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CURRENT LEGAL DEVELOPMENTS

Consideration at the United Nations of an International Prohibition on the Cloning of Human Beings

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Abstract

At the turn of the twenty-first century rapid advances in the life sciences had culminated in the successful cloning of mammals, with the potential for the development of cures to major diseases. It also raised the spectre of the cloning of human beings – a possibility declared repugnant to human dignity by UNESCO in 1997. In 2001, France and Germany initiated a process in the UN General Assembly to negotiate an international treaty banning the reproductive cloning of human beings. What started as a seemingly straightforward proposal soon ran into the cross-winds of the broader debate on the ethical and legal appropriateness of human embryonic stem-cell research. A major confrontation ensued at the United Nations between those states favouring a narrow ban limited to cloning for reproductive purposes, and those insisting on prohibiting all forms of human cloning, including for 'therapeutic' purposes. At play was not only a difference in worldview as to the meaning of human dignity in the twenty-first century (and the boundaries on scientific research), but also considerations relating to respect for cultural diversity, the economic consequences of finding cures to major diseases, and the ability of the technological 'have-nots' to limit the activities of the technological 'haves'.

Key words

customary international law; embryonic stem-cell research; human cloning; human dignity; reproductive cloning; therapeutic cloning

1. Introduction

By the late 1990s rapid advances in the life sciences, particularly in the field of genetics, had culminated in the cloning of the first mammal, a sheep named Dolly, soon to be followed by a host of other mammals, including CC the cat, a cloned mule, and cloned pigs, mice, calves, and rabbits. It seemed to be merely a matter of time before a human being was cloned. The implications of such a development were far-reaching: not only did it open a new vista of opportunities for medical research and treatment, but it also brought with it serious ethical and legal implications. While many countries professed a common abhorrence of the idea of creating a human

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clone, and proceeded to outlaw cloning techniques as a method of assisted human reproduction, the more difficult issue concerned the other potential uses of such technologies, particularly in the field of embryonic stem-cell research. At stake was a trade-off between the negative ethical implications of generating human embryos through an asexual process purely for research purposes, as against the potential for further medical and scientific breakthroughs leading to new understanding of major diseases.

In a context of the increasing globalization of scientific and technical knowledge, it was not long before such issues were raised at the international level. Efforts at intra-state co-ordination undertaken in Europe were followed by actions at a global level. The issue drew the attention of the United Nations Educational, Scientific and Cultural Organization (UNESCO), which, in its Universal Declaration on the Human Genome and Human Rights (the Human Genome Declaration) of 1997,[1] labelled the cloning of human beings a 'practice contrary to human dignity'. This was followed, in 2001, by an initiative in the UN General Assembly to negotiate an international treaty prohibiting the reproductive cloning of human beings, which quickly turned into a referendum on the acceptability of human cloning for purposes other than reproduction. The following is a discussion of the consideration of that initiative, offered as a brief history of what became a significant confrontation at the United Nations (culminating in the adoption of a divisive UN Declaration), with the emphasis on an evaluation of the impact on the development of legal norms in the area. Some modest thoughts on the underlying policy considerations at play are also proffered by way of providing a fuller picture of what transpired and, more generally, as an implicit comment on the difficulties of negotiating new international norms against the backdrop of rapidly evolving scientific developments.

2. The proposal for a prohibition – a chronology

At the 56th session of the UN General Assembly in 2001, Germany and France jointly proposed[2] the inclusion of an item entitled 'international convention against the reproductive cloning of human beings' in the Assembly's agenda, for consideration by its Sixth Committee.[3] The two sponsors referred to UNESCO's Human Genome Declaration which, in Article 11, provided that '[p]ractices . . . contrary to human

1. Adopted unanimously by the General Conference of UNESCO on 11 November 1997. *Records of the General Conference, Twenty-Ninth session, Paris, 21 October to 12 November 1997*, vol. I, Res. 16, at 41, subsequently endorsed by the United Nations General Assembly in Res. 53/152 of 9 December 1998. See generally M. Arsanjani, 'Negotiating the UN Declaration on Human Cloning', (2006) 100 AJIL 164.
2. See Letter dated 7 August 2001 from the Chargés d'affaires of the Permanent Missions of France and Germany to the United Nations addressed to the Secretary-General, UN Doc. A/56/192 (2001), containing an explanatory memorandum and a suggested draft resolution. Most of the UN documents referred to in this article are available at the website of the Ad Hoc Committee on the Reproductive Cloning of Human Beings, http://www.un.org/law/cloning/.
3. It was, at the time, not entirely clear that the General Assembly was the natural forum for the consideration of the proposal. Indeed, the explanatory memorandum attached to the sponsors' proposal focused less on the reasons for instituting a global ban on cloning for reproductive purposes and more on the appropriateness of bringing the issue to the General Assembly. The key rationale cited was that the 'universal context of the United Nations' was the more appropriate for providing an adequate response to the challenges posed by the new scientific breakthroughs relating to cloning (ibid., second para.). One can identify the following additional motivations for selecting the General Assembly, and the Sixth Committee in particular, which, even if not all of them were expressed, were certainly understood to apply: the *effectiveness* of the proposed

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dignity, such as reproductive cloning of human beings, shall not be permitted',[4] and invited states and competent international organizations to 'co-operate in identifying such practices and in taking, at national or international level, the measures necessary to ensure the principles set out in [the] Declaration'.[5]

The proposal called for a preparatory process during which the mandate for the negotiation of the treaty would first be negotiated and then presented to the Sixth Committee for approval. Governments were asked to commit to the idea of negotiating a treaty, while leaving the details, including its scope, to be worked out at a later stage. In retrospect, this was, to say the least, an unique procedure for the initiation of the negotiation of a multilateral treaty, especially for a penal treaty, in that the decision was taken to commence the process towards a treaty despite the majority of delegations not having actually expressed any views on the matter. It was clear that governments were swayed by the arguments of the sponsors that there appeared to be general agreement among states that the cloning of human beings for reproductive purposes had to be banned and that, in the face of such an imminent threat, there was no room for delay. They were also impressed by references to the issue in the Human Genome Declaration and in instruments already adopted at regional level in Europe.[6] Forty-eight states[7] joined as co-sponsors of the Franco-German proposal.[8]

However, by 2002, a difference of opinion had begun to emerge, initially in the Ad Hoc Committee, held early that year,[9] where some states questioned the 'narrow/focused' approach, limited only to questions of cloning for reproductive

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ban (required involving the primary 'producer states' in the biotechnology field in a negotiation with 'non-producer states' which had little or no involvement in the field of biotechnology, so as to establish a universal regime to prevent 'cloning havens'); the *procedural flexibility* offered by the General Assembly (the procedure existed for the participation of non-member states, interested specialized agencies and other UN entities); the *consensus tradition* of the Sixth Committee (the Sixth Committee has typically striven for the adoption of major legal instruments by consensus, which was considered the best procedure for ensuring the universality of an international ban); the *complexity of the issue* (the two sponsors maintained that '[b]ecause of its multidisciplinary nature the issue could not be dealt with in all its aspects in any of the specialized agencies . . . it therefore [fell] within the competence of the General Assembly' and that 'it [was] the Sixth Committee which seem[ed] most suited to conduct negotiations on elaborating a legally binding instrument which [would], no doubt, pose complex legal and technical problems' (ibid., third para.)); the *penal nature of the proposed treaty* (the work on cloning was modelled, in part, on the Sixth Committee's prior work in the field of international terrorism); and the *speedy negotiation of the treaty* (not only could the Sixth Committee negotiate penal treaties, but it had also developed the procedures to do so speedily).

4. *Supra* note 1.
5. Ibid.
6. See the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, adopted by the Council of Europe on 12 January 1998 (entry into force on 1 March 2001), ETS No.168, which, in Art. 1(1), provides that 'Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.'
7. See Report of the Sixth Committee, UN Doc. A/56/599 (2001).
8. Subsequently adopted as General Assembly Resolution 56/93 of 12 December 2001. The Resolution established an Ad Hoc Committee 'for the purpose of considering the elaboration of an international convention against the reproductive cloning of human beings' and entrusted it with the task of considering 'the elaboration of a mandate for the negotiation of such an international convention, including a list of the existing international instruments to be taken into consideration and a list of legal issues to be addressed in the convention'. It was assumed that, once the negotiating mandate had been approved by the General Assembly, the Ad Hoc Committee would be reconvened to commence the negotiation of the treaty itself.
9. See Report of the Ad Hoc Committee on an International Convention against the Reproductive Cloning of Human Beings, Official Records of the General Assembly, Fifty-Seventh Session, Supplement No. 51, UN Doc. A/57/51 (2002).

purposes. To them, a more 'comprehensive' approach also prohibiting the cloning of human embryos for other purposes, including therapeutic, research, or experimental purposes,[10] was more appropriate.[11] By the end of the year, two distinct camps had emerged: (i) those states, including France and Germany, supporting a narrower ban focusing only on cloning for reproductive purposes; and (ii) those, including Costa Rica, Spain, the United States, and the Holy See, which preferred a treaty with a broader mandate, namely to ban all cloning of human embryos ('human cloning'), regardless of the purpose, or which preferred not to have a treaty at all if the only other option was a treaty to ban cloning only for reproductive purposes.

In an attempt to bridge the emerging divergence in positions among governments, France and Germany proposed a 'step-by-step' approach whereby 'other forms of human cloning'[12] would be addressed as soon as negotiations on a convention against reproductive cloning on human beings had been concluded. This recognized for the first time that the work on the topic would not be limited to cloning for reproductive purposes, but that it would continue 'including through the elaboration of a separate international instrument',[13] and the Assembly would, in advance, decide to 'favourably consider any proposal to launch negotiations on a further legal instrument on other forms of cloning of human beings as soon as negotiations on a draft international convention prohibiting the reproductive cloning of human beings have been concluded'.[14] However, instead of bridging the emerging gap, the two sponsors found themselves increasingly isolated; on the one hand, their focus on a procedural solution, while not unprecedented in the Sixth Committee, fell short of meeting the core concerns of those favouring a comprehensive ban. On the other hand, by agreeing to a formula recognizing the possibility – indeed, the inevitability – of additional work being undertaken, including the negotiation of a further instrument, on cloning of human embryos for other purposes, the two sponsor states risked losing the support of those states, including the United Kingdom and others, which permitted such research under their national laws.

