

## **Play the Game Presentation: Using Human Rights Tools to Fight Systematic Doping**

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I want to preface my presentation with this: what I am arguing today should in no way take away from the values of WADA or the UNESCO convention.

I am a two time Olympic swimmer myself, and I am 100% committed to the idea of banning, penalizing, and sanctioning athletes, coaches, and medical care providers (the athlete entourage) who dope of their own volition. From 1990-1998 I competed internationally and experienced first hand the two main Chinese doping scandals at the 1994 World Championships where Chinese women won 12 of 16 events,<sup>1</sup> and the scandal at the 1998 World Championships where one Chinese swimmer was caught smuggling into Australia, enough HGH to supply her entire 23 person team for 2 weeks.<sup>2</sup> So I am very supportive of the goals of WADA and UNESCO in the fight against doping.

However, what I am arguing today is another way of looking at the doping issue, one which can complement international anti-doping law. This is the issue of using human rights tools to combat the doping of minor athletes.

While the missions of both WADA and the UNESCO Convention are to uphold the ethical principles of sport and protect the health of athletes,<sup>3</sup> my argument focuses on the health and human rights of minor athletes, in particular, under systematic doping regimes.

### **What do I mean by systematic doping?**

Doping can be divided into two categories:

First: doping by individual athletes who cheat for the rewards of winning such as money and fame.<sup>4</sup>

Second: systematic doping, which when state-sponsored is part of a government plan to enhance the country's athletic success.<sup>5</sup>

Of course, the best example of state-sponsored doping occurred in East Germany. We are all very familiar with what happened in the GDR from the early 1960s until 1989. Over 10,000 mostly minor athletes were systematically doped without their knowledge, under a codified

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<sup>1</sup> Phillip Whitten and Craig Lord, *Chinese Take Out*, SWIMMING WORLD, November 1994, at 60.

<sup>2</sup> Leigh Montville, *Wet and Wild: A Chinese Drug Bust*, SPORTS ILLUSTRATED, January 1998, at 64

<sup>3</sup> World Anti-Doping Agency, *Constitutive Instrument of Foundation of the World Anti-Doping Agency*, Art. 4, para. 2. at [http://www.wada-ama.org/docs/web/about\\_wada/history/constitutive\\_instrument\\_foundation.pdf](http://www.wada-ama.org/docs/web/about_wada/history/constitutive_instrument_foundation.pdf), (last visited 3/20/04). The Code, *supra* note 17, The purpose, scope and organization of the World Anti-Doping Program and the Code, at. 5 NEED TO ADD THE NEW CONVENTION

<sup>4</sup> According to the World Anti-Doping Code, an anti-doping violation includes one of more of the following: the presence in the sample of a prohibited substance, the use or attempted use of a prohibited substance or method, refusing to provide a sample or noncompliance with the out-of-competition testing requirements, tampering or attempting to tamper with a sample, possession or trafficking of a prohibited substance or method, or administration or attempted administration of a prohibited substance or method. The World Anti-Doping Code [hereinafter The Code] (published by the World Anti-Doping Agency 2003) at [http://www.wada-ama.org/docs/web/standards\\_harmonization/code/code\\_v3.pdf](http://www.wada-ama.org/docs/web/standards_harmonization/code/code_v3.pdf), (last visited 3/20/04).

<sup>5</sup> *Common Drugs of Use and Abuse*, at <http://news.findlaw.com/legalnews/sports/drugs/use/doping/index.html> (last visited 3/21/04).

program, which outlined the state's systematic doping program and how to avoid detection from the world's new anti-doping scheme.<sup>6</sup>

Today, those athletes are finding justice in the German courts. Some of the leaders of this program have been found criminally liable,<sup>7</sup> some athletes have received financial compensation for their physical and emotional suffering,<sup>8</sup> and some are suing the pharmaceutical company that made the steroids.<sup>9</sup> Basically, they are finding justice for the human rights abuses that were committed against them.

