

⁶³ See note 60.

5.1 Beyond species-typical functioning, transhumanism, health and disabled people

The term transhumanism was originally coined by Julian Huxley, First Director-General of UNESCO,⁶⁴ and has spread since then to be the foundation for a whole social movement. According to the World Transhumanist Association:

*Transhumanism is a way of thinking about the future that is based on the premise that the human species in its current form does not represent the end of our development but rather a comparatively early phase. We formally define it as follows: (1) The intellectual and cultural movement that affirms the possibility and desirability of fundamentally improving the human condition through applied reason, especially by developing and making widely available technologies to eliminate aging and to greatly enhance human intellectual, physical, and psychological capacities.*⁶⁵

The increasing ability of new and emerging science and technologies to generate human bodily enhancements in many shapes and forms that go beyond the species-typical will increasingly enable a culture of transhumanism, of increasing demand for, and acceptance of improving and modifying the human body (structure, function, abilities) beyond its species-typical boundaries and vice versa and will enable the transhumanisation of ableism,⁶⁶ that is the set of beliefs, processes and practices that perceive the “improvement” of human body abilities beyond typical *Homo sapiens* boundaries as essential. It exhibits the favouritism of beyond *Homo sapiens* typical abilities and perceived human bodies as limited, defective, in need of constant improvement, as being in a diminished state of being human if they are not enhanced beyond *Homo sapiens* typical abilities.

It follows a transhumanist model of health,⁶⁷ where “health” no longer has the endpoint of biological systems functioning within species-typical, normative frameworks. In this model, all *Homo sapiens* – no matter how conventionally “medically healthy” – are defined as limited, defective, and in need of constant improvement made possible by new technologies (a little bit like the constant software upgrades we do on our computers). “Health” in this model means having obtained maximum (at any given time) enhancement (improvement) of one’s abilities, functions, and body structure. The transhumanist model of health sees enhancement beyond species-typical body structures and functioning as therapeutic interventions (transhumanisation of medicalisation).⁶⁸ Disabled people are seen to play a key role in mainstreaming and in increasing the acceptance of beyond species-typical functioning, of “therapeutic enhancements.” Transhumanists see the potential of using disabled people as a trailblazer for the acceptance of transhumanist ideas and products.⁶⁹ James Hughes, the executive director of the World Transhumanist

⁶⁴ J Huxley, *New Bottles for New Wine*, (1957), 13-17, available at: <http://www.transhumanism.org/index.php/WTA/more/huxley>

⁶⁵ See note 1.

⁶⁶ See note 2.

⁶⁷ See note 60.

⁶⁸ See notes 2 and 60.

⁶⁹ See note 60.

Association, writes, “[a]lthough few disabled people and transhumanists realize it yet, we are allies in fighting for technological empowerment.”⁷⁰

5.2 Beyond species-typical functioning: a reason to exclude?

If one talks about achieving beyond species-typical functioning one is confronted with different types of interventions:

- External temporarily
- Internal temporarily
- Internal permanent

We do not talk about external interventions in terms of beyond species-typical functioning, but in terms of tools humans are mastering. This is because we see here no internal change to the human body. Many sports are defined by external technical aids athletes are using and the output measured is one of human capability beyond species-typical functioning. For humans to high jump five meters they need a tool such as a pole and pole jumping was born. Obviously one would not allow a person with a pole to compete within the high jump – that would be classified as techno doping – but a separate event is acceptable and not seen as doping as they all perform under the same parameters. Any wheelchair sport and sports that are based on external bionics could easily be accommodated under this framework. One just has to give them their separate sports within the Olympics and any sporting events.

Internal temporarily interventions are interventions which lead to internal metabolic and/or body structure changes that influence the capability of the body. These changes reverse when the interventions are stopped. Here we talk about the interventions in terms of beyond species-typical functioning and not in the way of tools humans are mastering. This is due to the fact that something internal to the human body is changed. Internal reversible doping is an issue that grasps the media spotlights much more often than external doping, mostly because of the cheating aspect.

5.3 The new kid on the block: Permanent interventions

Increasingly we see interventions that are permanent, irreversible or hard to reverse. The eye surgery that gives the eyes beyond species-typical eyesight and the bionic add-ons that are linked to the human nervous system are just two examples.