Spain subsequently circulated a memorandum[15] detailing the arguments in favour of an expanded scope for the convention to include all cloning of human embryos, regardless of the purpose. From its perspective, a ban adopted by the global community solely on cloning of human embryos for reproductive purposes would, *inter alia*, establish an *a contrario* impression that cloning for other purposes was

10. The distinction between 'reproductive' and 'therapeutic' or 'research' cloning has been described as follows: 'In the case of reproductive cloning, the aim of somatic cell nuclear transfer is to create an embryo carrying the same genetic information as the progenitor and to implant this embryo into a womb to generate a pregnancy, and from there to produce a baby. The goal of research cloning, however, is to create an embryo in the same manner as for reproductive cloning, not to produce a child but in order to derive embryonic stem cells which contain the same genetic characteristics as the progenitor. The embryo is unavoidably destroyed during this process.' See UNESCO, *Human Cloning: Ethical Issues* (2005), at 12–13.
11. See Report of the Ad Hoc Committee on an International Convention against the Reproductive Cloning of Human Beings, *supra* note 9, para. 13.
12. Revised proposal submitted by France and Germany, UN Doc. A/C.6/57/WG.1/CRP.1/Rev.1 (2002), preambular para. 10, reproduced in Report of the Working Group, UN Doc. A/C.6/57/L.4 (2002), Ann. I, at 5.
13. Ibid.
14. Ibid., operative para. 4 *bis*(a).
15. Memorandum submitted by Spain – The Spanish position on the draft international convention on human cloning, UN Doc. A/C.6/57/WG.1/CRP.2 (2002), reproduced in UN Doc. A/C.6/57/L.4 (2002), *supra* note 12, Ann. I, at 9.

permissible,[16] notwithstanding language in the revised Franco-German text clarifying that the prohibition on reproductive cloning would not 'imply the authorization of other forms of cloning of human beings'.[17] For political (and ideological) reasons, those delegations supporting the Spanish position simply could not accept the negotiation of a treaty that did not cover all forms of cloning.

Despite suggestions for an interim solution,[18] and faced with the possibility of a vote on two competing proposals for draft resolutions,[19] the Sixth Committee opted for a procedural decision to postpone the consideration of the item to the following session of the General Assembly.[20] It should be noted that, at that stage, the balance of support, if only by default, was marginally in favour of a negotiation of the narrower treaty. However, forcing the issue by resorting to a vote was not considered feasible by its supporters, all of whom emphasized the need for consensus. In retrospect, this was as close as the initial proposal for a ban only on reproductive cloning came to succeeding. From that point on the proposal for a 'narrow' ban was replaced by a more nuanced proposal closer to that of a comprehensive convention.

The year 2003 marked the beginning of a new phase; the initiative was seized early through the circulation of a Costa Rican proposal containing a text of a draft international convention on the prohibition of all forms of cloning.[21] The draft treaty was underpinned by the conviction that

16. Ibid. ('A partial prohibition of human cloning might be interpreted as a tacit acceptance of the form of cloning which is not prohibited and . . . would inevitably strengthen a movement in favour of the express authorization of therapeutic cloning'), at 10.
17. UN Doc. A/C.6/57/WG.1/CRP.1/Rev.1 (2002), *supra* note 12, operative para. 3(b).
18. Several proposals were made for establishing interim measures to prevent the cloning of a human being, in advance of final agreement on a formula for the international ban. The Franco-German proposal, in its revised form, included language whereby the General Assembly would call on states 'pending the entry into force of an international convention against the reproductive cloning of human beings, to adopt at the national level a prohibition [on] the reproductive cloning of human beings and to control other forms of cloning of human beings through regulations, moratoria or prohibition' (ibid., operative para. 4 *ter*). Under the terms of a further proposal, tabled by Mexico, the Assembly would, pending the adoption of an international convention against the cloning of human beings, adopt, *inter alia*, a moratorium ('shall not permit') on 'any research, experiment, development or application in their territories or areas under their jurisdiction or control of any technique aimed at the cloning of human beings' (Proposal submitted by Mexico, UN Doc. A/C.6/57/WG.1/CRP.3 (2002), reproduced in UN Doc. A/C.6/57/L.4 (2002), *supra* note 12, at 11). Neither proposal enjoyed significant support.
19. France and Germany again proposed a draft resolution (Draft Res. A/C.6/57/L.8 and Corr.1 (2002), reproduced in Report of the Sixth Committee, UN Doc. A/57/569 (2002) at 2, para. 7) on behalf of a group of 22 states, calling for the reconvening of the Ad Hoc Committee twice in 2003 in order to prepare 'as a matter of urgency and if possible by the end of 2003, a draft international convention against the reproductive cloning of human beings' (operative para. 2). An opposing proposal for a draft resolution (Draft Res. A/C.6/57/L.3/Rev.1 and Corr.1 (2002), reproduced in UN Doc. A/57/569 (2002), at 4, para. 10.), initially introduced by Spain, on behalf of a group of 37 co-sponsors, took a broader approach as reflected both in the new title 'international convention against human cloning' and by the general reference in the preamble to 'certain practices [posing] potential dangers to the integrity and dignity of the individual' ((preambular para. 5), with the only limitation on the scope of the treaty being that it should 'not prohibit the use of nuclear transfer or other cloning techniques to produce DNA molecules, organs, plants, tissues, cells other than human embryos or animals other than humans' (ibid.)).
20. The decision was adopted by the General Assembly, by consensus, as Dec. 57/512 of 19 November 2002.
21. Letter dated 2 April 2003 from the Permanent Representative of Costa Rica to the United Nations addressed to the Secretary-General, UN Doc. A/58/73 (2003), Ann. I. The Draft Treaty was largely based on the text of the International Convention for the Suppression of the Financing of Terrorism, adopted on 9 December 1999, UN Res. 54/109, Ann., which had been negotiated in the Sixth Committee.

> the cloning of human beings, whether carried out on an experimental basis, in the context of fertility treatments or pre-implantation diagnosis, for tissue transplantation or for any other purpose whatsoever, is morally repugnant, unethical and contrary to respect for the person and constitutes a grave violation of fundamental human rights which cannot under any circumstances be justified or accepted.[22]

This initiative was followed by the circulation of a draft resolution,[23] also proposed by Costa Rica, on behalf of over 60 states, seeking the negotiation of such an international convention. France and Germany subsequently circulated an opposing 'non-paper',[24] proposing a mandate for a comprehensive convention which would adopt a strict ban on cloning for reproductive purposes, while regulating cloning of human embryos for other purposes by means of either a ban or a moratorium, or through the adoption of strict national regulations. Nonetheless, while agreement seemed to have emerged on the form of the treaty (a single comprehensive instrument dealing with all forms of cloning of human beings), the differences between the two proposals remained significant.

As the Costa Rican proposals steadily attracted more support, the opposing group of states was increasingly in disarray. What had started as a loosely coherent coalition of states supporting a proposal for a 'narrow' ban had splintered into a grouping of states maintaining a range of views, united by a common opposition to a comprehensive ban on all forms of cloning of human beings. The gradual shift in the Franco-German position, first by accepting (in 2002) the basic proposition that all forms of cloning would eventually be covered, and then by agreeing (in 2003) to undertake such work in the context of a single comprehensive treaty, proved controversial to those states which already permitted embryonic stem-cell research in their countries. From that point onwards Belgium emerged as the co-ordinator for a group of states which continued to favour a global ban on cloning of human embryos for reproductive purposes, albeit now as part of a single, more nuanced, comprehensive package.

By the end of 2003, two draft resolutions were before the Sixth Committee: the Costa Rican proposal for the negotiation of a comprehensive ban on all forms of cloning of human embryos and a draft resolution,[25] submitted by Belgium, on behalf of a group of 23 states, based on the Franco-German draft resolution of the previous year, albeit with some modifications: in particular, it proposed allowing states the possibility of merely 'regulating' (i.e. not prohibiting) 'other forms of human cloning'.[26] At the time many smaller states, which were being actively courted by the protagonists on both sides, began to take affirmative positions. Of these the position of the states members of the Organization of the Islamic Conference (OIC) proved crucial: as events developed they become increasingly concerned about the possible success of the proposal for a comprehensive ban, which was spearheaded primarily by Roman

22. Preambular para. 5, which was based on preambular para. (c) of the resolution of the European Parliament on Human Cloning of 15 January 1998, *Official Journal, 1998* (C 34) 164 (15 Jan. 1998).
23. Draft Res. A/C.6/58/L.2 (2003), reproduced in Report of the Sixth Committee, UN Doc. A/58/520 (2003), at 2, para. 6.
24. On file with the author.
25. Draft Res. A/C.6/58/L.8 (2003), reproduced in UN Doc. A/58/520 (2003), *supra* note 23, at 4, para. 7.
26. Operative para. 6.

Catholic countries (including through the active participation of the Holy See itself) and the United States and which was premised on the Judaeo-Christian conception of the inception of life.[27] To their minds, the issue was too complex to be resolved by means of a mere up or down vote. Accordingly, their position evolved into one of active opposition to the holding of a vote on either proposal. This culminated in a procedural 'no-action' motion to adjourn the debate on the item until the 60th session of the General Assembly in 2005, proposed by Iran on behalf of that group of states. The motion was opposed by the proponents of a comprehensive ban, who, sensing success, favoured the committee proceeding to take action on the Costa Rican draft resolution. Conversely, it was supported by the group of states preferring the Belgian text which was also interested in procedural methods for preventing the holding of a vote on the proposal for a comprehensive ban. In a dramatic turn of events, the motion to adjourn the debate on the item succeeded by a recorded vote of 80 to 79, with 15 abstentions.[28] Consideration of the proposal to commence the negotiation on a treaty to ban all forms of cloning of human embryos, regardless of the purpose, had been thwarted by a single vote.[29]

In hindsight, the vote at the end of 2003 was the closest the proponents of a comprehensive ban came to having their proposal adopted. Had the motion failed, the Costa Rican proposal would have been voted on next. It is safe to say that it would have carried the day, since many states in the opposing camp were under pressure to support any proposal for a ban, even if not in the form that they preferred. Instead, the success of the 'no-action' motion had dealt a blow to the proponents of a comprehensive ban. Not only were they unable to have it submitted to a vote, but the item was postponed for a further two years – subsequently reduced to one year – by which time the momentum behind their proposal may have subsided. In addition, the opposing draft resolution was kept alive for consideration at a future date. For the supporters of the Belgian draft, the outcome of the work in 2003 was bittersweet, since it had confirmed that theirs was increasingly a minority position. For some states the close margin of defeat of the opposing proposal, instead of providing comfort, was a source of concern, since it confirmed just how realistic the possibility of a global ban on all forms of cloning of human embryos had become.[30]