However, this recourse and access to justice may never occur for children in non-democratic countries. While I will focus my discussion on China and Chinese swimming, this concept could be applied anywhere that minor athletes are being doped. The bottom line is that systematic doping not only violates international sports law, but is also a violation of international human rights law.

### **What do I mean by human rights violations:**

First, I am talking about the right to be healthy. These rights are protected in the Convention on the Rights of the Child and the International Convention on Economic, Social and Cultural Rights, which both provide that all children and people have the right to the highest standards of health.<sup>10</sup> It is also protected in the Convention on the Elimination of all forms of Discrimination Against Women, which provides for the removal of harmful health practices for women.<sup>11</sup>

Second, is the right of human dignity, basically the right that every human being should be treated as an end, not as a means to an end.<sup>12</sup> That is, not using athletes to promote nationalism and international sporting success, but rather as athletes in and of themselves.

This concept of human dignity is upheld in the UN Charter,<sup>13</sup> the Universal Declaration of Human Rights<sup>14</sup> and even the Olympic Charter, which says the goal of the Olympic movement 'is to place sport at the service of the harmonious development of man, with a view to encouraging the establishment of a peaceful society concerned with the preservation of human dignity.'<sup>15</sup>

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<sup>6</sup> STEVEN UNGERLEIDER, *FAUST'S GOLD: INSIDE THE EAST GERMAN DOPING MACHINE* xv (Thomas Dunne Books an Imprint of St. Martin's Press, 2001) at 88

<sup>7</sup> *Convicted, Former East German Official Fined in Doping Case*, CNN.COM at [http://sportsillustrated.cnn.com/athletics/news/1999/04/12/eastgerman\\_doping/](http://sportsillustrated.cnn.com/athletics/news/1999/04/12/eastgerman_doping/) (last visited 1/23/05), see also, UNGERLEIDER, *supra* note 6, at 76, 85, and 173

<sup>8</sup> Craig Lord, *Berlin Closes Account with GDR Doping-but the Victims Fight On*, SwimNews.com, available at <http://www.swimnews.com/News/displayStory.jhtml?id=3835>

<sup>9</sup> *Id.*

<sup>10</sup> Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989) Arts. 24, 29, and 31 [hereinafter CRC]. Ratified by China on April 1, 1992. and International Covenant on Economic, Social, and Cultural Rights, U.N. Doc. A/RES/2200 A (XXI) (1966) art. 15, [hereinafter ICEPCR]. available at <http://www.un.org/Depts/dhl/resguide/resins.htm>. China signed the ICEPCR on October 5, 1967, however, when China ratified on June 27, 2001 they stated that the signing of the Covenant by the authorities of Taiwan under the Chinese name on October 5, 1967 was illegal and null and void, and that China did not sign the Covenant until October 27, 1997.

<sup>11</sup> Convention for the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], art.

12. China ratified CEDAW on September 3, 1981, however they have not ratified the Optional Protocol.

<sup>12</sup> Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 849 (1983).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> THE OLYMPIC CHARTER, [hereinafter THE CHARTER] Fundamental Principles, para. 3. at [http://multimedia.olympic.org/pdf/en\\_report\\_122.pdf](http://multimedia.olympic.org/pdf/en_report_122.pdf)

Third, is the right to play and enjoy sports. The right to play sports is noted in the Children's Convention,<sup>16</sup> CEDAW,<sup>17</sup> ICESCR,<sup>18</sup> and the UN report "Sport for Development and Peace,"<sup>19</sup> mentioned earlier by Mr. Ogi

Finally, under the Universal Declaration of Human Rights, each person has the right not to suffer degrading treatment or attacks upon one's honour.<sup>20</sup>

### **How are these four rights violated by systematic doping?**

The right to health is violated when athletes are given performance enhancing drugs (like steroids, HGH, or EPO) or undergo performance enhancing procedures (such as blood or gene doping) because of the detrimental and known health effects.