The regulatory system is not prepared for what is coming. Annex I of the World Anti Doping Code that lists prohibited substances and methods⁷¹ lists mostly drugs. Method-wise it prohibits only enhancement of oxygen transport (blood doping is a term fitting into this category), intravenous infusions and gene doping. Very little foresight exists as to what might come in the future and how to deal with it. The ever increasing abilities to modify the human body permanently and temporarily towards beyond species-typical functioning, and the elimination of the therapy versus

⁷⁰ "Battle Plan to Be More than Well – Transhumanism is finally getting in gear" J Hughes, *World Transhumanist Association*, (2004), available at: <http://transhumanism.org/index.php/th/more/509/>

⁷¹ World Anti-Doping Agency, "The World Anti-Doping Code, Annex I – The Prohibited List – International Standard" (2007), available at: http://www.wada-ama.org/rtecontent/document/2007_List_En.pdf

enhancement argument⁷² will give weight to the move to allow beyond species-typical functioning not just with external tools but for internal modifications. The arguments used to denounce internal doping namely that it is not safe, that it is cheating and that it is against the Olympic spirit will increasingly come under pressure.

5.3.1 It's not safe

We have an ongoing problem in detecting the newest enhancement drugs. The detection capabilities are all the time behind the development of enhancement drugs. Therefore one can make a case that having these drugs used in the open might be safer especially if these drugs have to go through a food and drug administration (FDA) type approval process as medical drugs and devices have to. Various ethicists use the "it's safer" line of reasoning to justify the legalisation of internal doping i.e. Julian Savulescu (point 46) in the UK report *Human Enhancement Technologies in Sport*.⁷³ An editorial in a recent issue of the academic journal *Nature* seems to follow the same reasoning:

*This transition will not be painless. Some people will undoubtedly harm themselves through the use of enhancements, and there would need to be special protection for children. That said, athletes harm themselves in other forms of training, too. They may harm themselves less with drugs when doctors can be openly involved and masking agents dispensed with.*⁷⁴

5.3.2 It's against the spirit of the Olympics

The UK report *Human Enhancement Technologies in Sport*⁷⁵ by the UK House of Commons Science and Technology Committee cites bioethicist Julian Savulescu, who believes that performance enhancement "is not against the spirit of sport" and that "there is no reason sport must remain purely a test of natural ability" (point 44). Indeed performance enhancement as such does not go against the Olympic Charter⁷⁶ or the Olympic Spirit.⁷⁷ Many sports using external tools would have to be revisited if it would. Cheating does go against the Olympic charter and the Olympic spirit.

5.3.3 It's cheating

Obviously any doping which leads to performance enhancements which one uses to compete against the non-enhanced persons without telling them about the enhancement is cheating. Cheating however is not by itself an argument against performance enhancement. It is an argument against the competition of the enhanced against the non-enhanced that could be easily rectified by giving the internally doped people their own event as we do with the externally doped people. Indeed there is an

⁷² See note 60.

⁷³ See note 56.

⁷⁴ Editorial (Anon), "A sporting chance" (2007) 448 *Nature*, 512, available at: <http://www.nature.com/nature/journal/v448/n7153/full/448512a.html>

⁷⁵ See note 56.

⁷⁶ International Olympic Committee, *Olympic Charter* (2004), available at: http://www.hoo.hr/dokumenti/wordpdf/olimpijska_%20povelja/olimpijska_povelja_eng.pdf

⁷⁷ International Olympic Committee, "Olympic Spirit" (2008) available at: <http://www.olympicspirit.org/mission.php>

increasing group of people i.e. Julian Savulescu⁷⁸ and Andy Miah⁷⁹ who are against the ban of enhancement in sport and would have no problem in having the enhanced competing against each others. It is reported that Juan Antonio Samaranch the former president of the International Olympic Committee suggested in 1997 a “gladiator class” of athletes.⁸⁰ The academic journal *Nature* published recently an editorial that also seems to condone internal enhancements when it stated, “[a]s pharmacological enhancement becomes every day, views of bodily enhancement may evolve sufficiently for sporting rules to change on that, too.”⁸¹

The view of legalising internal doping is likely to become a more common sentiment when one considers the reality of a murky-to-non-existent line between legal and illegal Human Enhancement Technology (HET),⁸² the refusal to outlaw HETs in general, the lack of foresight about emerging HETs, inconsistency in rulings and the application of existing instruments, the increasing use and the ever-present expectation that athletes will perform beyond their natural abilities.⁸³ As the recent editorial in the academic journal *Nature* stated:

*As this change takes place, we will have to re-examine what we expect of athletes. If spectators are seeking to reset their body mass index through pharmacology, or taking pills that enhance their memory, is it reasonable that athletes should make do with bodies that have not seen such benefits? The more the public comes to live with the mixed and risk-related benefits of enhancement, the more it will appreciate that allowing such changes need not rob sport of its drama, nor athletes of their need for skill, training, character and dedication.*⁸⁴

5.4. Distributive justice the best battle line for the Olympic Spirit?

Most Olympic sports are not about natural abilities as they use external tools to increase the natural abilities of athletes. Many external and internal modifications of athletes are on the way that will change how people will perceive beyond species-typical functioning. We might see a future where everyone uses some form of HET,

⁷⁸ See note 56.

⁷⁹ A Miah, "Genetic Technologies and Sport: The New Ethical Issue" (2001) XXVIII *Journal of the Philosophy of Sport*, 32-52, available at:

<http://www.andymiah.net/documents/Miah2001GeneDoping.JPS.pdf> ; A Miah, "The engineered athlete: Human rights in the genetic revolution" (2000) 3 *Sport in Society*, 25-40; A Miah, "From anti-doping to a 'performance policy' sport technology, being human, and doing ethics" (2005) 5 *European Journal of Sport Science*, 51-57, available at: <http://www.informaworld.com/smpp/content~content=a714592360~db=all> ; B Kayser, A Mauron and A Miah, "Viewpoint: Legalisation of performance-enhancing drugs" (2005) 366 *The Lancet*, S21.

⁸⁰ "Playing Dirty", J Bryant, *Outside Magazine* (1999) available at: <http://outside.away.com/outside/magazine/0799/9907tour.html>

⁸¹ See note 74.

⁸² See notes 56 and 60.

⁸³ "NBICS, other convergences, ableism and the culture of peace", G Wolbring, Innovationwatch.com, 15 Apr 2007, available at: <http://www.innovationwatch.com/choiceisyours/choiceisyours-2007-04-15.htm>

⁸⁴ See note 74.

and the sponsors are the companies providing the HET. The issue of the future might be one of distributive justice meaning that one ensures that any external and internal modification and usage of tools and technical aids is safe and is distributed to all athletes for training and competition who have reached a certain level in an equal fashion outlawing any tool, method and internal intervention that is unsafe and where a distribution to all who qualify cannot be ensured.

6. Conclusion

From the foregoing the conclusion can be drawn that:

a) It is likely that the CRPD will play an important role in sports on all levels from local to international and from amateur to professional, strengthening disabled people sports and the move towards equal treatment of disabled and non-disabled athletes and the mainstreaming inclusion of disabled people in many sports performed by so called non-disabled athletes.

b) There will be more cases like the one of Oscar Pistorius and labelling them all as techno doping is very likely not feasible. Even if it would be feasible, the increase appearance of people like Oscar Pistorius might lead to new events being performed at the Olympics.

c) The ever increasing appearance of internal and external enhancements of the human body that go beyond the species-typical enable a culture of increasing demand for, and acceptance of, improvements to and modifications of the human body (structure, function, abilities) beyond its species-typical boundaries and vice versa, furthering the establishment of new social concepts such as transhumanism⁸⁵ and the transhumanisation of ableism,⁸⁶ demand a broad public debate as to what people see as important; a discourse which makes clear that the people, the spectators are also responsible for certain developments (for example if people watch events they know use doping that comes with consequences). It is not just a technical debate.

d) The concept of distributive justice might have to be added to the framework of the Olympic Spirit and sports in general if the wave of internal and external human performances enhancements cannot be stopped.

e) Sports in general have to be much more coherent around the issue of doping.

f) New sports appear all the time enabled by new science and technology products. So far most of these new sports relate to the use of new tools (Bobsleigh, snowboard, etc.). However increasingly new sports might be based on external or internal modifications of the human body itself.

A retooling of the discourse is needed if one wants to take on the challenges linked to advances and impacts of new and emerging science and technology products and new and emerging social concepts such as transhumanism and the transhumanisation of ableism.

⁸⁵ See note 1.

⁸⁶ See note 2.