The impasse continued into 2004, when, once again, a compromise solution between two competing proposals for draft resolutions was not forthcoming.[31]

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27. See M. Arsanjani, 'The Negotiations on a Treaty on Cloning: Some Reflections', in S. Vöneky and R. Wolfrum (eds.), *Human Dignity and Human Cloning* (2004), 145 at 152; Arsanjani, 'Negotiating', *supra* note 1, at 167–70.
28. For a breakdown of the vote see UN Doc. A/58/520 (2003), *supra* note 23, at 6–7, para. 10.
29. The outcome was all the more dramatic in the light of the fact that, despite a high turnout (174 out of then 191 member states), four of 17 states not present in the room (Benin, Côte d'Ivoire, Turkmenistan, and Chad) had been sponsors of Draft Res. A/C.6/58/L.2 (2003), *supra* note 23, and would most probably have voted against the motion. One such vote would have been sufficient to have defeated it. The outcome in the Sixth Committee was subsequently set aside by the plenary of the General Assembly where it was decided at the last minute to adopt instead a procedural decision simply to defer the item to the following session of the General Assembly in 2004 (as opposed to 2005). Dec. 58/523 of 9 December 2003, adopted by consensus.
30. See, e.g., the statement by the representative of the United Kingdom in the General Assembly plenary, whereby it was made clear that 'the United Kingdom would never be party to any convention that aimed to introduce a global ban on therapeutic cloning; neither will the United Kingdom participate in the drafting of such a convention or apply it in its national law' (UN Doc. A/58/PV.72 (2003), 11).
31. Draft Res. A/C.6/59/L.2 (2004) and A/C.6/59/L.8 (2004), reproduced in Report of the Sixth Committee, UN Doc. A/59/516 (2004), at 1, para. 5, and at 3, para. 6, respectively.

However, this time governments were less willing to resort to another divisive vote. In addition, by 2004 a number of states had either instituted domestic prohibitions, at a minimum on reproductive cloning, or were in the process of doing so. Hence it was increasingly considered possible to have an effective ban on reproductive cloning based solely on the co-operation of those states possessing the necessary technological capacity to carry out such experimentation. This changing state of affairs resulted in a clear, if subtle, shift in the dynamic of the negotiation. Supporters of the initial 'narrow' ban were no longer committed solely to a treaty, since their initial goal of such a ban was becoming a de facto reality. Indeed, for some a non-result in the Sixth Committee was increasingly preferable to negotiating a comprehensive treaty whose outcome was unpredictable. Such a change in inclination further constrained the options available to the supporters of a comprehensive ban, which saw convincing others to change sides as being key to the eventual success of their proposal. This dynamic played no small part in the eventual acquiescence by proponents of the comprehensive ban in abandoning their plans for a treaty in favour of another type of international instrument.

The Italian delegation subsequently submitted a new proposal[32] abandoning the treaty approach in favour of a declaration to be entitled the 'United Nations Declaration on Human Cloning'. It was decided[33] to proceed on the basis of the Italian proposal in a working group which met in February 2005. Not surprisingly, no agreement was again forthcoming; after all, the issue of contention was less the form of the instrument and more its substance.[34] Having survived largely intact after a series of votes on proposed amendments,[35] a revised version of the Draft Declaration, as formulated by the working group, was adopted by the Sixth Committee by a vote.[36] The General Assembly subsequently adopted Resolution 59/280, containing

32. Draft Res. A/C.6/59/L.26 (2004), in ibid., at 5, para. 7.
33. Dec. 59/547 of 23 December 2004.
34. The working group transmitted three alternatives to the Sixth Committee (Report of the Working Group established pursuant to General Assembly decision 59/547 to finalize the text of a United Nations declaration on human cloning, UN Doc. A/C.6/59/L.27/Rev.1 (2005)): (i) a new version of a Draft Declaration (UN Doc. A/C.6/59/L.27/Add.1 and Corr.1 (2005), reproduced in ibid., Ann. I); (ii) the Italian proposal (UN Doc. A/C.6/59/L.26 (2004), *supra* note 32, also reproduced in ibid., Ann. II.); and (iii) a set of modifications to the Italian proposal submitted by Belgium on behalf of supporters of the more nuanced ban (UN Doc. A/C.6/59/L.28 (2005), reproduced in ibid., Ann. III, as augmented by several oral suggestions, recorded in Ann. IV (originally issued as UN Doc. A/C.6/59/L.27/Add.2 (2005)).
35. The Committee first held a vote on each of three amendments to the text proposed by Belgium. Only the first succeeded. The proposed amendment was to insert the following text at the end of the second preambular para. of the new version of the Draft Declaration: 'and in particular Art. 11 thereof, which states that practices which are contrary to human dignity, such as the reproductive cloning of human beings, shall not be permitted'. The amendment was carried by a recorded vote of 59 in favour to 47 against, with 41 abstentions. For the details of the vote see Report of the Sixth Committee – Addendum, UN Doc. A/59/516/Add.1 (2004) at 3, para. 9. Under the second amendment, operative para. (a) of the new version of the Draft Declaration would have been deleted. The proposal was rejected by a vote of 57 against to 48 in favour, with 42 abstentions. The third proposed amendment would have involved replacing operative para. (b) of the new version of the Draft Declaration with the following text: 'Member States are called upon to prohibit the reproductive cloning of human beings; they are also called upon to prohibit other forms of human cloning inasmuch as they are incompatible with human dignity'. It, too, failed by a recorded vote of 55 against to 52 in favour, with 42 abstentions. For the details of the vote see ibid., at paras. 11 and 13 respectively.
36. 71 in favour to 35 against, with 43 abstentions. See ibid, para. 14 for a breakdown of the vote.

the United Nations Declaration on Human Cloning, on 8 March 2005, by a vote of 84 in favour to 34 against, with 37 abstentions.[37]

In the end, the difference was one of stamina. The supporters of the comprehensive ban were able to keep their constituency largely intact as they shifted from calling for a comprehensive ban to backing the Declaration. The same could not be said for the supporters of the narrow ban on reproductive cloning. Even Germany, a major proponent of the narrow ban, subsequently voted in favour of the Declaration. The key development, however, related to the stance taken by the states members of the OIC: while in 2003 they had provided the numbers to prevent the negotiation of an international treaty to establish a comprehensive ban, in 2005 many decided to abstain, thus opening the way for the proponents of a comprehensive ban to succeed, on a vote, to have their version of the Declaration adopted.

3. The United Nations Declaration on Human Cloning

3.1. Overview

The United Nations Declaration on Human Cloning (Human Cloning Declaration) reads as follows:

> *The General Assembly,*
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> *Guided* by the purposes and principles of the Charter of the United Nations,
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> *Recalling* the Universal Declaration on the Human Genome and Human Rights, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 11 November 1997, and in particular article 11 thereof, which states that practices which are contrary to human dignity, such as the reproductive cloning of human beings, shall not be permitted,
>
> *Recalling also* its resolution 53/152 of 9 December 1998, by which it endorsed the Universal Declaration on the Human Genome and Human Rights,

37. The breakdown of the vote was as follows: *In favour*: Afghanistan, Albania, Andorra, Australia, Austria, Bahrain, Bangladesh, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brunei Darussalam, Burundi, Chile, Comoros, Costa Rica, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Djibouti, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Georgia, Germany, Grenada, Guatemala, Guyana, Haiti, Honduras, Hungary, Iraq, Ireland, Italy, Kazakhstan, Kenya, Kuwait, Lesotho, Liberia, Liechtenstein, Madagascar, Malta, Marshall Islands, Mauritius, Mexico, Federated States of Micronesia, Monaco, Morocco, Nicaragua, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Qatar, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, São Tomé and Príncipe, Saudi Arabia, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Sudan, Suriname, Switzerland, Tajikistan, the former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Uganda, United Arab Emirates, United Republic of Tanzania, United States, Uzbekistan, and Zambia. *Against*: Belarus, Belgium, Brazil, Bulgaria, Cambodia, Canada, China, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea (North Korea), Denmark, Estonia, Finland, France, Gabon, Iceland, India, Jamaica, Japan, Lao People's Democratic Republic, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Republic of Korea (South Korea), Singapore, Spain, Sweden, Thailand, Tonga, and the United Kingdom. *Abstentions*: Algeria, Angola, Argentina, Azerbaijan, Bahamas, Barbados, Burkina Faso, Cameroon, Cape Verde, Colombia, Egypt, Indonesia, Iran, Israel, Jordan, Lebanon, Malaysia, Maldives, Mongolia, Myanmar, Namibia, Nepal, Oman, Pakistan, Moldova, Romania, Serbia and Montenegro, Somalia, South Africa, Sri Lanka, Syria, Tunisia, Turkey, Ukraine, Uruguay, Yemen, and Zimbabwe. *The following states did not participate in the vote*: Antigua and Barbuda, Armenia, Bhutan, Botswana, Central African Republic, Chad, Congo, Dominica, Fiji, Gambia, Ghana, Greece, Guinea, Guinea-Bissau, Kiribati, Kyrgyzstan, Libya, Malawi, Mali, Mauritania, Mozambique, Nauru, Niger, Nigeria, Papua New Guinea, Peru, Russian Federation, Senegal, Seychelles, Swaziland, Togo, Turkmenistan, Tuvalu, Vanuatu, Venezuela, and Vietnam.

Aware of the ethical concerns that certain applications of rapidly developing life sciences may raise with regard to human dignity, human rights and the fundamental freedoms of individuals,

Reaffirming that the application of life sciences should seek to offer relief from suffering and improve the health of individuals and humankind as a whole,

Emphasizing that the promotion of scientific and technical progress in life sciences should be sought in a manner that safeguards respect for human rights and the benefit of all,

Mindful of the serious medical, physical, psychological and social dangers that human cloning may imply for the individuals involved, and also conscious of the need to prevent the exploitation of women,

Convinced of the urgency of preventing the potential dangers of human cloning to human dignity,

Solemnly declares the following:

(a) Member States are called upon to adopt all measures necessary to protect adequately human life in the application of life sciences;

(b) Member States are called upon to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life;

(c) Member States are further called upon to adopt the measures necessary to prohibit the application of genetic engineering techniques that may be contrary to human dignity;

(d) Member States are called upon to take measures to prevent the exploitation of women in the application of life sciences;

(e) Member States are also called upon to adopt and implement without delay national legislation to bring into effect paragraphs (a) to (d);

(f) Member States are further called upon, in their financing of medical research, including of life sciences, to take into account the pressing global issues such as HIV/AIDS, tuberculosis and malaria, which affect in particular the developing countries.