The harmful effects of steroids include: liver damage such as tumors, jaundice and hepatitis C, heart disease, damage to other organs including the kidney and gall bladder, testicular and breast cancer, paralysis, severe acne, depression, suicidal tendencies, eating disorders, and specifically to women: miscarriages, deformed fetuses, ovarian cysts, painful menstruation, birth defects in children including clubfeet and blindness, increased body and facial hair, and other forms of permanent masculinization such as a deepening of the voice.<sup>21</sup>

The side effects of HGH and EPO include tissue swelling, headaches, carpal tunnel syndrome, diabetes, acromegaly, (which includes enlarged hands and feet, heart disease, arthritis and diabetes), and cancer.<sup>22</sup> Speakers this week have also mentioned high blood pressure, hypercholesteral, sudden death, growth of connective tissue in the heart, epilepsy, and psychiatric problems.<sup>23</sup>

The right to human dignity and the right to sport and play are violated when athletes are used as tools of the state, rather than for the pure love or joy of sport itself. When a state institutes a plan to unnaturally develop the performance of its minor athletes for the purpose of winning international acclaim, the athlete's human dignity is violated in its most basic sense. Experiences such as the chance to build self-confidence, pride and honor, and skill building such as

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<sup>16</sup> Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989) Arts. 24, 29, and 31 [hereinafter CRC]. Ratified by China on April 1, 1992.

<sup>17</sup> Convention for the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW], art. 13(2).

<sup>18</sup> International Covenant on Economic, Social, and Cultural Rights, U.N. Doc. A/RES/2200 A (XXI) (1966) art. 12, [hereinafter ICEPCR]. available at <http://www.un.org/Depts/dhl/resguide/resins.htm>

<sup>19</sup> *Sport for Development and Peace: Towards Achieving the Millennium Development Goals*, Report of the UN Inter-Agency Task Force on Sport for Development and Peace, U.N. 2003, at <http://www.un.org/themes/sport/reportE.pdf> (last visited 1/23/05).

<sup>20</sup> The Universal Declaration of Human Rights, U.N. Doc. A/777 (1948) [hereinafter UDHR] arts 5 and 12, at <http://www.un.org/Depts/dhl/resguide/resins.htm>

<sup>21</sup> The harmful effects include: liver damage such as tumors, jaundice and hepatitis C, heart disease, damage to other organs including the kidney and gall bladder, testicular and breast cancer, paralysis, severe acne, depression, suicidal tendencies, and eating disorders. The problems specific to women include: miscarriages, deformed fetuses, ovarian cysts, painful menstruation, birth defects in children including clubfeet and blindness, increased body and facial hair, and other forms of permanent masculinization such as a deepening of the voice. See Jere Longman, *East German Steroids' Toll: 'They Killed Heidi'*, New York Times, January 26, 2004, at D1, Karin Helmstaedt, *History of Doping: Acceptance Tinged With Fear*, American Swim Coaches Association On-line, at <http://www.swimmingcoach.org/articles/9904/9904-6.htm> (last visited 3/27/04), Frank Shorter, Testimony of Frank Shorter, Senate Hearing, June 18, 2002, Paul Geitner, *Ewald on Trial for Doping Athletes*, Slam! Sports on Canoe, AP story, at [http://www.canoe.ca/SlamOlympicScandal/may2\\_ewa.html](http://www.canoe.ca/SlamOlympicScandal/may2_ewa.html), (last visited 3/27/04), and UNGERLEIDER, *supra* note 5.

<sup>22</sup> Sabin Russell, *Aging Baby Boomers turn to hormone / Some doctors concerned about growing 'off-label' use of drug*, 11/17/03 S.F. CHRON., at A.1, 2003 WL 3768370

<sup>23</sup> Michael Kjaer, *Can doping use be a free choice?* Play the Game Conference, Nov. 8, 2005

teamwork, discipline, work ethic, and fair play<sup>24</sup> are lost when athletes are doped against their will.

The right not to be degraded and dishonored is violated when athletes are used as tools of the state, and especially when they are caught. In China athletes who are found to have doped are subjected to severe punishment,<sup>25</sup> harsher than those in the rest of the world.<sup>26</sup> These athletes, once the pride of their nation are shamed and cast aside.<sup>27</sup>

### **Why do we need to talk about this from a human rights perspective?**

Because drug tests carried out by anti-doping agencies are not completely effective.<sup>28</sup> As we have learned this week, only 20 countries have good anti-doping systems.<sup>29</sup>

While WADA appears to be working hard and law enforcement has begun to play a crucial role filling the gaps, there is another avenue we can use to combat systematic doping: by looking at the doping of minor athletes as a human rights issue.

### **What can human rights law do?**

Under customary international law, a state is responsible for the act of officials or official bodies, national or local, even if the acts were not authorized by or known to the responsible national authorities, indeed even if expressly forbidden by law, decree, or instruction.<sup>30</sup> Therefore, countries that systematically dope or allow any doping to occur at a lower level either provincially or within a sports association, school or club, should be found to have violated this international norm.

### **Let me paint you a picture:**

In order to understand this problem you and I must leave behind our anger and strip away our bias against those we consider to have cheated. Instead we must look at the individual swimmer in China, the 14 year old girl who left her home and family at age 12 to attend a military style

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<sup>24</sup> *Sport for Development and Peace: Towards Achieving the Millennium Development Goals*, Report of the UN Inter-Agency Task Force on Sport for Development and Peace, U.N. 2003, at <http://www.un.org/themes/sport/reportE.pdf> (last visited 1/23/05).

<sup>25</sup> Tim Healy and David Hsieh, *Slippery When Wet: New Evidence That Chinese Swimmers are Systematically Using Drugs*, ASIAWEEK, January 30, 1998, quoting Shui Bin, spokeswoman in Beijing for the State Physical Culture and Sports Commission

<sup>26</sup> *New Anti-doping Regulation Helps Build Clean Sports*, XINHUA NEWS AGENCY, Feb. 4, 2004

<sup>27</sup> John Goodbody, *China Pledges to Jail Drug Takers*, THE TIMES, March 2, 1995 at Sports

<sup>28</sup> Unfortunately, drug testing rarely catches cheaters, so in order to catch athletes who cheat, drug tests are administered to athletes by sports' ruling bodies at random times throughout the year. These tests are called out of competition tests, while tests conducted during competition are called in-competition tests. During in-competition testing, athletes know to stop taking particular drugs prior to the competition or use masking agents to disguise their presence. Additionally, there are no tests for certain drugs, procedures and substances like human growth hormone or blood doping. To date the few times athletes have been caught were under unique circumstances. In the case of the German Democratic Republic, [hereinafter GDR] the cheaters were revealed when the Berlin Wall fell and the STASI files were uncovered. In 1998, it was Australian customs agents who discovered human growth hormone in the luggage of a Chinese swimmer, revealing to the world that China had moved on to bigger and better drugs that could not be detected. Other swimmers are caught because new tests are developed to catch cheaters before they know they could be caught. This is what happened to the Chinese swimmers in 1994 and what happened recently with the synthetic designer steroid called THG. In the summer of 2003 an anonymous coach mailed a syringe containing a synthetic designer steroid to the United States Olympic Committee (hereinafter the USOC). After weeks of intensive testing and experimenting, scientists at the USOC drug lab figured out what it was and devised a test to catch it. A dozen San Francisco based athletes from several sports including track and field and American football tested positive for THG.

<sup>29</sup> Signund Loland, *Can worldwide testing be effective?* Play the Game Conference, Nov. 9, 2005

<sup>30</sup> Restatement Third of the Foreign Relations Law of the United States §702, Comment (b), and *Velasquez-Rodriguez v Honduras* (1988) Inter-Am Ct HR (ser C) no 4, IACt HR V.

sports school, isolated from the outside world, from her own country, and even from her family.<sup>31</sup>

Now concentrate on what it must be like for that 14 year old girl to be told the steroids she is given are vitamins and how she truly believes her coach because he has become her surrogate father.<sup>32</sup> We must picture ourselves in her shoes as her body changes; not just the simple changes of puberty, but also the changes that doping make to her body. We must imagine what it's like for her to have pubic hair grow over her abdomen, have her voice deepen, and her libido rage out of control.<sup>33</sup> We must picture how painful her menstruation has become, especially after she begins to receive steroid injections at age 15.<sup>34</sup>

We must also picture her 15 years later at age 30 when she tries to have a child of her own but the baby is born blind or with club feet.<sup>35</sup> Maybe she has liver damage or breast cancer or is unable to even conceive a child of her own. All these problems are side effects of prolonged steroid use. The side effects of HGH and EPO are also harmful; however, we've yet to see the long term side effects.