The first two operative paragraphs are the key provisions. Nonetheless, the first is not only noticeably ambiguous (how is 'human life' to be defined;[38] what constitutes 'adequate'[39] protection of human life?) but also broad (not specifically limited

38. Several states pointed to the ambiguity in the phrase 'human life' as a reason for not supporting the Human Cloning Declaration: see, for example, the summary of the statements made by the United Kingdom on the adoption of the Draft Declaration on Human Cloning by the Sixth Committee, UN Doc. A/C.6/59/SR.28 (2005) at 7–8, paras. 47–49, as well as that made following the adoption of the Human Cloning Declaration by the General Assembly, UN Doc. A/59/PV.82 (2005) at 4–5. See too the summary of the statements made by China ('the Declaration's wording is too confusing'), Thailand, Spain (which preferred 'human being'), Canada ('the ambiguity of the Declaration's language could give rise to certain political and legal concerns') at the latter meeting, UN Doc. A/59/PV.82 (2005) at 4–6, 8.

39. In the initial Italian proposal, in operative para. (b), states were called upon to 'ensure that, in the application of life science, *human dignity is respected in all circumstances* . . .' (emphasis added), UN Doc. A/C.6/59/L.26 (2004), *supra* note 34. This was modified in the final text, in operative para. (a), to 'adopt[ing] all measures necessary to *protect adequately human life in the application of life sciences*' (emphasis added), suggesting the recognition of an affirmative duty to protect. It should be recalled that a proposal by Belgium, made at the

to cloning). Similarly, the second is also cast in general terms, without specifying how to establish incompatibility with human dignity and the protection of human life. While avoiding the distinction between cloning for reproductive as opposed to therapeutic or research purposes, in its operative part,[40] the provision still leaves room for an interpretation that the cloning of human embryos might be permissible in circumstances where it is compatible with human dignity.[41] However, such a possibility is limited both by the inclusion of the second requirement of the protection of human life (especially since it is the 'life' of the human embryo that is in the mind of the drafters) and by the application of paragraph (a) – that is, whether the admonition on states to protect 'adequately' human life in the application of the life sciences further constrains the possibility that some forms of human cloning might be permissible. Much will turn on the interpretation of these provisions in practice.

3.2. The legal status of the Declaration

UN declarations are not binding. They fulfil an expository function: they purport to reflect the view of the international community on a particular issue at that point in time. This is not to say that they are devoid of normative content. Given the almost universal representation of the United Nations, a common understanding at the international political level as to the basic policy position on a particular issue invariably exerts normative 'weight' on the subsequent development of binding legal rules[42] – to the extent, that is, that there is agreement among states as to its normative value. Indeed, this was largely the position taken during the cloning negotiations vis-à-vis the UNESCO Human Genome Declaration, which, while similarly not strictly 'binding' on states, was consistently treated as being 'normative', in that it was viewed as a constraint on subsequent legal developments.

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stage of the adoption of the Draft Declaration in the Sixth Committee, to delete operative para. (a) of the final version, was defeated by a vote. See *supra* note 35.

40. The reference to cloning for 'reproductive' purposes in the second preambular para. had not featured in the initial draft formulated by the Working Group but was inserted into the text at a late stage after a contested vote on a proposal by Belgium. See *supra* note 35.

41. The formulation is reminiscent of a similar phrasing proposed by France and Germany, in 2002, in the context of a proposed interim moratorium or prohibition on 'other forms of cloning of human beings *that are contrary to human dignity*' (emphasis added). See Draft Res. A/C.6/57/L.8 and Corr.1 (2002), *supra* note 19, at 4).

42. Some political declarations, adopted by the United Nations, provide the basis for subsequent negotiations of international treaties; perhaps the most significant example being the Universal Declaration of Human Rights, adopted in 1948, which led to the adoption of a series of international human rights treaties. It may be argued that this phenomenon is particularly evident in regard (although not necessarily limited) to political declarations concerning quintessentially legal matters where the political statement almost by definition influences subsequent developments in the law, either by providing the key policy direction or by constraining the options available to the lawyers seeking to ascertain or clarify the legal position. Another illustration of this dynamic can again be drawn from the field of the regulation of international terrorism (offered here also because it was well-known to all delegations in the Sixth Committee at the time of the cloning negotiation): the 1996 General Assembly Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, adopted in Res. 51/210 of 17 December 1996, annex, *inter alia*, laid down a series of political understandings as to certain legal issues (e.g. the non-applicability of the traditional 'political offence' exception for extradition in the context of international terrorism, ibid., operative para. 6) and which later served as the basis for the treatment of such issues in a series of international anti-terrorism treaties. This is not to deny the formal status of declarations as being non-binding, but rather to suggest that such formalism is not always perceived in practice as the limiting factor that it is claimed to be in theory, especially by negotiators who quibble over each word and nuance of such types of declarations in the full knowledge and anticipation that the outcome of their work, even if strictly 'non-binding', may serve to constrain or influence the prevailing position in the law.

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That both the supporters and detractors of the Human Cloning Declaration appreciated the potential for it to play a similar 'normative' role was evident from the fact that the negotiation of a 'non-binding' instrument proved equally contentious. Given the novelty of the science and the relative lack of legal regulation at international level, the supporters of the narrow or more nuanced approach (particularly those supporting therapeutic cloning) did not relish an international statement, even if not binding, which suggested a duty to outlaw cloning of human embryos for purposes other than reproduction. While they would not feel legally compelled to put such legislation into place in their own respective jurisdictions,[43] such a statement might have a chilling effect on research by, *inter alia*, placing the funding of such work and the sharing of knowledge between researchers located in different countries (a common feature of modern scientific research) under a legal cloud. For the supporters of the comprehensive ban, the fact that the Declaration enjoyed a certain normative value was evident from both its content and its terms.[44]

3.3. Other considerations concerning the impact of the Declaration

Questions still remain, however, as to the significance of the Human Cloning Declaration as a reference point for subsequent legal developments, given the contentious way in which it was adopted. It is extremely rare for United Nations declarations to be adopted by a vote.[45] It goes without saying that the added value of a declaration adopted by the United Nations relates to the fact that it represents the *common* will of the international community. Not only was the Declaration adopted by a vote, it was carried only by a plurality (84 states), not even a majority, of states members of the United Nations. The majority of states either voted against it,[46] abstained, or did not participate in the vote. The outcome was all the more regrettable because of the fact that, of the 155 states which chose to participate in the vote, 71 (34 that voted against the Declaration and 37 that abstained) were compelled *not to support* a declaration which called for the prevention of the exploitation of women and for the appropriate financing of research into finding cures for major diseases, both of which are major projects of the United Nations.

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43. See the summary of the statements made by the Republic of Korea, the United Kingdom, Belgium, Singapore, China, Japan, Finland, Sweden, and the Netherlands, on the occasion of the adoption of the Draft Declaration on Human Cloning by the Sixth Committee, UN Doc. A/C.6/59/SR.28 (2005) at 7–10, as well as the statements made by China, India, Belgium, the United Kingdom, Republic of Korea, Japan, Singapore, South Africa, and the Netherlands following the adoption of the Human Cloning Declaration by the General Assembly, UN. Doc. A/59/PV.82 (2005) at 5–7, 9.
44. See the statements made by Costa Rica ('we have listened with concern as some delegations have understated the value of the new Declaration . . . we must recognize . . . the undeniable moral and political authority of its recommendations') and the Libyan Arab Jamahiriya ('[t]his is a step forward towards a future convention that would prohibit all forms of human cloning'), UN. Doc. A/59/PV.82 (2005) at 8 and 10.
45. This was noted by, among others, Brazil ('. . . a political declaration, as a non-binding instrument, should be reached only by consensus') on the occasion of the adoption of the Human Cloning Declaration by the General Assembly, ibid., at 6.
46. Including several states that supported a comprehensive ban in principle (some of which already had national legislation in place banning all forms of human cloning), but which, nonetheless, saw little merit in a divisive non-binding declaration. See the statements made by Norway and Canada on the occasion of the adoption of the draft Declaration on Human Cloning by the Sixth Committee, UN Doc. A/C.6/59/SR.28 (2005), at 9, para. 67) and at 10, para. 76, respectively, as well as that made by Norway following the adoption of the Human Cloning Declaration by the General Assembly, UN. Doc. A/59/PV.82 (2005) at 8.

It is also worth considering the relationship with the UNESCO Human Genome Declaration. While it is not unprecedented to have multiple international statements on a topic, the question is whether the two are compatible, and, if not, how to resolve any incompatibility in a manner that makes sense to the reader. Here 'compatibility' refers not only to textual coherence, but also to the fact that the Human Genome Declaration was adopted by consensus, albeit with a smaller representation than the UN General Assembly.[47] The first clear difference is that the Human Cloning Declaration, in referring to 'all forms of human cloning', largely avoids, at least in its operative part, the distinction between reproductive and therapeutic cloning which is evident in Article 11 of the Human Genome Declaration (which refers only to 'reproductive' cloning). This on its own is not evidence of a conflict. Clearly reproductive cloning is subsumed within the scope of the Human Cloning Declaration. To the extent that the Human Genome Declaration does not deal with other types of cloning, the Human Cloning Declaration can be seen as simply accumulating[48] on the earlier declaration.

The question, however, is whether the Human Genome Declaration implicitly envisages the permissibility of cloning of human embryos other than for reproductive purposes. If so, it is possible to contemplate a conflict between the two declarations, to the extent that operative paragraph (b) of the Human Cloning Declaration can be read to suggest that all forms of human cloning should be prohibited.[49] In such a case, it may be argued on the analogy with conflict rules existing in the context of conflicting treaties that the instrument adopted later in time (*lex posterior*) would prevail. In other words, the Human Cloning Declaration is to be seen as the more recent statement of position, and if it conflicts with an earlier declaration, that earlier text, to the extent of the conflict, is no longer representative of the prevailing position. However, such a conclusion is not without its difficulties. Against it one may argue that the *lex posterior* principle makes most sense in the context of instruments adopted by the same entity. Even though UNESCO is a specialized agency of the United Nations, it is an international organization in its own right. There is no rule of hierarchy between it and the United Nations, particularly not as regards non-binding instruments.[50] The purposes of the two organizations are different, and the contexts in which the two declarations were adopted were different. In addition, it may be argued that even if the Human Cloning Declaration supersedes the earlier Human Genome Declaration, to the extent of any inconsistency, it would only do so for those states that voted for it. Indeed, it may be that, notwithstanding its adoption earlier in time, the Human Genome Declaration, in the light of its adoption by

47. The United States was not a member of UNESCO at the time of the adoption of the Human Genome Declaration in 1997, having withdrawn from the organization in 1984. It subsequently rejoined in 2003.
48. On the accumulation of norms see J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003), at 161–4.
49. Many states supporters of the comprehensive ban would take that view. To them the cloning of a human embryo, regardless of the purpose, is by definition incompatible with human dignity and the protection of human life and should therefore be prohibited.
50. Art. 103 of the Charter of the United Nations does not apply since it deals with conflicts with 'obligations under any other international agreement'. However, non-binding declarations, such as the UNESCO Human Genome Declaration, do not establish 'obligations' for states *stricto sensu*.

consensus, will continue to be viewed as carrying greater 'normative' weight than the Human Cloning Declaration.