In certain situations it might be argued that this girl has a choice, or even that she knows that what is happening is wrong. However, the Chinese law does not provide a legal framework for young athletes to know the truth or even question authority about it.

- China's Sports Law takes a decentralized approach to sports administration leaving the door wide open for officials at all levels to look the other way when it comes to doping.<sup>36</sup>
- China's Human Rights Papers stress a focus on economic development as the basis for social development meaning that political and civil rights take a back seat to economic development.<sup>37</sup>
- Access to information and the Internet are severely restricted in China, so the chance is slim that a 14 year old girl at a military sports school with no English language skills can access information on international sports law or the world's anti-doping fight.<sup>38</sup>
- Add all those laws to the Chinese Constitution, which says that the rights of citizens are not inherent but conferred by the state,<sup>39</sup> which suggest that the athlete's dignity or human rights will not be valued over and above the state or province's desire to win gold and international prestige.

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<sup>31</sup> Adapted from the experiences of athletes in the GDR. Karin Helmstaedt, *History of Doping: Acceptance Tinged With Fear*, American Swim Coaches Association On-line, at <http://www.swimmingcoach.org/articles/9904/9904-6.htm> (last visited 3/27/04)

<sup>32</sup> See generally UNGERLEIDER, *supra* note 6

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> James A.R. Nafziger & Li Wei, *China's Sports Law*, 46 Am. J. Comp. L. 453 (1998).

<sup>37</sup> Pitman B. Potter, *The Chinese Legal System: Globalization and local legal culture*, 92-93 (RoutledgeCurzon, 2001).

<sup>38</sup> *Id.* citing the Law of the PRC on Protecting State Secrets, (1989), State Secrecy Protection Regulations for Computer Information Systems on the Internet, 2000; and Provisional Regulations of the PRC on Administration of Computer Information Systems and the International Internet, 1996.

<sup>39</sup> *Id.* citing the Constitution of the People's Republic of China, English version at <http://www.isinlaw.com>, (effective Dec. 4, 1982) [hereinafter the PRC Constitution] at arts. 52-54

It may also be true that our athlete, if she wins, receives benefits such as national glory and financial rewards that she believes far outweigh the denial of her basic health and human dignity. However, for every athlete who wins, thousands do not. There are hundreds of thousands of students attending thousands of sports schools across China,<sup>40</sup> so in imagining the life of our Chinese swimmer, we must also picture her if she does not win or find success. If she is a second or third tier athlete she will be used as a guinea pig to test new drugs before they are given to the top tier athletes.<sup>41</sup> In another scenario she may test positive or get caught by law enforcement carrying drugs outside of China for her coach and teammates. At this point her life is over; she is rejected by the sports body in her country and sent back to her hometown in disgrace.<sup>42</sup> Her life, once full of pride at being an elite swimmer, is now full of shame, and her dignity as a human being has been destroyed. She was never just training and competing for the love of sport and the dream of winning gold; in fact, she was never just a girl or even a human being. Instead she was used as a means to an end, as a way to bring national glory and international prestige to the state.<sup>43</sup>

### **What does using international human rights tools entail?**

It means encouraging United Nations organs such as the UN Commission on Human Rights, the UN Commission for the Convention on the Rights of the Child, and the UNESCO to conduct on-site visits in China.