A further consideration to be taken into account is the expansive scope *ratione materiae* of the Human Cloning Declaration: of the five substantive provisions (i.e. excluding operative paragraph (e)), only one – paragraph (b) – deals with cloning per se. The other four are cast in broader terms. Hence states are called upon to protect human life 'in the application of the life sciences',[51] which may include a host of research areas other than human cloning; to 'prohibit . . . genetic engineering techniques that may be contrary to human dignity',[52] which is not necessarily limited to the cloning of human embryos; to 'prevent the exploitation of women in the application of life sciences',[53] which, again, conceivably covers a range of possible research activities other than human cloning; and to take into account pressing global issues such as HIV/AIDS, tuberculosis, and malaria when financing medical research, including that relating to life sciences,[54] without restricting the research in question to that concerning the cloning of human embryos. The result was a declaration on human cloning more in name and less in substance.[55] The problem with such an approach is that the resulting normative lack of focus further serves to dilute its impact. In addition, if the goal was indeed a broader statement on the limitations on research in the life sciences, then the question may be raised as to why only those provisions and not others?[56] The risk is that by only highlighting some issues and leaving out others, the Assembly might be perceived as ascribing more importance to some over others.

4. A PROHIBITION ON HUMAN CLONING: SCOPE *RATIONE MATERIAE* AND THE EMERGENCE OF A CUSTOMARY PROHIBITION

Owing to the lack of agreement on the question of the scope of the proposed treaty *ratione materiae*, little time was spent on the details. It is possible, however, to discern some legal and policy issues (in addition to that of the question of scope), either referred to in passing or raised in preliminary form, which would have been the subject of consideration had the treaty negotiation materialized. The initial Franco-German proposals had provided a series of 'indicative elements', identified for inclusion in the proposed Draft Treaty, including the scope of the treaty, definitions, prohibition

51. Operative para. (a).
52. Operative para. (c).
53. Operative para. (d).
54. Operative para. (f).
55. See the statement of the United Kingdom following the adoption of the Human Cloning Declaration ('[w]e cannot accept such an ambiguous declaration, which may sow confusion about the acceptability of [human cloning as] an important field of research'), UN Doc. A/59/PV.82 (2005), at 4–5.
56. It may also be asked why the General Assembly, in particular its Sixth Committee, was the appropriate forum for such an undertaking. It is worth noting that UNESCO's International Bioethics Committee had, at the time of the adoption of the Human Cloning Declaration, already commenced its work on an international statement on bioethics, which was later adopted by UNESCO as the Universal Declaration on Bioethics and Human Rights, by acclamation at the Thirty-Third Session of the General Conference of UNESCO, on 19 October 2005. *Records of the General Conference, Thirty-Third Session, Paris, 3–21 October 2005*, vol. I, Res. 36, at 74. It is also noteworthy that, despite references to numerous UN instruments in that text, no mention is made to the Human Cloning Declaration adopted earlier that year by the United Nations.

of the reproductive cloning of human beings, national implementation (including penalties), preventive measures, jurisdiction, promotion and strengthening of international co-operation, exchange of information, and mechanisms for monitoring implementation.[57] Most of these elements were included in the 2003 Costa Rican proposal for a draft treaty. Likewise, to the extent that the two groups of states sought to dictate the contours of future negotiations through the elaboration of detailed draft resolutions, those texts were themselves infused with provisions purporting to regulate certain legal aspects of the topic. A consideration of those issues is beyond the scope of this article. Nonetheless, it is instructive to consider some of the issues raised in connection with the key question of the scope *ratione materiae* of the topic, by way of a fuller appreciation of the rationale for the various positions that were being maintained. It is also useful to reflect on the prohibition that was envisaged by the various protagonists and the possibility of the emergence of a limited customary prohibition.

4.1. Factors bearing on the scope *ratione materiae*

4.1.1. The time pressure and effectiveness of the proposed ban

The original sponsors of the proposal, France and Germany, repeatedly referred to the announcement by certain researchers of their intention to clone a human being, and cited the urgent need to prevent such an occurrence.[58] However, the perception of time pressure was not felt by all involved to the same degree: the proponents of the comprehensive ban, while acknowledging the risk of a human clone being born prior to a global prohibition being put into place, cautioned against rushing into adopting what would amount to an ineffective prohibition.[59]

Linked to the issue of time pressure was that of the effectiveness of the proposed ban. France and Germany argued that 'the stated intention of certain researchers and laboratories to attempt the reproductive cloning of human beings underlines how crucial it is for the international community to develop an *effective response* to this challenge'.[60] To their mind, for the ban to be effective it had to be truly global, including all producers and exporters of genetic technologies, it could only be limited to that form of cloning (for reproductive purposes) on which consensus (that it should be prohibited) existed, and it had to be based on a legally binding instrument which had been envisaged by the UNESCO Human Genome Declaration. The supporters of a comprehensive ban also relied on an effectiveness argument, albeit to draw the opposite conclusion; they cited the practical difficulties of enforcing a 'partial' ban. To their mind, '[b]ecause the process for reproductive and for therapeutic cloning [was] the same except for the ultimate purpose, it would be impossible to prevent

57. See, e.g., UN Doc. A/C.6/57/WG.1/CRP.1/Rev.1 (2002), *supra* note 12, at 6.
58. See, e.g., the Aide-memoire relating to the proposal by France and Germany in document A/C.6/57/WG.1/CRP.1, UN Doc. A/C.6/57/WG.1/CRP.1/Add.1 (2002), reproduced in UN Doc. A/C.6/57/L.4 (2002), *supra* note 12, at 7, paras. 2 ('The matter of prohibiting the reproductive cloning of human beings has become more urgent . . . With every passing day the risk [certain scientists] will accomplish their aims [to generate a cloned child] grows greater'), 5 ('we are in a race against time'), 6 ('[t]he opportunity to accomplish what can be accomplished before it is too late would be lost [if a complete ban is sought]'), and 10 ('[t]ime is running out. . .[s]hould we fail to [agree on a mandate], it may not be possible to adopt such a convention before it is too late').
59. See generally UN Doc. A/C.6/57/WG.1/CRP.2 (2002), *supra* note 15, at 9–10.
60. UN Doc. A/C.6/57/WG.1/CRP.1/Add.1 (2002), *supra* note 58, at 7, para. 2 (emphasis added).

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the former from occurring if the latter was not prevented at the same time'.[61] Hence effectiveness, by definition, necessitated a comprehensive ban since 'only a total prohibition [would] prevent embryos theoretically destined for research from being implanted for other purposes'.[62] In addition, they maintained that a partial prohibition would lead to legal uncertainty 'in a field in which the law must move ahead of reality'[63] so as to establish 'a clear definition of the boundaries of ethical and safe research'.[64]

4.1.2. Respect for cultural differences

As the momentum in the negotiations shifted, over time, in favour of the proponents of a comprehensive ban, several states which had either already adopted national regulations permitting human embryonic stem-cell research for therapeutic purposes or which intended doing so began to frame their arguments in terms of respect for cultural differences. For example, the United Kingdom, in a statement before the Sixth Committee, confirmed that

> [the United Kingdom] understands and respects the cultural, social and religious differences that may lead other countries to reach different conclusions on what type of research they permit. If other countries decide they want to ban therapeutic cloning then we respect that. All we are asking for is the same respect in return. We believe it would be totally wrong for the United Nations to attempt to override the position we have reached in the United Kingdom through our democratic processes. We are certainly not seeking to impose our views on other countries.[65]

The draft resolutions proposed by Belgium, in 2003 and 2004, were premised exactly on the need for a flexible regime that would allow for different approaches to be taken at the national level. On the other hand, the supporters of a comprehensive ban had set their sights on one single standard applicable to all forms of cloning.

4.1.3. Safety and the precautionary principle

The supporters of a comprehensive ban also cited concerns about the safety of human cloning as a research practice, since it necessarily involved experimentation with human embryos. To their mind, such practices, regardless of their purpose, were incompatible with existing legal and scientific research safeguards.[66] Reference was made to the experience gained with the cloning of animals, which had revealed 'the very limited efficacy of the techniques used and the considerable risks of embryonic malformation and deformation'.[67] In addition, it was maintained that the precautionary principle dictated that, in case of doubt as to the propriety of an action, the protection of the weaker party, namely the human embryo, had to

61. See UN Doc. A/C.6/57/WG.1/CRP.2 (2002), *supra* note 15, at 9.
62. Ibid., at 10.
63. Ibid.
64. Ibid.
65. Statement of the United Kingdom to the Sixth Committee at its 11th meeting, held on 21 October 2004 (on file with the author), summarized in UN Doc. A/C.6/59/SR.11 (2005).
66. UN Doc. A/C.6/57/WG.1/CRP.2 (2002), *supra* note 15, at 9–10.
67. Ibid., at 10.

be ensured.[68] A related concern was expressed about the potential for the exploitation of women, particularly in developing countries, which were considered to be 'particularly susceptible to the threat posed by new biotechnologies'.[69]

4.1.4. The availability of alternative avenues of research

The proponents of the comprehensive ban maintained that theirs was not an argument against scientific research that might lead to medical breakthroughs. Instead, they supported a principled approach, which established clear boundaries as to which types of research were permissible, thereby allowing for the appropriate allocation of resources to other promising avenues of research, such as into the use of adult stem-cells.[70] Indeed, it was argued that not only were adult stem-cells a safer alternative (to human embryonic stem-cells), but that research into the application of such stem-cells had already proved promising.[71]