Much of my evidence for systematic doping in China must be inferred using definable symptoms like China's links to the GDR, its past doping epidemics, the legal and cultural climate in China, and basic sporting indicators like surges in top placings and depth of the world rankings, physical characteristics, and athletes with unnaturally fast improvements and unnaturally high performance levels.<sup>44</sup>

Having to use these inferences needs to be replaced by real events, which means that we need to go into China and see what is going on.

Look at this example, FINA, the world swimming federation, conducted two on site visits in the 1990s, only to return after several days of meetings with officials (never with athletes) to say that they could find no evidence of systematic doping in China.<sup>45</sup> Yet both times it was obviously occurring.<sup>46</sup> Either FINA is incapable or unwilling to find evidence of this abuse. However, conducting thorough on site visit can be done with the help of the human rights community.

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<sup>40</sup> David Lindorff with Julia Flynn, *Does China Feed its Athletes 'Juice'?*, BUSINESS WEEK, June 19, 1995 at 140

<sup>41</sup> Phillip Whitten, *China Drug Bust*, SWIMMING WORLD, January 1995, at 71

<sup>42</sup> Healy and Hsieh, *supra* note 25

<sup>43</sup> "All the drug use in China," says Chinese dissident journalist Sang Ye, "springs from nationalism. Teams are made to feel that the glory of China is at stake." *Id.*

<sup>44</sup> Brent S. Rushall, Ph. D., R.Psy., *Drugs in Sport: A Primer for Politicians, Sports Officials With Aspirations of Higher Office, and Other Self-Serving Individuals*, October, 1997, at <http://coachsci.sdsu.edu/swimming/drugs/primer.htm>, (last visited 3/28/04).

<sup>45</sup> In response to criticism from the world swimming community, FINA sent a delegation to China in 1995. It sent three lawyers with no medical experience and they met with officials (but no athletes) over a four day period. In 1998, FINA sent another delegation to China to investigate. They met with several groups of swimming and sport officials (but again no athletes) over three days and issued a statement that there was no systematic doping in China. David Galluzzi, *The Doping Crisis in International Athletic Competition: Lessons From the Chinese Doping Scandal in Women's Swimming*, 10 SETON HALL J. SPORTS L. 65, at 80-88.

<sup>46</sup> In 1996 the Chinese swimming association reported to FINA that four Chinese athletes had tested positive at a meet in China. This information was not released by FINA to the public for over one year. By 1996 a four strikes you're out policy was in place for countries, which had more than four swimmers test positive in one year. Although China went over this number FINA did not enforce the rule due to technicalities. In 1998 the same thing happened and again FINA refused to enforce the rule, based on technicalities. *Id.*

## **Conclusion**

I want to finish by reading some of the words of one GDR swimmer who was doped under the East German doping program, from Steven Underleider's book, *Faust's Gold: Inside the East German Doping Machine*.

Olympic bronze medal swimmer, Christiane Knacke-Sommer's testimony at trial started out in typical fashion, "I was 15 when the pills started. The training motto at the pool was, 'You eat the pills or you die.' It was forbidden to refuse." However, the words she offered to describe her feelings today are particularly horrifying. "They destroyed my body and my mind. They gave me those pills, the Oral Turinabol, which made me crazy and ruined my body. They even poisoned my medal!" Then in the midst of her testimony, she stood up and threw her medal to the floor crying, "It is tainted, poisoned with drugs and a corrupt system. It is worthless and a terrible embarrassment to all Germans."

The doping problem is serious, not only for the harm it causes to athletes, but because of its pervasiveness. To combat this problem we need to surround it from all sides. WADA, UNESCO, and FINA cannot combat it alone. Law enforcement around the world is beginning to understand the problem, but many nations are not interested in fighting this endemic in their criminal justice systems. We need to also use the world's human rights instruments to fight this problem.

Sport plays a unique role in advancing human rights. The Olympic Charter itself emphasizes the importance of fair play and the belief that "the practice of sport is a human right."

To allow systematic human rights violations to continue when we have seen the devastating effects on the athletes of East Germany, would dishonour the role sport has played to further human rights in the past and would fail in at using sports to promote human rights in the future.