4.2. The prohibition and the possible emergence of a customary norm

The proposed convention was from the very beginning conceived of as being penal in nature. This basic approach was retained in all the proposals before the Sixth Committee. A key feature, therefore, was the provision containing the prohibition. As it was inextricably linked to the scope of the treaty itself, proposals for language on the prohibition closely tracked those for the scope of the treaty. Hence in 2002 proponents of a narrow ban envisaged a treaty containing a 'prohibition of reproductive cloning of human beings'.[72] By 2003 that proposal had evolved into an aggregated system of prohibitions and restrictions, depending on the purpose of human cloning being undertaken, and (in the case of cloning for non-reproductive purposes) determined by each state party in accordance with its internal laws.[73] Proposals for a comprehensive ban took a different approach: what was to be prohibited was not necessarily the cloning techniques themselves, but the 'creation of a living organism'.[74] The draft treaty proposed by Costa Rica established the basic prohibition in Article 2 on scope of application (definition of the crime), whereby

> Any person commits an offence . . . if that person intentionally engages in an action, such as somatic cell nuclear transfer or embryo-splitting, *resulting in the creation of a living organism*, at any stage of physical development, that is genetically virtually identical to an existing or previously human organism.[75]

The Human Cloning Declaration contains a provision calling on states to establish national prohibitions on human cloning.[76] The provision is structured in two

68. Ibid.
69. UN Doc. A/57/51 (2002), *supra* note 9, ch. II.B., at 3, para. 19. Such concerns were subsequently included in the Human Cloning Declaration, operative para. (d).
70. UN Doc. A/C.6/57/WG.1/CRP.2 (2002), *supra* note 15, at 11. See too the summarized statement of the United States of America ('[p]romising experiments with adult stem cells, which neither assaulted human dignity, nor transgressed medical ethics, offered an alternative to the use of cloned embryo cells'), UN Doc. A/C.6/57/SR.16 (2002), at 7, para. 43.
71. UN Doc. A/C.6/57/WG.1/CRP.2 (2002), *supra* note 15, at 11.
72. See Draft Res. A/C.6/57/L.8 and Corr.1 (2002), para. 3(a), *supra* note 19, at 3.
73. See Draft Res. A/C.6/58/L.8 (2003), reproduced in UN Doc. A/58/520 (2003), *supra* note 23, at 4.
74. See Art. 2 (1) of the Costa Rican draft treaty, in UN Doc. A/58/73 (2003), *supra* note 21, at 3.
75. Ibid. (emphasis added).
76. Operative para. (b) read together with para. (e).

parts: the activity to be prohibited ('all forms of human cloning') and the limits of the prohibition ('inasmuch as they are incompatible with human dignity and the protection of human life'). Although the latter half of the provision conceives of the possibility of human cloning being permissible, the dual requirement of compatibility with human dignity and with the protection of human life is designed to set the bar high.

Perhaps the most striking feature of the efforts at the United Nations was the consistent unanimity among states, in a forum with universal participation, that the cloning of a human embryo for reproductive purposes should be prohibited.[77] While a treaty-based prohibition never materialized, the question remains whether the high level of agreement on prohibiting cloning for reproductive purposes consistently maintained during several years of discussions held at international level signalled the emergence of a norm of customary international law. Clearly, consensus in political organs is not the test for the existence of a rule of customary international law. It might, however, be suggestive of the existence of such a rule or of its emergence.[78]

Of the recognized requirements for establishing a customary law norm, that of the existence of a general practice is perhaps the easier to establish. Of those states which had already put into place national legislation, or indicated their intention to do so, all had, at a minimum, included (or intended to include) a prohibition on cloning for reproductive purposes.[79] At the same time, not all states have passed such legislation. However, unanimity is not the recognized requirement for the existence of a 'general' practice sufficient to constitute customary international law.[80] Indeed, given the technical nature of the topic, one can only draw a limited inference from the fact that no state which does not possess the technical infrastructure to clone human beings has implemented a national ban. Surely the more significant factor is the emergence of such a practice among states enjoying the technical infrastructure and know-how to undertake such activities.[81] A case might, therefore, be made for

77. See, e.g., Report of the Ad Hoc Committee on an International Convention against the Reproductive Cloning of Human Beings, *supra* note 9, para. 11 ('[t]here was general agreement that the reproductive cloning of human beings . . . should be prohibited'); UN Doc. A/C.6/57/L.4 (2002), *supra* note 12, Ann.. II, para. 1 ('[a]ll speakers expressed their firm opposition to the reproductive cloning of human beings').

78. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 12 June 1986, [1986] ICJ Rep. 13, at 107, para. 203; R. Jennings and A. Watts, *Oppenheim's International Law* (1996), Vol. I, 28; M. Virally, 'The Sources of International Law', in M. Sørenson (ed.), *Manual of Public International Law* (1968), 116 at 139–40; D. P. O'Connell, *International Law* (1970), Vol. I, 25–9; A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat, and K. Ollers-Frahm (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), 677 at 751 ('[t]he collective attitude of States . . . in international organizations . . . can also be of paramount importance').

79. See the analysis of state practice contained in National Legislation concerning Human Reproductive and Therapeutic Cloning, UNESCO Doc. SHS-2004/WS/17 (2004), listing some 49 states either having prohibited human reproductive cloning or being in the process of doing so; E. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (1970), Vol. I, 67 ('. . . uniform legislation of a considerable number of states on a particular subject may be regarded as "evidence of a general practice followed as law" – i.e. customary international law').

80. Jennings and Watts, *supra* note 78, at 29; I. Brownlie, *Principles of Public International Law* (2003), 7 ('[c]ertainly universality is not required. . .'); E. Lauterpacht, *supra* note 79, at 66; N. Quoc Dinh, P. Dailler, and A. Pellet, *Droit international public* (2002), 329–31.

81. By 2004 a significant number of such states had either banned all forms of human cloning (for example, Austria, Canada, Denmark, France, Germany, Iceland, Japan, Norway, Slovakia, Spain, South Africa, Sweden,

recognizing, in the context of globalization, a 'thematic' customary practice of states sharing similar technological knowledge,[82] even if not necessarily all located within the same region.

The requirement of *opinio iuris sive necessitatis* (practice accepted as law),[83] however, is perhaps less clear in this context. While a significant number of states have felt it necessary to establish domestic prohibitions on reproductive cloning, it is not clear that they felt compelled to do so as a matter of international law binding on them, or whether it was a reflection of a voluntary usage – an accepted 'best practice' – in a newly emerging field (which could be changed at any time).[84] After all, that was the very purpose of the proposed treaty to ban reproductive cloning: to establish an international norm requiring states to establish such prohibitions in their domestic laws. Yet while there were significant differences between the two approaches espoused in the Sixth Committee, the key area of convergence was exactly on the point of the need to prohibit reproductive cloning.[85] No state at any time spoke in favour of permitting the cloning of human beings for reproductive purposes. All the proposals relating to the proposed treaty before the Sixth Committee in 2003 and 2004 shared in common a call on all states to introduce moratoria on reproductive cloning, pending the adoption of an international convention. The Human Cloning Declaration envisages states establishing national prohibitions on the cloning of human beings for reproductive purposes as necessarily falling within the scope of the phrase 'all forms of human cloning'.[86] To the extent, therefore, that states have increasingly felt constrained by events at the international level to put into place enforceable domestic law, it may be argued that one is in the presence of, at least, an emerging body of *opinio juris*. Such a conclusion is further buttressed by

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and Switzerland), banned only reproductive cloning without dealing with other forms of cloning (for example, Australia, Brazil, Greece, Israel (moratorium on reproductive cloning), Mexico, Portugal, Russian Federation (moratorium), and Thailand), or permitted experimentation with human embryos within some sort of internal regulatory framework, which typically included a prohibition on cloning for reproductive purposes (for example, Belgium, China, Finland, India, Republic of Korea, the Netherlands, Singapore, and the United Kingdom), UNESCO Doc. SHS-2004/WS/17 (2004).

82. Jennings and Watts, *supra* note 78, at 29 ('. . . in certain fields it is the practice and attitude of states directly concerned in that field which may be of most importance'); M. Virally, *supra* note 78, at 132–3; M. N. Shaw, *International Law* (2003), 74–5 ('[i]n new areas of law, customs can be quickly established by state practices by virtue of the newness of the situations involved, the lack of contrary rules to be surmounted and the overwhelming necessity to preserve a sense of regulation in international relations').
83. See Art. 38(1)(b) of the Statute of the International Court of Justice.
84. See *Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 265, at 276; *North Sea Continental Shelf Cases (Fed. Rep. of Germany v. Denmark; Fed. Rep. of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 44, para. 77; Jennings and Watts, *supra* note 78, at 27. A further difficulty relates to the content of the prohibition itself: for some the very act of creating a human embryo, regardless of its intended purpose, is essentially reproductive in nature. Interpreted in such a manner, a customary prohibition could include the generation of human embryos for purposes other than creating a human child. Much will turn, therefore, on the practice of states: less on what is prohibited and more on what is permitted.
85. The opposition to the Human Cloning Declaration had little to do with its intended coverage over reproductive cloning. See, e.g., the summary of the statements made by the United Kingdom, Belgium, China, Japan, Finland, Denmark, Sweden, Mongolia, France, Cuba, and Brazil on the occasion of the adoption of the draft Declaration on Human Cloning by the Sixth Committee UN. Doc. A/C.6/59/SR.28 (2005) at 7–10, as well as that made by China, Belgium, the United Kingdom, the Republic of Korea, Spain, Singapore ('there was . . . unanimity . . . that reproductive cloning . . . must be banned unequivocally'), South Africa, Brazil, France, and the Netherlands following the adoption of the Human Cloning Declaration by the General Assembly, UN. Doc. A/59/PV.82 (2005) at 4–9.
86. Operative para. (e).

the stark comparison with the proposal to negotiate an international prohibition on all forms of cloning for which state practice is more limited and the general applicability as a matter of law more controversial, to the extent that it may be possible to say, at present, that no customary norm exists. Indeed, this is confirmed by the contentious nature of the adoption of the Human Cloning Declaration, despite being non-binding.[87] A significant number of states, including many technologically advanced states,[88] either voted against the Declaration or abstained from voting. Many cited the expansive scope of the Declaration,[89] beyond cloning only for reproductive purposes, as the reason for doing so.

5. Underlying policy considerations

Cast against a background of rapid developments in the science, the negotiations on the proposed ban on the cloning of human beings revealed not only disagreement in the international community on how best to cope with the challenges posed by such developments, but also, at times, significant differences in world-view. Such differences can, in part, be explained by reference to several underlying issues that served to form and inform the perceptions (and assumptions) of delegations, and accordingly influenced the outcome of the negotiations.

5.1. The complexity of the legal, ethical, and moral issues involved – the 'right' to human dignity

In proposing the topic for consideration by the Sixth Committee, France and Germany deliberately chose to limit its scope to prohibiting the reproductive cloning of human beings – which they perceived as already having been agreed to – so as to avoid becoming involved in the broader legal, ethical, and moral questions implicated by experimentation on human embryos generally.[90] The goal was to establish a very specific international prohibition through the negotiation of an international penal treaty. In retrospect, such intentions proved ambitious. The negotiations quickly became mired in disagreement about the 'moral status' of the human embryo,[91] the

87. See the summary of the statement made by the Netherlands on the occasion of the adoption of the draft Declaration on Human Cloning by the Sixth Committee ('the number of votes against the Declaration and the number of abstentions indicated that the international community was far from ready to ban therapeutic cloning'), UN. Doc. A/C.6/59/SR.28 (2005) at 10. See too the statements of India ('[t]he Declaration . . . is non-binding and does not reflect agreement among the wider membership of the General Assembly'), the United Kingdom ('[t]he Declaration . . . is a weak, non-binding political statement that does not reflect anything approaching consensus within the General Assembly'), Belgium, Republic of Korea, Thailand, Spain, Singapore ('. . .the value of [the] document is highly questionable'), and the Netherlands, following the adoption of the Human Cloning Declaration UN Doc. A/59/PV.82 (2005), at 4–6, and 8.

88. See the discussion on the contest between technological 'haves' and 'have-nots' at section 5.3, *infra*.

89. See, e.g., the statements by China ('it . . . could be misunderstood as applying to all research into therapeutic cloning'), Belgium ('Belgium voted against the Declaration because it makes no distinction between reproductive cloning and therapeutic cloning'), the United Kingdom, Thailand, Japan, Singapore, and the Netherlands ('it can be seen as a call for a total ban on all forms of human cloning . . . we simply cannot, and will not, go that far'), following the adoption of the Human Cloning Declaration by the General Assembly on 8 March 2005, UN Doc. A/59/PV.82 (2005).

90. See D. W. Brock, 'Cloning Human Beings: An Assessment of the Ethical Issues Pro and Con', in P. Lauritzen (ed.), *Cloning and the Future of Human Embryo Research* (2001), at 93–113.

91. See generally C. S. Campbell, 'Source or Resource? Human Embryo Research as an Ethical Issue', ibid., at 34–49; D. Beyleveld, 'The Moral Status of the Human Embryo and Fetus', in H. Haker and D. Beyleveld (eds.), *The Ethics of Genetics in Human Procreation* (2000), at 59–85.

ethical and moral implications arising from the destruction of human embryos, and questions of freedom of scientific research and so forth – an emotionally charged set of issues with very little by way of middle ground.[92]

As invariably happens with such negotiations, the complexities of the issues involved are communicated through a conceptual vehicle, used as both rhetorical device and normative reference point. That role was played by the concept of human dignity,[93] which served as conduit for a variety of views and positions which all shared a common end result: the complete unacceptability of experimentation on human embryos regardless of the stage of development and of the purpose of the research.[94] Framing the debate in such terms had its practical advantages. Not only did it serve as a lingua franca, understood by states from all regions of the world, it also helped to bring the issue home to smaller states, which had little or no direct economic or political stake in the outcome of the negotiations on the topic. For many such states the negotiation came to be defined less as an attempt to prevent an imminent threat and more in terms of a defence against perceived transgressions against human dignity.[95] Indeed, the discussion increasingly took the shape of a contest of wills as to which conception of human dignity was to prevail. These issues were debated within the framework of at least four sets of arguments.

First, supporters of research into the possible therapeutic applications of human embryonic experimentation resorted to classical *balancing of rights* discourse. For them, questions of the legal status of the human embryo and the 'right'[96] to human dignity implicated in human embryonic research had to be balanced against considerations of, *inter alia*, freedom of research and the prospect of finding cures to major

92. For supporters of the comprehensive ban, the supposed distinction between therapeutic and experimental cloning 'masked the reality that a human being was being created for the purposes of destroying it to produce embryonic stem cell lines or to carry out other experimentation'. To their mind such activities 'raised profound ethical and moral questions and were highly controversial'. UN Doc. A/C.6/57/L.4 (2002), *supra* note 12, Ann. II, para. 3.

93. The UNESCO Declaration on the Human Genome had also cast the issue in such terms by labelling practices such as reproductive cloning as being 'contrary to human dignity'. Art. 11.

94. See the statement of Cameroon at the 57th session of the Sixth Committee, UN Doc. A/C.6/57/SR.16 (2002), para. 11. See Arsanjani, *supra* note 27, who points out that 'the conclusion that human dignity would be violated by reproductive cloning was expressed more as a given rather than based on any particular reasoning', at 153.

95. See the statement by Sudan made at the 57th session of the Sixth Committee, UN Doc. A/C.6/57/SR.16 (2002), para. 22. See too the statement by the Observer for the Holy See that '[r]egardless of its purpose and goals, human embryonic cloning was an assault on the integrity of the human person. Cloning a human embryo while planning its demise would institutionalize the deliberate, systematic destruction of nascent human life in the name of the unknown and questionable "good" of potential therapy or scientific discovery'. Ibid., para. 50.

96. The Universal Declaration of Human Rights, adopted in 1948, recognizes, *inter alia*, the 'inherent dignity . . . of all members of the human family' as being the 'foundation of freedom, justice and peace in the world' (first preambular para.) and provides that '[a]ll human beings are born free and equal in dignity and rights' (Art.1). Similarly, the 2005 UNESCO Universal Declaration on Bioethics and Human Rights, *supra* note 56, listed as one of its aims, 'to promote respect for human dignity and protect human rights, by ensuring respect for the life of human beings, and fundamental freedoms, consistent with international human rights law', Art. 2 (c). Strictly speaking, the concept of 'human dignity', which is posited at the level of generality, might best be viewed less as a right and more as a value underlying existing rights. The International Covenant on Civil and Political Rights, adopted on 16 December 1966, 999 UNTS 171, in its second preambular para., confirms that the 'rights [set out herein] *derive from* the inherent dignity of the human person' (emphasis added). See D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (2001), at 12–16 ('human dignity is the rock on which the superstructure of human rights is built'); G. P. Smith, *Human Rights and Biomedicine* (2000), at 14–15; S. Wheatley, 'Human Rights and Human Dignity in the Resolution of Certain Ethical Questions in Biomedicine', 2001 (3) *European Human Rights Law Review* 312, at 322 ff.

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diseases. The concern was that the Committee could be acting rashly in advising the prohibition of research which might have far-reaching implications for the future well-being of human beings. Ethical considerations were also referred to in support of embryonic stem-cell research. For example, the United Kingdom maintained that it would be 'indefensible to stop [stem cell] research and deny millions of people – and their families – the chance of new treatments which could save their lives'.[97]

The second group of arguments related to the *lack of uniformity of approach* at state level. By 2003, supporters of therapeutic cloning had resorted to mounting a – largely rearguard – defence based on respect for cultural diversity and differences of opinion between different societies as to the ethical and moral limitations of such research. In response, supporters of the comprehensive ban pointed to the inconsistency in supporting the concept of human dignity as being universally applicable, while maintaining an interpretation, in the context of human embryonic research, based on a culturally relativist proposition. Such arguments were also not without their difficulties. Despite depictions to the contrary, proponents of therapeutic cloning were not opposed to the universality of the concept of human dignity. They simply did not share the same perception of its content, particularly as to what constituted a 'human being' for purposes of human embryonic research. In this lay one of the key weaknesses of the claim by proponents of the comprehensive ban that theirs was a position based on a universal consensus as to what constitutes a 'human' for purposes of the concept of human dignity: it was rooted in the fundamental, predominantly Christian, assumption that human life begins at conception[98] – a view not shared by most other major faiths. As such, their proposal was, likewise, premised on a particular – culturally relativist – world-view.[99] No doubt these were among the concerns in the minds of those states from the Islamic world which, despite displaying no obvious affinity for therapeutic cloning, nonetheless successfully blocked the negotiation of a comprehensive treaty-based ban in 2003 and which opted to abstain during the vote on the Human Cloning Declaration in 2005.[100]

The third set of arguments concerned the *existence of domestic legal barriers* to accepting an international treaty implicitly recognizing the lawfulness of experimentation on human embryos. On several occasions supporters of a comprehensive ban referred to domestic norms, such as constitutional protections and judicial pronouncements on the application of domestic and regional human rights norms (relating, *inter alia*, to human dignity) as constraining the options available to them

97. Statement made at the 2003 session of the Sixth Committee, at its 11th meeting (on file with the author).
98. See, e.g., the statement by Costa Rica at the 57th session of the Sixth Committee, UN Doc. A/C.6/57/SR.16 (2002), para. 8. See too the paper by the Holy See circulated at the working group at the 58th session of the Sixth Committee in 2003. UN Doc. A/C.6/58/WG.1/CRP.1 (2003), para. 2, reproduced in Report of the Working Group, UN Doc. A/C.6/58/L.9 (2003), Ann. I, at 4.
99. See, e.g., the summary of the statement of the Republic of Korea ('[t]he term "human life", which lay at its core, was ambiguous and confusing, carrying different meanings in different States, societies, cultures and religions') and Singapore ('[n]o single State, ethnic group or religion should be allowed to prevail over others who held divergent but equally deep-seated views and beliefs') on the occasion of the adoption of the Draft Declaration on human cloning by the Sixth Committee, UN Doc. A/C.6/59/SR.28 (2005) at 7, para. 44 and at 8, para. 53, respectively.
100. See the summary of the statement by Syria in the Sixth Committee, on 28 February 2005 ('States should be left to interpret the term "human life" as they saw fit'), ibid. at 7, para. 46.

at the international level.[101] This reflected a difference in the approach of states as to the effect of existing domestic norms on their respective negotiation positions. Some proponents of the 'narrow' ban, such as Germany, already had in place a domestic comprehensive ban covering all forms of human embryonic research. Yet they did not feel constrained by their respective internal laws in proposing a narrow ban at the international level: they were prepared to accept a more limited international prohibition, on the understanding that states were free to adopt stricter restrictions in their domestic law.

The debate further revealed *differences in normative outlook*. Proponents of the narrow ban took a permissive view of the existing international legal framework, namely that there were no applicable legally binding rules at the international level to prevent the creation of human clone embryos.[102] They pointed to the UNESCO Human Genome Declaration, which had called for regulation of the issue of human reproductive cloning, implying that no such regulation existed. To their minds, the drafters of the UNESCO Declaration had on purpose construed it narrowly in order to avoid the very controversy over the legality of other forms of cloning which was plaguing the Sixth Committee. Accordingly, proposals to establish a more comprehensive ban at the international level threatened the delicate balance reached in the UNESCO Declaration. Supporters of the comprehensive ban did not share such perceptions: the UNESCO Human Genome Declaration had confirmed that practices '*such as* reproductive cloning of human beings' were 'contrary to human dignity' and 'shall not be permitted';[103] the phrase 'such as' was interpreted to mean that the reference to reproductive cloning was only indicative.[104] Furthermore, the regulation of the cloning of human embryos had to be seen against the broader context of existing international legal norms, particularly in human rights instruments which were seen as 'living' texts, susceptible to further interpretation and adaptation to apply to the challenges posed by advances in science. As such, the concept of human dignity 'trumped' other applicable rights and freedoms in the context of any experimentation on human embryos. Viewed in that way, the underlying policy question was less whether to put into place a ban on reproductive cloning and more whether to permit other types of human cloning. Such differences in appreciation as to the normative framework in which the negotiations were taking place contributed in no small part to the inability of the two sides to find a middle ground. To a certain

101. See, e.g., the statement by Costa Rica at the 57th session of the Sixth Committee, in 2002. UN Doc. A/C.6/57/SR.16, para. 8 (2002).

102. See, e.g., the statement made by Germany in 2002 where it was suggested that failure to put into place 'national and international norms on cloning . . . would create a dangerously permissive environment with regard to experimentation'. UN Doc. A/C.6/57/SR.16, para. 6 (2002).

103. Art. 11 (emphasis added).

104. Reference was also made to an existing prohibition on such research adopted in the European context in the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine, also known as the 'Oviedo Convention'), adopted by the Council of Europe on 4 April 1997, ETS No. 164, which, in Art. 18 (2), expressly prohibits 'the creation of human embryos for research purposes'. See too the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, *supra* note 6. See, e.g., UN Doc. A/C.6/57/WG.1/CRP.2 (2002), *supra* note 15, at 9.

extent they were speaking past each other; the differences between the two sides were not always only ideological, but were also a function of differing conceptions as to the structure of the system itself, in particular regarding the interaction between existing general norms and special norms covering a particular issue.

5.2. The question of impact on other issues

A further key contextual consideration related to the concern as to the normative 'spill-over' effect that a comprehensive ban would have. Even if not always articulated in such terms, it was clear that some states, in which medical practices such as abortion and *in vitro* fertilization were lawful, were increasingly uncomfortable with the ideological tone of the debate. No doubt some came to suspect that the supporters of the comprehensive ban on human cloning had their eyes on broader goals. In particular, the concern was that the comprehensive ban would be instrumental in establishing, at international level, a prohibition on the destruction of human embryos at any stage of development. It is instructive to note that the proponents of the comprehensive ban felt it necessary expressly to clarify that the purpose was not to regulate abortion, stem-cell research, or *in vitro* fertilization.[105] No matter how the issue was described, there was no denying that their proposal was based on the central idea that the destruction of a human embryo, even at its earliest stages of development and regardless of its purpose, amounted to 'killing' a human being. As such, the tag 'human cloning' served only to confirm that the treaty would be limited to regulating the destruction of a human embryo in the context of cloning. Nonetheless, some no doubt were concerned that its effect would be to change the default international position on the destruction of human embryos from substantively neutral (i.e. no regulation)[106] to a presumption in favour of the prohibition of such destruction. The ideological and political implications for some states of such a development were not insignificant.[107] Suffice it to add that such concerns were not only felt by Western secular states, but were also shared by some in the Islamic community to the extent that the recognition, in international law, of a 'presumption in favour of life' from the time of conception onwards represented a primarily Christian world-view.

5.3. The contest between technological 'haves' and 'have-nots'

A further underlying theme concerned the economic implications of a global ban on the cloning of human embryos. The negotiations took place against the background of a flurry of activity related to human embryonic research involving a number of

105. See the commentary to the draft international convention on the prohibition of all forms of human cloning, UN Doc. A/58/73 (2003), *supra* note 21, Ann. II, at 12.

106. See, e.g., the view of the US government during the process of ratifying the Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979, 1249 UNTS 13, that the Convention 'is abortion neutral, that is, that it does not create or reflect an international right to abortion or sanction abortion as a means of family planning', in M. Nash Leich, 'Contemporary Practice of the United States relating to International Law', (1995) 89 AJIL 96, at 107.

107. See, e.g., the summary of the statement made by Canada on the occasion of the adoption of the Draft Declaration on Human Cloning by the Sixth Committee ('it ventured into the complex area of reproductive rights, and that was unacceptable'), UN Doc. A/C.6/59/SR.28 (2005), at 10, para. 76.

actors ranging from research institutions to government policy-makers and industry partners. It was understood from the very beginning that a key purpose of the exercise was to put into place legal disincentives for private actors seeking to invest in technologies whose purpose was to clone a human being.[108] By implication, the goal was also to establish greater legal certainty by specifying what was permissible. This had obvious economic and practical advantages: public and private money could be directed into ethically acceptable technologies, while attempts at creating a human clone would be marginalized and starved of resources. However, not everyone saw the issue in the same light: those proposing a comprehensive ban maintained that an effective ban necessitated halting all such research, not only that related to reproductive cloning. This had more immediate economic implications for many of the countries already permitting (or which intended to permit) embryonic stem-cell research based on cloned human embryos, the point being that the debate, while cast mostly in terms of ethics and morality, was not without its economic subtext, which can be considered on at least two levels.

First, the negotiations took the form of a struggle between technological 'haves' and 'have-nots' as to the appropriate allocation of resources for medical and scientific research. With the exception of the United States and a handful of other developed states, the vast majority of the supporters of the comprehensive ban, and for that matter the Human Cloning Declaration,[109] were small states with little or no existing infrastructure for undertaking the type of research in question. To them, the economic repercussions of standing on principle by supporting a comprehensive ban were outweighed by its political benefits. Furthermore, the linkage to the redirection of funds towards combating existing diseases and scourges (all of which disproportionately affect smaller states), resonated strongly.[110] Conversely, the group which opposed the comprehensive ban, and which either voted against or abstained from the vote for the Human Cloning Declaration, included a significant number of technologically advanced states. Their arguments in favour of allowing research into therapeutic cloning based on respect for cultural diversity can also be understood as assertions of the basic entitlement of states to decide on the priorities guiding their respective funding of medical and scientific research.

On a further level, the negotiation also revealed a contest among the technologically advanced states themselves as to the economic benefits to be obtained from such research. From a historical perspective, one of the key features of the negotiations on the cloning ban was the position taken by the United States – long a leader in the field of bio-medical research – against any type of human embryonic research. Many in the pro-therapeutic research camp, no doubt, understood the active participation of the United States in a large coalition with primarily developing countries aimed at thwarting such research as an attempt to constrain the comparative economic advantages to be gained by those states undertaking such research.

108. See UN Doc. A/57/51 (2002), *supra* note 9, ch. II.B., at 3–4, para. 25.
109. See *supra* note 37, for a breakdown of the vote during the adoption of the Human Cloning Declaration.
110. See the summary of the statement made by Ethiopia following the adoption of the Human Cloning Declaration by the General Assembly, UN Doc. A/59/PV.82 (2005), at 9–10.

6. Conclusion

International law has traditionally concerned itself more with the interaction between states, and less with developments inside states. However, in more recent times the subject matter of international law has expanded significantly, including what might loosely be termed 'social issues', or issues traditionally left to regulation by national laws according to the values and mores prevalent in the society in question at the time. Viewed in historical terms, the negotiation of an international treaty to ban the cloning of human beings was a further manifestation of such a trend. What was perhaps unique was less the idea of regulating the subject through an international instrument (which had already been undertaken, albeit in non-binding form, by UNESCO in its Human Genome Declaration) and more the fact that it was seen fit for an international penal treaty.

Yet, after four years of bitter disagreement on the basic issue to be considered, no agreement on a treaty was possible, raising questions as to the usefulness of attempting to regulate such contentious issues through the treaty-making process.[111] That the Human Cloning Declaration was eventually adopted is ascribable less to the reaching of an accommodation between the various positions and more to the determination of a group of states to obtain a specific statement from the United Nations at whatever cost. Underlying all of this are quasi-constitutional questions as to the appropriateness of the United Nations dealing with such issues, given the level of division of views in the international community. Indeed, the entire experience could be presented as a cautionary tale, not only from the perspective of attempting to regulate such contentious issues at international level, but also as to the role of the lawmaking process itself. It is common to hear the criticism that the law typically follows developments in society as opposed to anticipating them. However, in this case, proactive attempts to resort to the law in order to prevent the occurrence of the unthinkable quickly got bogged down in disagreement as to the fundamental policies at play. Clearly a lack of agreement at the policy level constrained attempts at lawmaking.

It will no doubt be claimed that the United Nations failed to deliver on the global ban that it had set out to put into place. To an extent that is true: no treaty establishing a global prohibition materialized. Instead, the General Assembly 'settled' for a non-binding political declaration, adopted only by a plurality of states but opposed by a significant number of those to which it would apply in practice. Yet evaluations as to the outcome of a negotiation turn on the appropriate yardstick to be applied. From the perspective of the initial proponents of an international convention against the reproductive cloning of human beings, the goal was not necessarily the treaty itself but the introduction of a comprehensive network of prohibitions on reproductive cloning at the national level so as to prevent the cloning of a human being. In other words, the value of the treaty was its anticipated 'catalytic effect' on national laws. It was a means to an end. From that perspective, therefore, the negotiation was less of a failure for the proponents of the ban on reproductive cloning since it was

111. See Arsanjani, *supra* note 27, at 159–60.

increasingly evident that many states, particularly technologically advanced states, were beginning to put such national prohibitions into place of their own accord. Such an evaluation is further buttressed by the suggestion made here that the negotiation evidenced the emergence of a customary international law prohibition on the cloning of human embryos for reproductive purposes. What is more difficult to ascertain, in terms of winners and losers, is the question of a prohibition on other forms of cloning. Certainly the supporters of that position can, and no doubt will continue to, claim a certain modicum of success. It has to be conceded, however, that the Human Cloning Declaration is not without its controversy and that its value in terms of influencing the international debate on the issue of human embryonic research is still to be ascertained.